Laws of the Land:
Indigenous & State Jurisdictions on the Central Coast

by

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

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Abstract

With discussion of Indigenous laws on the rise in Canada, this thesis explores the question of law's power: jurisdiction. In this project, I ask whether Indigenous jurisdiction is active in conflicts between Indigenous and state actors over the environment, in the context of the Heiltsuk Nation on the central coast of British Columbia. This project looks to critical legal theory for an understanding of jurisdiction. It identifies three aspects of jurisdiction that are discussed in critical legal theory and related fields: that it is technical, it is authoritative, and it is spatial. Adopting these qualities as provisional indicators of jurisdiction, it applies thefzm to three case studies of Heiltsuk (or "Haíłzaqv") conflicts with the state, which engage colonial law in different ways. The three case studies concern (1) herring harvest and management, which was litigated in *R v Gladstone*; (2) land use and forestry, which is the subject of the Great Bear Rainforest agreements; and (3) trophy hunting for bears, which is the subject of a grassroots campaign based on Indigenous law. Adopting a qualitative approach adapted from institutional ethnography, this project applies a critical jurisdictional lens to each case study, using documentary review and interviews to explore the technical, authoritative, and spatial aspects of each conflict. Ultimately, I find that expressions of Heiltsuk jurisdiction – as understood from a colonial, critical perspective – are already at play in each conflict, although this is not immediately visible from the point of view of colonial law. In the conclusion, I explore the different manifestations and strategies of Heiltsuk jurisdictional expressions, and the ways that colonial jurisdiction interacts with them.

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Dedication

Thank you and a huge ğiáxsiẋa to the Heiltsuk Nation for welcoming this inquiry and my visits to your Traditional Territory. Thank you in particular to William Gladstone, William Housty, Larry Jorgenson, Hilistis Pauline Waterfall, and the seven other individuals who generously shared their time, passion, and expertise with me. Your community is inspiring and I will carry your stories with me always.

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CHAPTER 1: INTRODUCTION

In March 2014, RCMP officers were deployed to the remote coastal Indian reserve community of Bella Bella to "keep the peace" in the Heiltsuk First Nation, which was opposing a federally-licensed fishery in local waters.[1] The fishery produced herring spawn-on-kelp, a traditional staple of the Heiltsuk (or "Haíłzaqv")[2] economy and the subject of the first commercial Aboriginal harvesting right to be recognized by Canadian courts.[3] A quick news search established that Haíłzaqv and federal actors had long disagreed over the management and harvest of herring, as well as other fisheries.[4] The skirmish had been triggered by a Haíłzaqv-issued ban on the federal Department of Fisheries and Oceans ("DFO") opening the fishery to non-Aboriginal commercial fishers that season. "We will exercise our authority to stop any commercial herring activity in our territories," the Haíłzaqv statement declared. "We will protect our aboriginal rights to the fullest extent possible should commercial fishers not abide by the ban."[5] The statement referenced the commercial Aboriginal

[1] See Larry Pynn, "RCMP descend on native community on central coast to keep the peace in herring fishery row", *Vancouver Sun* (31 March 2014), online: <www.vancouversun.com> [*Pynn*].

[2] Since 2015, when the interviews in this project were carried out, the Haíłzaqv have begun publicly using spelling and orthography that is being developed and popularized through a language revitalization project. "Heiltsuk" is still the more commonly-circulated name, and it is still used in titles such as "Heiltsuk Tribal Council," but "Haíłzaqv" is the term used by the Heiltsuk Tribal Council to refer to its people. As discussed in Chapter 2, the more contemporary spelling of Haíłzaqv words was adopted for this project.

[3] See *R v Gladstone*, [1996] 2 SCR 723 [*R v Gladstone*].

[4] See Scott Simpson, "Natives lose fishing bid: Band cites need to sustain community", *Vancouver Sun* (30 Nov 1990) B5; James Vassallo, "DFO defends herring levels", *Daily News* (24 March 2005) 1/front. Fish farms are also a recurring issue. See Dan MacLennan, "Heiltsuk First Nation to battle fish farm expansion", *Courier – Islander* (12 October 2002) A3.

[5] See Pynn, *supra* note 1.

harvesting right, but the claim to authority clearly extended beyond the right to fish: it expressed a collective decision about access to the fishery and the potential for Haíłzaqv enforcement. I read it as an assertion of jurisdiction.

Focussing on the role of legal systems in the conflict between the Haíłzaqv and the colonial government suggests that legal pluralism is shaping the environment of the coast of what is now called British Columbia. For much of the twentieth century, the fact that Indigenous peoples in Canada had distinct legal systems was not considered; instead, Indigenous legal traditions were parsed as "customs," while "law" was treated as a Western phenomenon.[6] In recent years, discussion of Indigenous legal traditions has become more accepted, as reflected in legal scholarship,[7] Supreme Court submissions,[8] public reports[9] and declarations,[10] and the creation of a joint common law and Indigenous law degree program at the University of Victoria.[11] Canadian society is beginning to recognize that Canadian law is but one of many legal systems that run across Canada soil. But in an overt political struggle, such as that between the Haíłzaqv and the DFO, it is not yet clear whether this recognition of Indigenous legalities offer anything tangible to Indigenous communities.

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[6] See generally Jo-Anne Fiske, "From Customary Law to Oral Traditions: Discursive Formation of Plural Legalisms in Northern British Columbia, 1857-1993" BC Studies 115/116 Autumn Winter 1997/1998 267 at 284-288 [*Fiske*]. For the use of Indigenous law as evidence in Canadian law, see *Delgamuukw v British Columbia,* [1997] 3 SCR 1010 at 148 [*Delgamuukw*]. But see *R v Marshall; R v Bernard*, [2005] SCJ No 44, 2005 SCC 43 (SCC).

[7] See John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) [*Borrows, Constitution*].

[8] See Union of British Columbia Indian Chiefs, "Tsilhqot'in Appeal - Supreme Court of Canada: UBCIC Coalition Factum and Oral Argument" (7 November 2013), online (pdf): *Supreme Court of Canada* <www.scc-csc.ca/WebDocuments-DocumentsWeb/34986/FM140_Intervener_Coalition-of-the-Union-of-BC-Indian-Chiefs-et-al.pdf [*UBCIC, Tsilhqot'in*].

[9] See Tsleil-Waututh Nation, Treaty, Lands & Resources Department, "Assessment of the Trans Mountain Pipeline and Tanker Expansion Proposal" (Report, 2015), online (pdf): *Expert Panel Review of the Environmental Assessment Process* <eareview-examenee.ca/wp-content/uploads/uploaded_files/twn-assessment-report-11x17-small.pdf>.

[10] See Sandra Cuffe, No Consent? No Pipeline!", Vancouver Media Coop (25 March 2011), online: <vancouver.mediacoop.ca> (discussing the 2010 "Save the Fraser Declaration" by Nadleh Whut'en, Nak'adli, Takla Lake, Saik'uz, We'suwet'en, and Tl'azt'en First Nations).

[11] See University of Victoria, "World's first Indigenous law degree to be offered at UVic", Press Release (21 February 2018), online: *University of Victoria* <www.uvic.ca/news>.

Flying to the University of Victoria over the Salish Sea that separates Vancouver Island from mainland British Columbia ("BC"), one can see, out the plane window, a plume of light, greyish river water stretching from the mouth of a river on the mainland. From the city, the Salish Sea appears to be a single body of water, with a river running into it; but from a different angle, from above, two separate, intermixing bodies of water appear in that space. This is the nature of an estuary: a place where riverine and ocean waters meet in perpetual confluence, mixing over time while new waters rush into the mixing space, leaving a clear line between fresh and saline water that stretches far out into the sea. Like law in Canada, this straight is, in fact, plural; like law in Canada, it has more than one source. What the plume represents is not just plurality of waters, but their ongoing influx: fresh and saline water will eventually mix, but as long as the river flows and the ocean circulates, the line of separation will remain. Like the Salish Sea, laws in Canada emerge from the power of different ecosystems, but unlike it, only one source – the British-derived, Canadian, "colonial" legal system – is understood to have influence: it has exclusive jurisdiction, or the power to determine and enforce laws. Is there an angle from which the source and ongoing influence of Indigenous legal systems can be seen? Can the recognition of Indigenous legal systems mean anything, without a recognition of Indigenous jurisdiction?

1.1 An Estuary of Jurisdictions

Laws and jurisdictions have a long history in the central coast of what is now called British Columbia ("BC"). Haíłzaqv-speaking people and their forebears have lived in the central coast under political, social, and economic practices structured and guided by traditional law since time

immemorial, which scientific evidence dates to more than 10,000 years.[12] The Haíłzaqv community has published some materials about Haíłzaqv law, but focused less on Haíłzaqv jurisdiction, which it identifies with the Haíłzaqv term "7àxuài" roughly translated to mean the power of the Haíłzaqv people's connection to their place.[13] For their part, Haíłzaqv traditional laws are known as Gvi'ilas, or "Ğvi'ilás."[14] Traditional or "customary" laws have historically provided the norms and procedures that guide behaviour, structure relationships, and outline processes for resolving disagreement and making collective decisions in human communities.[15] Indeed, Ğvi'ilás still plays an important role in allocating stewardship responsibilities, guiding relationships, and regulating access to resources within the Haíłzaqv community.[16] Traditional laws also play an important role in guiding interactions with other legal systems – and in the case of Ğvi'ilás, the Haíłzaqv entered into a treaty with the Haida Nation in

[12] See "Heiltsuk Nation" (2016), online: *Central Coast Indigenous Resource Alliance* <www.ccira.ca/heiltsuk/>. A recent discovery suggests that 14,000 years – the end of the last ice age – might be more accurate. See Roshini Nair, "Archeological find affirms Heiltsuk Nation's oral history", *CBC* (30 March 2017), online: <www.cbc.ca>.

[13] Hogan et al, *infra* note 14 at 8. See also "Investigation Report: The 48 hours after the grounding of the Nathan E Stwart and its oil spill" (Report, 2017), online (pdf): *Heiltsuk Tribal Council* <heiltsuknation.ca> [*Nathan E Stewart Report*] (responding to a spill by a colonially-licensed tugboat operator in the months after the interviews in this project were carried out).

[14] Hogan, Philip et al, "Qn qńts SámsXáts 7ńs7ats - For Our Children's Tomorrows" (Report, 2005), online: Heiltsuk Tribal Council, archived at <www.firstnations.eu/media/04-1-land-use-plan.pdf> at 8 [*Hogan et al*]. The spelling "Gvi'ilas," which is used in that report, was the conventional spelling at the time it was published; more recently, the Heiltsuk have shifted spelling and orthography to reflect the revitalization of the Heiltsuk language. As discussed in Chapter 2, in this project, the contemporary spelling of Haíłzaqv words is generally adopted.

[15] See generally Borrows, Constitution, *supra* note 7 at Chapter 1 (pointing out that this is the role that law plays in all human communities).

[16] See Frank Brown and Y Kathy Brown, eds, "Staying The Course, Staying Alive – Coastal First Nations Fundamental Truths: Biodiversity, Stewardship and Sustainability" (Report, 2009), online (pdf): *Biodiversity BC* < <www.biodiversitybc.org/assets/Default/BBC_Staying_the_Course_Web.pdf> [*Brown & Brown*] (identifying seven fundamental principles of Ğvi'ilás that guide Haíłzaqv environmental stewardship and development). See also Joint Review Panel for the Enbridge Northern Gateway Project, "Hearing Transcript – April 3, 2012 Vol 37 – Bella Bella, BC (A40564)," "Hearing Transcript – April 4, 2012 Vol 38 – Bella Bella, BC (A40595)," and "Hearing Transcript – April 5, 2012 Vol 39 – Bella Bella, BC (A40623)" School," online (pdfs): *Canadian Environmental Assessment Agency* <www.acee-ceaa.gc.ca/050/evaluations/document/exploration/21799?culture=en-CA>.

the late nineteenth century, and renewed it in 2015.[17] Traditional laws would have guided Haíłzaqv interactions with European explorers in the 1800s,[18] and they continue to guide interactions with colonial activity today.[19]

In addition to Indigenous laws, colonial laws and jurisdictions also flow over the central coast. The traditions of colonial law evolved primarily in Britain, in the context of a different geography and set of historical forces,[20] and trickled into the area during the establishment of small British colonies to the south of BC, in the mid 1800s. Most of these colonies were set up to defend against American expansionism,[21] but by 1861, their settlers had claimed all of what is now BC as "Crown land," making it subject to colonial law and jurisdiction; soon after, they established a regime for allowing settlers to claim plots of that land as individually-held private property, under the British common law.[22] The assertion of common law authority over those lands by the British government was quick to follow, resulting in the federation of BC with Canada in 1871.[23] By the early 1880s, colonial laws had legalized

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[17] See "To lay the copper on the floor" (1 November 2017), online (blog): Haida Nation <www.haidanation.ca/?p=5835>. See also Ryan Erwin, "Heiltsuk and Haida Nations finalize peace treaty", *Global News* (30 June 2015), online: <globalnews.ca>. This spelling of the term is not the only spelling, but it is the most recent to be used by the Haíłzaqv, and reflects a project of language revitalization.

[18] See generally Michael E Harkin, *The Heiltsuks: Dialogues of Culture and History on the Northwest Coast* (Lincoln: University of Nebraska Press, 1997) [*Harkin*] (exploring Haíłzaqv engagement with early explorers, and the incorporation of new ideas, practices, and authority figures into the Haíłzaqv worldview and way of life).

[19] See Nathan E Stewart Report, *supra* note 13 at 7 (responding to an oil spill by a colonially-licensed tugboat operator). See also "Our History" (2014), online: *Qqs Projects Society* <www.qqsprojects.org> (describing a community-initiated criminal justice project based on Ğvi'ilás). See also Culture, *supra* note 57.

[20] See generally Harold J Berman, "Introductory Remarks: Why the History of Western Law is not Written" (1984) 3 Uni of Illinois Law Rev 511 (identifying some of the historical forces that have shaped the British legal system).

[21] See Sydney L Harring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: University of Toronto Press, 1998) ff 186-216 [*Harring*].

[22] The law did not allow Indigenous people to also claim land as property. See Chief Joe Mathias and Gary R Yabsley, "Conspiracy of Legislation: The Suppression of Indian Rights in Canada" (1991) 89 BC Studies 34 at 35, 42 See also John Borrows, "Nanabush Goes West: Title, Treaties, and the Trickster in British Columbia" in *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) 77 at 78 n 6 [*Borrows, Nanabush*].

[23] *Ibid* at 84-85 (relaying that only a small minority of the population of the province voted to confederate: votes were open only to adult, male, British settlers, who were a clear minority as compared to the Indigenous population, especially when combined with the East Asian settler population).

settler resource operations that had reached the central coast.[24] Institutions for upholding colonial authority spread out to follow settler activities, such as courts to adjudicate disputes over criminal matters and resources, including disputes involving Indigenous people.[25] Today, the BC court system is a powerful force of law in the province, and the colonial constitution considered the final word on jurisdiction in Canada.[26]

Although they clearly overlap in time and space, Haíłzaqv and colonial legal systems do not have a framework reconciling their laws or jurisdictions. The need for this must have been obvious early on – indeed, early interactions between BC settlers and Indigenous people were diplomatic and militaristic, as in other international relationships.[27] However, instead of forming the basis of a negotiated intersocietal framework, their early diplomatic relationship devolved into a colonial dynamic. By the 1860s, the BC settler government had decided not to negotiate any treaties with Indigenous peoples,[28] and instructed its adjudicators not to apply Indigenous laws when dealing with

[24] A cannery in neighbouring territory opened in 1883, and by 1881 a Haíłzaqv leader had written to the Department of Indian Affairs for a Haíłzaqv-owned sawmill. See Harkin, *supra* note 18 at 141-143.
[25] See Fiske, *supra* note 6.
[26] See *Constitution Act, 1867*, (UK), 30 & 31 Vict, c 3 (formerly *British North America Act*, 1867), reprinted in RSC 1985, App II, No. 5, especially ss 91.12 [*Constitution Act, 1867*] (designating jurisdiction over "Sea coast and inland fisheries" to the Federal Crown), 91.24 (designating jurisdiction over "Indians and lands reserved for Indians" to the Federal Crown); 92.5 (designating jurisdiction over "The Management and Sale of the Public Lands…and of the Timber and Wood thereon" to the Provincial Crown); 92.13 (designating jurisdiction over "Property and Civil Rights" to the Provincial Crown), and 92.16 (designating jurisdiction over "Matters of a merely local and private Nature" to the Provincial Crown).
[27] See Harring, *supra* note 21. The Royal Commission of Aboriginal Peoples describes this early stage of relations as involving "contact and cooperation" between separate peoples, which gave rise to trade, intercultural diplomacy, and treaties between Indigenous nations and colonial nations across most of Canada. It was followed by the "displacement" stage. See *Report of the Royal Commission on Aboriginal Peoples,* vol 1 (Ottawa: Supply and Services Canada, 1991), s 1 [*RCAP*].
[28] See John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" in *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) 66 at 78 [*Borrows, Frozen*] (identifying that the refusal to sign treaties was tacitly accepted as a term of BC's federation with Canada, notwithstanding the federal Crown's policy that treaties must be signed). Note, however, that there are a few treaties within the territory of BC.

Indigenous peoples.[29] The Haíłzaqv, of course, pushed back. When colonial government representatives visited in 1913, a Haíłzaqv leader told them explicitly:

> We own the whole of this Country, every bit of it, and we ought to have something to say about it. The Government has not bought any land from us so far as we know and we are simply lending this land to the Government. We own it all. We will never change our minds in that respect, and after we are dead, our children will still hold on to the same ideas… [W]e consider that the Government is stealing that land from us, and we also understand it is unlawful for the Government to take this land.[30]

Colonial legal authorities did not begin to address the need to reconcile legal systems for another eighty years,[31] when BC finally entered into formal treaty negotiations with the Heiltsuk Nation in 1993. Twenty years later, in 2003, the Heiltsuk Nation withdrew, dissatisfied with the form of reconciliation offered to them through those negotiations.[32] Still receiving the influx of distinct

[29] Adjudicators of criminal and resource-related matters had applied both colonial and Indigenous laws previously, in the late 1800s, when it seemed appropriate in the circumstances. See Fiske, *supra* note 6 at 273-76.

[30] See *Royal Commission on Indian Affairs in British Columbia (1913-1916): transcripts of evidence, Bella Coola Agency* (25 August 1913) GR-1995 MS-1056 (Victoria: BC Archives) [*McKenna-McBride*] (quoting Bob Anderson for the Bella Bella Tribe). Elsewhere in the transcript, Mr. Anderson's appears to articulate the conundrum of both Haíłzaqv and colonial jurisdictions: "we know that it is lawful to steal land," he states, seemingly identifying the juxtaposition of a settler acting "lawfully" under colonial law even while "stealing land" under to Haíłzaqv law." *Ibid*.

[31] In the intervening period, colonial laws were specifically enacted to strangle out Indigenous jurisdictions. The *Indian Act*, for example, was enacted in BC to regulate the lives of Indians in 1876, amended to ban the exercise of Indigenous legal institutions in 1884, and amended again to ban Indigenous peoples from bringing claims of title or sovereignty to settler courts in 1927. See John Milloy, "Indian Act Colonialism: A Century of Dishonour 1869-1969" (Research Paper, 2008), online: *National Centre for First Nations Governance* <www.fngovernance.org/ncfng_research/milloy.pdf> [*Milloy*]. For a brief discussion of the importance of the potlatch as a legal institution, see Borrows, Constitution, *supra* note 7 at 40-41. For a discussion of the applicability to the Haíłzaqv context, see Harkin, *supra* note 18 at 127.

[32] See "Heiltsuk Nation" (last visited 11 October 2019), online: *BC Treaty Commission* <www.bctreaty.net/heiltsuk-nation/>. See also "Heiltsuk (Bella Bella) Nation" (last visited 11 October 2019), online: *Government of British Columbia* <www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/first-nations-a-z-listing/heiltsuk-bella-bella-nation>. The Haíłzaqv re-opened negotiation of rights, title, and self-government under a reconciliation agreement known as the Tuígila Agreement in 2019. *Ibid*.

Indigenous and colonial legal systems, still without a legitimate mechanism to reconcile conflicting laws and jurisdictions, the central coast remains a "borderlands."[33]

1.2 The Research Question

While discussion of Indigenous legal traditions and their place in Canada has become more widespread in recent years, the question of Indigenous jurisdictions has been slower to emerge.[34] Jurisdiction may be generally defined as law's power: it is the ability to determine what the law is in a given instance. To be meaningful, recognition of a legal system would seem to require acknowledgment of its jurisdiction. For legal and governmental institutions founded upon colonial law's unilateral assertion of exclusive territorial jurisdiction over Indigenous lands, the proposal that there may be Indigenous jurisdictions suggests a conceptual problem, perhaps even an existential threat. It also suggests an opportunity. Indigenous legal traditions may offer tools that the common law does not: ways to reshape Canadian society and its relationship with both Indigenous peoples and the non-human world. The curiosity driving this research project is what it might look like for Canadian law to recognize Indigenous jurisdictions over particular environments. The narrower research question of this project is: in the case of the Haíłzaqv, is Indigenous jurisdiction already operating? If so, does it take shape and interact with colonial law in ways that can be made visible to Canadian legal actors?

[33] See generally Gloria Anzaldua, *Borderlands/La Fontera: The New Mestiza*, 2nd ed (San Francisco: Aunt Lute Books: 1999) at 19 ("the borderlands are physically present in wherever two or more cultures edge each other, where people of different races occupy the same territory, where under, lower, middle and upper classes touch, where the space between two individuals shrinks with intimacy").

[34] For one work dealing with jurisdiction directly, see Shiri Pasternak, *Grounded Authority: The Algonquins of Barriere Lake Against the State* (Minneapolis: University of Minnesota Press, 2017) [*Pasternak*].

This research question interests me for three reasons. First, it seems important to the Haíłzaqv, who have been asserting jurisdiction in different ways during more than a century of colonization. Individuals who were blockading fishing boats in 2015 had to purchase gas, take time out of their lives, and risk prosecution or liability under the colonial legal system. It is obviously urgent to the Haíłzaqv that Ǧvi'ilás have an impact in their environment, notwithstanding colonial law. Second, the environment that hangs in the balance is a special one. Haíłzaqv territory makes up about 35,553 square kilometers of inlets, islands, and mountainous inland watersheds in the central coast of BC, from Calvert Island in the south to Milbank Sound in the north, inland as far as Kimsquit, and out into the open sea.[35] The Haíłzaqv people are currently based in Bella Bella, a coastal reserve community accessible only by boat or plane, which faces east towards a deep, narrow strait, part of the inside passage to Alaska. Their territory is part of a 74,000-square kilometer area known as the "Great Bear Rainforest," which sustains a quarter of the planet's remaining coastal temperate rain forests, twenty per cent of its remaining wild salmon stocks, and its only population of white-furred black bears.[36]

Third, I am personally interested in the role of law in decolonial work, environmental stewardship, and reconciliation. On the one hand, colonial law does not seem like the proper tool to

[35] See "Territory" (2015), online: *Heiltsuk Nation* <www.heiltsuknation.ca/about-2/territory> [*Heiltsuk Nation, Territory*]. See also "Qn qnts sasm?ats 7ns8ats – Heiltsuk Title & Rights Strategy: Implementing a Reconciliation Agenda," (Report, 2015), online: *Heiltsuk Nation* <www.heiltsuknation.ca/wp-content/uploads/2015/11/Heiltsuk-Title-Strategy.PUBLIC.pdf>.

[36] Merran Smith, Art Sterritt & Patrick Armstrong, *"From Conflict to Collaboration: The Story of the Great Bear Rainforest"* (Report, 2007), online (pdf): *Coast Funds* <coastfunds.ca/wp-content/uploads/2016/02/StoryoftheGBR.pdf> [*Smith et al*]. In 1997, the World Resources Institute used satellite imagery to assess that state of the earth's forests, and found that Canada was one of eight territories where original frontier forests were intact and not under immediate threat, but that BC's coastal temperate rainforest, which hosts a particularly rich ecosystem, was "under siege." See Dirk Bryant, Daniel Nielsen & Laura Tangley, "The Last Frontier Forests: Ecosystems and Economies on the Edge" (Report, 1997), online (pdf): *World Resources Institute* < pdf.wri.org/last_frontier_forests.pdf>.

dismantle the colonial "house."[37] Historically, it played a key role in the colonization of settler states: settlers bring their legal systems with them when they immigrate,[38] and then use their laws to contain the political status of the original peoples and the physical spaces that they occupy.[39] A close look at the early days of settler colonial practices in North America reveals legal mechanisms being violently extended over Indigenous people and spaces,[40] while jurisprudence theoretically justified the encroachment of colonial law through the racist doctrine that colonizers could accumulate property and territory simply by claiming it, since Indigenous peoples were not capable of holding land.[41] Today, law continues to play an important role in enabling colonial structures of rule, the dispossession of Indigenous lands, and expansions of capitalist markets,[42] and legal remedies for the wrongs of colonization often depend upon a re-enforcement of colonial legal authority.[43] In many ways, colonial law does not seem like the right tool for pushing back colonization. At the same time, other manifestations of colonial law seem imminent. Early treaties incorporated processes and symbols that arguably reflect a commitment to carrying out a consensual relationship, based on a shared

[37] See generally Audre Lorde, "The Master's Tools Will Never Dismantle the Master's House" (1984), reprinted in *Sister Outsider: Essays and Speeches* (Berkeley, CA: Crossing Press, 2007) 110.
[38] See generally Eve Tuck State & K Wayne Yang, "Decolonization is not a metaphor" (2012) 1:1 Decolonization: Indigeneity, Education & Society 1.
[39] See generally David E Wilkins & K Tsianina Lomawaima, *Uneven Ground: American Indian Sovereignty and Federal Law,* 1st ed (Norman: University of Oklahoma Press, 2001) [*Wilkins & Lomawaima*]. For a Canadian perspective, see John Milloy, *supra* note 31.
[40] See Lisa Ford, *Settler Sovereignty* (Cambridge: Harvard University Press, 2010). Territoriality, in particular, has been called settler colonialism's "irreducible element." See Patrick Wolfe, "Settler colonialism and the elimination of the native" (2006) 8:4 Journal of Genocide Research 387 at 388 [*Wolfe*].
[41] See *St. Catherine's Milling & Lumber Co v R* (1888), 14 AC 46 (PC) (applying *Johnson v McIntosh*, 21 US (8 Wheat) 543 (1823) to bring the Doctrine of Discovery into Canadian jurisprudence). For a critical examination of *Johnson v McIntosh* and related cases see David E Wilkins, *American Indian Sovereignty and the US Supreme Court* (Austin: University of Texas Press, 1997) at 19-63 [*Wilkins*]. For a critical examination of *St. Catherine's Milling,* see Sidney Harring, *supra* note 21. For various interpretations of the Doctrine of Discovery see Wilkins & Lomawaima*, supra* note 39 at 19-63.
[42] See generally Glen Coulthard, *Red Skins White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014).
[43] Alyosha Goldstein, "Where the Nation Takes Place: Proprietary Regimes, Antistatism, and US Settler Colonialism" (2008) 107:4 South Atlantic Quarterly 834 at 842.

normativity.[44] In 1982, the enactment of Section 35 in the patriated *Constitution Act, 1982*[45] guaranteed that Canada would "recognize and affirm" the "existing aboriginal and treaty rights of the Aboriginal peoples of Canada," including such early treaty relationships. The fact that these "aboriginal and treaty rights" were not defined in 1982 has positioned the colonial legal system as the adjudicator of what this constitutional enactment means. The resulting jurisprudence has empowered Indigenous communities, even if it has so far failed to empower Indigenous legal traditions.[46] Additionally, both colonial courts and colonial governments have identified a theoretical necessity for Indigenous governance in Canada,[47] but have not yet recognized its jurisdiction. In both courts and governments, recognition of Indigenous jurisdictions in colonial law may be waiting to happen.

1.3 Overview of this Project

The question of this research project is, again in the case of the Haíłzaqv, is Indigenous jurisdiction already operating, and if so, how does it take shape and interact with colonial law? Is it possible to make it visible to Canadian legal actors? Chapter 1, this introduction, provides context for

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[44] See John Borrows, "Wampum at Niagara" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: UBC Press, 1997) 155 [*Borrows, Wampum*]. See also James (sakej) Youngblood Henderson, "Mikmaw Tenure in Atlantic Canada" (1995) 18 Dalhousie LJ 196 at 240-260 [*Henderson*]. However, colonial courts have not necessarily upheld the principles of consent or shared normativity. See Sharon Venne, "Understanding Treaty 6: An Indigenous Perspective" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: UBC Press, 1997) 173. Colonial governments also do not necessarily honour those principles when negotiating treaties now. See Johnny Camille Mack, *Thickening Totems and Thinning Imperialism* (LLM Thesis, University of Victoria Faculty of Law, 2009) [unpublished] [*Mack*].

[45] *Constitution Act, 1982,* Being Schedule B of the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act 1982*] (section 35 reads: "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed").

[46] See generally Borrows, Frozen, *supra* note 28.

[47] See Minister of Indian Affairs and Northern Development, *Gathering Strength: Canada's Aboriginal Action Plan* (Ottawa: Public Works and Government Services Canada, 1997). See also *Campbell v British Columbia,* [2000] 4 CNLR 1 (BCSC); See also Kent McNeil, "The Jurisdiction of Inherent Right Aboriginal Governments" (Research Report, 2007), online (pdf): *National Centre for First Nations Governance*, <www.fngovernance.org/ncfng_research/kent_mcneil.pdf> [*McNeil*].

this research question, as well as an overview and guide to the project itself. It has introduced the Haíłzaqv community, identified the research question, and discussed some preliminary issues. It also provides a road map of the project, a note on the researcher, and a discussion of terminology.

Chapter 2 reviews the methodology of the research project. Generally, I suggest a definition of jurisdiction and apply it to Haíłzaqv activities in disputes with colonial law. The application of jurisdiction has some similarities with approaches to studying Indigenous legal traditions, with a crucial difference: I do not necessarily propose a definition of 7àxuài or other understandings of Ǧvi'ilás jurisdiction, but rather an investigation of how the Haíłzaqv manifest what colonial law might recognize as jurisdiction from a critical perspective, when engaged in struggles with colonial law. The examination of the case studies is accomplished through qualitative research through semi-structured interviews, based on the approach of institutional ethnography. Chapter 2 provides context and support for these methodological choices.

Chapter 3, the literature review, explores the nature of jurisdiction. As noted above, I generally propose that jurisdiction is the connection between law and power, and acknowledges that this definition resonates with the Haíłzaqv definition of 7àxuài, or the power of the people's connection to a place. In Chapter 3, however, I take up an examination of literature within scholarship derived primarily from colonial law and theory. I examine two areas of law (including work on Indigenous legal traditions) that provide an orientation towards jurisdiction, and then three aspects of jurisdiction that have been identified by critical legal theory, exploring them in related scholarship. Through the exploration of these different aspects of jurisdiction, I propose a tentative, symptomatic approach to identifying i outside of the context of colonial law. Based on the literature review, jurisdiction (which may or may not map onto the Haíłzaqv concept of 7àxuài) is indicated by with manifestations of legal techniques, legal authority, and legal space.

In Chapters 4, 5, and 6, I apply the methodology – and these three indicators of jurisdiction – to different case studies, in order to investigate how the Haíłzaqv structure their relationship with the environment in the context of a conflict with colonial law, and whether jurisdiction, as defined by this project, is discernible. The first case study, in Chapter 4, concerns the dispute over fisheries. This dispute has a long history, but it came to focus on herring and the harvest of herring eggs laid on kelp during litigation in the 1990s, which resulted in a Supreme Court of Canada judgment recognizing that the Haíłzaqv people had a constitutional Aboriginal right to harvest and commercially sell this fisheries product.[48] Although the court judgment fell short of recognizing a Haíłzaqv right to manage and control access to the fishery, it was ground breaking: it was the first commercial Aboriginal right ever recognized in Canada. However, in the years since, DFO management of the resource has led to stock decline and the licensing of competitive harvests, and greatly diminished the harvest. This has led to an ongoing struggle by the Haíłzaqv to exercise more control over herring in their waters. Chapter 4 looks at this history and the Supreme Court case that has shaped the struggle over herring fisheries, as well as ongoing activism for more context in the context of colonial laws and constitutional Aboriginal rights.

In the second case study, in Chapter 5, I explore another arena where the Haíłzaqv have struggled for control over the environment: forests. In 2000, after a decade of intense anti-logging activism by Indigenous and non-Indigenous entities, a coalition of First Nations including the Heiltsuk Nation entered into negotiated agreements with the government BC, outlining cooperative land use planning and management protocols within their respective traditional territories. The area covered by these agreements is known as the Great Bear Rainforest ("GBR"), and the agreements are referred to as the "GBR Agreements." Under these agreements, the Heiltsuk Nation has specific forms of

[48] R v Gladstone*, supra* note 3.

authority that are recognized by the colonial government, and that allows them to participate in developing better logging practices, establishing conservation areas, and liaising with proponents. In Chapter 5, I examine Haíłzaqv participation in and resistance to the implementation of the GBR Agreements, as part of a struggle for more control over the land-based environment through negotiated protocols.

In the third case study, in Chapter 6, I explore the context of wildlife hunting. Every year, the provincial government licenses hunting throughout BC, including a "trophy" hunt for bears such as grizzly bears, where no meat or other usable parts of the animal are harvested. In 2013, the Haíłzaqv Nation collaborated with other coastal First Nations to issue a ban on the trophy hunt within their territories. It was framed as a declaration of Indigenous laws. In Chapter 6, I look at how the Haíłzaqv have undertaken to communicate and enforce the ban, and where they have had successes and limitations upholding Indigenous laws.

In Chapter 7, I offer a review and reflection on this project. Chapter 7 includes an overview of the project and its findings, and then a discussion of what can be learned about jurisdiction and Haíłzaqv expressions of it by reading the case studies together. It draws some provisional conclusions about Haíłzaqv expressions of jurisdiction over the environment in the context of struggles with the colonial state, and some reflections on how Haíłzaqv and the colonial state manifest jurisdiction in different contexts, where Haíłzaqv expressions of jurisdiction are able to exercise relatively more and less legal power, and how they have evolved.

1.4 A Note on the Researcher

Academic scholarship tends to privilege specific types of knowledge and perspectives on the world, in part by obscuring the identities of researchers behind credentials and footnotes. Feminist

scholarship and decolonial scholarship challenge researchers to confront this paradigm by explicitly sharing their own social positioning.[49] As a feminist engaged in research with decolonial aspirations, I have spent time throughout this project considering who I am, what I am trying to achieve, and how these orientations impact my work. I am a white, middle class woman, and come to this work influenced by my race, class, and gender.[50] Study and activism have made me more conscious of the structures of oppression and privilege in which I am situated, but they have not changed how I am located. I am also, primarily, a settler. Many of my ancestors emigrated from the British Isles in the 1800s,[51] and my presence and citizenship here – in places I call home and deeply love – are therefore enabled by the structures of colonization.[52] This also means that I am not Haíłzaqv; I am an outsider in the context of this research,[53] a literal visitor in Haíłzaqv territories. Finally, I am a lawyer and an academic researcher, applying interpretive theories and methods backed by state-supported

[49] See generally Donna J Haraway, "Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective" in *Simians, Cyborgs, and Women: The Reinvention of Nature* (New York: Routledge, 1991) 183. See also Margaret Kovach, *Indigenous Methodologies* (Toronto: University of Toronto Press, 2009) especially at 40, 80, 110, & 145 [*Kovach*].

[50] See bell hooks, *Feminist Theory: From Margin to Centre* (Boston: South End Press, 1984). I am also able-bodied, urban, and cis-gendered.

[51] Some have stressed the importance of self-locating through one's own settlement stories, as part of relational citizenship. See Deanne Aline Marie LeBlanc, *Identifying the Settler Denizen within Settler Colonialism* (MA Thesis, University of Victoria Department of Political Science, 2014) [unpublished]. From what I have been able to gather of my own settlement story, many of my ancestors emigrated from Ireland, Scotland, Wales, and mainland Europe in the mid-to-late 1800s, arriving in Ontario about three generations ago. On my mother's side, there is also some Indigenous ancestry, with which I have a very limited relationship. This is part of what I share when I say asked if I am Indigenous, which did occur during interviews for this project. For the purposes of this project, I explicitly self-identify as a "settler" because positionality with respect to Indigeneity is important in this project.

[52] See especially Wolfe, *supra* note 40 at 390 (terming settler colonization "a structure, rather than an event").

[53] Kovach suggests that outsiders to Indigenous communities should try to be informed by synchronous qualitative methods and critical theory. See Kovach, *supra* note 49 at 30-36. I have adopted such an approach, as discussed in Chapter 2, below.

institutions.[54] My work is located in this complex web of socio-political relationships; it is an expression of what I can see from there.

Critical self-reflection on this project has also pushed me to better understand my own motives.[55] Although I have personal and professional interests vested in the colonial legal system, legal education and practice have troubled me. On a personal level, working towards justice through law has often felt like a process of foreclosing alternative ways of thinking, relating, and being that are important to my own well-being – to creativity, healing, and growth. On an institutional level, there is no question that the justice offered by Canadian law is accompanied by alienating processes, discriminatory and violent outcomes, and a failure to relate to the non-human world. These symptoms of dysfunction may be most pronounced in Canadian law's treatment of Indigenous communities – which are the same communities that offer alternatives, such as restorative justice, deep ecological approaches, and Indigenous legal traditions. As someone living under colonial law, and who has practiced colonial law for Indigenous clients, I hope for meaningful alternatives. What are the possibilities of thinking about Indigenous laws jurisdictionally?

1.5 Terminology

In this project, I speak of "law" and "jurisdiction" cross-culturally, which means that the specific law or jurisdiction at issue must be identified. Throughout, I use the term "colonial law" to describe Canadian state laws and legal systems, and the terms "Indigenous law," " Haíłzaqv law," or

[54] Academic privilege involves greater access to material resources and power of interpretation. See Gillian Rose, "Situating knowledges: positionality, reflexivities and other tactics" (1997) 21:3 Progress in Human Geography 305 at 307.

[55] See Kovach, *supra* note 49 at 108, 111 & 113.

"Ğvi'ilás" to describe Haíłzaqv community laws and legal systems. "Colonial law" includes federal laws, provincial laws, government regulations, law-making and policy-making systems, jurisprudence, and the Canadian Constitution. While I will usually distinguish between these sources of law, they all fall within the category of "colonial law" because they are all parts of the colonial legal structure. Occasionally, I use the term "Canadian law" instead, or the term "Crown" to designate colonial actors, governments, or laws.

When I refer to "Haíłzaqv jurisdiction," "Haíłzaqv legal authority," "expressions of Haíłzaqv jurisdiction," or "Haíłzaqv jurisdictional expressions," I am not referring to 7àxuài, or the concept of Haíłzaqv legal power or jurisdiction from within the Haíłzaqv legal framework. I cannot speak for Haíłzaqv jurisdiction, or even know whether "jurisdiction" is an appropriate term to use in the context of the Haíłzaqv legal system or this study of it. This project should not be read to define or limit the scope, nature, or content of Haíłzaqv legal power, authority, sovereignty, or jurisdiction as the Haíłzaqv understand it, or as their legal system provides. It is not my aim. Instead, I study what appears as jurisdiction by analogy with colonial jurisdiction, when colonial jurisdiction is critically viewed. In particular, I study expressions of this analogical understanding of Haíłzaqv jurisdiction in relation to the laws and jurisdictions of the state. As discussed below, I do this in order to explore whether and how Haíłzaqv jurisdiction might be understood and made visible from a colonial legal perspective, and to offer tools for Haíłzaqv legal actors to think about how colonial jurisdiction affects the Haíłzaqv legal system and how the Haíłzaqv community navigates it, in order to raise questions of how colonial jurisdiction interacts (and might interact differently) with Indigenous legal power. Ultimately, this project may also offer a framework for Haíłzaqv legal actors to better understand their own concept of jurisdiction or 7àxuài, but it may not. That is for Haíłzaqv legal actors to decide.

In general, terms such as "Indigenous legal tradition," "Indigenous law," or "Indigenous legal system" refer to laws that are genealogically linked to traditional, customary, or inherent Indigenous laws, decision-making processes, and governance structures, including contemporary interpretations of those laws, processes, and structures by the relevant communities.[56] I use these term even where such traditional legal practices are expressed through, and intermingled with, colonial legalities such as Band Councils (though where the jurisdiction of a Band Council is relevant, I note its colonial origins). For the purposes of this project, "Indigenous legal traditions" or "Indigenous law" are used to refer to Indigenous legal systems generally, and sometimes when referring specifically to Haíłzaqv law, in order to avoid redundancy. For its part, the specific term "Haíłzaqv law" includes Ǧvi'ilás and the decision-making processes and governance structures that supported it, as well as modern Haíłzaqv declarations of law referencing Ǧvi'ilás and individual interpretations of it by Haíłzaqv community members. According to Heiltsuk Nation, Ǧvi'ilás is:

> the laws of our ancestors… our 'power' or authority over all matters that affect our lives… [and a] complex and comprehensive system of laws that embodies values, beliefs, teachings, principles, practices, and consequences. Inherent in this is the understanding that all things are connected and that unity is important to maintain. Gvi'ilas has been described as the ethos of our people…. [governing] our relationship and responsibilities to land and resources, but also social relationships and obligations with respect to lands and resources.... [and] our relationships with both the temporal and spiritual worlds.[57]

I am not trained to interpret or apply Ǧvi'ilás, and this project does not advance any theory of its framework or content. When I refer to Ǧvi'ilás, I refer to its articulation in one a few specific sources: publications supported by the Heiltsuk Nation, interpretations advanced by Haíłzaqv individuals in documents published by the Heiltsuk Nation or organizations with which it works, statements made

[56] See John Borrows, "With or Without You: First Nations Law in Canada" in *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) 3 [*Borrows, Without*].
[57] See "Culture" (2015), online: *Heiltsuk Nation* <heiltsuknation.ca/about-2/heiltsuk-culture/> [*Culture*].

in the recent Enbridge pipeline hearings, and my own interviews with individuals from the Haíłzaqv community.[58] From time to time, I also references Haíłzaqv stories and Northwest Coastal ethnographic works as corollary sources of information about Haíłzaqv practices, social structures, stories, and relationships with the environment. These are provided as statements of my understanding of what I have learned about Ǧvi'ilás, not as statements of Ǧvi'ilás itself.

Clearly, "Heiltsuk" or "Haíłzaqv" is the best term for designating those laws, jurisdictions, and other things that are specifically Haíłzaqv; however, in different contexts, I also use the terms "Indigenous, "Aboriginal," and "Indian" as modifiers for Haíłzaqv or other Indigenous peoples. The terms are, in many cases, interchangeable, but they are situated within different kinds of discourse. "Indigenous" is the term this project uses when speaking more generally about communities dispossessed by the Canadian colonial process, though sometimes it is used to refer to the Haíłzaqv specifically when framed within that context. I default to the term "Indigenous" because it focuses on the experience of colonization, connects local and global struggles, and remains open-ended.[59] I use the term "Aboriginal" and "Indian" when referring to specific contexts framed by the discourse of the colonial legal system. In this project, the terminology of "Aboriginal" primarily references post-1982 jurisprudence under Section 35 of the *Constitution Act, 1982*, which recognizes "[A]boriginal and treaty rights."[60] The terminology of "Indian" refers the Section 91.24 of the earlier *Constitution Act,*

[58] To contextualize these statements, I rely upon two historical documents to which my attention was directed by the Heiltsuk Cultural Centre: a 1996 ethnohistory of the Bella Bella community, and a compilation of Haíłzaqv stories. See Harkin, *supra* note 18. See also Franz Boas, *Bella Bella Tales* (Millwood, NY: Kraus Reprint Co, 1973) [*Boas*].
[59] See Sita Venkateswa & Emma Hughes, "Introduction" in Sita Venkateswa and Emma Hughes, eds, *The Politics of Indigeneity* (London: Zed Books, 2014).
[60] Constitution Act 1982, *supra* note 45 (as cited above, section 35 reads: "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed").

1867, which refers to federal jurisdiction over "Indians,"[61] as well as the federal *Indian Act*[62] and some historical writing. With respect to terminology that is not dictated by the colonial legal system, I use the term "Heiltsuk Nation" when referring to that entity as it self-identifies,[63] "Heiltsuk Tribal Council" when referring to the Band Council empowered by the *Indian Act*, and "the Haíłzaqv," "Haíłzaqv community," or "Haíłzaqv people" to refer to its peoples. I use the term "First Nations" when referring to Indigenous collectivities as defined by the colonial government; "Indigenous Nations" when referring to multiple, similarly-constituted Nations; and "Indigenous communities" when referring to the peoples of a particular Indigenous Nation, or to collectivities constituted at the sub-Nation level.[64]

I use the word "environment" to refer to the world encompassing the land, sea, and animals within Haíłzaqv territories. I choose that term over the word "nature" to avoid rhetorical commitment to the man-nature dichotomy built into colonial modes of thought. I choose it over the word "territory" to avoid the particular statist assumptions of how power is structured through the carving up of space, though I also use the term "Traditional Territory" to describe the place of my research, based on Haíłzaqv representations about their bounded space.[65] I choose it over the word "creation" to avoid the historical religious connotations that accompany non-Indigenous usage of the word, and

[61] Constitution Act, 1867, *supra* note 26.
[62] *Indian Act*, RSC 1985, c I-5 [*Indian Act*].
[63] See the website of the Heiltsuk Tribal Council, which uses the term "Heiltsuk Nation" frequently. See "Heiltsuk Tribal Council Bella Bella BC – Home of the Haíłzaqv" (2015), online: *Heiltsuk Nation* <heiltsuknation.ca>. As explored in Chapter 5, below, the colonially-empowered Heiltsuk Tribal Council has formed governmental agreements with traditionally-empowered government structures, and this project understands the "Heiltsuk Nation" to refer to that hybrid, overarching governmental entity.
[64] For example, the Haida Nation includes both of the First Nations and Indigenous communities of Old Masset and Skidegate.
[65] In this project, the Heiltsuk Traditional Territory is identified with the territory described on the website of the Heiltsuk Nation: "from the southern tip of Calvert Island, up Dean and Burke Channels as far as Kimsquit and the head of Dean Inlet to the northeast, and up the Mathieson and Finlayson Channels to the north. It includes Roscoe, Cousins and Spiller Inlets, and Ellerslie Lake, and the outer coast regions of Milbanke Sound, Queens Sound, and the Goose Island Group and Calvert." See Heiltsuk Nation, Territory, *supra* note 35.

over the word "Gaia" to avoid the particular spiritual connotations that accompany metaphysical Western understandings of the living earth. I like the word "environment" because it lacks the theoretical baggage to prevent it from referring, vaguely, to much the same thing: the interconnected totality of the non-human (and also human) living world. This project relies upon the term "environment" because it because it channels that vagueness into the discourse of Indigenous and state actors making claims about the impact of their legal systems across a range of subjects.

Finally, throughout this project, I use the words "intermingled" and "stratified" to describe the relationship between Indigenous and colonial jurisdictions. This terminology is intended to invoke the image of an estuary, a partially enclosed marine environment with a river running into it like the delta in the Salish Sea, described above. Under these particular conditions, saline and fresh water come into contact, circulate, and form a pattern of interaction. In the right circumstances, a clear line of stratification between dense, salty sea water and light, fresh, sedimented river water can be seen – a line that may shift but does not disintegrate, because it is constituted in perpetuity where the two water bodies meet. The truth is that river water and ocean water do not easily mix; instead, they form a dynamic relationship, which persists even as individual molecules of water disperse. They run side by side, interacting, but layered. This is a "halocline," which "flows." This image of two different sources of water brought together by geography, which intermingle but remain stratified, is the metaphor used to describe the coming together of Indigenous and colonial legalities, and jurisdictions.[66] I like the image of the estuary because it is geographically determined, because it shows ongoing separateness even while combination takes place, and because it offers promise: by bringing riverine and marine

[66] I appreciate the help of Professor Curran in brainstorming this metaphor with me, which replaces an earlier metaphor of entanglement. For the latter, see Jean Dennison, *Colonial Entanglement: Constituting a Twenty-First-Century Osage Nation* (Chapel Hill: The University of North Carolina Press, 2012) at 7. Because my aim is to identify separateness where in something that seems terminally interconnected, rather than draw out the interconnectedness apparently separate systems, I choose a different metaphor than Dennison.

influences into close and dynamic proximity, estuaries create some of the most unique and ecologically rich environments on the planet.

CHAPTER 2: METHODOLOGY

This chapter reviews the methodology of this project. It proceeds by identifying indicators of jurisdiction through the literature review, and then applying those indicators to three case studies of Haíłzaqv struggles with colonial law over lands and resources within the Traditional Territory. In this Chapter, I set out the methodological choices that guide this project, as well as the context and support for them, and I discuss how the project was carried out. In Section 2.1, I review the qualitative, ethnographic methodology within which this project is situated, and the ways in which this project differs from ethnography. In Section 2.2, I provide more detailed information about how this project was carried out, and the specific tools that it applies. In Section 2.3, I discuss method of identifying interviewees, carrying out interviews, and analyzing them, as well as how it proceeded. Finally, in Section 2.4, I reflect on the limitations of this project: some of the shortfalls faced by this methodology and how I addressed them, as well as other choices that guided this project. Section 2.5 provides a brief review and conclusion.

This method of exploring the concept of jurisdiction is derived from work around Indigenous legal traditions, but with a difference. I do not necessarily propose a definition of 7àxuài or a theory of Ǧvi'ilás jurisdiction, but rather investigate how the Haíłzaqv manifest what might be recognizable as jurisdiction by analogy with colonial law, when engaged in struggles with colonial law. My project in this chapter is to describe how that sequence of steps is applied, and the methods through which material of the case studies were gathered at a specific moment in time.

2.1 An Ethnographic Approach

This project relies on qualitative research as its framework for exploring expressions of Haíłzaqv jurisdiction and their interactions with colonial jurisdictions over the environment. Qualitative research is appropriate because this is essentially a descriptive project:[67] it describes Haíłzaqv struggles with colonial law as jurisdictional struggles, and a place marked by environmental disputes as a place overlaid with stratified jurisdictions. It does so by situating those struggles within socio-legal context, using literature and interviews with the Haíłzaqv community members who carry them out.[68] Like many other qualitative researchers, I believe that research is inevitably political, and so aim to do research that might provide decolonial tools by shifting discourse towards terms that challenge existing power structures.[69] Through a project of seeing jurisdiction, I hope to make visible more of the legal and political legitimacy of the Haíłzaqv, the contingency of Canada's claim to "exclusive" jurisdiction, and the possibility of doing things differently.

The particular qualitative approach of this project is related to ethnography. Ethnography is the study of culture "from the inside," rather than an objective or external point of view; it offers a "thick" description[70] of social practices and meanings, aimed less at being authoritative than at being intelligible across cultures. The anti-positivist but empirical orientation of ethnography leaves space for multi-faceted and reflexive epistemologies, and has generated a particular sensitivity to relations

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[67] See Margot Ely et al, *Doing Qualitative Research: Circles Within Circles* (Philadelphia: RoutledgeFalmer, Taylor & Francis Inc, 1991) at 1-8 [*Ely et al*].
[68] See Alan Bryman, "The Debate About Quantitative and Qualitative Research: A Question of Method or Epistemology?" (1984) 35 The British Journal of Sociology 75 at 78.
[69] See Morwena Griffiths, *Educational Research for Social Justice: Getting Off the Fence* (Philadelphia: Open University Press, 1998).
[70] Clifford Geertz, "Thick Description: Toward an Interpretive Theory of Culture" in *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 1973) 3.

and practices of power in research.[71] Socio-legal scholars have built upon ethnographic methods to compare constitutional frameworks,[72] explore epistemology in legal processes,[73] and unpack Indigenous legal systems.[74] For a researcher trying to get a handle on how Haíłzaqv law interacts with colonial law, ethnography offers useful tools.

One specific set of ethnographic tools applied in this project comes from the field of institutional ethnography. That field takes day-to-day life as the sociological problematic, and explores the trans-local "relations of rule" empirically linking the day-to-day problematic of lived experience with broader forms of social organization.[75] In institutional ethnography, relations of rule are those state-oriented (or transnational), increasingly text-mediated forms of coordination through which power is increasingly deployed; institutions are clusters of text-mediated social relations organized around specific functions; and ethnography includes not only interviews and observations, but also analysis of texts and the use of texts.[76] Institutional ethnography is driven by the question of *how* things happen, and it offers answers drawn from an exploration of how coordinated and text-mediated social practices structure experience.[77] As described below, this project draws upon analysis of key

[71] See Lisa Wedeen, "Ethnography as Interpretive Enterprise", in Edward Schatz, ed, *Political Ethnography: What Immersion Contributes to the Study of Power* (Chicago: University of Chicago Press, 2009) 75.
[72] See Kim Scheppele, "Constitutional Ethnography: An Introduction" (2004) 38 Law and Soc'y Review 38.
[73] See Mariana Valverde, "Introduction" in *Law's Dream of Common Knowledge* (Princeton: Princeton University Press, 2003) [*Valverde*].
[74] See Valerie Ruth Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (PhD Dissertation, University of Victoria Faculty of Law, 2009) [unpublished] at 19 [*Napoleon, Ayook*] (noting that her work on the Gitksan legal system has ethnographic elements).
[75] See Dorothy E Smith, "Institutional Ethnography" in Tim May, ed, *Qualitative research in action* (London: Sage, 2002) 17.
[76] See Marjorie L Devault & Liza McCoy, "Institutional Ethnography" in William K Carrol, *Critical Strategies for Social Research* (Toronto: Canadian Scholars' Press Inc, 2004) 191. See also Marjorie L DeVault and Liza McCoy, "Institutional Ethnography: Using Interviews to Investigate Ruling Relations" in Dorothy E Smith, ed, *Institutional Ethnography as Practice* (Maryland: Rowman & Littlefield Publishers Inc, 2006) 15 [*DeVault & McCoy*].
[77] See DeVault & McCoy*, ibid* at 19.

"institutionalized" texts, interviews with people who live within their framework, and an exploration of how people understand and organize around them.

Another specific set of ethnographic tools taken up by this project comes from the study of Indigenous legal traditions. In that field, researchers use some of the tools of ethnography such as iterative interviews, cultural discourse, and Indigenous philosophy in order to describe Indigenous laws "from the inside," in the way that an Indigenous legal practitioner would – while attending to the limits of the researcher's own cultural horizon, which is shaped by colonial understandings of law.[78] The project is driven by the practical objective of how to do things with law in the context of both Indigenous and colonial legal systems, and it results in a description that is more "external" than "internal": a working theory of jurisdiction as it is visible from a critical and theoretical perspective, which may provide insight to colonial legal practitioners, and, perhaps, to Indigenous legal practitioners as well. Like the study of Indigenous legal traditions, this project draws on interviews and cultural concepts in order to develop a working theory of jurisdiction that results in both an "internal" and "external" description. It uses the methodological tools from institutional ethnography to follow the methodological steps of that field: it applies philosophical ideas about law drawn from academic western studies to non-traditionally "legal" contexts, as identified by key legal texts, in order to "draw out"[79] an understanding of jurisdiction.

However, this project is not a true ethnography, in the sense of either institutional ethnography or how it is applied within the study Indigenous legal traditions. Unlike those disciplines, it does not aim to explicate Indigenous law or jurisdiction on Indigenous terms. I lack the training in Haíłzaqv

[78] See Napoloen, Ayook, *supra* note 74 at 17-19, 50-51 (noting, at page 50, a parallel between the "internal" and "external" distinction she draws from the work of Jeremy Webber, and, at footnote 10, the more general distinction between "etic" and "emic" work in the behavioural sciences).
[79] John Borrows, *Drawing Out Law* (Toronto: University of Toronto Press, 2010) (in the context of creatively writing about Indigenous laws, rather than jurisdiction).

law and philosophy that would be required to propose a "thick" description of Haíłzaqv jurisdiction, "from the inside." Instead, this project focuses on developing and applying an understanding of jurisdiction that is based on an external definition, drawn from theories of colonial law, and only within the context of confrontations with the state. In other words, the project is not to explicate 7àxuài, but to explore whether something like colonial jurisdiction manifests in Haíłzaqv encounters with colonial law. This project also parts ways with institutional ethnography by exploring not how a state-oriented institution organizes and is manifested through ordinary life, but how struggles with state-oriented institutions organize and give rise to specific expressions of Indigenous law, as revealed through the everyday experiences of people working within those struggles. There are also other, subtler differences. For example, ultimately, this project conceives of Indigenous law and jurisdiction as existing independently of the state, rather than deriving from or responding to the state, even if it results in the state-like and subaltern expressions that are identified in this project. And, this project looks for jurisdiction not in one specific institution, but in multiple Haíłzaqv formations within the legal halocline of Haíłzaqv Traditional Territory.[80]

2.2 Exploration and Analysis of Jurisdictions

As described above, this project is divided into the three case studies centering three Haíłzaqv struggles with colonial law over the environment. First, it looks at a dispute over fisheries, which takes place within the context of a colonial constitutional right to commercially fish. Second, it looks at forestry within the Great Bear Rainforest, in the context of negotiations towards GBR Agreements

[80] I am inspired here by Cruikshank's foray into centering the landscape as a subject of discourse that reveals complex dynamics of colonial encounter. See Julie Cruikshank, *Do Glaciers Listen? Local Knowledge, Colonial Encounters, Social Imagination* (Vancouver: University of British Columbia Press, 2005) [*Cruikshank*].

that determine how land-use planning will take place, and the procedure for establishing forestry practices and other uses. Third, it looks at trophy hunting, in the context of a colonially-licensed trophy bear hunt and an Indigenous declaration of law banning that hunt in Haíłzaqv and neighbouring territories.

These three case studies were chosen because they explicitly foreground the struggle between Haíłzaqv and state legal systems, in these different contexts: a constitutional Aboriginal right held by the Haíłzaqv within federal colonial law, government-to-government agreements negotiated between the Heiltsuk Nation (and others) and the province, and a unilateral declaration statement of Indigenous laws delivered by the Haíłzaqv (and others). These three case studies appear to offer a number of points of contrast for reflection: they represent different sites of struggle between Haíłzaqv and colonial law (ie colonial legal institutions, government-to-government interactions, and appeals to colonial citizens); they appear to reference different sources of law (colonial law, negotiated law, and Indigenous law); and they apply to different ecological contexts (water, land, animals). As a set of historical experiments, they offer rich material for reflection on Haíłzaqv-colonial legal interaction.

In this project, each case study is explored through the framework of jurisdiction. That framework is developed through a review of the literature. In Chapter 3, this project discusses what literature drawn from the study of colonial law and politics can offer as a foundation for understanding jurisdiction. In general, jurisdiction is not a topic that has attracted much attention within law, but recent work in critical legal theory has begun to explore it as the "diction" of the "juridical": law's speech. This body of work primarily frames jurisdiction as a "technique" of law, and explores its ways of articulating and embodying law within lived practices. What jurisdiction does with its technical powers is "authorize" law, because it has the "authority" to do so. And – as pointed out by scholars of critical legal geography, jurisdiction "maps" law and the spaces of laws authorities. There are other

ways to think about jurisdiction, but these themes – techniques, authority, and engagements with space – are chosen as a framework of this project, after a review of the "key legal texts" and work in legal pluralism and the study of Indigenous legal traditions.[81]

It is this framework of jurisdiction – as indicated by techniques, authority, and engagements with space – that is applied to the case studies. Because each of the three case studies is defined by a particular historical context, each begins with a documentary and textual overview that examines the legal and jurisdictional aspects of each case study. The documentary overview involves a review of academic literature on Haíłzaqv and colonial jurisdictions, including historical and ethnographic sources, and a news search on the topic. These secondary sources provide information about the case studies, and provide insight into the historical and social context and the concepts and vocabularies that have emerged to make sense of them.[82] This documentary review of texts also describes the specific laws within which each case study is presently situated. Texts are words, images, or sounds that have been set into material form to coordinate people's consciousness,[83] and oral traditions – such as the "stories" or "histories" in which Indigenous legal and political processes are traditionally fixed – may also be a kind of text.[84] The textual overview focuses on the "key legal texts" – the Supreme Court decision, signed GBR agreements, and published statements about the trophy hunt ban – to present the sequences of action giving rise to the particular legal framework in which each

[81] This is consistent with ethnographic analysis, which is not a distinct stage of research but begins pre-fieldwork. See Martyn Hammersley & Paul Atkinson*, Ethnography: Principles in Practice,* 2d ed (New York: Routledge, 1995) at 205-238 [*Hammersley & Atkinson*].

[82] *Ibid* at 160.

[83] See Dorothy E Smith, "Incorporating Texts into Ethnographic Practice" in Dorothy E Smith, ed, *Institutional Ethnography as Practice* (Lanham: Rowen and Littlefield Publishers Inc, 2006) 65 at 66 [*Dorothy E Smith*].

[84] To overly privilege written texts in this context would perpetuate a deep Western bias. See Cruikshank, *supra* note 79 at 436. For the purposes of this project, which aims simply to understand the role of texts in jurisdictional formations, the assumption is that both written and oral traditions are equally a part of larger social processes, and to include oral traditions where relevant and possible (by relying on interviews, community-produced documents, and, in a few cases, stories relayed to ethnographers).

case study is situated.[85] However, a range of other texts are also included, with special emphasis on material about Haíłzaqv law and history, for reasons discussed below.

Then, the project moves on to investigate the current struggle at the heart of each case study, through the perspectives of the Haíłzaqv actors engaged in it as framed by jurisdiction and its three indicators: legal techniques, authority, and engagements with space. As described below, the representation of this perspective was is based on interviews. Especially in an Indigenous context, such "community engagement" connotes an extractive relationship that benefits only the researcher.[86] To address this, literature on anti-colonial research methods stresses the importance of establishing mutually-beneficial relationships, taking direction from community, and demonstrating respect.[87] I have tried to follow these guidelines. I was fortunate to be able to connect with the Haíłzaqv through an existing collaboration between the community and my supervisor,[88] and I hope to have strengthened a longer-term, mutually-beneficial relationship through my work. When I learned from my supervisor that one of the topics I had become interested in – jurisdiction – was already of interest to Haíłzaqv resource managers, I focussed on that topic, trying to frame the research question in a way that has the potential to produce research useful to Haíłzaqv struggles for self-determination with respect to the environment.[89] I received feedback and approval from the Heiltsuk Tribal Council

[85] Central to institutional ethnography the insight that texts are not abstract but are embedded in human activity in particular times and places, and drive it forward. This has been simplified as the "Act-Text-Act" paradigm of viewing texts. See Dorothy E Smith, *supra* note 83 at 67.
[86] See Kovach, *supra* note 49 at 143.
[87] *Ibid* at 172. See also Linda Smith, *Decolonizing Methodologies* (New York: Zed Books Limited, 1999) [*Smith*].
[88] Between 201 and 2015. Professor Deborah Curran ran an environmental law class at the Hakai Beach Institute, located on Calvert Island. The access point was Bella Bella. Students would meet with HIRMD leaders for an orientation to the coast, and were required to complete a final paper answering a question posed by the organization as their final project. In the summer of 2013, I served as a teaching assistant for this course.
[89] Research and activism should align where possible. See Smith, *supra* note 87 at 344.

before this project was undertaken,[90] and I was able to travel to Bella Bella for interviews.[91] This project is not a perfect example of decolonial research, but it has attempted to contribute to the iterative process of collaborative research and community reflection in which the Haíłzaqv are currently engaged.

2.3 Interview Methods

The exploration of the current struggle at the heart of each case study, and its jurisdictional nature, is based on interviews with members of the Haíłzaqv community engaged in those struggles. This project draws on interviews with eleven individuals, about each of the three case studies, though participants typically spoke about only the one or two that they knew best.[92] Participant interviewees were selected as "informants" with knowledge about the subject, rather than as a random sample.[93] An effort was made to draw participants from the spheres of people working in political leadership,[94] resource management, and harvesting, in order to invite knowledge of environmental jurisdictions drawn from different spheres.[95] Participants were recruited through the "snowballing" or "chain of action" method:[96] the first few participants identified other potential participants who might know

[90] The Heiltsuk Tribal Council has its own researcher application process. Smith notes that, in addition to ethics protocols for researchers contacting Indigenous peoples, the development of community ethics guidelines is an important development for decolonial research. *Ibid* at 206. This research was also reviewed and accepted by the University of Victoria's Human Ethics Research Board through a separate process.
[91] Smith notes the importance of presenting yourself face to face. See Smith, *supra* note 87 at 210.
[92] Ten interviews were done in person in Bella Bella during May 2015, while the last interview was conducted over the telephone in September 2015. Where consent was given and follow-up questions arose from the data, I contacted individual participants to clarify the interview through Autumn, 2015.
[93] See DeVault & McCoy, *supra* note 76 at 18. See also Hammersley & Atkinson, *supra* note 81 at 137.
[94] Political leadership is representation in either a Band Council or traditional political structure.
[95] This technique is outlined in Devault & McCoy, *supra* note 76 at 32.
[96] See David L Morgan, "Snowball Sampling" in Lisa M Given, ed, *The SAGE Encyclopedia of Qualitative Research,* online version (Thousand Oaks, CA: Sage Publications Inc, 2008) 816. See also Devault & McCoy, *supra* note 76 at 33. In addition, one of the administrators at HIRMD who was not interviewed offered some suggestions.

more about the subject, and so on.[97] Interviewees included traditional chiefs, elected Haíłzaqv officials, people who work within Haíłzaqv resource-management institutions, traditional harvesters including a number of fishermen, and community workers.[98] In order to ensure that participants from a small community were free to share perspectives on different governance structures without apprehension of potential reprisal, participants were anonymized.

Meetings with participants began with an outline of the idea of jurisdiction,[99] and then turned to semi-structured interviews, which were initially guided by a set of open-ended written questions relating to the authority, jurisdiction, and implementation of Haíłzaqv legal authority within a given case study, but evolved into unstructured conversations composed of follow-up questions and discussion,[100] with particular attention given to the role of law and legal texts.[101]

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[97] In addition, some effort was made to be referred to individuals representing other cross-sections of Haíłzaqv society. Out of the eleven interviewees, there were 9 ethnically Haíłzaqv individuals and 2 non-ethnically Haíłzaqv individuals; 8 men and 3 women; and 3 elders as well as 1 younger person.

[98] It should be noted that roles in Bella Bella overlapped to such an extent that most participants mentioned experiences at least two spheres. For example, out of 11 interviewees, 10 mentioned participation in community harvest and seven were serving or had served in positions of political leadership.

[99] By describing the research and asking participants what they thought of it, interviews began with a space in which the theory of jurisdiction and the utility of the project could be discussed. For the researcher, this offered an opportunity to learn from, rather than simply about, the community. For those in the community who look to this project for political insight, these reflections are included in the final chapter, situating the strategy of jurisdictional reframing within community perspectives on its colonizing and decolonizing potential. See Alison Jones, with Kuni Jenkins, "Rethinking Collaboration: Working the Indigene-Colonizer Hyphen" in Norman K Denzin, Yvonna S Lincoln & Linda Tuhiwai Smith, eds, *Handbook of Critical and Indigenous Methodologies*, (Los Angeles: Sage Publications Inc, 2008) 471.

[100] Open-ended inquiry is important to in inquiry into "how things work." See Devault & McCoy, *supra* note 76 at 23. See also Marie L Campbell, "Institutional Ethnography and Experience as Data" in William K Carrol, *Critical Strategies for Social Research* (Toronto: Canadian Scholars' Press Inc, 2004) ("it is my task as an institutional ethnographer to search out, come to understand, and describe...participants direct the inquiry"). For specific guidelines, see Lioness Ayres, "Semi Structured Interview" in Lisa M Given, ed, *The SAGE Encyclopedia of Qualitative Research* (Thousand Oaks, CA: Sage Publications Inc, 2008) 811. See also Kathryn J Roulston, "Open-ended question" in Lisa M Given, ed, *The SAGE Encyclopedia of Qualitative Research* (Thousand Oaks, CA: Sage Publications Inc, 2008) 583.

[101] In most cases, attention to texts involved "listening for texts" such as Supreme Court decisions, legislation, Haíłzaqv rules or regulations, Ğvi'ilás, and asking follow up questions about how they worked. Where an individual was obviously working within a particular legal framework, however, I would bring up legal text. See DeVault & McCoy, *supra* note 76 at 34.

Interviews were recorded, transcribed, and then divided into sections on each of the three case studies, resulting in a separate document with information about each case study.[102] Each file was coded for themes of jurisdiction: references to techniques, authority, and spatiality.[103] The categories were elaborated to include specific key words and references as they emerged during the first readings of the interviews: for example, the terms "responsibility" and "legitimacy" emerged from the interviews, because many interviewees shied away from or objected to the use of the word "authority," calling for an understanding of related terms.[104] Although ethnographic methodologies note the importance of staying open to what emerges from the data, it may be helpful to apply an existing organizing scheme.[105] A variation on that approach was applied here, with the aim of "reframing"

[102] In some cases, stories or statements about matters not directly related to one of the three case studies were included within a case study. This occurred when, for example, when a discussion about the herring fishery turned to other fisheries or to the restoration of streams; or when a discussion of jurisdiction turned to historic times. In such cases, the information emerges from distinct Indigenous (and local) conceptual and narrative structures within which knowledge is maintained, and reveals the complex social processes within which the case studies are situated. See Julie Cruikshank, "Discovery of Gold on the Klondike: Perspectives from Oral Tradition" in *Reading Beyond Words: Contexts for Native History*, 2d ed, eds Jennifer S H Brown & Elizabeth Vibert (Peterborough: Broadview Press, 2003) 433.

[103] Coding was done via word processing software, primarily using the text colouring and cut-and-paste functions, to identify and group interview material that dealt with a specific theme. This is consistent with ethnographic analysis, which is not a distinct stage of research but begins pre-fieldwork. See Hammersley & Atkinson*, supra* note 81 at 197. Coding selectively highlights aspects of reality that are considered significant for the research. It typically requires broad descriptive categories, and may raise the issue of how to code something that relates to two categories simultaneously. See Allen Johnson & Ross Sackett, "Direct Systematic Observation of Behaviour" in *Handbook of Methods in Cultural Anthropology* (New York: Altamira Press, 1998) 301 at 322-328. In this case, conceptual categories are broad enough to include a variety of key words or references (listed in the footnote below), and the simultaneity problem was dealt with by recording doubly referential statements in both categories.

[104] References to authority, technicality, and space were coded based on a variety of words that related to each concept. Legitimacy was coded when there were references to: authority, legal power, legitimacy, responsibility, normativity, or belonging to a particular political or legal system. Technicalities (or techniques) were coded for when there were references to: paper trails, contracts, public communications, methods of enforcement, institutions, data, regalia, or science. Space was coded when there were references to: space, geography, particular places or locations, distance, proximity, travel, maps, or information networks. These conceptual clusters emerged as the interviews were coded, with the literature that the indicators were drawn from in mind. For a breakdown of the "steps" involved, see Alan Bryman, "Qualitative Data Analysis" in *Social Research Methods* 4th ed (New York: Oxford University Press, 2012) 564 [*Bryman*].

[105] See especially Ely et al, *supra* note 67 at 147. See also Hammersley & Atkinson, *supra* note 81 at 215.

legal and political discourse in a potentially empowering way.[106] Legitimacy and responsibility are discussed, but typically, the word "authority" is used.

Interviews were analyzed using careful reading and note taking, additional research, the occasional follow-up conversations with participants, and reflection on time spent in Bella Bella. Particular attention was paid to the role and meaning of "key legal texts," as well as other texts they referenced.[107] A chart of sub-themes or points of interest was created to maintain a balanced sense of what came up in each theme of each case study.[108] From most themes in each case study, a prominent sub-theme emerges, one that is widely referenced and can be linked to the theoretical material compiled in the literature review – for example, one sub-theme that emerges from the exploration of "space" as a quality of Haíłzaqv struggles with state jurisdiction is the use of maps, which is a subject discussed in the literature review of jurisdiction as a spatial phenomenon. Prominent sub-themes like this are explored and adapted into narratives structuring the discussion of each theme. Where prominent sub-themes do not emerge, various sub-themes are tied together, or the lack of material on that theme is discussed.

2.4 Limitations and Choices

There are three core limitations to this project. The first is the moment in time that it reflects. Interviews were carried out in Bella Bella in May of 2015, which was a busy time for many interviewees. What came to be called the "herring uprising" – the successful occupation of the DFO Office to stop the commercial herring fishery from opening in May of 2015 – had just occurred, and the future of

[106] "Reframing" can be part of an Indigenous research agenda. See Smith, *supra* note 87 at 255.
[107] Conversations can serve as an entry point into institutional relations and texts, as well as an organizing In institutional ethnography. See generally Susan Marie Turner, "Mapping Institutions as Work and Texts" in Dorothy E Smith, Ed, *Institutional Ethnography as Practice* (Lanham: Rowen and Littlefield Publishers Inc, 2006) 139 at 151.
[108] Adapted from one of the strategies outlined in Bryman, *supra* note 104.

the long-held Aboriginal commercial fishing right was very much on the mind of some interviewees. In contrast, the GBR Agreements struck some interviewees as unclear in form and utility at that time: although they had been signed, implementation was still being negotiated, and the Crown had not yet passed legislation incorporating the agreements into colonial law. Several interviewees voiced frustration about the many years of negotiating without clear social and economic benefits, or increased control on the ground. Finally, the trophy hunt ban had only recently been announced, so there was not very much information or history available. Only two of the individuals who had worked on it were present in the community at that time.

This project reflects that moment in time. There is comparatively more interview-based information about the herring fishery than any other case study, while the information about the trophy hunt ban depends heavily on one interviewee who was very involved in that campaign. This disparity in material from case study to case study also occurs in the documentary material available: comparatively more information about the herring fishery has been written, in part because the Haíłzaqv have attracted scholarship on this subject since 1996's *R v Gladstone*. In contrast, the GBR Agreements – which only began to be negotiated in 2000 – have had less time to attract scholarship, and much of it focuses on the settler environmental movement rather than Indigenous law. For its part, the trophy hunt ban has attracted almost no academic literature at all. Chapters 4, 5, and 6 reflect this disparity: the chapters on fisheries and the GBR Agreements are simply longer than the chapter on the trophy hunt ban, and the case study on the herring fishery is able – when discussing Haíłzaqv law – to build on existing scholarly interpretations, whereas the other case studies can rely only on historical material and direct Haíłzaqv statements about Haíłzaqv law.

This project is also limited to a very specific concept of "jurisdiction." As discussed above, it relies on a definition of jurisdiction derived from colonial legal theory; it asks whether something that

can be characterized as "jurisdiction" in a way that is comparable with – and potentially recognizable to – colonial law, not whether the Haíłzaqv have a concept of jurisdiction, or how it works. Again, it does not attempt to theorize 7àxuài, or Haíłzaqv jurisdiction "from the inside." Rather, this project engaged interviewees using questions about a topic that some did not think reflected Haíłzaqv legality, or the social reality they found themselves in. In particular, I began interviews by describing jurisdiction as "whose laws apply," or "who has authority to decide the law." I then asked questions about the case study that the interviewee was most involved in, and followed up with targeted questions aimed at drawing out authoritative, technical, and spatial aspects of that struggle, listening for its connection to Haíłzaqv law.

In many cases, "jurisdiction" was not identified as a concept or word with which the interviewees were, at that time, concerned. Some used the term "jurisdiction" to describe what the Haíłzaqv were doing with Ǧvi'ilás, but others identified it only with colonial law, and said that the problem they were facing was that the colonial legal system had jurisdiction, while they did not. Since the problem of asserting law and jurisdiction in a context of "exclusive" colonial jurisdiction is precisely the issue this project was trying to get at, I leave open the possibility that Haíłzaqv jurisdiction might be expressed even if this was not always how all interviewees describe it. This project focusses on pulling out evidence and insight into three aspects of jurisdiction, as I had identified them: legal techniques, authority, and engagements with space. While I believe my findings do reflect Haíłzaqv experiences of expressing and engaging with what I propose can be understood as "jurisdiction," they do not necessarily express Haíłzaqv "inside" understandings of "jurisdiction" or the concept of 7àxuài.

A third limitation of this project is a scarcity of textual resources regarding Haíłzaqv law. This project was not undertaken to ethnographically explore a theory of Haíłzaqv law from the inside; that is another, larger project, one that the Haíłzaqv are currently undertaking themselves. This project

does, however, assume the existence of and work from the Haíłzaqv legal system, since it explores jurisdiction. Because there is no definitive literature on Haíłzaqv law, this project mainly depends on statements about Haíłzaqv law drawn from Haíłzaqv publications and public statements by community members about Ǧvi'ilás law and 7àxuài jurisdiction. However, for context, it also draws on scholarly publications, traditional stories collected by early explorers, and an ethnography of the Haíłzaqv. Again, these sources are not used to assemble a theory of Haíłzaqv law or jurisdiction, but to explore how the idea of jurisdiction – as understood from a colonial theoretical perspective – can be applied to the Haíłzaqv struggle with the state over the relationship with the Traditional Territory, and can illuminate ways in which that struggle is a legal one.

The format of the case study chapters also reflects a stylistic choice. Because the body of literature that relates to Haíłzaqv law and jurisdiction is a much smaller body of resources than that available for the study of colonial law, I repeatedly found myself producing pages on colonial legalities and only short statements on Haíłzaqv law. Since the point of this project is to visibilize expressions of Haíłzaqv jurisdiction, I chose to change my writing process to address this reality. In the opening section of each case study, this project designates equal space – one paragraph each – to the sources of Haíłzaqv and colonial law, and tries to equalize space in the rest of the "documentary review" parts of the case study chapters thereafter. This has meant taking a very high-level view of colonial law, in order not to spend time speaking for it in all of its complexity, since this project cannot do that for Haíłzaqv law. It has also meant repeating some of the main points and sources regarding Haíłzaqv law in each chapter, in order to trace the origins in each case study from the Haíłzaqv perspective in the same manner as colonial law, since the material on the Haíłzaqv is more limited. The result may not provide a satisfactory account of either colonial or Haíłzaqv law, but it does allow for the visibility of both, for the purposes of tracing jurisdictions.

Another stylistic choice is reflected by the order in which the three indicators of jurisdiction are discussed, which changes from Chapter 3 to Chapters 4, 5 and 6. In the context of the literature review, where theory is unpacked, the natural flow of ideas is different than in the context of the case studies, where it is applied. In critical legal theory, the insight that "juris" "diction" is the "voice" of "law" offers a jumping off point for understanding jurisdiction from an "external" perspective, as a kind of technique. The next insight is that what law's techniques do is, in part, authorize law, and this focus on authority invites return to a more "internal" point of view. The insight of the sub-discipline of critical legal geography, that law is spatial, can stand alone. For that reason, in the literature review, techniques are discussed before authority, and the idea of legal space comes last. In the case studies, however, the discussion of authority precedes the discussion of spatiality, and techniques come last. This reflects the need to ground each case study within Haíłzaqv legality, which was not immediately visible within a colonial context. Beginning with a discussion of authority, which offers the most "internal" view, establishes the connection between the struggle and Haíłzaqv law. The next natural step is to discuss the space of the struggle, and how the conflict arises out of the environment. The discussion of techniques comes last, offering insight into how the struggle of Haíłzaqv legal authority within its legal space is carried out.

A final stylistic choice worth highlighting is the spellings that are used for Haíłzaqv words in this project. Until recently, the standard spelling for Haíłzaqv was "Heiltsuk," and that spelling was still in wide circulation in 2015, when the interviews in this project were completed. In the following years, however, much in the community evolved and changed. In particular, the Haíłzaqv was moving through a language revitalization project, and had begun using new spellings for Heiltsuk words on its website, which more accurately express the Heiltsuk language. "Heiltsuk" is better spelled "Haíłzaqv."

Similarly, "Gvi'ilas" is better spelt as "Ǧvi'ilás," "7áxvái" as "7àxuài," and "Hemox" as "Yím̓as."[109] When I contacted Interviewees in 2019 to alert them that the project was nearing completion, one stressed the importance of this change, and during revisions, I chose to adopt the newer spellings in this project. To me, this represented another opportunity to respect and hold up the ongoing journey of Haíłzaqv self-determination, to which I understand language and identity to be vital. However, I continue to use older spellings in the context of proper names, such as the "Heiltsuk Tribal Council," or in quotes from written sources that were published prior to the name change.

2.5 Review of Methodology Chapter

This project draws on ethnographic-inspired methodologies that have developed the study of Indigenous legal traditions and institutional ethnography, and uses them to explore the jurisdiction of Haíłzaqv law over the environment in the context of colonial rule. It does this by applying indicators of jurisdiction derived from theoretical literature to case studies of Haíłzaqv struggles with colonial law over lands and resources within Haíłzaqv territory. Although the Haíłzaqv are involved in multiple simultaneous efforts to reclaim control over their environment by asserting legal power and engaging with colonial law, three case studies were selected for their comparative properties. Information about the case studies was gathered through textual review and through qualitative interviews, and the process of compiling information and presenting it has been reflexive, in order to reflect the intentions of the project.

In this chapter, I have set out the methodological choices that give shape to that project, and

[109] I adopt these spellings from the most recent Haíłzaqv report on Haíłzaqv laws that is posted on the Heiltsuk Tribal Council website. See Heiltsuk Tribal Council, "Dáduqvḷá1 qn̓txv Ǧviḷásax̌ - To look at our traditional laws: Decision of the Heiltsuk (Haíłzaqv) Dáduqvḷá Committee Regarding the October 13, 2016 Nathan E. Stewart Spill" (Report, May 2018), online (pdf): Heiltsuk Tribal Council <www.heiltsuknation.ca/wp-content/uploads/2018/10/Heiltsuk_Adjudication_Report.pdf>.

the context and support for them. In Section 2.1, I reviewed the qualitative, ethnographic methodology within which this project is situated, with attention to the two subfields of institutional ethnography and Indigenous legal traditions from which it specifically draws, as well as differences between this project and those fields. In Section 2.2, I outlined how this project proceeds, using the tools of theory, textual overview, and interviews with community members to explore and analyze jurisdiction. In Section 2.3, I discussed the basis of the interview process that is used, as well as how these methods were adapted in the context of the interviews themselves. In Section 2.4, I looked at some of the limitations of this project, and how they were addressed, as well as some stylistic choices that guide the presentation of the case studies. With this methodology in place, I now turn to theory to explore the nature of jurisdiction in a way that can be applied throughout this project.

CHAPTER 3: LITERATURE REVIEW

Although jurisdiction does an enormous amount of work in law, there is no clear definition or well-established theory of it.[110] Black's Law Dictionary emphasizes the multi-faceted nature of jurisdiction, listing pages of possible applications and, until recently, defining it generally as "[a] term of comprehensive import embracing every kind of judicial action. It is the power of the court to decide."[111] An 1890 guide defines it as "a power constitutionally conferred upon a court, a single judge, or a magistrate, to take cognizance of and decide causes according to law, and to carry their sentence into execution," but elsewhere notes that jurisdiction can be legislative and executive, as well as judicial.[112] A contemporary encyclopedia defines it as "the power and authority to declare, apply, and interpret law over specified geographical areas, subject matters (in rem), or persons (in personam)."[113] Its meaning is not precise, but varied, and vast.

What is common to each of these definitions is a link between law and power. Jurisdiction is the power of a legal action; the power to decide how the law applies to a situation; the power to create laws through legislative functions; the power of law's enforcement. Remove jurisdiction from law, and

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[110] Shannaugh Dorsett, *Thinking Jurisdictionally: A Geneology of Native Title* (PhD Dissertation, University of New South Wales Faculty of Law, 2005) [unpublished] [*Dorsett*].

[111] *Black's Law Dictionary*, 6th ed (St Paul: West Publishing, 1990), sub verbo "jurisdiction". The definition was updated in 1999, and now begins to simply with one very prominent instance of jurisdiction: a government's territorial jurisdiction. See *Black's Law Dictionary*, 10th ed (St Paul: West Group, 2014) sub verbo "jurisdiction".

[112] See Joseph H Vance, *Jurisdiction: Its Exercise in Commencing an Action at Law* (Ann Arbor, Michigan: The Argus Book and Job Rooms, 1890). As outlined in this text, jurisdiction may be original or delegated, exclusive or concurrent, general or limited, and legislative, executive, or judicial.

[113] Nelson C Dometrius & Eric Booth, "Jurisdiction" in Donald P Haider-Markel, ed, *Political Encyclopedia of US States and Regions* (Washington: CQ Press, 2008) 826.

what is left behind is rules, principles, institutions, roles, ideas, and formalized conversations – but nothing that *binds* in that particularly legal way. Without jurisdiction, the court cannot make an order that will be followed, the plaintiff has no right to engage a court, the legislature cannot enact its will. Without jurisdiction, law is just another discourse, another set of normative social practices. It is jurisdiction that enables law to be realized and enforced in social life. Yet it is taken for granted.

This chapter discusses what theoretical literature related to law can offer towards a deeper understanding of jurisdiction. It begins with a detailed overview of this chapter and the three indicators of jurisdiction that it identifies: techniques, authority, and space. It then pauses to look at literature that is already oriented towards jurisdiction, but that does not explicitly deal with it: legal pluralism and work on Indigenous legal traditions. Instead of providing insight into what jurisdiction is, those fields provide an orientation towards jurisdiction. Then it begins delving into theory in earnest, using critical legal theory to identify three qualities of jurisdiction: techniques, authority, and engagement with space. The rest of this literature review is organized around those three aspects – techniques, authority, and space – which become the indicators of jurisdiction that are applied to the case studies later in this project.

3.1 Overview of the Literature on Jurisdiction

This literature review is organized into five substantive subsections, plus sections for a detailed introduction, in this Section, as well as a final conclusion. In Section 3.2, I review literature that centers jurisdiction but does not engage with it directly, that I find offers an orientation towards jurisdiction rather than a theory of it. Specifically, in Subsection 3.2.1 I review the meaning and role of jurisdiction in one field within which this project is methodologically situated: legal pluralism. I conclude that the field has not addressed jurisdiction in any depth, but that the approach of legal pluralism, which adopts

a theoretical understanding of law and then applies it to both state and non-state legal orders, does offer an orientation towards how this project uses literature on jurisdiction. I then look at Indigenous legal traditions, in Subsection 3.2.2. I begin with a brief introduction to the field and the way that it has dealt with jurisdiction, and then explain how work in the field will be incorporated in other sections of the literature review. Although scholarship in that area has not dealt with jurisdiction in detail, it has explored how legal systems are structured within specific Indigenous legal traditions, and can guide a reading of literature on jurisdiction and help with the identification of qualities that resonate with Indigenous legal theories and practices of law. In particular, it offers the insight that a study of an Indigenous legal system from the perspective of colonial law or theory will not necessarily reflect or actualize Indigenous law. I therefore adopt an orientation that seeks expressions of Haíłzaqv jurisdiction as they can be understood from a colonial legal perspective, rather than 7àxuài.

In Section 3.3, I review the qualities of jurisdiction that are discussed in critical legal theory, and explore them in related work. I begin in Subsection 3.3.1 with the central insight of critical legal theory: that jurisdiction is a technique. Critical legal theory stresses this technical dimension of *how* law takes hold. It explores the idea that jurisdiction is a set of techniques or practices that identify law as law, and give it the force of application in social life. From this perspective, jurisdiction is not so much a thing, or a concept, as a way of doing things. The etymology of the word "jurisdiction" directs our attention towards how we come to know the law: it indicates that the law ("juris") is being articulated ("dicto"). Jurisdiction can thus be understood as a way of speaking: it is a speech that declares the law, and – in doing so – invokes the power and authority to speak in the name of the law.[114] Another

[114] See Shannaugh Dorsett & Shaun McVeigh, *Jurisdiction* (New York: Routledge, 2012) at 4 [*Dorsett & McVeigh*] (citing Rush, *infra* note 161).

etymology suggests that the root for "diction" is not speech but enforcement ("ditio").[115] Either way, jurisdiction is expressive rather than representative because rather than simply refer to things, it makes changes to the world's future.[116] It generates effects: designating and delimiting what is legal; providing tools for using law; and producing legal relationships – between jurisdiction's speaker and listening subjects, and between different subjects, or the subjects and the community, if the law speaks of them.[117] The techniques by which it generates these effects are broadly identified by critical legal theory, and explored and expanded upon through related critical and historical scholarship, as well as work on Indigenous legal traditions.

I explore the second indicator of jurisdiction in Subsection 3.3.2: Authority. I begin by discussing another insight of critical legal theory which resonates with the issue of Indigenous and state legalities: that jurisdiction is law's *why*. As "the first question of law," jurisdiction inaugurates law's speaker with the authority to speak the law, and their speech as legally authoritative: in other words, jurisdiction authorizes law.[118] I review that work in critical legal theory, supported by legal and political theory dealing with underlying concepts; I also take up scholarship dealing with constitutionalism in the Canadian settler-state context. Although constitutionalism and other underlying theories in Subsection 3.3.2 section do not take up jurisdiction *per se*, they do take authority

[115] In Latin, "juris" is law, and "diction" is "to speak," though another possible root is "ditio," or "to impose force of judgment." See Dorsett, *supra* note 110 at 12-13 (tracing the etymological analysis to Douzinas, *infra* note 117, and to Sir E Coke, *The Fourth Part of the Institutes of the Laws of England: Concerning the Jurisdiction of the Courts* (London: W Lee and D Parkman, 1644)).

[116] See Edward Mussawir, "The Activity of Judgment: Deleuze, Jurisdiction and the Procedural Genre of Jurisprudence" (2010) 7 Law, Culture and the Humanities 463 at 473-474 [*Mussawir, Activity*]. See also Edward Mussawir, *Jurisdiction in Deleuze: The Expression and Representation of Law* (New York: Routledge, 2011) [*Mussawir*].

[117] See Dorsett & McVeigh, *supra* note 114 at 10-16 (noting, for example, that in the case of a marriage, the issue that engages jurisdiction is not whether the marriage is appropriate or even legally valid, but rather the fact that marriages belong to law). See also Costas Douzinas, "The Metaphysics of Jurisdiction" in *Jurisprudence of Jurisdiction*, Shaun McVeigh, ed (New York: Routledge-Cavendish, 2007) 21 at 28 [*Douzinas*].

[118] Dorsett & McVeigh, *ibid* at 4, 32.

very seriously:[119] they are concerned with why governments, states, and laws have power, and how those powers are distributed within and between legal systems. If, as critical legal theory suggests, jurisdiction is what "polices the limits of the legal," because its "boundaries and limits are the very precondition of law's power,[120] these less critical perspectives investigate how those boundaries and limits are formed, and the source of their power and authority, as understood from inside of the legal system. To organize this material, I begin this Subsection 3.3.2 with the underlying values that empower law and jurisdiction, move on to the constitutions that create the framework of jurisdiction, and then discuss how jurisdiction is administered day-to-day. I rely on examples from the Canadian legal system and Indigenous legal traditions.

In Subsection 3.3.3, I explore the third quality of jurisdiction: a spatial dimension. I begin with a discussion of critical legal geography, a discipline of critical legal theory that conceives law as spatial.[121] Some work in that field has taken up jurisdiction, to explore *where* particular laws have force. The central insight of that work is that abstract forms of rule such as law or jurisdiction have spatial dimension; by organizing human bodies and their material practices, they produce a certain kind of space – physically, representationally, and imaginatively.[122] Most obviously, jurisdiction is a map of law: like cartographic maps, laws distort reality in order to project it in useful ways,[123] and jurisdiction

[119] As noted by Dorsett & McVeigh, "the framing of authority and jurisdiction will direct attention straight away to 'constitutional' thinking – that is to the sorts of public law jurisprudence that are concerned with the creation of political orders and their government. This is an important genre of jurisprudential thought." *Ibid* at 33.
[120] Asha Kaushal, "The Politics of Jurisdiction" (2015) 78(5) The Modern Law Review 759 at 781-783 [*Kaushal*].
[121] See especially Nicholas Blomley & Joel Bakan, "Spacing Out: Towards a Critical Geography of Law" (1992) 30(3) *Osgoode Hall LJ* 661. See also David Harvey, "Between Space and Time: Reflections on Geographic Imagination" (1990) 8 Annals of the Association of American Geographers 418.
[122] For the discussion of Lefebre's idea of the production of space, see Chris Butler, "Critical Legal Studies and the Politics of Space" (2009) 18 Social & Legal Studies 313 at 320 [*Butler*]. See generally David Harvey, *The Condition of Postmodernity* (Cambridge MA: Blackwell, 1989) at 218-223 [*Harvey*].
[123] See Santos, *supra* note 121.

provides the "scales" that are used to sort out the spatial reach of different, often-overlapping laws.[124] In Subsection 3.3.3, I discuss that idea in critical legal geography, as well as related geographic and ethnographic work on mapping; I then move on to the concept of territory, also identified as central by critical legal geographers, and explore how it has been treated by social geography and as it appear in Indigenous legal traditions; finally, I provide a review of a few additional concepts from social geography that might provide other frameworks for exploring jurisdiction. I end the chapter with a brief conclusion, in Section 3.4, that summarizes the literature review, the indicators of jurisdiction, and their relevance to the rest of this project.

Overall, I do not argue that techniques, authority, and space are necessary or sufficient qualities of jurisdiction. There are other ways to think about jurisdiction, and other ways to identify it. I follow the literature towards techniques, authority, and space by choice, and for specific reasons. First, because I look at radically different legal systems (federal and provincial state laws, on the one hand, and Haíłzaqv Indigenous laws, on the other), I prefer a high-level theoretical framework over a set of questions developed to trace jurisdiction in other work dealing with a specific, more urban context.[125] Second, because I am looking at jurisdictional struggles between Indigenous and state governments, I choose indicators that are attuned to how jurisdictions manifest in relation to one another, rather than the issues of identity and governance that may give rise to them internally, as theorized in other work about jurisdiction.[126] Other work may attune to aspects or indicators of jurisdiction, but techniques, authority, and space are where this project begins.

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[124] Mariana Valverde, "Jurisdiction and Scale: Legal 'Technicalities' as Resources for Theory" (2009) 18 Social & Legal Studies 139 [Valverde, Scale].

[125] For work taking the latter approach, see *ibid* at 144 (Valverde emphasizes the role of jurisdiction in organizing cities, and suggests that jurisdiction asks four questions: where, who, what, and how).

[126] For work taking the latter approach, see Kaushal, *supra* note 120 (categorizing the literature on jurisdiction into discussions of community, governance, and territory, and placing the discussion of techniques within each).

3.2 An Orientation Towards Jurisdiction

3.2.1 Legal Pluralism

Legal pluralism queries how multiple legal systems coexist and interact in a single socio-geographic environment. For that reason, jurisdiction might be expected to be a central topic, but a review of the field found that the legal pluralism does not look at jurisdiction very closely.[127] Instead, it focusses almost entirely on the meaning and manifestation of "law." Legal pluralism has been defined as "a situation in which two or more legal systems coexist in the same social field,"[128] and the study of legal pluralism is the study of legal systems through this lens. As a discipline, legal pluralism is both descriptive and exhortative: descriptive, because it traces multiple norm-generating systems that do exist; and exhortative, because it calls all of them "law." Using "law" to describe systems that the state does not designate as "legal" disrupts one of statehood's fundamental premises: that it is only state-legitimized rules that have law's authority.[129] That premise – sometimes called "legal centralism" – is reflected in much of Western legal theory, which grounds the authority of law in sovereignty, a quality that is defined and held by states.[130] Legal pluralism is a Western legal theorical framework that challenges that assumption.

Legal pluralism proceeds by defining "law" using criteria other than that of the state legal system, and then looks for evidence of such "law" in a system of normative ordering that is not the

[127] One important exception is the work of Valverde, Scale, *supra* note 124. However, because it engages with social geography, it is dealt with in Subsection 3.3.3, below.
[128] See Merry, *supra* note 125.
[129] See Griffiths, *supra* note 126.
[130] *Ibid* at 3. The ideology of legal centralism discussed by Merry is closely connected with the ideology of sovereignty, discussed in Subsection 3.3.2, below. Using Merry's emphasis on challenging legal centralism, legal pluralism becomes broad enough for many theoretical frameworks and norm-generating systems. *Ibid* at 872-875. See also Ralf Michaels, "Global Legal Pluralism" (2009) 5 Annual Review of Law and Social Science 243. Compare Franz von Benda-Beckmann, "Who's Afraid of Legal Pluralism?" (2002) 47 Journal of Legal Pluralism 37 at 58 (arguing that not all scholars of legal pluralism focus on unseating legal centralism).

state legal system. This project may be understood to include two branches of work. A first, more empirical or technical branch of legal pluralist scholarship focuses on the descriptive aspect of the legal pluralist project, applying a theoretical definition of law to particular case studies of non-state activity, in order to reveal the interplay of legal systems, often of the state and a non-state community. For example, scholars working from case studies of Indigenous laws over land and resources have suggested that Indigenous legal claims can play a strategic role in negotiations with the state;[131] that political changes can lead to "open moments" in which ambiguity allows legal authority to be redefined;[132] and that attempting to subsume Indigenous law within the state legal system can reduce their influence.[133] A second, theoretical branch emphasizes the exhortative aspect of this project, drawing from disciplines such as anthropology, philosophy, and political theory to come up with ways to define "law" through the social sciences: for example, as a system of normative ordering that includes rules and compliance.[134] Work grounded in social theory identifies law using anthropological criteria such as rules and punishments,[135] while work drawing on liberal political theory identifies law

[131] See Tom G Svensson, "Indigenous Rights and Customary Law Discourse: Comparing the Nisga'a and the Sami" (2002) 34:47 The Journal of Legal Pluralism and Unofficial Law 1 (but without discussing jurisdiction directly).
[132] Christian Lund, "Struggles for Land and Political Power" (1998) 30 The Journal for Legal Pluralism and Unofficial Law 1 at 2 (but discussing disputes over land tenure rather than jurisdiction per se).
[133] See Gordon R Woodman, "Customary Law, State Courts, and the Notion of Institutionalization of Norms in Ghana and Nigeria" in Antony Allott and Gordon R Woodman, eds, *People's Law and State Law: the Bellagio Papers* (Dordrecht: Foris Publications, 1985) 143. Another case study suggests that that this may open up Indigenous legal systems to outside control. See Martina Locher et al, "Land Grabbing Investment Principles and Plural Legal Orders of Land Use" (2012) 44 Journal of Legal Pluralism 65 (but, again, without discussing jurisdiction directly).
[134] See Merry, *supra* note 125.
[135] *Ibid*. See also Sally Engle Merry, "Transnational Human Rights and Local Activism: Mapping the Middle" in R Provost and C Sheppard, eds, *Dialogues on Human Rights and Legal Pluralism* (New York: Springer Science+Business Media, 2013) 207.

with norms for coordinating behaviour and resolving disputes,[136] and another approach based on realist philosophy identifies it simply with reference to whatever social actors refer to as "law."[137]

In general, neither field of legal pluralism addresses jurisdiction head-on. In both empirical and theoretical legal pluralism, jurisdiction is typically not defined, but is simply identified with the authority to make juridical or governance decisions, usually in the context of the state. For example, empirical work typically identifies "jurisdiction" as a quality of the state legal system, or as a form of resistance to the state legal system.[138] Even where this literature makes findings about jurisdiction, they tend to be peripheral to the study of the interaction between legal systems, not focussed on jurisdiction in its own right – for example, in studies finding that jurisdictional redundancy may improve performance;[139] that subaltern legal systems may manoeuvre within state institutions in order to assert jurisdiction;[140] or that jurisdictional competition may work to the advantage of those legal systems that

[136] See Jeremy Webber, "Legal Pluralism and Human Agency" (2006) 44 Osgoode Hall Law Journal 167. See also Jeremy Webber, "Relations of Force and Relations of Justice" (1995) 33 Osgoode Hall Law Journal 623 at 647-650.
[137] See Brian Z Tamanaha, "A Non-Essentialist Version of Legal Pluralism" (2000) 27 Journal of Law & Society 296. But see Richard Nobles & Richard Schiff, "Understanding Legal Pluralism" In *Observing Law through Systems Theory* (Oxford: Hart Publishing, 2013) 88.
[138] When dealing with a non-state legal system, legal pluralist studies typically recognize jurisdiction only when it takes form as a challenge to state jurisdiction. See Helene Maria Kyed "The Politics of Legal Pluralism: State Policies on Legal Pluralism and their Local Dynamics in Mozambique" (2009) 41:59 Journal of Legal Pluralism 87. See also Stephen Lubkemann, Deborah Isser & Peter Chapman, "Neither State Nor Custom – Just Naked Power: The Consequences of Ideals-Oriented Rule of Law Policy-Making in Liberia" (2011) 43:63 Journal of Legal Pluralism 73. See also Shaun Larcom, "Taking customary law seriously: a case of legal re- ordering in Kieta" (2013) 45:2 Journal of Legal Pluralism 190. A small body of legal pluralist work specifically exploring the management of natural resources also tends to identify jurisdiction only in relation to the state. See Yonariza Shivakoti & Ganesh P Shivakoti, "Decentralization and Co-Management of Protected Areas in Indonesia" (2008) 40:57 Journal of Legal Pluralism 141 (identifying community jurisdictions with the geographic regions allocated by the state). See also Rikardo Simarmata, "Legal Complexity in Natural Resource Management in the Frontier Mahakam Delta of East Kalimantan, Indonesia" (2010) 42:62 Journal of Legal Pluralism 115 (treating jurisdiction as "state jurisdiction"). See also Charles E Benjamin, "Legal Pluralism and Decentralization: Natural Resource Management in Mali" (2008) 36 World Development 2255 (identifying jurisdiction with what is recognized as such by the state). See also Svein Jentoft, "Legal Pluralism and the Governability of Fisheries and Coastal Systems" 43:64 (2013) Journal of Legal Pluralism 149 (using the framework of "governance" instead)
[139] Robert M Cover, "The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation" (1980-1981) 22 William & Mary Law Review 639.
[140] Ido Shahar, "Legal Pluralism Incarnate: An Institutional Perspective on Courts of Law in Colonial and Postcolonial

offer better chances of enforcement.[141] For its part, theoretical legal pluralism uses the term "jurisdiction" when the dominant legal system asserts itself over non-state legal systems, especially through the decision-making authority of a judge, suggesting that jurisdiction is a quality of state legal systems, rather than a quality of law.[142] It does not delve much further into the topic.

Although this project cannot rely on legal pluralism for a definition or set of indicators for jurisdiction, it does borrow from legal pluralism's orientation towards the study of law. It proceeds by analogy with the legal pluralist approach, looking at theoretical insights into the nature of jurisdiction and applying them to non-state systems of normative ordering, both empirically and exhortatively. However, it differs from legal pluralism in three ways. First, it studies jurisdiction as such, rather than law. Second, it does not apply existing legal pluralist methods or sociological theories, but draws its definition from the philosophically-oriented field of critical legal theory, as supported by diverse work in critical theory and legal history, constitutionalism, and social geography. Third, it incorporates and aligns with work on Indigenous legal traditions, bringing in an additional methodological commitment of empowerment, which is discussed below.

3.2.2 Indigenous Legal Traditions

Indigenous legal traditions are normative systems that governed Indigenous communities prior to colonization, and continue to be used by those communities in various forms today. An Indigenous legal system is the traditions that enact a community's ideas about the nature of law, the

Settings" (2012) 44:65 The Journal of Legal Pluralism and Unofficial Law 133.

[141] Laura Benton, "Historical Perspectives on Legal Pluralism" (2011) 3:1 Hague Journal on the Rule of Law 57.

[142] See Robert M Cover, "The Supreme Court, 1982 Term – Forward: Nomos and Narrative" (1983) 97 Harvard Law Review 4 at 54-60. See also Paul Schiff Berman, "The New Legal Pluralism" (2009) 5 Annual Review of Law & Society 225 at 234.

role of law in society, and how law and legal pedagogy should be carried out.[143] Contemporary work on Indigenous legal traditions typically involves a scholar applying legal and social theory to contemporary practices, and working with a community to identify its existing legal resources in order to enable working within them in a more explicitly "legal" way.[144] The work of John Borrows is the standard in that field.[145] However, ethnographic inquiries into Indigenous customs, worldviews, and legal traditions pre-date this particular approach, and are also canvassed in this literature review, here and in the sections that follow.[146]

Legal pluralism shares some ground with the study of Indigenous legal traditions: they both seek to unseat legal centralism, and to illuminate Indigenous legalities "juristically;"[147] however, work in Indigenous legal traditions rarely engages with legal pluralism as a field.[148] This may be because the

[143] Val Napoleon & Hadley Friedland, "Indigenous Legal Traditions: Roots to Renaissance" in Markus D Dubber and Tatjana Hörnle, eds, *The Oxford Handbook of Criminal Law* (Oxford, UK: Oxford University Press, 2014) 225 at 227. See also Val Napoleon, *Thinking About Indigenous Legal Orders*, Research Paper (Ottawa: National Centre for First Nations Governance, 2007) [*Napoleon*].

[144] See Napoleon, *ibid*.

[145] See especially John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002).

[146] Because anthropological work relating to Native American and other Indigenous cultures is a broad field, I relied upon the suggestions of scholars at the University of Victoria, and a search of its database, to identify work that was most relevant to the question of Indigenous jurisdiction that is being discussed in this project. This literature review does not attempt to reflect a comprehensive overview of work from Indigenous studies generally.

[147] Here, I reference the distinction between "social science" legal pluralism (which deals with identifying multiple normative systems) and "juristic" legal pluralism (which deals with how a single sovereignty manages the interaction of multiple state legal systems). See Merry, *supra* note 125 at 871. As referenced at note 77, Napoleon notes the importance of the "internal" perspective in the study of Indigenous legal traditions, as well as the benefits and risks of a legally-trained eye. See Napoleon, Ayook, *supra* note 74 at 17-18, 50-51.

[148] Some scholars of Indigenous legal traditions do situate themselves within legal pluralism. See Keith Richotte Jr, "Legal Pluralism and Tribal Constitutions" (2009-2010) 36 William Mitchell Law Review 447 (incorporating legal pluralism into his work and arguing that a number of Indigenous thinkers advocate implicitly for it). Most, however, cite legal pluralist definitions of law, but do not engage with it further. For a relevant criticism of legal pluralism see Gad Barzilai, "Beyond Relativism: Where is the Power in Legal Pluralism" (2008) 9 Theoretical Inquiries in Law 395. For a general critique of the application of Western theories to Indigenous thought, see Leroy Little Bear, "Jagged Worldviews Colliding" in Marie Battiste, ed, *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000) 77.

work has a different aim: it is not so much analytic as "resurgent"[149] meaning that it seeks to activate Indigenous legal systems, not just visibilize them. In the study of Indigenous legal systems, the project is not simply to challenge the idea of legal centralism, but to interrupt the practice of it, actually manifesting law as plural.[150] This approach has been characterized as a "turn sideways:" rather than continue to struggle with colonialism, Indigenous communities turn towards each other, building power from within.[151] The study of Indigenous legal traditions could be understood as legal pluralism, but rather than focussing on state law and how it interacts with other legal orders, it often focusses on the study and empowerment of Indigenous legal systems on their own terms.

The study of Indigenous legal traditions has not yet taken on the question of jurisdiction directly. One scholar identified a need to focus on law rather than jurisdiction, at least at first, in the following terms: "[b]eginning with notions of 'jurisdiction' actually distracts us from what the operation of the [I]ndigenous legal order would entail without imposed external limitations applied from the outset."[152] Perhaps for that reason, the field does not offer a large body of material on jurisdiction: to date, it is mentioned only occasionally, as a finding rather than a point of inquiry. For example, the exercise of Gitksan jurisdiction has been identified with feasting and pole raising, which invoke the deep relationship between specific laws and specific territories.[153] Similarly, WSÁNEĆ jurisdiction has been said to arise from relationships and the responsibilities they engender, including

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[149] Taiaiake Alfred, *Was*ase: Indigenous Pathways of Action and Freedom* (Toronto: Broadview, 2005). For another approach, see Dale Turner, *This Is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006). See also Borrows, Without, *supra* note 56.

[150] For a recent comment on the emergence of Indigenous legal pluralism in Canada, see Patrick Macklem, "Indigenous Peoples and the Ethos of Legal Pluralism in Canada" in Patrick Macklem and Doulgas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016) 17.

[151] See Mack, *supra* note 44 at 26-28 (drawing this metaphor from a creation story).

[152] Robert Justin Clifford, *WSÁNEĆ Law and the Fuel Spill at Goldstream*, LLM Thesis (Victoria, BC: University of Victoria, Faculty of Law, 2014) [unpublished] at 88 [*Clifford*].

[153] See Napoleon, Ayook*, supra* note 74 at 12, 169-170.

relationships with the non-human world.[154] Anthropological and other work that intersects with the study of Indigenous legal traditions also tends not to address jurisdiction, though it typically unpacks culture, governance, or worldview, in which jurisdiction would be embedded.[155] One exception is a study of the Barrier Lake Algonquin's struggle for control over lands and resources, which has ben analyzed from a political science perspective with jurisdiction as a starting point[156] – albeit, without attempting to define jurisdiction from a perspective "internal" to the Algonquin worldview.

In this project, work on Indigenous legal traditions is not used to provide the framework for jurisdiction, or a criterion of it, but is instead woven into the discussion of other literature as it relates to each indicator – techniques, authority, and engagement with space – and as it resonates with the colonial-derived scholarship within which it is discussed. This is because the field of Indigenous legal traditions does not offer a theory of jurisdiction at this point: it has not taken up jurisdiction as a question in and of itself, and most scholarship is committed to studying Indigenous legal traditions individually rather than making such overarching claims. In addition, it is because a methodological commitment of this project drawn from work on Indigenous legal traditions is to "activate" Haíłzaqv jurisdiction, albeit in a roundabout way. This project aims to visibilize expressions of Haíłzaqv jurisdiction from within a colonial legal perspective, in order to lay the ground work for colonial actors to recognize and relate to them in new ways – and that aim is best served by an approach that works in relation to the colonial legal system. It also aims to provide Haíłzaqv legal actors with conceptual

[154] See Clifford, *supra* note 152 at 4, 8-9, 82-93.

[155] One exception is an inquiry into Hopi jurisdiction in the context of tribal courts, which draws upon critical legal theory to argue that both the limit and content of Hopi jurisdiction is determined by tradition, as it is continually transmitted. Richland draws upon anthropology as well as critical legal theory to study how appeal courts treat Hopi tribal courts. See Justin B Richland, "Hopi Tradition as Jurisdiction: On the Potentializing Limits of Hopi Sovereignty" (2011) 36 Law & Social Inquiry 1 at 201-234.

[156] Pasternak, *supra* note 34. This project directly follows that work by drawing from critical legal theory and focusing on political struggles over land as expressions of jurisdictions, but differs by delving into what jurisdiction is and how it can be identified – and from a perspective grounded in law, legal theory, and Indigenous legal traditions rather than political science.

tools to better understand how colonial jurisdiction impacts Ǧvi'ilás, and how expressions of Ǧvi'ilás power – which may or may not be jurisdiction or 7àxuài – interact with and impact it, in turn.

3.3 A Critical Theory of Jurisdiction

3.3.1 Jurisdiction as Technique

Etymologically, jurisdiction is law's speech – the "diction" of the "juris."[157] The word brings attention to how the law becomes known: it is stated by something or someone. From a critical perspective, jurisdiction can thus be understood as an act of speaking: of declaring the law, and – in doing so – of invoking the power and authority to speak in the name of the law.[158] This kind of speech designates and delimits what is legal, provides tools for using law, and it produces legal relationships – between jurisdiction's speaker and listening subjects, between the subjects themselves if law speaks of them.[159] If jurisdiction is understood as speech, it must be a speech of particular kind.

A Deleuzian view argues that jurisdiction is an "expressive" rather than a "representative" speech-act, because rather than refer to concepts, it performs: it generates effects.[160] It is a speech that does things in the social world, substantively and also performatively, by involving the listener in its speech. A semiotic lens describes jurisdictional speech as "doubly genitive," inaugurating not only the speaker of law, but also law itself, by inhabiting two speech positions at once.[161] Like the writer of

[157] As noted above, in Latin, "juris" is law, and "diction" is "to speak," though another possible root is "ditio," or "to impose force of judgment." See Dorsett, *supra* note 110 at 12-14. The Greek word for "justice" and the Greek word for "gift" have also been raised as possible roots. *Ibid.* See also Douzinas, *supra* note 117.
[158] See Dorsett & McVeigh, *supra* note 114 at 4 (citing Rush, *infra* note 161). Note that Dorsett & McVeigh do not theorize the form of jurisdiction, but trace particular forms that it takes in the common law as well as in the pre-common law world of the middle ages. *Ibid* at 20-29.
[159] *Ibid* at 10-16 (noting, for example, that with respect to marriage, the issue is not why the relationship is legal, but the fact that it belongs to law). See also Douzinas, *supra* note 117 at 28.
[160] See Mussawir, *supra* note 116 at 473-474.
[161] See Douzinas, *supra* note 117.

fiction, jurisdiction is both author and narrator of law.[162] More than a simple concept or a language, jurisdiction is a practice:

> Jurisdiction is not so much a discourse, not so much a statement of the law, but a site or space of enunciation. It refers us first and foremost to the power and authority to speak in the name of law and only subsequently to the fact that the law is stated – and stated to be something or someone.[163]

How does jurisdiction do this?[164] Framed critically in this way, jurisdiction reveals itself not as an ideal form, but as a way of doing things.[165] It is a way of gesturing to and enacting the power of law.

This critical legal theory approach to jurisdiction stresses the "how" of jurisdiction, and identifies the importance of techniques that jurisdiction uses in order to give form to law. Broadly, these are techniques for inaugurating law, transmitting law, mapping or visually representing law and legal relationships, situating law, remembering law, and engaging legal relationships. High level examples of such techniques include writing, mapping, precedent, and categorization, which deploy law into the world, and also hold law together internally.[166] Law may be understood to be visibilized and made legible through a wide range of aesthetic techniques,[167] including ritualistic or spectacular

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[162] *Ibid*. See also Bradin Cormack, *A Power to Do Justice: Jurisdiction, English Literature, and the Rise of Common Law, 1509-1625* (Chicago: The University of Chicago Press, 2007) at 4-5 [*Cormack*] (building on critical theory to explore jurisdiction from the discipline of law and literature).

[163] Peter Rush, "An Altered Jurisdiction: Corporeal Traces of Law" (1997) 6 Griffith LR 144 at 150 [*Rush*].

[164] See Daniel Matthews, "From Jurisdiction to Juriswriting: At the Expressive Limits of the Law" (2017) 13 Law, Culture and the Humanities 425 [*Matthews*] (noting that Deleuze breaks with much of Western philosophical tradition by asking "how" rather than "what" or "why," and that Mussawir follows him). See also Michel Foucault, "Society Must be Defended: Lectures at the College de France, 1975-1976" David Macy, trans (New York: Picador, 2003) (warning among other things, that when studying power, one should not look for structures but at situations; not for its intentions, but for how it works). See also Dorsett & McVeigh, *supra* note 114 at 55 (discussing jurisdiction in the context of Foucault). This approach might be thought of as "rhizomal:" patterned off of the roots of a spreading plant like grass, rather than a single tree. See Gilles Deleuze and Felix Guattari, *A Thousand Plateaus* (Minneapolis: University of Minnesota Press, 1987) at 28. See also Eileen Honan, "Writing the Rhizome: an (Im)plausible Methodology" (2007) 20 International Journal of Qualitative Studies in Education 531 at 531-532, 536.

[165] Dorsett & McVeigh, *ibid* at 26.

[166] *Ibid* at 54-55.

[167] See Cormack, *supra* note 162 at 4-6 (discussing the role of aesthetics).

performances that make legal authority "visual, palpable, bodily (accessible to the senses),"[168] as well as other artistic and symbolic representations of law's authority.[169] A variety of discursive practices may be relevant, because it is through them that jurisdiction articulates the law and also offers an explanation of itself.[170] And a critical lens that sees law as a Foucaultian assemblage of governmental techniques can also bring in administrative measures,[171] coercive mechanisms,[172] and truth telling practices.[173] As a technique, jurisdiction is multiple, and evolves.

Writing provides one example of how jurisdiction inheres in specific techniques. Writing is a technique because is a material technology that relies on other technologies, artifacts, and human practices.[174] It is jurisdictional because it is used in a variety of ways to enact law. By encoding language in a way that cannot readily be changed, it serves as an "artificial memory" that does not depend on living practices such as rituals, memory aids, or witnesses. Prior to writing, colonial common law jurisdiction relied upon other techniques for stabilizing memory and transmitting law through time: for example, the legal transfer of land in medieval times required a witnessed ceremony in which a symbolic sod and twig were publicly transferred.[175] Over time, the colonial common law adopted

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[168] Julie Stone Peters, "Legal Performance Good and Bad" (2008) 4 Law, Culture and the Humanities 179 at 180 [*Peters*]. Although the language of "jurisdiction" is not widely employed by either Peters nor her subjects (Foucault and Derrida), they are all concerned with "the founding of law's authority," which is one definition of jurisdiction. See Dorsett & McVeigh, *supra* note 114.

[169] Dorsett & McVeigh, *ibid* at 50.

[170] Cormack, *supra* note 162 at 7-10. See also Matthews, *supra* note 164.

[171] See Valverde, Scale, *supra* note 124 at 140, 143-144;

[172] See generally Pat O'Malley & Mariana Valverde, "Foucault, Criminal Law and the Governmentalization of the State" in Markus D Dubber, ed, *Foundational Texts in Modern Criminal Law* (New York: Oxford University Press, 2014) 317 at 323, 326-328 [*O'Malley and Valverde*] (discussing existing interpretations of Foucault, and suggesting that he offers a definition of law that includes practices hybrid with governmentality, sovereignty, and discipline).

[173] See generally Mariana Valverde, "Foucault on 'Avowal': Theatres of Truth from Homer to Modern Psychology" (2015) 40:4 Law & Social Inquiry 1080 [*Valverde, Foucault*].

[174] See Michael T Clancy, *From Memory to Written Record: England 106 - 1307*, 3rd ed (Malden, MA: Wiley-Blackwell, 2013) at 296-297 [*Clancy*].

[175] See Heather MacNeil, "From the memory of the act to the act itself: The evolution of written records as proof of jural acts in England, 11th to 17th century" (2006) 6 Archival Science 313.

writing as a technique of embodying the power of the law: the ceremony became the written deed.[176] More jurisdictionally, writing allows representations of truth and power to be partially disembedded from living practices, and to be recorded and stored in a way that enable legal authority to be located far from where legal relationships are carried out. Indeed, the spread of literacy in the common law world has been attributed to the proliferation of legal "writs" during the rise of a centralized royal government, which used them to claim legal authority over a multitude of independent medieval jurisdictions.[177] In colonial law, jurisdiction still relies upon non-written, cognitive practices to transmit law, such as categorization, precedent, and witnessing,[178] but also continues to rely upon writs and other written instruments: the parking ticket contains a different kind of writing than a book, because it initiates a legal process, engaging jurisdiction;[179] and land transfer record, which are increasingly centralized.[180]

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[176] *Ibid*. Writing was also adopted as a way of transmitting legal truth: once proven into evidence, a written document is treated as a window into what actually happened, rather than way of remembering it. This has made it difficult for the Canadian legal system to accept non-written histories such as Indigenous histories into evidence. See Lorraine Weir, "'Oral Tradition' as Legal Fiction: The Challenge of Dechen Ts'edilhtan in *Tsilhqot'in Nation v. British Columbia*" (2016) 29 International Journal of the Semiotics of Law 159 [*Weir*].

[177] See Clancy, *supra* note 174. See also Andrew H Hershey, "Justice and Bureaucracy: The English Royal Writ and '1258'" (1998) 113 The English Historical Review 829 (examining the utility of writs to individuals seeking justice and the royal government's seeking expansion of its power). For more work drawing on the move away from independent medieval jurisdictions, see Dorsett & McVeigh, *supra* note 114 at 42-48. See also Richard T Ford, "Law's Territory: a History of Jurisdiction" (1999) 97 Michigan Law Review 843 [*Ford*]. See also Peter Goodrich, *Law in the Courts of Love: Literature and Other Minor Jurisprudences* (London: Routledge, 1996). See also John Borrows, "Sovereignty's Alchemy" (1999) 37 Osgoode Hall Law Journal 537 at 550 [*Borrows, Alchemy*] (discussing F W Maitland, *The Forms of Action at Common Law* (Cambridge: Cambridge University Press, 1948)).

[178] See Dorsett & McVeigh, *ibid* at 57-71. Briefly, precedent – the decision-making practice of dealing with similar situations in the same way law each time – may be understood as a technique of transmitting law across time and space, and thus holding it together. Categorization – a conceptual practice that sorts life into categories, and law into the various domains to which those categories belong – does organizational work. For an overview of conceptual categories within Inuit law, see Borrows, Constitution, *supra* note 6 at 101-104.

[179] See generally Dorsett & McVeigh*, Ibid* at 57-62 (noting contemporary legal customs that treat writing as a definitive repository of law, such as the civil code or the American constitution).

[180] See generally Renisa Mawani "Law, Settler Colonialism, and 'the Forgotten Space' of Maritime Worlds" (2016) 12 Annual Review of Law and Social Sciences 107.

Indigenous legal traditions also incorporate techniques for enhancing public memory and transmitting law, but traditionally in ways other than through writing. One element of many Indigenous legal traditions is the story: an oral recounting of social life that communicates law and how it is applied, often with supernatural elements.[181] Oral traditions have cultural techniques for ensuring the integrity of such stories, though unlike written texts, oral traditions are not necessarily reproduced perfectly from one recounting to another: in some traditions, they may evolve in relation to the oratorical context and their internal truth.[182] Techniques for accurately transmitting oral traditions include memory aids such as wampum belts, culturally modified trees, and scrolls; the framework of genres ranging from proverbs to epics to memorized speech; the use of social roles, such as designated knowledge keepers; and practices surrounding the telling of the story, such as witnesses, dances, or repetition within a tale.[183] One important technique that has attracted scholarship is performance. Through a prescribed combination of techniques, a story may be told in a way that "expresses" tradition, through the observance of ceremonies, the training of specific performers and collective witnessing, for example.[184] When law is engaged, a performance may be understood to be a

[181] Stories with fictional or supernatural elements are one important part of many Indigenous legal traditions. See Val Napoleon & Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions through Stories" (2016) 61:4 McGill Law Journal 725 at 279-284. For an example of contemporary legal story-making, see Borrows, Drawing, *supra* note 78.

[182] See Weir, *supra* note 176. For one perspective on how the epistemology of how Indigenous stories differs from Western stories, see Lee Maracle, "Oratory on Oratory" in Smaro Kamboureli and Roy Mika, eds, *Trans.Can.Lit: Resituating the Study of Canadian Literature* (Waterloo: Wilfred Laurier University Press, 2007) 55 at 70. For contrasting examples of traditions with word-for-word "reproduction," see Jan Vansina, *Oral Tradition as History* (Madison: University of Wisconsin Press, 1985) at 41-42.

[183] See Borrows, Constitution, *supra* note 7 at 59, 140 (citing Vansina, *ibid*). Memory aids cited by Borrows include wampum belts, masks, totem poles, medicine bundles, culturally modified trees, birch bark scrolls, petroglyphs, button blankets, land forms, and crests. Genres of oral tradition include memorized speech, historical gossip, personal reminiscences, formalized group accounts, representations of origins and genesis, genealogies, epics, tales, proverbs, and sayings. Practices include pre-hearing preparations, mnemonic devices, ceremonial repetition, witnesses, dances, feasts, songs, poems, the use of testing, and the use of places.

[184] See Vansina, *ibid* at 33-56.

form of jurisdiction: indeed, in Carrier Indigenous legal traditions, performance has been clearly identified as a key way of engaging legal relationships, deliberations, and applications.[185]

Other parallels can be drawn between techniques used by colonial jurisdiction and techniques used by Indigenous legal traditions. Colonial jurisdiction visualizes jurisdiction over space through the use of maps,[186] while Gitkxan law raises carved poles to express ownership or jurisdiction over territory.[187] Colonial jurisdiction often uses robes, emblems, and ceremonial roles to designate authority and jurisdiction in a courthouse,[188] while Iroquois treaties often incorporate the symbol of a chain or a spoon to represent relational obligations,[189] and Mi'kmaq law uses wampum strings or belts with patterns of shells to symbolize legal relationships, along with public readings to keep them relevant and to tie them to larger Mi'kmaq narratives.[190] To have legal power, colonial legal decision making must often engage in certain epistemic practices, such as the "veridication" practices of taking an oath, calling witnesses, and being evaluated by one's peers;[191] the scientific techniques relied upon

[185] See Borrows, Constitution, *supra* note 7 at 91-95 (discussing the potlatch ceremony in the Carrier Kungax tradition).
[186] See Dorsett & McVeigh, *supra* note 114 at 57-71.
[187] See Napoleon, Ayook, *supra* note 74 at xiv, 7-8, 168, 171-172, 299 (discussing the pole-raising feast).
[188] See Dorsett & McVeigh, *supra* note 114 at 48. See also Peters, *supra* note 168 at 189-190. The ceremonial roles of a courtroom, such as judge and jury, have received special attention. *Ibid* at 189-190, 192. See also Lorna Hutson, "Review of Bradin Cormack, 'A Power to do Justice: Jurisdiction, English Literature and the Rise of Common Law, 1509-1625' (Chicago: University of Chicago Press, 2007) xiii + 406 pages, illus., index", Book Review, 22:3 Law & Literature 508 at 510-511 [*Hutson*] (discussing Foucault's take on the theatricality of courts as an inheritance from the church, and Derrida's, which suggests it helps law obscure the basis for its own authority). For a related take on colonial law, see Wilkins, *supra* note 41 at 1-18.
[189] See Borrows, Constitution, *supra* note 7 at 76-77 (discussing the Silver Covenant Chain as a symbol of a strong relationship that is regularly polished). See also Victor P Lytwyn, "A Dish with One Spoon: The Shared Hunting Grounds Agreement in the Great Lakes and St Lawrence Valley Region" in David H Pentland, ed, *Papers of the 28th Algonquian Conference* (Winnipeg: University of Manitoba, 1997) 210 (discussing the single dish and spoon as a symbol for sharing a harvest).
[190] See Henderson, *supra* note 43 at 74-76.
[191] See Valverde, Foucault, *supra* note 173 (reviewing Michel Foucault's lectures on the truth-testing or "avowal" process developed by the judicial system, though not as part of an analysis of jurisdiction *per se.* Valverde notes that in some circumstances, the police investigative process plays a similar role).

in environmental governance;[192] and categorization. Similarly, many oral traditions also rely on witnessing to know what the law is, and depend upon traditional ecological knowledge to make decisions, which may be based on creation stories, spiritual insight, and personal or family knowledge of the land.[193] Finally, coercive mechanisms for imposing law's power – such as policing[194] and institutionalization[195] – may be compared to principles for carrying out Cree law to deal with a dangerous or "Windigo" individual through escalating steps: healing, supervision, separation, and finally incapacitation.[196]

This Section 3.3.1 has considered the technical aspect of jurisdiction offered by the critical legal theory tradition. It has looked at critical legal theory and related theoretical and historical

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[192] Science has not yet attracted much attention in the study of jurisdiction. However, the dependence of contemporary "governance" on the scientific method has long been a topic of theoretical inquiry, especially in the context of the environment. See especially Bruno Latour, *We Have Never Been Modern*, trans by Catherine Porter (Cambridge: Harvard University Press, 1991). For a recent examination of the relationship between science and policy, see Ann Campbell Keller, *Science in Environmental Policy: The Politics of Objective Advice* (Cambridge: The MIT Press, 2009). For a technical perspective, see Liora Salter, "Science and Peer Review: The Canadian Standard-Setting Experience" (1985) 10:4 Science, Technology & Human Values 37. See also Roger Alex Clapp & Cecelia Mortenson, "Adversarial Science: Conflict Resolution and Scientific Review in British Columbia's Central Coast" (2011) 24:9 Society & Natural Resources: An International Journal 902. See also Chris Idzikowski & John Rumbold, "Sleep in a legal context: The role of the expert witness" (2015) 55(3) Medicine, Science and the Law 176.

[193] See Cruikshank, *supra* note 79. See also Paul Nadasdy, *Hunters and Bureaucrats* (Vancouver: UBC Press, 2004) at 61-114 [*Nadasdy*].

[194] See generally Juliet B Rogers, "Humiliation, Justice and the Play of Anxiety in Competing Jurisdictions" (2017) 28 Law Critique 289 (arguing that the anxiety of the tenuous nature of Australian jurisdiction over Indigenous raises anxiety, which is symptomatically expressed through the policing of Indigenous bodies).

[195] See generally Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Random House, 1995). Although Foucault focuses on governmentality and power, not legality, some scholarship has argued that the "expulsion" of "juridical power" from Foucault's analysis is a misinterpretation of his work. See O'Malley and Valverde, *supra* note 172 at 326. See also Kevin Walby, "Contributions to a Post-Sovereigntist Understanding of Law: Foucault, Law as Governance, and Legal Pluralism" (2007) 16(4) Social & Legal Studies 551 [*Walby*]. Work in jurisdiction has directed comparatively less attention to coercion through physical rather than cognitive techniques. See especially Cormack, *supra* note 162 at 41. However, bureaucratic and punitive techniques seem intrinsic to state jurisdiction, since "enforcement" is half of the equation of jurisdiction in international law. See generally Roger O'Keefe, "Universal Jurisdiction" (2004) 2 Journal of International Criminal Justice 735. See also Peters, *supra* note 168 at 185.

[196] See Hadley Louise Freidland, *The Wetico (Windigo) Legal Principles: Responding to Harm in Cree, Anishinabek and Saulteaux Societies* (LLM Thesis, University of Alberta Faculty of Graduate Studies, 2009) [unpublished]. Borrows also breaks down a particular Windigo execution into steps, which gave it justness and legitimacy within the community, and restored balance. see Borrows, Constitution, *supra* note 7 at 83.

scholarship, as well as work in Indigenous legal traditions that illuminates how techniques can be seen or understood in that context. What this section brings to light is the central role of techniques in transmitting law into social practices, giving it power. It also suggests that the distinction between the techniques of Indigenous and colonial jurisdictions is a soft one, and that law's techniques are not fixed. For example, writing and administrative bureaucracy[197] are important techniques of colonial law that continue to extend colonial jurisdiction over Indigenous lands and lives; at the same time, they increasingly incorporate Indigenous forms of truth,[198] and have been taken up by Indigenous communities as techniques for pushing back colonial law and extending their own legal traditions.[199] As living traditions, both state and Indigenous jurisdictions continue to evolve in response to the conditions in which they find themselves, especially in relationship to one another.

3.3.2 Jurisdiction as Authority

The speech of law is not merely technical; it performs a particular role. As "the first question of law," it inaugurates law's speaker with the authority to speak the law, and inaugurates that speech as legally authoritative. In short, jurisdiction *authorizes* law.[200] In western scholarship, "authority" has been defined as a property of communities, which arises from shared beliefs, and is able to channel

[197] For a discussion of bureaucracy and Indigeneity, see Nadasdy, *supra* note 193 (critically analyzing co-management between Indigenous and state actors). See also Laurent Fourchard, "Bureaucrats and Indigenes: Producing and Bypassing Certificates of Origin in Nigeria (2015) 85(1) Africa 37 (examining bureaucratic structures for conferring Indigenous status and privilege).
[198] For a critical discussion of the treatment of oratory by Canadian courts, see Val Napoleon, "*Delgamuukw*: A Legal Straightjacket for Oral Histories?" (2005) 20(2) *Canadian Journal of Law and Society* 123. Compare with Weir, *supra* note 176 (dealing with *Tsilhqot'in, infra* note 277).
[199] See also John Borrows, "Heroes, tricksters, monsters, and caretakers: indigenous law and legal education" (2016) 61:4 McGill Law Journal 820 at 820-821 (noting that many Indigenous legal traditions now use positivist forms of law such as written bylaws, and cautioning against overly privileging narrative as the source of law).
[200] See Dorsett & McVeigh, *supra* note 114 at 4, 32.

power through relationships.[201] However, in the study of Indigenous legal traditions, "authority" has sometimes been considered a hierarchical concept that does not satisfactorily explain jurisdiction. In some Indigenous legal traditions, law's force is traced, instead, through relationships that give rise to responsibilities,[202] suggesting that the basis for jurisdiction may be an "ontology of care."[203] Although this project primarily relies upon the language of "authority" from colonial legal scholarship, it proceeds on the assumption that authority does something general that other concepts, such as responsibility, may also refer to: namely, it speaks to the "why" of law, or legitimizes it.[204]

In colonial legal scholarship, the "why" of law is explored through legal and political theory, especially constitutionalism, a field that examines how communities manifest law and governance. Various scholars of Indigenous legal traditions also take up this question. This project approaches the "why" of law at three different levels: at the level of the abstract, where theoretical literature considers the source of law's authority and the shared, unspoken beliefs underlying it; at the level of the community, by way of specific constitutions establishing authorities within a legal community, which

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[201] See generally Hannah Arendt, *What Is Authority? Between Past and Future: Eight Exercises in Political Thought* (New York: Penguin, 1977) at 91 (authority is evidenced by power that does not rely directly on persuasion or violence). Dorsett & McVeigh also rely on Arendt. See Dorsett & McVeigh, *supra* note 114 at 33-34 (bringing Arendt into the analysis of jurisdiction). See also Leila Dawney, "Review 1: Immanent Authority" (2011) Authority Research Network Working Paper, online (word document): *Authority Research Network* <www.authorityresearch.net/literature-reviews-on-authority.html>.

[202] See Clifford, *supra* note 152 at 61-87 (writing, "[e]vident [in the stories] is that the WSÁNEĆ do not have an authority over the islands within their territory; rather, they each…have a series of responsibilities in relation to one another"). Although, as Clifford notes, it cannot be universalized, law arising from relationship and responsibility has been identified in other Indigenous legal traditions as well. See especially Christine F Black, *The Land is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (New York: Rutledge, 2011) at 15-16 [*Black*] (noting that responsibilities and rights go hand-in-hand). See also Heidi Kiiwetinepinesiik Stark, "Respect, Responsibility, and Renewal: The Foundations of Anishinaabe Treaty Making with the United States and Canada" (2010) 34:2 American Indian Culture & Research Journal 145. See also James (Sákéj) Youngblood Henderson, "Postcolonial Indigenous Legal Consciousness" 1 Indigenous Law Journal 1 at 44-45.

[203] Pasternak, *supra* note 34 at 6, 28.

[204] "Legitimacy" is borrowed from Weber's formulation, when he identifies authority as "belief in the legitimacy of command." See Max Weber "The Types of Authority and Imperative Coordination" in *The Theory of Social and Economic Organizations* (Glencoe, Illinois: The Falcon's Wing Press, 1964) 324. See also Clifford, *supra* note 152 at 155.

are studied by scholars of constitutionalism; and at the level of the particular, where specific rules are assumed to be authoritative, in ways that critical legal theory explores. This framework offers a structure for exploring "why" specific laws have authority, and is inspired by work on Indigenous jurisprudence from Australia, which hypothesizes three layers to legal reasoning: overarching cosmology, a basic law of relationship, and allocation of rights and responsibilities.[205] Each layer – abstraction, community, and particularity – is overviewed below.

First, jurisdiction authorizes law at the level of abstraction by engaging a community's underlying understandings and beliefs. Law is usually legitimized through a sacred or creation story element;[206] thus, techniques of jurisdiction are often said to require something *im*material:[207] for example, representations of religious authority;[208] the evocation of an emotional affect that signifies justice;[209] or a discourse that engages mysticism.[210] At its most general, this can be understood as an "articulation of some of what is already there": the power of direct engagement with a culture's deep, implicit, and shared understandings.[211] What persuades individuals that jurisdiction matters is not the specific legal and political system that enables it, but their affinity to that system, the engagement of values and beliefs that have formed them, but are not up front in daily consciousness.

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[205] Black notes three concentric, "triadic circles" that shape Indigenous jurisprudence in what is now Australia: an overarching cosmology, the basic law of relationship, and the allocation of rights and responsibilities. See Black, *supra* note 202 at 15-16

[206] See Jeremy Webber, "The Grammar of Customary Law" (2009) 54 McGill Law Journal 579 at 61 (discussing the sacred element of law in the context of both state and Indigenous legal systems).

[207] See Dorsett & McVeigh, *supra* note 114 at 49-50.

[208] *Ibid* at 32 (such an affect may be evoked by the performance of judging).

[209] See Mussawir, Activity, *supra* note 116 at 472-474.

[210] See Cormack, *supra* note 162 at 6-10 (but using the language of sovereignty rather than political authority). For Cormack, jurisdiction's discourse is one of *de*mystification. Compare Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority'" in Gil Anidjar, ed, *Acts of Religion* (New York: Routledge, 2002) 230 at 240. For a discussion of these two approaches, see Hutson, *supra* note 188 at 512. See also Matthews, *supra* note 164.

[211] Andrée Boisselle, "Beyond Consent and Disagreement: Why Law's Authority Is Not Just about Will" in Jeremy Webber & Colin Macleod, eds, *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010) 207 at 208.

Colonial and Indigenous legal traditions have some different underlying beliefs. In the study of the common law, law's authority is often said to be based on "sovereignty,"[212] or a people's "supreme authority within a territory." Sovereignty is originally a theological concept referring to the divine right of kings, which mutated over centuries to reflect evolving ideas about the rational and secular governance, and became a foundation of the international law in the 1840s treaties of Westphalia, when European states agreed that each would have supreme rule within its own, bounded territory.[213] Critiques of constitutionalism point out that this underlying belief in "sovereignty" is premised on Indigenous exclusion,[214] and may be an expression of "bare sovereignty."[215]

Indigenous peoples sometimes reference sovereignty in struggles against colonization,[216] but Indigenous legal scholarship often refers to a different set of pre-legal commitments, referred to

[212] Canadian jurisdiction explicitly relies upon the concept of sovereignty. For an example in domestic law, see *R v Sparrow*, [1990] 1 SCR 1075 at 1103 [*Sparrow*]. At international law, sovereignty – and, increasingly, constitutions expressing it – has become a necessary condition of recognized statehood. See *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, arts 2(1), 2(4). For a discussion, see Alan James, *Sovereign Statehood*: *The Basis of International Society* (London: Allen & Unwin, 1896). However, sovereignty is a complex concept in Canada, with its federalist structure, acknowledgment of Quebec sovereignty, and Indigenous nations.

[213] See generally Jens Bartleson, *A Geneology of Sovereignty* (New York: Cambridge University Press, 1995). See also Murkens, *supra*; Jeremy Jennings, "The reform of the French Constitution" in Richard Bellamy and Dario Castiglione, eds, *Constitutionalism in Transformation* (Cambridge Mass: Blackwell, 1996) 76. See also William G Andrews, ed, *Constitutions and Constitutionalism* (Princeton: Van Nostrand, 1968) [*Andrews*]. For a review of contemporary other ideas theories of sovereignty relevant to Canada, see Jeremy Webber, "We Are Still in the Age of Encounter: Section 35 and a Canada Beyond Sovereignty" in Patrick Macklem and Doulgas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016) 63. See also James Tully, "Modern Constitutional Democracy and Imperialism" (2008) 46.3 Osgoode Hall Law Journal 461. See also Peter Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 108-124 [*Macklem*] (discussing the evolution of the meaning of sovereignty in Canada).

[214] See Karena Shaw*, Indigeneity and Political Theory: Sovereignty and the Limits of the Political* (New York: Routledge, 2008). Compare Webber, Sovereignty, *ibid*. For an analysis of how these concepts continue to be used by Canadian courts, see Borrows, Alchemy, *supra* note 177.

[215] Douzinas, *supra* note 117 at 22.

[216] See Joanne Barker, "For Whom Sovereignty Matters" in Joanne Barker, ed*, Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination* (Lincoln: University of Nebraska Press, 2005) 1.

variously as the "lifeworld,"[217] "cosmology,"[218] or "sacred."[219] In a similar way to how an understanding of the conceptual history of "sovereignty" sheds insight on the functionality and underlying commitments of the legal system that is based upon it, an understanding of the epistemological, ontological, and cosmological basis for a specific Indigenous legal tradition may be crucial to understanding how and why it works.[220] For example, the Carrier legal tradition includes a kungax creation story, which offers a metaphysical orientation and grounds Carrier relationships with the land. Specific laws, such as respect for animals, are anchored in the spirit world and creation story. When it is relayed, the story is told in such a way as to stimulate emotion from listeners, so that the affective power of the kungax becomes a part of legal decision-making.[221] The sacred and the affective experience are part of the source of law's authority.

Second, jurisdiction authorizes law at the level of the community, often – but not always – through identifiable constitutions. From a critical perspective, this means that it might be understood as "apparatus through which state sovereignty is rendered meaningful;"[222] that apparatus is shaped by the "original act" that establishes the polis, or political community, and its powers.[223] Jurisdiction is

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[217] Aaron Mills, "Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill Law Journal 847 esp at 850 [*Mills*] (defining lifeworld as the ontological, epistemological, and cosmological framework through which the world appears to a people).

[218] Black, *supra* note 202 at 15 (explaining that cosmological creation stories define a people's principles, ideals, values and philosophies, which, in turn, inform the legal regime).

[219] Borrows, Constitution, *supra* note 7 at 24 (noting that "Laws can be regarded as sacred if they stem from the Creator, creation stories or revered ancient teachings that have withstood the test of time").

[220] See Mills, *supra* note 217 at 855 n 14.

[221] Borrows, Constitution, *supra* note 7 at 91-96.

[222] Pasternak, *supra* note 34 at 3.

[223] Marcela Echeverri, "Constitutionalism" in *Oxford Encyclopaedia of the Modern World*, Peter N Stears, ed, online version (Oxford, UK: Oxford University Press, 2008). There are different traditions of constitutions, but in general, they are understood to stabilize unified governance by articulating common values and holding government accountable to them, or appearing to do so. See Andrews, *supra* note 213 at 23. See also David Arase, "Constitutionalism" in Peter N Stearns, Ed, *Oxford Encyclopedia of the Modern World*, online version (Oxford University Press, 2008). See also Martin Loughin, "What is Constitutionalization?" in Petra Dobner and Martin Loughin, eds, *The Twilight of Constitutionalism?* (Oxford UK: Oxford University Press, 2010) 47. See also Jo Eric Khushal Murkens, "Constitutionalism" in Mark Bevir, Ed, *Encyclopedia of Political Theory,* online version (California:

thus "co-generative" of politics: it embodies and channels political authority, and in doing so, bounds that authority within certain limits. Jurisdiction applies to insiders rather than outsiders, can be exercised over public matters versus private, is invoked only by certain speakers of law.[224] Since it polices the limits of the legal, its "boundaries and limits are the very precondition of law's power;" it not only speaks of where law reaches, who is included, and on what terms, but continually reconstitutes jurisdiction through its discourse.[225] There are limits to how sovereignty can flow, to what exercises of authority are legal; those limits constitute its legality.

In the study of colonial common law, Canada's original act is sometimes imagined as Britain planting a constitutional "tree" in new world soil.[226] Today, the exercise of Canadian jurisdiction must always find its authority in the constitution, much of which is a written account of how the government is structured and which arms of it have jurisdiction over which matters.[227] One critique of this form of Canadian constitutionalism is that it fails to account for Indigenous Treaties.[228] Since treaties are

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Sage Publications, 2010).

[224] Even as a form of speech, jurisdiction can be understood to result in differentiation. For example, Douzinas focuses on how jurisdiction's speech choreographs social life, creating a single speaker and many listeners, and a group of listeners and those who are outside the community. Douzinas, *supra* note 117. Another theorist argues that the very form of jurisdiction is premised on sexual differentiation, with women positioned outside of the law. Maria Drakopoulou, "On the Founding of Law's Jurisdiction and the Politics of Sexual Difference: The Case of Roman Law," in Shaun McVeigh, ed, *Jurisprudence of Jurisdiction* (New York: Routledge-Cavendish, 2007) 33.

[225] Kaushal, *supra* note 120 at 764, 781-783. Indeed, common law research on jurisdiction leads to constitutional judgments about what does *not* belong to law, or belongs to a *which* legal authority. See *Reference Re Secession of Quebec*, [1998] 2 SCR 217 [*SCC Reference*] (delineating federal and provincial authorities).

[226] *Edwards v Canada* (AG), [1930] AC 124, 1929 CanLII 438 (UK JCPC) at 106-107 (calling the Canadian constitution a "living tree" planted by the British common wealth on North American soil, leading to a "purposive" approach to constitutional interpretation that differs from the "originalist" approach in the United States). For an argument that the "living tree" metaphor offers the possibility of a much more expansive understanding of Aboriginal rights, see John Borrows, "(Ab)Originalism and Canada's Constitution" (2012) 58 Supreme Court Law Review 352. See also UBCIC, Tsilhqot'in, *supra* note 8 at para 10.

[227] See *Constitution Act, 1867*, *supra* note 26, ss 92 and 92. See also Constitution Act 1982, *supra* note 45. In addition to its written form, the Canadian constitution also draws on unwritten sources: conventions inherited from British constitutionalism such as the royal prerogative, and interpretive principles such as federalism, democracy, and the rule of law. See SCC Reference, *supra* note 225.

[228] See especially Borrows, Wampum, *supra* note 44 (discussing the addresses the history of the *Royal Proclamation of 1763,* placing it in the context of the 1764 *Treaty at Niagara*, and argues that the two must be

inter-legal agreements premised on the recognized sovereignty and law of two separate nations, and since many of Canada-Indigenous treaties pre-date or are roughly contemporaneous with the *Constitution Act, 1867*, they obviously played a role in grounding the authority of Canada's constitution and recognizing the authority of Indigenous legalities. However, they do not appear in Canada's constitution except as one possible source of Section 35 rights.

An alternative way of understanding Canada's "original moment" is to make Aboriginal treaties foundational constitutional documents, ushering in a new federalism between not only provinces and federal parties, but also treaty parties.[229] Another approach considers the current constitution a "partial forgery,"[230] because – under an inter-group theory of constitutionalism – the original act of any nation is not the act of asserting dominion, but the coming together of different peoples: French and English, settler and Indigenous, and landed and immigrant communities. Under this account, Canada's constitution is not a written document, but a set of relationships based on mutual recognition, self-determination, and shared responsibility. Only some of those are captured in the written constitution acts, and not all of them exist yet in Canadian society, making Canadian constitutionalism latent, an incomplete project.[231]

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read together as a constitutional agreement establishing mutual respect, sharing, and non-interference between the British Crown and at least 24 Indigenous nations). See generally RCAP, *supra* note 27, vol 1. For a critique of the current treaty process, see Stephanie Irlbacher-Fox, *Finding Dahshaa: Self-Government, Social Suffering, and Aboriginal Policy in Canada* (Vancouver: UBC Press, 2010). For an approach to constitutional interpretation that would recognize treaty relationships, see Brian Slattery, "The Organic Constitution: Aboriginal Peoples and the Evolution of Canada" (1995) 34 Osgoode Hall Law Journal 1. See also Brian Slattery, "The Metamorphosis of Aboriginal Title" (2006) 85 La revue du barreau Canadien 255.

[229] See James (Sakej) Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58 Sask Law Review 241 at 244, 246, 248, 260, 325.

[230] See James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (New York: Cambridge University Press, 1995).

[231] *Ibid*. Tully argues that true constitutions always embody three principles: mutual recognition of self-governing peoples, mutual consent to shared authority, and continuation of self-rule. In this way, they are like treaties: a way of negotiating difference other than imperialism. In contrast, sovereignty, uniformity, progressiveness, and national identity are not constitutional principles, but rather forgeries invented to serve imperial purposes. See

These alternate understandings of Canada's constitution may be more in tune with Indigenous perspectives on treaty and constitutionalism. For example, in 1764, the British entered into the Treaty of Niagara with approximately 2000 Indigenous Nations, as a way of bringing the previous year's Royal Proclamation – a unilateral promise by the Crown – into its inter-group relationships. The treaty process included Indigenous customs, such as a two-row wampum belt that was designed to evoke two boats travelling together without steering one another: a relationship of peace, friendship, respect, and non-interference. That particular wampum built upon an existing Iroquois treaty,[232] and reflects Iroquois laws of living together in confederacy. According to Iroquois tradition, Iroquoian people were introduced by a peacemaker to the Great Law of Peace. The resulting confederacy they created to live together peacefully gives each nation internal autonomy, as well as representation on a consensus-based council that governs external affairs.[233] This expression of constitutionalism and treaty is based on mutual agreement between groups.

Finally, at the third level, the level of particularity, jurisdiction authorizes the distribution of legal authority within the polis to deal with specific matters. Constitutions distribute power and rights among institutions and citizens, establishing and mobilizing a map of who-speaks-where, or the "rules of the game" for legal life.[234] Jurisdiction may appear in an interaction with a police officer or a dispute with a neighbour, without any clear link to its source or rationale. This is the quality of jurisdiction that most critical legal scholarship focusses on: it looks at the moment when sovereignty has already

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also James Tully, *Public Philosophy in a New Key*, vol 2 (New York: Cambridge, 2008) at 195-242 (applying these ideas in settler state context).

[232] See Borrows, Wampum, *supra* note 44 at 155-172.

[233] See Borrows, Constitution, *supra* note 7 at 72-77. See also RCAP, *supra* note 27, vol 1, s 4. See also David Bedford & Thom Workman, "The Great Law of Peace: Alternative Inter-Nation(al) Practices and the Iroquoian Confederacy" (1997) 22 Alternatives 87.

[234] See Macklem, *supra* note 213 at 21.

been delegated,[235] when jurisdiction performs the "governance of legal governance,"[236] when the speech of law explains itself as merely "administrative."[237] At the point of application, jurisdiction is taken for granted, obscuring the "why" of legal authority; or, if jurisdiction is called into question, it engages multiple techniques for its justification.[238]

For example, in Canadian law, a ticket issued for a hunting or fishing infraction typically identifies the regulation violated, the penalty, and the court with the authority to hear any defense. It thus ushers in a series of detailed requirements such as fine amounts, deadlines, and specific and places and times to appear. In doing so, it typically does not cite the constitution, the political community, or even the law from which it derives its authority. A lawyer would be able to research the authority of the regulation and trace it back to its constitutional source, at which point a question about political authority could arise, but the ticket manifests jurisdiction in a way that imposes a particular reading of legal authority as a bare fact. In settler states, this quality of jurisdiction means that it imposes the fact of colonial rule, making it a "corporeal trace" of the original act of colonization,[239] which embodies ongoing imperialism, giving it a structure and process.[240] It has been argued that the administration of Canadian jurisdiction is not authorized over Indigenous lands and peoples, even though this occurs

[235] See Dorsett & McVeigh, *supra* note 114 at 34.
[236] Valverde, Scale, *supra* note 124 at 145. For a discussion of law as Foucaultian "governance, see Walby, *supra* note 195. See also Valverde, *supra* note 73 at 26.
[237] See Cormack, *supra* note 162 at 7 ("the law functions by keeping the source of its authority in fixed view as, insistently, the merely technical (and for that reason discursively unassailable)... [it] obliquely encounters the impossibility of grounding itself… projecting it onto the manageable…axis of competence or scope"). See also Matthews, *supra* note 164 (framing this discourse as a creative intervention that positions jurisdiction both within and against sovereignty).
[238] See Cormack, *supra* note 162 at 24.
[239] Rush, *supra* note 163 at 150.
[240] See James Q Whitman, "Western Legal Imperialism: Thinking About the Deep Historical Roots" (2009) 10.2 Theoretical Inquiries in Law 305. See also Tara Williamson, "The Edges of Exception: Implications for Indigenous Liberation in Canada" (2009) 14 Appeal: Review of Current Law & Legal Reform 68.

constantly, as a matter of jurisdiction and of fact.[241]

For their part, although traditional Indigenous legal systems are sometimes less administrative in nature, they do include protocols embodying jurisdiction in specific instances. For example, in the Anishinaabe legal tradition, some of the roles that are required to uphold Anishinaabe laws are distributed to particular clans or dodems, the members of which are responsible for carrying out the work of protector, mediator, and so on.[242] This sets the framework for particular legal interactions to take place. In addition, the Anishinabek Nation is currently developing a written, positive forms of its constitution and traditional laws, which will offer an explicit assertion of jurisdiction within the nation's treaty territory, and a code of legal obligations that apply to development proposals within that territory, as an application of jurisdiction.[243] Such a code can be understood as detailed guidance for Anishinaabe actors dealing with developers under Anishinabek jurisdiction.

This Section 3.3.2 has looked at the authoritative aspect of jurisdiction, as identified by critical legal theory and supported by legal and political theory, including constitutionalism from settler states. In addition, it has drawn from work in Indigenous legal traditions. This literature reveals that jurisdiction is a site at which law becomes authoritative, or legitimate. This authorizing work of jurisdiction activates pre-legal beliefs, the way that the legal community holding those beliefs is organized, and specific legal relationships and structures that carry it out. As a central way of organizing jurisdiction within a community, constitutions may serve as the axis along which jurisdiction can be traced, from the details of a parking ticket to the underlying commitments of the

[241] See Pasternak, *supra* note 34 at 6-16. See generally McNeil, *supra* note 47. See also Kent McNeil, "Indigenous Land Rights and Self-Government: Inseparable Entitlements" in Lisa Ford and Tim Rows, eds, *Between Indigenous and Settler Governance* (New York: Routledge, 2013) 135.
[242] See Wapshkaa Ma'iingan (Aaron Mills), "Aki, Anishinaabek, kaye tahsh Crown" (2010) 9:1 Indigenous Law Journal 107 at 137-139
[243] *Ibid* at 121,142-148.

community that creates them. Because of this central role, it is often constitutions that are contested in a struggle over whose law is legitimate. But if jurisdiction is co-generative with authority in each instance, jurisdiction may have its own role to play as a tool for challenging whose law rules, and why.

3.3.3 Jurisdiction as Space

Legal communities take up space. They occupy it with their physical, spatial bodies, and the material practices that sustain and relate them. In so doing, they "produce" space:[244] by establishing social practices and shared meanings that organize space to reproduce a way of being together in the material world, and reproduce it into the future. In establishing itself, a legal community thus passes through a "trial by space."[245] Jurisdiction, therefore, is spatial. It reflects not only a community's physical space, but also its orientation towards its space. Critical geographers studying the laws of cities have suggested that socio-legal life occurs within and is constituted by different legal spaces.[246] Jurisdiction is the way that different areas are identified as legal in different ways, and thus enables multiple legal spaces to overlay one another, with law operating differently and even incongruently at different scales: for example, local and provincial laws both exist in one place, but need not be aligned.[247] These jurisdictional spaces are not only physical but also abstract, with jurisdiction representing an imaginary vertical relationship between different spaces and different scales: for example, municipal power is said to derive from provincial power, rather than being its own centre of

[244] Butler, *supra* note 122 at 320 (discussing the "production of space" through the lens of Henri Lefebre).
[245] *Ibid* at 325.
[246] See Santos, *supra* note 121 at 288.
[247] See Valverde, Scale, *supra* note 124.

gravity.[248] Jurisdiction, then, is the apparatus that constitutes legal spaces, maps them, and relates them to one another imaginatively.

Although the field of critical legal geography is a small one, it opens the door to a number of interesting ways to look at jurisdiction. If jurisdiction is spatial, then what can geographic concepts, technologies, and theories offer as a way of understanding it? Maps are one such tool. If jurisdiction organizes legal space,[249] it forms a map of legal authority:[250] a shared understanding of where laws have force, and the scales at which different jurisdictions operate. The "mapping" explored by critical legal scholars is typically an image of something inchoate: an overlay of multiple jurisdictions in written laws that are never all visually represented together, and which thus operate in contradictory ways at different scales.[251] However, actual maps do visualize a legal community's relationship with its space. For example, maps of colonial explorers show the corridors and enclaves of coastlines within which local laws could be navigated, or foreign rule could be imagined to take hold, rather than entire landscapes.[252] It was only later, thanks to the midwife of modern cartography, that the form of colonial jurisdiction could emerge, both domestically and in colonies. Based on the rationalized, gridded, measured environments represented through cartographic maps, landscapes began to be seen as

[248] See Nicholas Blomley, "What Sort of Legal Space is a City?'" in A M Brighenti, ed, *Urban Interstices: The Aesthetics and the Politics of the In-between* (Burlington: Ashgate, 2013) 1.
[249] See Nicholas Blomley, "Legal Territories and the 'Golden Metewand' of the Law" in *Law, Space and the Geographies of Power* (NY: Guildford Press, 1994) 67 [*Blomley*] (emphasizing the rationalization of space through the map – its survey, or grid – that makes land is made available to a centralized legal system and ruling elites.
[250] See Santos, *supra* note 121 (noting that the map may be inaccurate rather than a true representation of social reality).
[251] See Valverde, Scale, *supra* note 124 at 144 (noting that jurisdiction may deploy law at different scales, such that multiple large-scale and small-scale legal systems may operate in the same physical and social places without interacting).
[252] See Lauren Benton, "Spatial Histories of Empire" (2006) 30 Itinerario 19.

empty, and as knowable through abstraction; such empty, rationally-contained spaces could be imagined subject to absent, centralized rule.[253]

Other kinds of maps can reflect different orientations towards the landscape, and different ways that laws take up space. Western Apache place names and understandings of the environment are mapped through stories about wisdom, responsibility, and the repercussions of disruptive social acts. Physically travelling to them in order to see and feel the landscape is required for the story to enter into the imagination of an individual, and to begin to "work" to keep person on the path of wisdom, towards becoming a better Apache citizen and individual. This "appropriation" of portions of the earth into the collective imagination, as a network of interconnected physical places with shared cultural meanings, can be understood as cognitive, social, and spiritual mapping, through techniques of story and lived experiences of places rather than through measurements or physical drawings. Instead of abstract space, such maps may reflect the Heideggerian notion of "dwelling": they represent a landscape that is specific, symbolic, and particular.[254] However, it is not only cognitive maps that can reflect this kind of orientation toward the environment: among the Beaver Indians of Canada's north-western sub-arctic, great hunters were known to locate their prey in dreams, and to map the trails to get there when they awoke. These subjective dream maps represent an orientation to the environment

[253] See Ford, *supra* 177 at 873-875. (discussing the rise of territorial jurisdiction in Thailand, England, and France). See also Blomley, *supra* note 249 (noting the historical coincidence of the consolidation of law in England and its first atlas). This change from knowledge embedded in actual social relations and experiences towards rationalized knowledge may reflect the process of "disembedding" theorized by Polanyi. See Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston: Beacon Press, 1944). Territoriality has been said to rely on this kind of mapping. See Elden, *infra* note 261.

[254] See Keith H Basso, *Wisdom Sits in Places: Landscape and Language Among the Western Apache* (Albuquerque: University of New Mexico Press, 1996) at 28, 32, 59, 83,86, 106, 127, 147, 143-144.

that sharply contrasts with the maps of traplines, alienated land, forestry, and oil and gas developments of colonial developers, which represent different sorts of dreams.[255]

One of the most central legal spaces that communities map is a territory. In the context of the state, jurisdiction has become almost synonymous with space, through the concept of territory,[256] a social and physical space within which a particular social and legal system operates. Territory has been said to be "psychosomatic" of human communities,[257] but states manifest it in a particular way: through territorial jurisdiction. Under international law, a state must have a territory in order to maintain its status as a state,[258] because within that legal framework, peace is maintained by the sovereigns of different countries containing their sovereignty within their own territory, and allowing other sovereigns to do the same.[259] Territorial jurisdiction is thus co-extensive with sovereignty: if sovereignty is "supreme authority within a territory," territory becomes the container for sovereignty, the space for supreme authority to rule. This particular form of territoriality is a relatively recent innovation: historically, Western relationships with the environment were oriented differently, through the concept of a "fatherland" from which a people emerged, feudal relations mapping space, a walled area protecting a particular community, or the military "terrain" that was travelled in

[255] See Hugh Brody, *Maps and Dreams: Indians and the British Columbia Frontier* (Vancouver: Douglas & McIntyre Ltd, 1993) (discussing the Beaver Indians of Northern BC). For another discussion of mapping Indigenous territories in the context of the Tlingit and Athapaskan peoples, see Cruikshank, *supra* note 79 at 228, 238, 267.
[256] See Blomley, *supra* note 249. See also Neil Brenner & Stuart Elden, "Henri Lefabvre on State, Space, Territory" (2009) 3 International Political Sociology 353. See also Cormack, *supra* note 162 at 25-26.
[257] Jean Gottman, The Significance of Territory (Charlottesville: The University Press of Virginia, 1973) at 100 [*Gottman*].
[258] See *Corfu Channel, United Kingdom v Albania, Judgment, Compensation*, (1949) ICJ Rep 244, ICGJ 201 (ICJ 1949), 15th December 1949, International Court of Justice (individual opinion of Judge Alvarez) ("by sovereignty we understand the whole body of rights and attributes which a state possesses within its territory, to the exclusion of and also in relation to other states").
[259] See Gottman, *supra* note 257 at 8.

conquest.[260] Each of these ideas offers a different basis for jurisdiction: a relationship with ancestry, a property relationship, a means of protection, or an experience of victory and defeat. Territorial jurisdiction evolved to offer something different: it is an assemblage of different parts of each of these historic ideas and practices, but one that essentially relocates the divine right to rule, or sovereignty, in a specific area of land.[261] It thus marks a shift from jurisdiction over specific persons or matters to jurisdiction over whatever falls within a geographic area.[262]

Indigenous communities also manifest territory, but sometimes differently. One example that has been studied by Indigenous legal scholarship is that of Gitkxan, whose territory is assembled out of the territories passed down through families, each of which are held by the chiefs of interrelated but independent hereditary "Houses." Those chiefs make up overarching and decentralized traditional government of the Gitkxan.[263] The Gitkxan territory, then, may be seen less as a bounded space of rule than as a space that arises out of the relationship between each of the Houses, and their relationships with the lands within each respective territory, which is maintained through ceremonies such as feasts, stories, and pole-raising.[264] The landscape is the source of jurisdiction: "laws emerged from [the] earliest experiences of connecting to [the] lands," and it is the "intertwining of people, history, and land [that] creates Gitksan jurisdiction."[265] Similarly, in the neighbouring Nisga'a tradition,

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[260] Stuart Elden, *The Birth of Territory* (Chicago: The University of Chicago Press, 2013) at 145 [*Elden*]. Note that Elden provides history of Western political relationships with land without positing cause-and-effect relationships.
[261] Saskia Sassen, *Territory, Authority, Rights: from Medieval to Global Assemblages* (Princeton: Princeton University Press, 2006) [*Sassen*].
[262] Elden, *supra* note 260.
[263] Napoleon, Ayook, *supra* note 74 at 168. Houses, or "wilps," are matrilineal kinship groups who maintain ceremonial obligations linking it to the land and territory such as feasting neighbouring houses. *Ibid* at 4-5. For more on Gitksan law and culture, see Richard Daly, *Our Box Was Full: An Ethnography for the Delgamuukw Plaintiffs* (Vancouver: UBC Press, 2005).
[264] See Napoleon, Ayook, *ibid* at 169-170.
[265] *Ibid* at 169. Traditional territorial boundaries were sometimes identified with fixed landmarks such as year-round streams, mountains, cut trails, and modified trees, and recounted publicly at a ceremony. *Ibid* at 171-173. See also Neil J Sterritt, *Tribal boundaries in the Nass watershed* (Vancouver: UBC Press, 1998).

the political organization of territory occurs through "wilps," or interrelated but independent tribal houses. Each has a specific origin story linking it to its territory during the time of creation, as well as a record of major events that would have shifted the uses or boundaries of the territory, and other key legal information about that territory.[266] In these Indigenous legal traditions, territory may be understood to be coextensive with identity:[267] it arises from a relationship with the land, is expressed in cultural and spiritual practices, and flows through relationships of kin. Although concepts of land tenure differ between Indigenous communities, the central role of land or territory in forming identity and community is one that has been suggested to apply in many Indigenous nations.[268]

In addition to territoriality, social geography offers other windows into the social organization of space, which could therefore be explored through the lens of jurisdiction. When a society "secretes" space through its social practices, it also embeds power spatially in ways that seem natural and that reproduce themselves.[269] One dimension of how space is produced in social relations concerns the lived experience of one's geography. Phenomenologically, geographers identify a difference between abstract understandings of space as generalized or empty, and more particular understandings that are based on specific places, and that arise from "being."[270] Another dynamic arises from the perspective

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[266] Borrows, Constitution, *supra* note 7 at 96-99. See also Richard Overstall, "Encountering the Spirit in the Land: 'Property' in a Kinship-Based Legal Order" in Ziff et al, eds, *A Property Law Reader: Cases, Questions, and Commentary,* 3rd ed (Toronto: Thomson Reuters, 2012) 80 at 88.

[267] Napoleon, Ayook, *supra* note 74 at 169.

[268] See generally Leroy Little Bear, "Aboriginal Rights and the Canadian 'Grundnorm'" in J Rick Pointing, ed, *Arduous Journey: Canadian Indians and Decolonization* (Toronto: McClelland & Stewart, 1986) 246. See also Cruikshank, *supra* note 79.

[269] Henri Lefebvre, *The Production of Space* (1974), (Cambridge: Basil Blackwell, Inc, 1991) at p 9, 27-33.

[270] *Ibid* at 15-16, 35-37, 73-76, 85, 88. See also Yi-Fu Tuan, *Space and Place: The Perspective of Experience* (Minneapolis: University of Minnesota Press, 1977) at 1-18. The discipline of social geography looks not only at phenomenological experience, but also how and why such experiences are produced. See Harvey, *supra* note 122 at 229-259. For a discussion of "space" and "place" in the context of ethnographic work with a specific Indigenous community, see Cruikshank, *supra* at note 79 67. For an investigation of how law may be stored landscape features, see Andrée Boisselle, "Our Constitution is set in stone: Looking at the Transformer Stories through the

of political economy, which identifies a distinction between an extractive "centre", and the remote "territory" that it governs, where there are also localized and dispersed forms of social organization and power.[271] A jurisdictional way of understanding these kinds of dynamics might a proposed distinction between "synthetic" and "organic" jurisdictions: those that are created to centralize territorial rule, and those that emerge locally to resist it.[272] Another way of thinking about spatial organization focuses on borders, and the extent to which they exist alongside and are troubled by "flows" – the movement of information, bodies, or capital across and between jurisdictions, that interconnects them.[273] Social geography offers many such insights; this chapter can only capture a few. This Section 3.3.3 has considered what a geographic lens can illuminate about jurisdiction, both in the common law and in Indigenous legal traditions. In doing so, it has suggested a third aspect of jurisdiction: in addition to being technical and authoritative, jurisdiction is spatial. To do so, it has surveyed some of the tools that social geography offers to understanding of jurisdiction, especially the representation of space through maps, the political understanding of space as territory, and a handful of dynamics of spatiality – such as space versus place, center versus territory, or borders versus flows. It has focused, in particular, on territoriality. Within the framework of colonial territoriality, where both social and physical space have been re-shaped to reflect colonial territoriality,[274] Indigenous

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Lens of Law" (Research Report, 2010), online (pdf): *Stó:lō Research and Resource Management Centre* <www.srrmcentre.com/pdf/Library/Boisselle_2010_Our%20constitution%20is%20set%20in%20stone.pdf>.

[271] See Michael M'Gonigle, "A dialectic of Centre and Territory in Nature: The Political Economy of Ecological Flows and Spatial Relations" in Fred P Gale and Michael M'Gonigle, eds*, Nature, Production, Power* (Northampton MA: Edward Elgar Publishing, 2000) 3 (arguing for a model that applies to market economies, but also to hierarchical power structures built on labour tied to land). See also Gottman, *supra* note 257.

[272] See Ford, *supra* note 177.

[273] For an overview of the discussion of borders and flows, see Chris Rumford, "Introduction: Theorizing Borders" (2006) 9 European Journal of Social Theory 155. See also Emmanuel Brunet-Jailly, "Theorizing Borders: An Interdisciplinary Perspective" (2005) 10:4 Geopolitics 633 (emphasizing the role of borderlands communities).

[274] See generally Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (Vancouver: UBC Press, 2002).

exercises of self-determination may manifest as political uprisings against state-authorized development,[275] or as land claims.[276] The lens of territoriality may offer a more nuanced understanding of what is at stake in such struggles, and the other tools of social geography may provide insight into where, how, and why they manifest.

3.4 Review of the Chapter and Indicators of Jurisdiction

This literature review has discussed Western theoretical work that deals with the idea of jurisdiction. I began by providing a brief overview of the field with which this project would seem to most closely align: legal pluralism. In Section 3.2, I discussed legal pluralism, and concluded that although conceptually offers precedent for how this project will proceed (by applying extra-legal definitions of legal phenomena to both state and non-state normative systems), it does not offer much insight into jurisdiction itself. I also discussed the field of Indigenous legal traditions, and some of the ethnographic work that preceded it. I found that Indigenous legal scholars also have yet to deal with jurisdiction in much depth, but that the rich array of work on Indigenous legal traditions provides an important framework for an orientation towards jurisdiction. In Section 3.3, I then looked at critical legal theory, which has begun to discuss jurisdiction in some detail, and overviewed work in and related to that discussion in three sections, which correspond to three different aspects of jurisdiction, chosen because they resonate with the context at hand and relevant work in Indigenous legal traditions.

[275] See Pasternak, *supra* note 34. See also John Weaver, "Concepts of Economic Improvement and the Social Construction of Property Rights: Highlights from the English-Speaking World" in J McLaren, AR Buck and N Wright, eds, *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press 2005) 79.
[276] See *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 256 [*Tsilhqot'in*]. For an overview of the role played by the presumption of "sovereignty" in prior litigation, see Borrows, Alchemy, *supra* note 177. For the American context, see Wilkins, *supra* note 41 at 1-18.

Literature relating to each of those three aspects was explored in turn. In Subsection 3.3.1, I explored jurisdiction as a "technique," or a way of doing things. I drew primarily on critical legal theory as well as some historical work that it engages with in critical theory, literary theory, and legal history, and related work in Indigenous theory. It explored what it means for jurisdiction to be technical, with examples from both colonial and Indigenous jurisdictions. In Subsection 3.3.2, I looked at jurisdiction as a way of designating "authority" or legitimacy. I began with critical legal theory then turned to legal and political theory, constitutional theory that deals with Indigeneity in Canada, and examples from colonial and Indigenous legal systems. I sketched legal authority at three levels, from abstract, pre-legal values, to community-wide or constitutional arrangements, to technical regulations. In Subsection 3.3.3, I engaged with the idea that jurisdiction takes up and produces "space," from critical legal geography. I drew on that field as well as social geography dealing with spatial concepts relevant to legal though. I finished by offering a few ideas from further afield within that discipline, though I did not attempt a review of social geography as a whole.

This chapter not only explored literature on jurisdiction – it also organized it in a way that serves a purpose in this project. Overall, the literature review suggests that jurisdiction can be identified with the characteristics of technicalities, authoritativeness, and a spatial dimension. As noted above, this is not to claim that techniques, authority, and territoriality are the only aspects of jurisdiction, or that they are necessarily required of jurisdiction in every culture or context. Rather, this project suggests that these three qualities may provide a framework for understanding the operation of jurisdiction over the environment in the context of disputes between Indigenous and state actors over land and resources in Canada. The discussion thus provides a framework for the chapters that follow, wherein this project explores whether and how jurisdiction manifests in the case studies of Haíłzaqv struggles with state jurisdiction using where techniques, authority, and space as indicators, based on

the material in this chapter. Because this framework is a deconstructive one that arrives at different indicators of jurisdiction, it opens up the possibility showing parallels between Canadian jurisdiction and expressions of Haíłzaqv jurisdiction as a matter of description – rather than a debate over whether either jurisdiction is valid or right. In this way, the project aims to offer Canadian legal actors an opportunity to see Haíłzaqv activity in ways that they can recognize as jurisdictional, and Haíłzaqv actors to see how jurisdiction is operating in their Traditional Territory (whether or not they identify it as 7àxuài).

CHAPTER 4: CASE STUDY 1
JURISDICTION OVER A FISHERY AFTER LITIGATION

In 1996, the Supreme Court of Canada handed down the decision *R v Gladstone*, a ruling that established that the Haíłzaqv have a constitutionally-protected Aboriginal right to harvest and sell the spawn of herring, laid on submerged plants such as kelp (known as "spawn on kelp" or "SOK").[277] Herring are bony fish about twenty centimeters long that congregate along the central coast of British Columbia.[278] In the spring, schools of herring migrate to shallow areas to lay thousands of eggs, which attach to suspended substrates in the water, such as floating sea grass, kelp, or tree branches. The Haíłzaqv have an ancient relationship with the herring, which is structured by Ǧvi'ilás practices of harvest and stewardship;[279] however, under the colonial *Constitution Act,* fisheries fall within federal jurisdiction.[280] After the enactment of Section 35 of the *Constitution Act, 1982*,[281] Aboriginal people were only thought to carve out of that jurisdiction a narrow right to harvest for "subsistence."[282] *R v*

[277] R v Gladstone, *supra* note 3.
[278] A S Hourston & C W Haegele, *Herring on Canada's Pacific Coast,* Special Publication of Fisheries and Aquatic Sciences 48 (1980) online (pdf): Government of Canada <publications.gc.ca/collections/collection_2016/mpo-dfo/Fs41-31-48-eng.pdf>.
[279] See Brown & Brown, *supra* note 16.
[280] Constitution Act, 1867, *supra* note 26, s 91.12. See also *Fisheries Act,* RSC 1985, c F-14
[281] Constitution Act 1982, *supra* note 45, s 35.
[282] Colonial law has made room for an inherent right to harvest herring and other products for "subsistence" purposes for much longer than it has recognized "Aboriginal" rights. Limited and non-constitutional harvesting rights were recognized as a matter of custom and treaty before first being legislated in 1888. See *Ahousaht Indian Band and Nation v Canada (Attorney General)*, 2009 BCSC 1494 at para 59. For a comparison of how courts versus Crown entities have dealt with Indigenous claims to fishing rights with different sources, see Douglas C Harris & Peter Millerd, "Food Fish, Commercial Fish, and Fish to Support a Moderate Livelihood: Characterizing Aboriginal and Treaty Rights to Canadian Fisheries" (2010) 1:1 Arctic Review on Law and Politics 82.

Gladstone was the first recognition that the Aboriginal right to harvest could encompass harvest for the purpose of trade or sale.

The decision created a new legal stratification, but it failed to recognize that expressions of Haíłzaqv jurisdiction were engaged, and conflict and blockades emerged in the years that followed. Jurisdiction is law's power, which this project associates with three qualities: techniques for imposing the law, authority to speak the law, and a spatiality across which law takes hold. In fisheries, jurisdiction is the power to regulate use of a particular natural resource, which is a type of "biophysical materials and processes that meet human needs and wants": in this case, herring eggs.[283] Colonial law considers humans capable of appropriating natural resources into forms of property,[284] and considers ecosystems something that human interaction can manage.[285] Haíłzaqv law centres a long relationship with the species, and a history of mutual care, which may lead to different considerations.[286] In both systems, though, fish themselves cannot be subject to human laws: exercising jurisdiction over the non-human world means exercising jurisdiction over human interaction with it. This means that what is at stake in a jurisdictional struggle is regulatory authority over a resource, meaning the power to speak and impose laws about human interaction with herring, both in the regulator's own community and likely with respect to others who would interact with the fish (at least in the same waters). The *R v Gladstone* case does not deal with regulatory authority: it merely recognizes that the Haíłzaqv have a

[283] See Noel Castree et al, eds, *A Dictionary of Human Geography* (Oxford University Press, 2013), sub verbo "Natural Resources."
[284] See Anthony Scott, *The Evolution of Resource Property Rights* (New York: Oxford University Press, 2008) at 26-27. For a critical perspective on property law, see Jane B Baron, "Rescuing the Bundle-of-Rights Metaphor in Property Law" (2013) 82 University of Cincinnati Law Review 57. See also Morris R Cohen, "Property and Sovereignty" (1927-1928) 13 Cornell Law Quarterly 8.
[285] See Val Plumwood, "Nature as Agency and the Prospects for a Progressive Naturalism" 12 Capitalism Nature Socialism 3 (exploring how scientific rationalism separates humans from the non-human world, establishing relations of social power and domination).
[286] See Brown & Brown, *supra* note 16 at xv-xix.

legal right to harvest, but leaves all recognized authority to regulate use of the resource and stock levels with the Crown.[287]

This chapter explores the jurisdictional nature of the Haíłzaqv and state disagreements over regulation of the herring fishery, and the way in which *R v Gladstone* mediates it. In Section 4.1, I apply a jurisdictional lens to the history of Haíłzaqv and state laws and management practices, their interactions, and their interpretation by the colonial Supreme Court in *R v Gladstone*. This section provides an overview of the basis of Haíłzaqv and colonial provincial jurisdictions over water and fisheries, by tracing first the history of Haíłzaqv and colonial jurisdictions, and then how they impacted one another. It then provides a brief overview of the present jurisdictional halocline: the impact of the Haíłzaqv claim to commercial fishing rights in colonial courts. In Section 4.2, I move on to explore the perspectives of Haíłzaqv community members engaged in ongoing disagreement after *R v Gladstone*, up to the spring of 2015. This section relies primarily upon interviews conducted in May of 2015, shortly after the Haíłzaqv protest over colonial fisheries management that led to an occupation of the DFO office. It explores expressions of Haíłzaqv jurisdiction through the frameworks of (i) authority, (ii) spatiality, and (iii) techniques of deploying law.

Each section dealing with one of these aspects of jurisdiction begins by summarizing historical facts related to it. It then discusses material drawn from interviews through the lens of two themes drawn from the theoretical work on that aspect of jurisdiction in the literature review; and concludes by reflecting on the nature of that aspect of jurisdiction as it appears in the material available. The analysis outlines how Haíłzaqv engagement over regulation of the herring fishery has authoritative, territorial, and technical aspects, and can be understood as jurisdictional. The chapter ends with a

[287] For a contrasting approach taken by American courts, see *United States v Washington*, 384 F Supp 312 (WD Wash. 1974), aff'd, 520 F 2d 676 (9th Cir. 1975) [*US v Washington*].

conclusion, in Section 3.3, which provides a brief update on new developments between 2015-2019, and offers some reflections on the themes that emerged in this chapter. Overall, Haíłzaqv struggles over herring are connected to Ǧvi'ilás and have authoritative, territorial, and technical underpinnings that interrelate and that have evolved to address incursions by not only settlers but by the colonial legal system. One way of understanding this is as jurisdiction.

4.1 Jurisdictions over Fisheries

4.1.1 Influx of Jurisdictions

7àxuài is the "power" or "authority" that Haíłzaqv people derive from their ownership of or connection to the land and marine areas, which has been identified with jurisdiction.[288] Haíłzaqv connection to the land extends over the traditional territories of its five tribal groups, which includes approximately 17,000 square kilometers of ocean, including inlets, channels, and open sea.[289] Ǧvi'ilás traditional laws apply to that territory and the people within it, and direct the Haíłzaqv to balance the health of the land with human needs by carefully managing harvest and stewardship of its resources.[290] This marine territory was part of the relationship with neighbouring Indigenous nations: when relationships with neighbouring Indigenous nations were not good, travel is remembered to have been pushed outside of archipelago channels, into open ocean.[291]

[288] See Hogan et al, *supra* note 14 at 8. See also Nathan E Stewart Report, *supra* note 13 at para 7.
[289] See Heiltsuk Nation, Territory, *supra* note 35. See also Laurie Whitehead & Jennifer Carpenter, "Implementing Ecosystem-based Management in the Central Coast of British Columbia: Support for Heiltsuk Participation in the Strategic Landscape Reserve Design Process" (Report, 2014), online (pdf): North Pacific Landscape Conservation Cooperative <nplcc.blob.core.windows.net/media/Default/2012_Documents/Implementing_Ecosystem_Based_Management/HIRMD_Final%20Report_12Nov201.pdf> [*Whitehead*].
[290] See Nathan E Stewart Report, *supra* note 13 at para 7.
[291] Interview 1.

Jurisdiction over herring – and SOK, specifically – is linked to an ancient relationship with the creation story figure Raven, who is said to have carried herring into Haíłzaqv territory.[292] The SOK harvest anchors many aspects of Ǧvi'ilás. According to an elder, stewardship and harvest are organized geographically: specific rivers and inlets where herring gather or spawn are within the territory of specific kin-based communities, which hold the responsibility to protect and control access to that waterway and its resources.[293] They are also guided by words, rules, and protocols,[294] as well as a low-impact method of harvesting SOK: by sinking kelp and hemlock branches into the shallows where herring spawn, they can harvest the eggs which have been laid on the substrate without killing any live herring.[295] Harvesters prepare for the herring to arrive by finding branches to serve as substrates, setting them up in the places for which their families hold stewardship and harvesting responsibilities, and waiting until the sea is milky with spawn.[296] When the boughs or kelp are removed, layers of spawn are attached to it, which can be eaten and dried for storage. Because it is a rich and flavourful food source that is only available in the inlets where herring spawn, SOK is also a valuable trade commodity, and played a role in the development of inter-nation protocols and alliances in the area,[297] including with Europeans.[298]

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[292] *Brown & Brown, supra* note 16 at xv (citing Franz Boas). See also "Raven Obtains the Herring" in Boas, *supra* note 58 at 6-12.
[293] Interview 1.
[294] Brown & Brown*, supra* note 16 at xv, 31, 39. For a review of historical Haíłzaqv regulation of the SOK fishery, see Douglas C Harris, "Territoriality, Aboriginal Rights, and the Heiltsuk Spawn-on-Kelp Fishery" (2000) 34:1 UBC Law Review 195 at 200-202 [*Harris, Territoriality*]. For an overview of Haíłzaqv herring management strategies, see Alisha Gauvreau, *"Everything Revolves Around the Herring": The Heiltsuk-Herring Relationship Through Time* (MSc Thesis, Laurentian University Faculty of Environment: 2009) [unpublished] at 15.
[295] Interview 1. See also Brown & Brown*, supra* note 16 at viii, 39. See also Harris, Territoriality, *ibid*.
[296] See Harris, Territoriality, *ibid* at 201-202. See also Interview 8.
[297] R v Gladstone*, supra* note 3 at 744-748. See also Brown & Brown*, supra* note 16 at 60. See also Miles Powell, "Divided Waters: Heiltsuk Spatial Management of Herring Fisheries and the Politics of Native Sovereignty" (Winter 2012) 43 Western Historical Quarterly 463 at 468-469 [*Powell*].
[298] After European ships exploring the coast arrived around 1790, trade relationships in general were slowly extended to Europeans as well. See generally Harkin, *supra* note 18 at 124, 130-135. For an overview of the

The Crown began asserting colonial jurisdiction over the fisheries in 1858, when mainland BC became a colony. In the eyes of the Crown, this made it subject to British common law, which included the ancient British law giving the public a general right of access to fisheries.[299] Settlers governed by the Crown arrived in Haíłzaqv territory with the assumption that all waters were legally available to them for fishing, subject only to colonial legislation. This reflects a broader shift in the relationship between Haíłzaqv and colonial actors, from a trade relationship between independent nations to a colonial one based on a lack of recognition or consent – which was soon to be reflected in colonial legislation as well as colonial disregard for Haíłzaqv law.

4.1.2 Confluence of Jurisdictions

By the turn of the century, the federal government had begun passing colonial laws specific to herring: in 1905, it began requiring that individuals who were commercially fishing herring hold licenses issued by the colonial government;[300] in 1932, it prohibited the herring SOK fishery in any form;[301] and in 1955, it re-opened the herring SOK to be harvested as part of the food fishery, but not commercially.[302] At the same time as it was passing laws, it operationalized them by issuing licenses and establishing incentives for industrial development by colonial citizens, such as canneries for larger commercial harvest areas.[303] By 1968, however, licensed commercial fishing had decimated the herring

historical evidence that this trade relationship between Indigenous coastal villages and early European traders included SOK, see R v Gladstone*, supra* note 3 at 745-746.

[299] See The public right to fish was protected by Britain's constitutional *Magna Carta* of 1215, and colonial authorities ultimately concluded that this mean that they could not recognize exclusive Indian fisheries. See Douglas C Harris, *Fish, Law, and Colonialism: The Legal Capture of Salmon in British Columbia* (Toronto: University of Toronto Press, 2000) at 28-32 [*Harris, Colonialism*].

[300] Harris, Territoriality, *supra* note 294 at 203 (citing OC (31 January 1905) C Gaz 1905.I.1648).

[301] *Ibid* at 204 (citing *Fisheries Act*, RSC 1927, c 73, as am. and consolidated by SC 1932, c 42, s 30).

[302] *Ibid* at 205 (citing *BC Fisheries Reg* SOR/54-260, s 3).

[303] In Haíłzaqv Traditional Territory, a salmon cannery was set up at Namu in 1983 and at Kimsquit in 1902. See Dianne Newell, *The Development of the Pacific Salmon-Canning Industry: A Grown Man's Game* (Montreal: McGill-Queen's University Press, 2014) at 61.

population, making the commercial fishery untenable.[304] The population had crashed. The federal government then began licensing a commercial fishery for herring spawn, instead of herring fish. However, the first such fishery created, in 1972, was not an Aboriginal SOK fishery, but a "sac roe" fishery, which required gutting pregnant herring in order to remove the spawn from inside of their bodies.[305] Like the former commercial herring fishery, it also relied on killing herring, and directly reduced the already-diminished population ("Kill Fishery"). The SOK harvest was disallowed.

As the Crown passed laws about the herring fishery, the Haíłzaqv grappled with the damage that its influx of jurisdiction was having on their herring and their legal system. In the early 1900s, as settler use of fisheries intensified, the Haíłzaqv had appeared before the McKenna-McBride commission, which toured BC on behalf of the Crown to assess the success of the reserve land system that had been set up in previous decades, and make recommendations. When it reached Bella Bella, many attended it to argue that reserves must include exclusive rights over fishing in adjacent waterways, in order to serve their purpose of sustaining the population living on the reserve. One chief clearly asserted Haíłzaqv ownership over the entire Traditional Territory.[306] Instead of recognizing Haíłzaqv territorial or marine jurisdiction in response, colonial law moved to close it off: Haíłzaqv harvest from its own fisheries were soon made illegal under colonial law unless they were

[304] For an overview review of the stages of the commercial fishery, see Harris, Territoriality, *supra* note 294 at 202-206. For a scientific statement on the impact of the commercial fishery on the stock collapse, see Canadian Science Advisory Secretariat, "Stock Assessment and Management Advice for British Columbia Pacific Herring: 2015 Status and 2016 Forecast" Science Advisory Report 2015/038 (Report, 2015), online (pdf): *Department of Fisheries and Oceans Canada*, <waves-vagues.dfo-mpo.gc.ca/Library/363816.pdf> [*DFO Herring Assessment 2015*].

[305] By 1975, it had issued nearly 1500 commercial "H Licenses" for the sac roe fishery. See Harris, Territoriality, *supra* note 294 at 206-207. See also Powell, *supra* note 297 at 478. See also Dianne Newell, *Tangled webs of history: Indians and the law in Canada's North Pacific Coast fisheries* (Toronto: University of Toronto Press, 1993) at 192-198 [*Newell*].

[306] See McKenna-McBride, *supra* note 30 at 57-60.

carried out under an "Indian food fishery" license,[307] and only for "subsistence" purposes, not "commercial" purposes[308] – though there is evidence that Haíłzaqv trade continued nonetheless.[309] During the first half of the twentieth century, a number of colonial laws and policies aimed at suppressing Aboriginal rights and culture also took effect.

After the 1968 herring population crash, attention shifted to jurisdiction over herring, and the Haíłzaqv joined with other First Nations to advocate for managerial control. In addition to the unsustainable fishing practices that had led to the crash, they opposed the colonial herring spawn "sac roe" fishery, which killed herring. However, the colonial government would not shut it down; instead, it agreed to issue additional commercial licenses to the Heiltsuk First Nation and other First Nations for their SOK fisheries, alongside licenses for the "sac roe" Kill Fishery.[310] However, the new colonial commercial licenses for SOK required First Nations to completely alter their harvesting practices, and to transfer herring into artificial ponds before they spawned, and transfer them back out again afterwards, rather than harvesting the spawn off of open-water kelp.[311] The Haíłzaqv refused to participate in these "closed pond" fisheries at first, arguing that the colonial "closed pond" method

[307] See generally Newell*, supra* note 305 at 62-67, 96, 116-119 (tracing licensing requirements, which were introduced in 1918; criminalization of the sale and purchase of fish from the Indian food fishery followed).
[308] The separation of the food fishery from a trade or commercial fishery did not reflect traditional patterns of Indigenous harvest. Instead, this distinction was imposed by the Crown to limit and regulate Indigenous fisheries, which were sometimes regarded by colonial officials of the time as a gift to Indigenous peoples, rather than as a right. This distinction required Indigenous persons to choose between their Indian food fishing rights and participation in the wage labour economy. See Harris, Colonialism*, supra* note 299 at 16, 72-78, 214.
[309] For a discussion of the evidence of ongoing trade with settlers, especially Japanese settlers, see Harris, Territoriality, *supra* note 294 at 203-205.
[310] The DFO issued a series of "H" licenses to authorize herring roe Kill Fisheries. Those licenses specified one of two methods of harvest that must be used: "seines" or "gillnets," depending on the license. Later, the DFO issued "J" licenses in order to authorize the herring SOK fishery. Those "J" license initially also specified the method of harvest. *Ibid* at 218, 221.
[311] This method, known as "closed pond" harvesting, was preferred by the DFO because it was easier to supervise, rather than the traditional, open-water method, known as "open pond" harvesting. Both "open pond" and "closed pond" harvests were ultimately licensed under "J" licenses. *Ibid* at 207, 214-215.

was more expensive and killed more herring than the traditional "open-pond" method; instead, they continued to advocate their own herring management plans.[312] However, by 1978, the Haíłzaqv had accepted a single herring SOK license, while continuing to advocate politically for more licenses, exclusive access to the fishery, and management authority;[313] by the 1980s, colonial law had stopped requiring SOK harvests to take place in "closed ponds," and traditional harvest methods were restored.[314]

4.1.3 Halocline of Jurisdictions

During this time, colonial law began to evolve, reflecting the efforts of many Indigenous people for recognition by colonial law. In 1973, the Nisga'a in Northern British Columbia had achieved court recognition of the existence of Aboriginal title to land,[315] and in 1975, a US Federal Court of Appeal found that Indigenous peoples in Washington State had co-management rights over their traditional fisheries.[316] In 1981, the Haíłzaqv began to pursue recognition through the courts, launching a title claim to their traditional lands and waters, which remains outstanding.[317] In 1982, Section 35 of the *Constitution Act, 1982*[318] was enacted, and in 1989, the Haíłzaqv launched a court

[312] The SOK fishery began in 1975. The Haíłzaqv fought to use traditional harvesting methods and implemented specific licensing and pricing schemes; however, in 1978, the Haíłzaqv accepted a single "J" license for a "closed pond" SOK fishery. However, the Haíłzaqv continued to advocate for additional licenses and open-pond practices. *Ibid* at 214-216, 218, 221. See also Newell*, supra* note 305 at 198-201. See also Miles A Powell, *Coming Full Circle? An Environmental History of Herring Spawn Harvest among the Heiltsuk* (MA Thesis, Simon Fraser University Department of History, 2006) [unpublished] at 473, 479 [*Powell 2006*].
[313] See Harris, Territoriality, *supra* note 294 at 214-222.
[314] See Powell 2006, *supra* note 312 at 41, 74. See also Newell, *supra* note 305 at 197.
[315] *Calder et al v Attorney-General of British Columbia*, [1973] SCR 313 [*Calder*]. However, it was more than 40 years before the Supreme Court made a finding that an Aboriginal group held Aboriginal title. See Tsilhqot'in*, supra* note 276.
[316] See US v Washington, *supra* note 287.
[317] See *Reid v Canada*, [1993] CJ No 180 (FC), Exhibit 15 [*Reid*].
[318] Constitution Act 1982*, supra* note 45.

claim for recognition of a Section 35 Aboriginal right to exclusively harvest – and thus manage – the SOK fishery, in a case called *Reid v Canada*.[319] It was unsuccessful, with the court seemingly unable to grasp the territorial and managerial elements of the claim within the Section 35 constitutional framework.[320] However, it was not appealed, likely because, by the time it was decided, Haíłzaqv rights to herring SOK were in court again, after Haíłzaqv brothers William and Donald Gladstone tried to sell herring SOK harvested under the Haíłzaqv food fishery license of "sustenance" fishing, not the commercial license. As a defence to this quasi-criminal prosecution, the Gladstone brothers claimed an Aboriginal right to sell herring SOK.[321] In 1996, the Supreme Court decided *R v Gladstone* and acquitted the brothers,[322] recognizing that Haíłzaqv individuals like the Gladstone brothers had a constitutional right to commercially harvest and sell herring SOK, which had not been adequately accommodated by the commercial licensing scheme.[323]

In *R v Gladstone*, the Haíłzaqv achieved colonial legal recognition of a constitutional right to a commercial SOK harvest, which could not be infringed by the Crown without justification – essentially, this required the Crown to show that any limits placed on Haíłzaqv harvest of SOK had a

[319] Reid, *supra* note 315. Then-Chief Councilor Cecil Reid initiated the action for exclusive commercial SOK rights on behalf of the community in 1989.
[320] For an analysis of territoriality in the claim, and the court's approach to it, see Powell, *supra* note 297 at 481-482. See also Harris, Territoriality, *supra* note 294 at 222. See also Powell 2006, *supra* note 312 at 76-80.
[321] For a discussion of the circumstances, see Harris, Territoriality, *ibid* at 203-205. See also Powell, *supra* note 297 at 463.
[322] They were initially unsuccessful: it was only at the Supreme Court, on their third and final appeal, that they were acquitted on that basis. Compare the lower court decisions. See *R v Gladstone,* 1991 CanLII 1120 (BC SC) (finding that there was a Section 35 commercial right, but that it only protected trade with other Indigenous communities and was not infringed by the licensing regime). See also *R v Gladstone* (1993), 80 BCLR (2d) 133 (BC CA) (Lambert JA dissenting).
[323] The court found that that selling herring SOK for moderate livelihood purposes was protected because the Haíłzaqv were able to raise convincing evidence that, historically, the herring SOK trade was "integral to" their "distinctive culture", and that the contemporary sales were continuous with that practice. This met the test for a constitutional Aboriginal right. For that test, see *R v Van der Peet,* [1996] 2 SCR 507. See also *R v Sappier; R v Gray*, [2006] 2 SCR 686. This approach has been criticized as "freezing" rights at the time of contact. See Borrows, Nanabush, *supra* note 22 (building, in part, on the dissent in *Van der Peet*).

valid purpose, and that the Aboriginal right has been prioritized above other interests.[324] *R v Gladstone* remained the extent of colonial courts' recognition of any expression of Haíłzaqv jurisdiction over herring. Because it arose out of the quasi-criminal defence of a specific activity, rather than a comprehensive claim for managerial rights (like *Reid v Canada* had been), it is extremely narrow: although Haíłzaqv have commercial rights to catch and sell fish and may distribute that right individually within their own community, they have little say in management of the fishery, allocation of other licenses, or harvest limits.[325]

4.1.4 Jurisdictions post-Litigation

In some ways, *R v Gladstone* did change the framework for Haíłzaqv and state relationships with the herring. The Haíłzaqv were able to increase their commercial catch limit for SOK,[326] and file a suit for damages based on the SOK harvest they were deprived of by the Crown's unconstitutional limit on their participation prior to the *R v Gladstone* decision, in a case called *Germyn*,[327] which has led

[324] According to earlier Supreme Court jurisprudence, when determining whether the infringement of an Aboriginal right is valid and constitutional, the purposes of the infringement are ranked; only purposes that are ranked to have a higher priority than the Aboriginal right may infringe it. Traditionally, only "conservation" may be prioritized before an Aboriginal right, but all other purposes have a lower priority than Aboriginal rights. Sparrow, *supra* note 213 at 1113-1114. However, in *R v Gladstone*, the court added "regional fairness" to the list of purposes that could justify the limitation or infringement of an Aboriginal right in the context of a commercial dimension to that right. R v Gladstone, *supra* note 3 at para 75.

[325] Haíłzaqv enforcement practices received some limited colonial recognition in the early 1990s, through the Heiltsuk Coastal Guardian Watchmen program, under which community members are tasked with monitoring the territory and communicating with the public, in parallel with similar initiatives in First Nations along the coast. See generally Harris, Territoriality, *supra* note 294 at 221, 223-224.

[326] The Haíłzaqv were able to increase their catch from one license for eight tonnes to nine licenses for a total of 476 tonnes by 2004. See "Herring fishery management plans released" *Campbell River Mirror* (28 January 2005) 14. See also R v Gladstone, *supra* note 3 at paras 1, 50.

[327] See Chief Marilyn Slett et al, "Heiltsuk Nation Presentation" (Slides), online (pdf): *Ocean Modeling Forum*, <oceanmodelingforum.org/wp-content/uploads/2015/06/04_Brown.pdf> (discussing the claim filed in *Chief Germyn (Heiltsuk First Nation) v Canada* (2000)).

to settlement negotiations.[328] In addition, they began negotiating a marine management plan with the provincial government[329] (though, unlike the federal government, it has very limited jurisdiction over the Haíłzaqv's archipelago waterways).[330] With respect to management over the herring fisheries, however, there was little effect. The DFO continues to impose colonial limits on how much herring and SOK can be taken for that purpose under colonial law,[331] and herring management and harvest allocations continued to be carried out by the DFO with no formal Haíłzaqv involvement.

Instead, many expressions of Haíłzaqv jurisdiction over herring post-*R v Gladstone* manifest through advocacy, rather than through legal avenues. This includes plans to protest and disrupt the DFO-licensed fishery in 2001,[332] 2005,[333] 2014,[334] and then in 2015, when the interviews in this chapter were conducted. This post-R v Gladstone advocacy first came to a head in 2003,[335] when the herring

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[328] *Ibid* at 26.

[329] *Central Coast Marine Plan Implementation Agreement*, Central Coast Indigenous Resource Alliance Member Nations Kitasoo Indian Band, Heiltsuk Nation, Nuxalk Nation, Wuikinuxv Nation, and Her Majesty the Queen in Right of the Province of British Columbia, August 3, 2016. The agreement is non-binding and sets out joint provincial-First Nations decision-making with respect to specific marine regions. For an overview, see Heiltsuk Nation et al, "Central Coast Marine Plan" (2015), online (pdf): *Coastal First Nations* <mappocean.org/wp-content/uploads/2015/08/MarinePlan_CentralCoast_10082015.pdf> [*Marine Plan*].

[330] "Sea Coast and Inland Fisheries" falls within federal jurisdiction. See *Constitution Act, 1867, supra* note 26, s 91(12). At the same time, the Supreme Court of Canada has affirmed that the seabed between Vancouver Island and the mainland of British Columbia falls within Provincial jurisdiction. See *Reference re: Ownership of the Bed of the Strait of Georgia and Related Areas*, [1984] 1 SCR 388. However, the impact of this ruling to the seabed of between the mainland and the archipelago coast farther north, where the Haíłzaqv are located, remains limited, and does not usurp federal jurisdiction over fisheries.

[331] See *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332, s 4.

[332] See Shayne Morrow, "Heiltsuk leader threatens West Coast herring roe fishery" *Alberni Valley Times* (27 March 2001) 5.

[333] See Doug Ward, "Heiltsuk Indian band plans to blockade herring fleet" *The Vancouver Sun* (19 March 2005) B7. See also "Natives protest fishery" *Alberni Valley Times* (24 March 2005) A2.

[334] See Mike Hager, "First Nation requests meeting to defuse herring-roe conflict; Heiltsuk promised last week to sabotage commercial fishermen" The Vancouver Sun (31 March 2014) A7. See also Mark Hume, "First Nations demand Central Coast herring fishery be called off" *The Globe and Mai*l (1 April 2014) S1. For the denouement, see Mark Hume, "Tensions rise as fishery reopens" *The Globe and Mail* (4 April 2014) S2.

[335] The issue of contradicting Haíłzaqv and DFO laws has come to a head in 2002 in the context of salmon, due to a hatchery that was licensed upstream of the Haíłzaqv. See Lynne Davis, "Home or Global Treasure? Understanding Relationships between the Heiltsuk Nation and Environmentalists" (2011) 171 BC Studies 9 at 21-22 [*Davis*].

population crashed for the second time.[336] In 2004, the Haíłzaqv formally wrote to the DFO to assert that the herring stock was being mismanaged, and that the fishery was endangered due to too many fish being allocated to commercial Kill Fisheries.[337] In 2005, the DFO attempted to raise the catch limit on herring, despite low stocks, and the Haíłzaqv threatened to blockade the fishery to stop harvest from taking place, staging an on-water protest.[338] By 2008, the population had reached a new low, and the DFO closed all commercial Kill Fisheries.[339] They did not open again until 2014, when the Minister ordered the fishery to open despite the DFO recommending that it remain closed.[340] The Haíłzaqv protested again, and successfully pressured the DFO to exclude the primary herring breeding ground and harvest location at Spiller Channel, near Bella Bella.[341]

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[336] Historically, the herring catch for the entire central coast was 22,100 tonnes. The fishery closed due to a stock crash in 1968. In 1997, when the commercial fishing right recognized by R v Gladstone came into effect, the herring catch had been reinstated and the catch was 8,600 tonnes. By 2003, it had decreased to 3,300 tonnes. See "Central Coast Herring: Stock Status Report B6-02 (2002)" (Report, 2002), online: *Department of Fisheries and Oceans Canada* <www.dfo-mpo.gc.ca> (last accessed 2017) at 2.

[337] Heiltsuk Tribal Council, "Sustainable Management of the Pacific Herring Fishery", Petition No 134 (8 December 2004), online: Office of the Auditor General of Canada <www.oag-bvg.gc.ca/internet/English/pet_134_e_28861.html> (last visited 2017). The Haíłzaqv argued that new Supreme Court caselaw at the time – which established a duty to consult and accommodate Aboriginal groups about decisions that could impact their constitutional rights and interests – required that their commercial right be accommodated. See *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511 [*Haida*].

[338] The Haíłzaqv objected to an alleged change from the catch limit recommended by DFO scientists to a higher limit requested by the commercial fishing lobby. See Doug Ward, "Heiltsuk Indian band plans to blockade herring fleet" *The Vancouver Sun* (19 March 2005). See also "Natives Protest Fishery" *Alberni Valley Times* (24 March 2005).

[339] By 2007, the DFO was licensing twice the amount of herring be caught as license-holders were actually catching in that area. See Department of Fisheries and Oceans Canada, "Stock Assessment on Central Coast Pacific Herring," Science Advisory Report 2008/010 (Report, 2008), online (pdf): Department of Fisheries and Oceans Canada <waves-vagues.dfo-mpo.gc.ca/Library/332603.pdf> at 1.

[340] See the discussion of the "other previously closed areas" in *Ahousaht First Nation v Canada (Fisheries and Oceans)*, 2015 FC 253 at paras 6-11. This attempt to open the fishery despite scientific recommendations was successfully challenged in courts by the Ahousaht in 2014. See *Ahousaht First Nation v Canada (Fisheries and Oceans)*, 2014 FC 197 [*Ahousaht, 2014*].

[341] See Canadian Science Advisory Secretariat, "Stock Assessment and Management Advice for British Columbia Pacific Herring: 2014 Status and 2015 Forecast" Science Advisory Report 2014/060 (Report, 2014), online (pdf): *Department of Fisheries and Oceans Canada* <waves-vagues.dfo-mpo.gc.ca/Library/364435.pdf>.

In 2015, the DFO announced that the Kill Fisheries for herring spawn would open, with the support of its scientists – including the primary breeding ground and harvesting location at Spiller Channel. According to a Haíłzaqv political organizer, to keep the fishery closed, the Haíłzaqv occupied the local DFO office for three days, served a written "eviction notice" from Haíłzaqv territory, and set off protests in four other municipal areas that briefly shut down a central DFO Office, in what some interviewees termed the "herring uprising."[342] They eventually secured a written agreement that the fishery would not open that year, and that collaborative management would be explored in years to come.[343]

4.2 Haíłzaqv Perspectives

Haíłzaqv perspectives on the struggle over herring SOK were canvassed in May of 2015, shortly after the "herring uprising." As outlined below, interviewees offered perspectives about authority, spatiality, and techniques of their activity, and connections to Haíłzaqv law that suggest jurisdiction. However, it is important to note that, when asked directly about the concept of "jurisdiction," interviewees had different opinions about whether their herring stewardship or the term 7àxuài should be considered it. To some interviewees, the "herring uprising" and other Haíłzaqv harvesting and stewardship practices were best characterized as assertions of Aboriginal rights and title under the colonial constitution; to others, they were affirmations that the Crown had no business interfering with ancient Haíłzaqv practices; and to yet others, they were indeed expressions of

[342] Interview 4.

[343] Interview 4. See also Coastal First Nations, "Heiltsuk, DFO Announce Major Changes to Management Plan for Pacific Herring", Press Release (18 January 2016), online: *Coastal First Nations* <coastalfirstnations.ca> [*CFN Press Release 2016*]. See also "Bella Bella herring fishery to reopen with much smaller catch" *Radio West, CBC News* (19 January 2016), online: <www.cbc.ca> [*Reopen*].

Haíłzaqv law and power that might be seen as jurisdiction.[344] Most were focussed on the outcome of better herring management, not the recognition of Haíłzaqv law.[345] However, in the longer term, the Haíłzaqv have become focussed on having an institutionalized role in colonial legal management bodies, whether or not that role is understood as "jurisdictional."

4.2.1 Authority in the Fishery

Jurisdiction authorizes laws, by anchoring specific rules and practices in the "lifeworld" of a community: its foundational, constitutional beliefs. This establishes the "why" of law: through concepts such as authority or related ideas – such as relationships engendering responsibility – jurisdiction legitimizes law. The "herring uprising" served to focus attention on how both the Haíłzaqv and the state authorize herring fisheries, through different and unreconciled beliefs about jurisdiction. That issue had not been addressed through *R v Gladstone*: although the Haíłzaqv right to fish and sell SOK was recognized, the court did not question its presumption that the colonial Crown held jurisdiction over "public" fisheries. Early post-*R v Gladstone* advocacy took place through letter-writing that challenged this presumption, pointing out that the Haíłzaqv did not agree with colonial management decisions. As time went by, and outcomes of those management decisions worsened, Haíłzaqv shifted their attention to asserting authority over herring management directly.

The "herring uprising" was one episode in a long series of disputes over herring management that took place through on-water protests. At such protests, the Haíłzaqv asserted de facto authority over the fishery by showing up at commercial fishing operations stating that they would enforce a

[344] Interview 1; Interview 3; Interview 4; Interview 8; Interview 9; Interview 10.
[345] Interview 4 (stating, "the first goal is rebuilding the stocks. That's our primary focus. You rebuild the stocks and we can agree to that").

closure of the fishery, if they had to, by cutting nets or blocking boats. By 2015, this advocacy had become focussed not only on stopping the trend in unsustainable colonial management decisions, but also on obtaining Crown-recognized authority for Haíłzaqv to participate in management themselves. During the "herring uprising," demonstrators demanded – and received – a letter confirming the DFO's commitment to exploring a shared management arrangement for the following season. As discussed below, this shift towards a demand for state-recognized authority over herring management is anchored in shared, constitutional beliefs and practices related to herring, and expresses the Ǧvi'ilás responsibility that Haíłzaqv carry with respect to the herring fisheries.

4.2.1.1 Sub-theme – Underlying Values

Haíłzaqv authority with respect to herring runs deep. Multiple interviewees pointed to the Haíłzaqv's historic, traditional governance in the territory as the basis for their authority.[346] When sked about harvesting traditions, Interviewees cited oral history accounts of their ancestors being placed in the territory by the Creator,[347] the fact that the territory is covered with historic sites dating back over 10,000 years,[348] and the traditional practice of resource use being managed by specific families, through tribal and diplomatic relationships and territorial signifiers such as totem poles.[349] More recent stories connecting Haíłzaqv deep history with the present were also mentioned, such as confrontations with settler fishermen at the turn of the century,[350] assertions of jurisdiction during the 1913 McKenna

[346] Many also pointed to their current occupation and reliance on the territory, which is outlined in the discussion of "Embeddedness in the place", below.
[347] Interview 11.
[348] Interview 4; Interview 7; Interview 11.
[349] Interview 1; Interview 6.
[350] Interview 1; Interview 6.

McBride commission,[351] and the passing down of land use sites, knowledge, and practices from grandparents.[352] The herring SOK fishery carries its own, specific oral history and responsibilities. The supernatural figure Raven is said to have transplanted herring eggs into Haíłzaqv Traditional Territory, grounding an ancient stewardship relationship with the herring.[353] These laws and traditions about herring might be understood as constitutional: they are part of the foundation of the Haíłzaqv community, and link deeply held cultural beliefs to present day guides for behaviour. One interviewee described the sense of citizenship that can emerge from tradition:

> I was out there in the open water…realizing that at least 11,000 years of people ahead of me did this very thing. That does something to me internally, and really connects me in a way that helps me to appreciate the abundance…of what I inherited. By the same token, realizing how vulnerable it is, and needing to protect it.[354]

Another interviewee described their significance in the following terms: "we can't pick up a book and find Ǧvi'ilás, [we]'re just born into learning those principles."[355]

According to two interviewees, the practice of placing hemlock boughs or kelp in the water to gather SOK expresses the stewardship relationship by providing additional substrates for eggs – which would otherwise layer onto substrates with eggs already on them, smothering those earlier layers – thus enhancing the fishery.[356] Ǧvi'ilás principles thus seem to be expressed through contemporary management decisions, such as continuing to use the traditional method of harvest, including commitment to "open pond" harvesting. The Haíłzaqv fought to have their "open pond" method recognized under the colonial licensing system because it harms fewer herring, allows the herring SOK

[351] Interview 1; Interview 3; Interview 8.
[352] Interview 1; Interview 2; Interview 6; Interview 7.
[353] Interview 11.
[354] Interview 7.
[355] Interview 9.
[356] Interview 1; Interview 8. See also R v Gladstone*, supra* note 3 at 744-748.

harvest to be open to as many community members as possible, and requires a very low investment to participate.[357] Ǧvi'ilás principles can also be seen to be expressed through knowledge, in the community, of who is responsible for various locations throughout the Traditional Territory, including the primary herring SOK harvest site at Spiller Channel, which has been passed down to interviewees by grandparents along with knowledge of which family's harvest area it is.[358] At the same time, access to harvest locations among community members is not currently restricted, given the difficulty that would be put on individuals responsible for more remote locations, in the current ecological, cultural, and socio-economic context.[359] Instead, participation is monitored for responsible practices.[360] This commitment to Haíłzaqv shared culture and tradition extends into the future, through a commitment to passing on resources, land-use practices, and ways of grappling with the colonial government to future generations, as well as the belief that the Haíłzaqv will outlast the colonial regime.[361]

4.2.1.2 Sub-theme – Responsibility as Authority

When asked explicitly about "authority," several interviewees objected to the term. Some noted that Haíłzaqv used to have or should have "authority," but that – unfortunately – it was the DFO that exercised authority under *R v Gladstone*.[362] Other interviewees objected to the word

[357] Interview 4; Interview 6; Interview 8.
[358] Interview 1; Interview 6; Interview 11.
[359] Interview 6.
[360] Interview 4.
[361] Interview 3; Interview 7; Interview 8.
[362] Interview 1; Interview 3; Interview 6; Interview 3 (raising a similar objection to the term 'jurisdiction,' stating, "I don't relate terribly well to [the term] 'jurisdiction' because it sounds like something we're sharing, that maybe we're dealing in a situation where the [colonial] government has the power to hand out licenses and decide how the land is going to be used, and what we can and can't do and that kind of stuff. But that's not [okay within expressions of Haíłzaqv jurisdiction], that's just the way things are").

"authority" altogether,[363] and characterized the Haíłzaqv relationship with the herring as one of "responsibility," instead. One interviewee provided the following explanation of why "authority" was not a term that resonated with Haíłzaqv worldviews:

> I have a hard time with "authority." Because it's not part of our mentality… My brother inherited the chieftainship, and although he's got perceived authority as traditional chief in our family, he absolutely has no authority without us. We share the responsibility, and he takes a leadership in making sure that everything is done, but we guide him…. I don't think that there is an interpretation of authority within our culture, within our language, because there really wasn't a power vested, *per se*, in an individual or in an entity. Like the Tribal Council has got responsibility, but it doesn't necessarily have authority.[364]

Another interviewee explained that "authority" was not a term that fit into Haíłzaqv legal traditions, because Ǧvi'ilás did not include the power to create law: "we don't get to decide what the law is… Indigenous laws are something that's instilled in you."[365] For example, the inheritance of familial rights to resource use sites carries with it a responsibility to look after those places,[366] and the continuation of Haíłzaqv as a people depends upon passing places and practices to future generations, making harvest and management of SOK a "necessity."[367] With families holding responsibility for specific access points, the fishery was not open access, but rather stewarded by specific families and by the harvesting practices themselves: one interviewee said, "there's no real conservation concern because you don't kill the herring. That's the method our people practiced for thousands of years. When it comes right down to it what jurisdiction has the right to stop it? None."[368]

In a context where government cutbacks are understood to have led to a withdrawal of colonial personnel from the territory, and management decisions have reduced the stock, the

[363] Interview 7; Interview 3.
[364] Interview 7.
[365] Interview 3.
[366] Interview 9.
[367] Interview 6.
[368] Interview 8.

perception was that responsibility for the herring could not be left to the DFO.[369] The 2015 "herring uprising" was framed as just such a shift of responsibility. Colonial management decisions by the DFO were deemed "irresponsible,"[370] with an older interviewee noting that many staples of their diet – such as abalone, salmon, and cod – come within the "management" jurisdiction of the DFO and were harvested at such a rate that they disappeared from the territory.[371] Interviewees also focussed on the fact that Canadian law allows the DFO minister to open a fishery against the recommendations of scientific staff in charge of managing the resource, and had done so in the past.[372] Prior to the "herring uprising," the Haíłzaqv had tried for years to influence DFO management decisions,[373] and in 2014 (when it had re-opened the commercial Kill Fisheries against the recommendation of scientific staff), they had convinced the DFO to keep the most productive breeding ground at Spiller Channel closed.[374] The "herring uprising" arose because the Haíłzaqv saw themselves as responsible for protecting the herring notwithstanding the DFO management regime, and when the DFO was not responsive to a similar request to keep Spiller Channel closed in 2015, they had a responsibility to protect the herring. In the words of one interviewee:

> Our chief said it best: The Department of Fisheries and Oceans won't shut down area seven, but we will…. It's our responsibility…it's about saying we're going to take responsibility to protect these resources for our people, and we're going to apply our authority, what we refer to as Ǧvi'ilás (which is our laws) and our 7àxuài (…to exercise those laws)…. We said we have authority to make a decision for that place. And we did.[375]

[369] Interview 7 (noting that provincial parks staff were unable to attend Bella Bella); Interview 2. See also the discussion under "4.2.2.2: Subtheme - Embeddedness in Place," below.
[370] Interview 4; Interview 11.
[371] Interview 6.
[372] Interview 2; Interview 6. See also Ahousaht, 2014, *supra* note 340.
[373] Interview 6; Interview 8.
[374] Interview 4.
[375] Interview 4.

Another Interviewee put it this way: "when you're relying on the DFO to make proper decisions and they're cutting back and you see the cutbacks, it means we need to pick up. And we're doing that."[376] Indeed, after the "herring uprising," interviewees expressed an intention to exercise responsibility over the herring by advocating against, working with, and even helping to train DFO staff – whichever strategy was needed. However, they also believed that they needed to obtain colonial-recognized control over the fishery, in order to secure the herring from further DFO mismanagement, such as the practice of maintaining the population at the current low level, rather than work to restore it to historic higher levels.[377]

4.2.1.3 Reflections on Authority post-Litigation

For interviewees, traditional laws and customs about herring are anchored deep in Haíłzaqv history. They are connected to sacred stories and ancient relationships with the land that define who the Haíłzaqv are and their relationship with the Traditional Territory. This relationship is not understood to be chosen, but rather to be inherited through familial responsibilities for specific territories and Haíłzaqv traditions of harvesting and responsibility. The fact that the contemporary harvest can be traced through the organization of political and territorial relationships and back into deep history suggests it is part of the fabric of the constitution of the Haíłzaqv as a people responsible to the Traditional Territory. Relationships with the herring seem to be co-constitutive of Haíłzaqv legal authority, expressing not only Ǧvi'ilás but its foundation in Haíłzaqv identity and political authority as the people of their place.

[376] Interview 2.
[377] Interview 6; Interview 8.

However, the expression of constitutional authority was framed, through Ǧvi'ilás, as a form of responsibility, rather than authority. Though the harvest is not currently distributed geographically along family lines, traditional rights and responsibilities are tracked and carried out today, and the "herring uprising" can be seen as an evolution of them. Indeed, Ǧvi'ilás appears to be most strongly engaged in moments of herring crisis. Faced with population crashes, unscientific decisions to permit fishing, and fishing practices with high mortality rates, assertions of Haíłzaqv legal authority strengthen. Although expressions of Haíłzaqv jurisdiction may manifest through harvesting practices, it is at these times that Haíłzaqv and colonial laws are most clearly in conflict, and that Haíłzaqv law reveals itself to be expressed through a relationship of responsibility with herring, as expressed through the community's willingness to move from working politically for legal recognition to directly enforcing their laws – even at the risk of significant costs to themselves.

4.2.2 Spatial Dimensions of the Fishery

Communities occupy space, so jurisdiction has a spatial dimension: it produces legal spaces here a community's laws are authoritative, and organizes a community's orientation towards space in a way that reflects and reproduces its social and legal practices. Legal orientations towards legal space can vary along many axes. However, in both colonial and Haíłzaqv legal systems, it takes a form of territoriality: a bounded space within which law has power. Colonial jurisdiction is attached to the territory of Canada, which is clearly visible on maps and supported by the international state system, and which recognizes Canadian jurisdiction roughly 22 kilometers into open ocean.[378] The territorial dimension of the Haíłzaqv relationships with the ocean was drawn to the attention of colonial actors

[378] See *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3, 21 ILM 1261.

as far back as the McKenna-McBride commission in 1913, when Haíłzaqv asserted the right to hold exclusively hold and be paid for licenses to fisheries near their reserves,[379] and is clear today, in maps of the Traditional Territory, which include rivers as well as large swaths of inland and open ocean.[380] Territoriality was also at play in the 1989 case *Reid v Canada*, wherein the Haíłzaqv claimed a constitutional right to exclusive SOK harvesting within their territory.[381]

However, *Reid v Canada* claim, which included a territorial component, did not go to the Supreme Court; instead, the Supreme court heard the rights-based *R v Gladstone*. In that case, the Supreme Court do not consider the idea of Haíłzaqv water territory, and conversely, do not limit the Haíłzaqv SOK harvest to any particular colonial-defined territory. In the end, the decision recognizes a Haíłzaqv constitutional Aboriginal right to participate in a non-exclusive fishery for herring SOK, which is suggested not to have any geographic limits.[382] This is contrary to actual Haíłzaqv SOK harvesting practices, which can only occur when and where herring come into nearby shallows to spawn. The lack of territorial specificity in colonial law, and the emphasis on connection to specific places in Haíłzaqv law, reveals two very different – yet overlapping – spatial expressions of jurisdiction.

[379] See McKenna-McBride*, supra* note 30 at 60-61.
[380] See Heiltsuk Nation, Territory, *supra* note 35.
[381] Harris, Territoriality, *supra* note 294.
[382] The majority found that the right could not be exclusive on the grounds that it would remove the common law public right of access to fisheries; only the minority judgment of McLachlin J mentioned the territorial aspect of the claim, to waters "near Bella Bella." See R v Gladstone*, supra* note 3 at paras 57-73, 161-165. For an analysis of how this appears to ignore the spatial limits of Haíłzaqv claims to herring. See Harris, Territoriality*, supra* note 294 at 225-232. See also Kent McNeil, "How Can Infringements of Constitutional Rights be Justified?" (1997) 8:2 *Constitutional Forum* 33.

4.2.2.1 Subtheme – Scales of Management

Haíłzaqv and colonial jurisdictions pick out different kinds of harvesting areas. For the Haíłzaqv, the SOK harvest is not only limited to its Traditional Territory, but also to specific locations within it where the herring lay their eggs: the main spawning ground near Spiller Channel, which is near Bella Bella, another area at Calvert Island; and another that is managed by the neighbouring Indigenous Nation.[383] The Haíłzaqv understand their territory to host different populations of fish, which congregate at one of these specific different places. In contrast, under colonial management jurisdiction, the entire central coast – which is made of up areas "6," "7," and "8" – is treated as one management territory, with a single population of fish, and a single marine biomass on which catch limits are based.[384] Within that large area, fishing boats may typically harvest the allowable catch in any location.

Haíłzaqv and colonial laws manage the SOK fishery at different scales. For the Haíłzaqv, harvesting areas host specific populations of fish and are managed individually. Spiller Channel is known as a "holding area" for the majority of adult, spawning herring in Heiltsuk Traditional Territory, so it is there that the SOK harvest takes place and is monitored. The herring gathering area at Calvert Island is known to host small, juvenile fish, and is not generally harvested.[385] In contrast, for the DFO, Spiller Channel is known as "7-12," "7-13" and "7-14," and makes up just three sections of "Resource Management Area 7," which is, in turn, one of the three contiguous areas that make up the "central coast" fishery.[386] It also includes the area at Calvert Island, which the DFO knows as "Area 8", and

[383] Interview 2; Interview 4; Interview 11. Haíłzaqv territorial authority in Area 6 is delegated to the neighbouring Kitasoo / Xai-xais, which also has a claim to the area.
[384] DFO Herring Assessment 2015, *supra* note 304.
[385] Interview 4.
[386] Area 7 overlays most of Haíłzaqv ocean territory, along with Area 8 and part of Area 6. Interview 4. Area 7 also makes up more than half of the "central coast" fishery. For a map of Area 7, see Kevin Star, "2015 Commercial Sac

the area shared with and managed by a the neighbouring First Nation, known as "Area 6." The area it covers is comparatively vast. Under the DFO, fish are studied and managed on this regional scale, with test catches considered to be representative of the entire central coast, and catch limits and individual licences applying to the entire area.

These different scales of herring management have become a key site of struggle over the fishery. The 2007 herring population crash led the Haíłzaqv to suspect that DFO scientific methodologies had led to overfishing: although catch limits were calculated for the entire central coast population, commercial fishing takes place almost exclusively in Area 7, near Spiller Channel[387] – which is also the most productive spawning ground and where most of the Haíłzaqv herring SOK harvest takes place.[388] The Haíłzaqv were concerned that when the DFO studied the herring population and set catch limits, the inclusion of juvenile herring from Area 8 and other areas in the central coast fishery was inflating the estimate of the harvestable biomass, since that the actual harvest was effectively confined to the small Area 7.[389]

Struggles over the herring fishery have become focussed on Area 7, the area where both commercial fishing and SOK harvests take place. In 2014, the DFO tried to open Area 7 for the first time since the 2007 population crash, but, after some Haíłzaqv advocacy, confined the opening to other areas. In 2015, the "herring uprising" was precipitated by the decision to re-open Area 7,

Roe No-Go Zone," Map (HIRMD GIS, 2015). For an overlay of Haíłzaqv Traditional Territory and colonial management zones, see Harris, Territoriality, *supra* note 294 at 197.

[387] Interview 4.

[388] Interview 2; Interview 6; Interview 11.

[389] DFO Herring Assessment 2015, *supra* note 304 at 22 (the report notes that Area 8 had only been chosen to be fished by commercial fishing boats during three of the past 30 years it had been open).

including Spiller Channel.[390] The Haíłzaqv were adamant that Area 7 continue to remain closed, since herring stocks the previous year had been so low that they had not even met their DFO-set catch limits for SOK harvesting, even without a Kill Fishery in Area 7.[391] A failed meeting to discuss the issue turned into an occupation of the DFO office near Bella Bella, and resistance escalated as the opening date approached.[392] At the last minute, and after a significant number of fish had already been harvested by a commercial fishing boat, the decision was reversed, and Area 7 never officially opened.[393] To address the standoff, the DFO's 2016 annual scientific report on herring took up the Haíłzaqv concern about the areas used for herring management and licensing, and considered whether the inclusion of Area 8 in the measuring of biomass resulted in an overfishing of Area 7.[394]

4.2.2.2 Subtheme – Embeddedness in Place

For the Haíłzaqv, spatiality also provides a benchmark for evaluating jurisdiction: authority is attributed to laws and individuals that are physically proximate to, and thus interconnected with, the herring. For example, multiple interviewees stressed that they are "the first folk to feel it" when something happens in their territory,[395] giving them the insight into the natural laws of the herring

[390] Interview 4. From 2007 to 2013, after the population crash, no commercial Kill Fisheries were licensed in areas 6-8; in 2014, some 687 tonnes of herring were removed from Area 6 by commercial fishing boats. See DFO Herring Assessment 2015, *supra* note 304.
[391] Interview 4 (discussing the 2014 harvest).
[392] Interview 4.
[393] Interview 4 (explaining that Area 6 was opened per colonial law, and only for 12 hours, so few herring were caught; meanwhile, Area 8 was opened per both colonial and Haíłzaqv law, but no commercial fishing boats bothered to fish there. As referenced below, however, 600 tonnes of herring were caught were part of a "test catch" carried out by a commercial fishing boat before the fishery opened, on behalf of the DFO, in order to determine if the fish roe was ready for harvest. With DFO permission, those fish were kept).
[394] DFO Herring Assessment 2015, *supra* note 304 at 22 (setting out alternate population estimates that were not very different from the originals, and a similar lower recommended catch limit).
[395] Interview 2. Similar sentiments were expressed in Interview 8 (also noting that the Haíłzaqv are already physically positioned to "manage" herring year-round) and in Interview 10 (regarding disasters such as oil spills).

fisheries. Similarly, they said that, because of their ancient relationship in the territory, they spent centuries developing their herring management techniques and laws.[396] One interviewee described the direct consequences of resource depletion on the Haíłzaqv:

> Our community is hanging on for its dear life to trying to keep our culture. We've all said our back door is our refrigerator, and it's half empty or depleted, and we're trying to hang onto that way of life, I guess. I have kids now that haven't even had abalone, no idea what it tastes like or what it meant to us. We had different seasons and when you lose a season it only affects the people who are aware of it or know it. Our grandchildren don't know of that, they don't even know the season.[397]

Because of their close connection to the herring and their location at the site where it is being managed, impacts on the herring immediately affect the Haíłzaqv food fishery, environment, and culture.[398]

In contrast, colonial jurisdictions over herring were described as distant, unaccountable to the impacts on the fishery, and increasingly disconnected as government cutbacks result in fewer and fewer front-line staff. For example, one interview expressed concern about the DFO's understanding of the territory as follows:

> It's hard to understand how people can make decisions without having any proper input. We have to go all the way to Ottawa to meet with the DFO. And we see less and less of the fisheries officers: we used to have fisheries officers and field officers [in the territory], now we don't see them… They don't really see what's happening on the ground.[399]

To another interviewee, such "armchair" management decisions seem to emphasize political trade-offs over stewardship values, and to lose sight of what is happening to the fish and what is at stake for the region, including the Haíłzaqv.[400] The commercial fishing industry (and lobby) is also known to be run and largely staffed by individuals whose resources and interests lie outside of Haíłzaqv

[396] Interview 8.
[397] Interview 6.
[398] Interview 6; Interview 8; Interview 11.
[399] Interview 2.
[400] Interview 6.

territory. In a market system, they are understood to prioritize maintaining a place in the market, regardless of stock levels,[401] and taking enough herring to make a profit.[402] This extractive relationship was seen as an unaccountable and thus illegitimate basis for or exercise of jurisdiction.

4.2.3 Reflections on Space post-Litigation

R v Gladstone was a relatively early attempt by the colonial Supreme Court of Canada to "reconcile" Aboriginal commercial practices with colonial "supreme authority" within the territory of Canada. However, because the case did not deal directly with regulatory authority, it implicitly condoned DFO authority over management-size territorialities without considering them, and it failed to account for Haíłzaqv territoriality at all. The harvesting right has therefore become a flashpoint for Haíłzaqv claims to territoriality: if colonial management decisions based on exclusive territorial jurisdiction make the exercise of the constitutional Aboriginal right impossible by diminishing stocks, then the protection of that "right" may be seen an avenue for disputing colonial territorial jurisdiction. On a practical level, Haíłzaqv efforts to uphold Ǧvi'ilás over the herring and the SOK fishery have become highly focussed on the spatial configurations that colonial legal actors rely on for herring management. The Haíłzaqv focus on advocating for a scale of herring management that is derived from their local and historic understanding of herring activity at specific sites, rather than from a map of the coast. The specificity of that effort appears to have born some fruit. On a theoretical level, the broad, national scale of colonial regulatory authority over fisheries contributes to a Haíłzaqv perception that it cannot be recognized by Ǧvi'ilás. Decision-makers who remain distant from the territory, extractivist harvesting, and fewer frontline staff appear to violate an ethic of interconnection

[401] Interview 8.
[402] Interview 6; Interview 11.

that carries normative weight in Haíłzaqv law. In contrast, Haíłzaqv embeddedness in the local territory is seen to flow into accountability, in a feedback loop between the well-being of the Haíłzaqv and the herring.

4.2.3 Techniques of Ğvi'ilás in the Fishery

Historically, Haíłzaqv laws and customs governing herring management were carried out primarily through the practices of harvest that regulated access to and stewardship of the fishery. During the late 19th and most of the 20th century, Ğvi'ilás was also expressed with respect to colonial actors – from statements to the McKenna-McBride commission, to letters to the Crown during the 1969 population crash, to an insistence on Haíłzaqv practices being recognized in the terms of colonial SOK licensing. After colonial courts recognized the possibility of Aboriginal title and Section 35 of the *Constitution Act, 1982* was enacted, the Haíłzaqv engaged directly with the colonial legal system, through cases *Reid v Canada* and *R v Gladstone*; however, they did not win any recognition of Ğvi'ilás. Post-*R v Gladstone* engagement with the colonial legal system has resulted in increased catch limits, a monetary claim, and management agreements with an arm of colonial government that did not have authority over herring – none of which offer the recognized ability to uphold Ğvi'ilás under the colonial regime.

As herring stocks plummeted, Haíłzaqv efforts became increasingly focussed on impacting DFO management decisions directly. This can be most clearly seen in the on-water protests and other direct-action techniques that erupted in 2001, 2005, 2014, and – as discussed below – the proliferation of tactics and demands that were deployed in the "herring uprising" of 2015. However, colonial court decisions are still understood to play an ongoing role in this direct exercise of Ğvi'ilás authority. In addition to the more visible techniques of upholding Ğvi'ilás, Haíłzaqv institutions have invested

heavily in producing alternative science on herring management, with a recent focus on "correcting" the DFO science that guides herring management decisions.

4.2.3.1 Subtheme – Enforcing Ğvi'ilás

As noted above, direct action has become a Haíłzaqv technique of last resort for asserting authority over herring fisheries: though it has a high cost, Haíłzaqv community members have, more than once, physically positioned themselves to prevent commercial fisheries from taking place. In 2015, when the DFO announced the opening of the commercial herring Kill Fisheries, Haíłzaqv leaders delivered a written "eviction notice" to the DFO office in Bella Bella and asked for a meeting with DFO officials, where they planned to insist that Area 7 remain closed, as it had the previous year. When the DFO locked its doors behind the first representatives to arrive, barring other community members from attending the meeting where the notice was to be delivered, those who were already inside announced that they would simply stay inside the locked office and occupy it until the order to open the fishery was revoked.[403] The occupation was the most visible of a diverse array of tactics that were deployed to uphold this assertion of Ğvi'ilás during this time. Haíłzaqv community members camped outside of the DFO offices in Bella Bella, personally reached out to individual Crown officers and commercial fishermen they knew, called commercial fishing companies to announce that the fishery was closed, and monitored the commercial fishing fleet in their own boats.[404] Using social media, they mobilized supporting demonstrations at larger DFO offices in Victoria, Nanaimo, Bella Coola, and Vancouver (where they briefly closed down the DFO office altogether, leading to a tense

[403] Interview 4.
[404] Interview 4.

standoff), as well as at the parking lots of grocery stores owned by large-scale commercial fisherman Jim Patterson, who owns many of the licenses in the central coast.[405] The stand-off lasted for three and a half days, until a regional official from the DFO flew to Bella Bella personally and agreed to some conditions: to stop Area 7 from opening,[406] to provide the DFO data on herring to the Haíłzaqv for review, and to commit to work on a shared approach to management the following season.[407] Haíłzaqv boats had escorted the commercial fishing fleet out of the territory before the DFO's announcement was made.[408] Although some fish were caught, Area 7 never officially opened.

This "herring uprising" was a clear manifestation of the enforcement of Haíłzaqv law within a colonial regime, but the Haíłzaqv also understood it to be an enforcement of colonial law. One interviewee noted that commercial herring Kill Fisheries violate the constitutional right recognized by *R v Gladstone*: colonial law requires that Aboriginal rights be prioritized over and balanced with other commercial fisheries, but all of the non-Aboriginal Kill Fisheries take place *before* the SOK fishery (i.e. they require catching and killing pregnant herring before they have laid their eggs),[409] and so the SOK fishery is never prioritized. In 2014 and 2015, harvest levels of the Kill Fisheries reduced the herring population enough to effect the SOK harvest: both years, the Haíłzaqv fell short of reaching the catch limit of their own commercial herring SOK license.[410] Even in 2015, when Area 7 never opened, a commercial fisherman was understood to have harvested 600 tonnes of herring as part of a "test

[405] Interview 4.
[406] Interview 4. Area 6 was opened briefly but almost no fish were caught. See also Mark Hume, "Heiltsuk First Nation claims victory over disputed herring fishery" *The Globe and Mail* (1 April 2015). See also "Heiltsuk protest shuts out commercial herring fishermen" *CBC News* (2 April 2015), online: <www.cbc.ca>.
[407] Interview 4.
[408] Interview 4.
[409] Interview 9; Interview 4.
[410] Interview 4 (noting that in both 2014 and 2015, commercial fishing boats harvested over 600 tonnes of herring from Haíłzaqv waters, and in both years, Haíłzaqv fell short of reaching the catch limit of their own commercial herring SOK license).

catch," which the DFO authorized in order to determine the maturity of the herring. Then, on a discretionary basis, the DFO permitted the herring to be kept rather than thrown back into the ocean, and the Haíłzaqv did not harvest enough herring SOK to fill their quota that year.[411] From the perspective of the Haíłzaqv, the commercial fishery is in violation of colonial law, and colonial courts are bound to recognize that.[412] This means that Haíłzaqv see the DFO decisions to open the fishery and to allow a test catch to be kept as actionable, since it impacts their constitutional right and their material harvest levels; for that reason, they estimate their legal liability for direct action tactics under colonial law to be reduced. As one interviewee explained,

> Court cases, they just help us to make sure…there's laws…to protect what we're doing…. [But w]e would have done it anyways. We're strong enough to know that if there's a threat on our culture, our way of life, something has to be done.[413]

It also means that the Haíłzaqv may turn to courts again to enforce *R v Gladstone* – not as a way of winning recognition of Ǧvi'ilás, but as a way of enforcing colonial law over colonial actors, through a claim for damages for the effect that the Kill Fisheries have had on the SOK harvest.[414] As one interviewee put it, "[if] jurisdiction is who gets to decide the law, First Nations are achieving deciding the law by going to court and winning court cases."

4.2.3.2 Subtheme – Independent Science

Science has long provided a justification for colonial management decisions, and a basis for Haíłzaqv to challenge them. For example, in the 1970s, the DFO chose to license the herring SOK

[411] Interview 4 (explaining that the DFO permits a preliminary "test" catch to assess whether the herring eggs inside of the herring are mature enough to be harvested, before opening the fishery. In 2015, it permitted the boat which had conducted the catch to keep those fish, over 600 tonnes of herring).
[412] Interview 4; Interview 9.
[413] Interview 4.
[414] Interview 4.

fishery as a "closed pond" fishery on the basis of a study it had conducted, and the Haíłzaqv sponsored their own scientific studies to show that "open pond" fisheries had lower mortality rates.[415] Since *R v Gladstone*, the community has become involved in scientific research into herring through at least three different opportunities: a partnership with Simon Fraser University, settlement monies being sought through the a lawsuit against Canada for damages arising from *R v Gladstone*, and a grant for scientific research.[416] Contemporary licensing conditions continued to be based on DFO studies that estimate the biomass of the herring and the amount that can be removed, but interviewees do not trust DFO science,[417] since it has led to herring population crashes that could easily be predicted with Haíłzaqv knowledge. As one interviewee put it:

> It was clear as day to us that herring stocks would crash: you saw less herring, smaller herring, you didn't see herring in places where they had returned for millennia…I never saw or understood why the DFO didn't understand that.[418]

In fact, prior to the 2007 herring crash, the Haíłzaqv had reached out repeatedly to warn the DFO of an impending crisis, based on their observations of the fishery,[419] without effect.

The need to enforce Ǧvi'ilás in the face of the DFO has led in a focus on science as a primary tool for upholding Haíłzaqv law. In 2015, the community had retained three scientists[420] to carry out studies aimed at addressing the structural failure of colonial science by incorporating traditional knowledge rather than reproducing the particular biases of DFO research.[421] Their purpose is to

[415] Powell*, supra* note 297 at 479. When the Haíłzaqv advocated for an "open pond" fishery which they knew to be less damaging to the herring, they received only the promise of another DFO study. There is no evidence that this was done. See generally Harris, Territoriality*, supra* note 294 at 215.
[416] Interview 8; Interview 4.
[417] Interview 2.
[418] Interview 6.
[419] Interview 8.
[420] Interview 4.
[421] Interview 6; Interview 8.

produce science that can support Haíłzaqv legal claims, and also to provide the Haíłzaqv with more information about herring ecology and best management practices to rebuild local stocks.[422] Science can be used not only to try and rebut DFO science-based decisions, but also to redirect them. During the 2015 "herring uprising," demonstrators specifically demanded – and won – access to the DFO's raw data, in order to conduct an independent audit on its reports, biomass calculations, and catch limits.[423] They also demanded – and won – a commitment to attempting some form of collaborative management the following season.[424] In the future, the Haíłzaqv are planning a study that tags herring, in order to directly address the DFO's assumption that all of the central coast herring are one population, and to explore whether there are actually multiple populations, as traditional knowledge suggests.[425]

4.2.3.3 Reflections on Techniques Post-Litigation

After DFO management led to a population crash which closed the Haíłzaqv commercial herring SOK fishery, the Haíłzaqv focussed on exercising managerial jurisdiction through techniques relied upon by colonial law. They have upheld Ǧvi'ilás in on-the-ground enforcement activities such as direct action, which – since Haíłzaqv jurisdiction is not recognized by colonial law – could result in criminal charges and lawsuits under colonial law. However, as demonstrated by *R v Gladstone*, *Germyn*, and ongoing research into potential lawsuits for Aboriginal rights violations, they are also willing to enforce Ǧvi'ilás through colonial law itself, when it can be leveraged to hold back colonial practices that violate it. They have also invested heavily in science, an important basis of Crown management

[422] Interview 4; Interview 8.
[423] Interview 4.
[424] Interview 4.
[425] Interview 4.

decisions, and one which – with some modifications – could provide a framework for colonial law to find agreement with Ǧvi'ilás.

There is a common theme in this diverse array of techniques for giving force to Ǧvi'ilás in a colonial regime that does not recognize it. Direct action, legal action, and science are all aimed at impacting – and now infiltrating – colonial management. Without recognized jurisdiction from colonial actors, upholding Ǧvi'ilás on the ground is difficult, costly, and repetitive. Participation in colonial management through scientific engagement and a collaborative management process seems to offer the possibility that Ǧvi'ilás could be implemented through colonial licensing techniques, regardless of whether its jurisdiction is officially recognized.

4.3 Findings of Case Study 1

The herring SOK fishery is the subject of the first constitutional harvesting right for Aboriginal people that has a commercial dimension, in Canada. Recognition of that commercial harvesting right was won through litigation in a colonial court, in the case *R v Gladstone*. However, that decision did not recognize any Haíłzaqv jurisdiction over regulatory management, which has resulted in ongoing disputes between the Haíłzaqv and the Crown, as stocks have collapsed and the herring fishery – and even the SOK harvest – have become untenable. Disputes focus on management methodologies and decisions, and the colonial licensing of other herring roe harvesters who kill herring before they can lay eggs as SOK. These disputes came to a head during 2015, when the interviews in this chapter were conducted. Material from those interviews suggests that the disputes have a jurisdictional aspect: Haíłzaqv actions are aimed at upholding Ǧvi'ilás as it relates to herring, in ways that have clear authoritative, spatial, and technical dimensions, appearing to express Haíłzaqv jurisdiction.

Haíłzaqv laws about the herring fishery are grounded in relationships, and understood as a form of responsibility. Haíłzaqv have ancient stewardship relationships with herring, anchored deep within the Haíłzaqv community and identity. In a sense, these relationships seem constitutional: constitutive of who the Haíłzaqv are, the nature of the territory they inhabit, and legal relationships with respect to herring. They come with a responsibility that is not chosen, but rather inherited. Historically, Haíłzaqv responsibility for herring was implemented through cultural and harvest practices by individuals responsible for specific locations, less as a form of regulating others' use of a resource than as a way of imposing an ethics among community members. In the colonial context, Haíłzaqv responsibility cannot be said to have the same effect, and instead manifests in conflicts with federal decisions about regulatory management and the licensing of other users, where they undermine Haíłzaqv expressions of jurisdiction over responsibility for the herring.

Haíłzaqv relationships with herring are also spatial. Both colonial and Haíłzaqv jurisdictions attach to ocean territories, and have smaller spatial configurations within those territories for organizing management, though the sizes of these territories and areas differ between Haíłzaqv and colonial jurisdictions. The sizes and meanings of their management areas also differ: for the Haíłzaqv, management occurs at specific harvest sites, according to the particular norms and understandings of the herring populations which breed there; for the DFO, it occurs on the basis of mapped management units, at the scale of the entire central coast. Additionally, the Crown's perceived "armchair" management in an age of cutbacks is in conflict with a Haíłzaqv understanding of authority that is profoundly spatial. For many interviewees, physical proximity to and interdependence with a resource is an index of legitimate authority over it. The legitimacy of the spatial areas within which herring are studied and harvested by the DFO have become a key concern for the Haíłzaqv, as they have watched stocks collapsed under DFO science.

Haíłzaqv law also has a number of techniques that have evolved from pre-contact practices focussed on allocating stewardship rights and responsibilities to sophisticated strategies of interference with the colonial legal regime, when it violates Ǧvi'ilás. Techniques of jurisdiction such as direct action and independent science are the most visible expressions of Haíłzaqv jurisdiction, yet the least obviously jurisdictional. Within the colonial legal framework, they are coded as "protests" that occur at the margin of what is legal, and "research" that occurs outside of the resource colonial management regime. However, interviews reveal that they are intentional, impactful ways of asserting and upholding Haíłzaqv law in the context of a colonial legal system where it is not recognized, which have evolved in method and specific intent over time. Another, related technique of Haíłzaqv jurisdictional expression is engagement with colonial law, which offers an avenue for challenging Crown decisions that may violate the colonial constitution as well as Haíłzaqv law.

Since the interviews in this chapter were conducted, those techniques have borne fruit. In January 2016, the Haíłzaqv entered into a one-year joint management agreement with the DFO, which closed Spiller Channel to the herring "sac roe" fishery and lowered the percentage of biomass that could be harvested, in line with Haíłzaqv stewardship decisions.[426] In addition, the DFO's annual scientific report took up the Haíłzaqv concern that the inclusion of Area 8 in the measuring of biomass resulted in an overfishing of Area 7, and included an alternative population estimate that excluded Area 8, but still arrived at a similar recommended catch limit.[427] This shift to Haíłzaqv involvement in herring management marked a first, tentative step out of the framework of colonial jurisdiction that had been re-inscribed by the courts in *R v Gladstone*, and towards one established by both jurisdictions

[426] See CFN Press Release 2016, *supra* note 343. See also Reopen, *supra* note 343.
[427] See DFO Herring Assessment 2015, *supra* note 304 at 22-24. The alternate population estimates were not very different, and did not result in a lower recommended catch limit.

– although Haíłzaqv jurisdiction is not recognized by Crown documents. By 2018, the DFO had announced a suspension of the gill-net Kill Fishery, and efforts to draft an ongoing joint management plan were underway, though stocks remain low.[428]

As a strategy, then, litigation was insufficient as a way of securing recognition of any expression of Haíłzaqv jurisdiction, or of upholding Ǧvi'ilás. Although *R v Gladstone* marked a step forward in the space allocated to Haíłzaqv people under colonial law, it was not a space with any jurisdictional aspects. Although an inadequate framework for upholding Ǧvi'ilás, *R v Gladstone* shaped the kinds of Haíłzaqv jurisdictional expression that followed, as the viability of the colonial-recognized commercial SOK fishery became the flashpoint in colonial and Haíłzaqv disputes over herring and marine management. Litigation was followed by the pursuit of negotiation, with direct action (and potentially additional litigation) as a way of getting there. The 2015 "herring uprising" and steps towards collaborative management that followed mark a shift towards a negotiated outcome, one that has been framed by litigation but actually purchased through decades of investment in high-risk and high-cost techniques such as direct action for the Haíłzaqv. It is an outcome that still will not give the Haíłzaqv true decision-making power, such as a veto, or formally recognize their jurisdiction, and it is an outcome that may well be limited by *R v Gladstone*, which focusses on a very narrow fishery and a very narrow right. It is just the next strategy for upholding Ǧvi'ilás in the context of colonial jurisdiction.

[428] See "DFO's agreement to suspend roe herring fishery will give stocks an opportunity to recover", Press Release (4 March 2018), online: *Heiltsuk Nation* <www.heiltsuknation.ca>.

CHAPTER 5: CASE STUDY 2
JURISDICTION OVER FORESTS AFTER NEGOTIATIONS

In 2001, the Haíłzaqv signed a protocol with the province of British Columbia, the first of the GBR Agreements, establishing government-to-government decision-making process for forestry and land use in their Traditional Territory.[429] The news that the Haíłzaqv and six other First Nations would be working with the Province towards shared land-use planning made headlines:[430] it was seen as an important environmental initiative, and it also marked the end of a stand-off between environmentalists, foresters, Crown officials, and First Nations. The territory in question was the Great Bear Rainforest, which includes 6.4 million hectares of the largest coastal temperate rainforest in the world. Western red cedar and sitka spruce predominate, and, in its natural state, 70% is old growth.[431] The Haíłzaqv have lived in this environment since time immemorial, and have relationships with their lands and forests, which are guided by Ǧvi'ilás.[432] However, in the past century and half, colonial law has been unilaterally imposed over to lands and forests by the province.[433] Under those

[429] *General Protocol Agreement on Land Use Planning and Interim Measures*, Gitga'at First Nation, Haida Nation, Haisla Nation, Heiltsuk Nation, Kitasoo/Xaixais First Nation, Metlakatla First Nation, Old Massett Vil lage Council, Skidegate Band Council, and British Columbia (2001) [*2001 General Protocol*].
[430] See Kim Lunman, "Deal saves rare bear's habitat" *The Globe & Mail* (4 April 2001).
[431] "Old growth" includes trees over 250 years old. See Karen Price, Erica B Lilles & Allen Banner, "Long-term recovery of epiphytic communities in the Great Bear Rainforest of coastal British Columbia" (2017) 391 Forest Ecology and Management 296 [*Price et al 2017*].
[432] The Haíłzaqv identify relationships with multiple species within the lands and forests of their Traditional Territory, including a number of trees, plants, animals, and minerals. See Hogan et al, *supra* note 14 at 1.
[433] Lands and forests fall under provincial jurisdiction. See Constitution Act, 1867*, supra* note 26, s 109 (designating the Province jurisdiction over lands, mines, minerals, and Royalties), and Constitution Act 1982, *supra* note 45, s 92A (designating jurisdiction over forestry resources, non-renewable resources, and electricity resources to the

laws, 90 per cent of BC is considered to be Crown-owned land, and logging has been authorized on it.[434] Of the land within the GBR, less than one per cent of old growth is left intact.[435] During the 1980s and 1990s, environmentalists began organizing to stop logging in parts of BC, and First Nations were filing title claims in the colonial court system. The 2001 protocol represented a new response to the ecological crisis and political conflict.

The four GBR Agreements restructure how colonial legal decisions about forestry and land-use decisions are made, by incorporating First Nations input into the process, and by setting new legal restrictions on outcomes based on input from stakeholders in the environmental and forestry sectors. This chapter explores the jurisdictional dimensions of those changes. Section 5.1 offers an overview of the basis of Haíłzaqv and colonial provincial jurisdictions in the area. It provides a history of Haíłzaqv expressions of jurisdiction over forests, of colonial jurisdiction over forests, and of the historic impact of the spread of colonial jurisdiction on those expressions of Haíłzaqv jurisdiction. It follows this with an introduction to the context in which the GBR Agreements were signed: the lead up to the "war in the woods." Section 5.2 draws primarily upon interviews conducted in May of 2015, when those Agreements were in place but the implementation process – including most colonial legislative enactments – was not fully underway. It explores manifestations of Haíłzaqv jurisdiction through the frameworks of authority, spatiality, and techniques of deploying law.

The discussion of each of these indicators of jurisdiction begins with an introduction to the constitutional, territorial, or technical aspects of the GBR Agreements, followed by a discussion of

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Provinces). With a few early exceptions, the lands in BC over which this jurisdiction was asserted were never the subject of any treaty. For an illustrative legal overview, see Borrows, Nanabush, *supra* note 22 at 85 n 72.

[434] Michael Howlett et al, "From Government to Governance in Forest Planning? Lessons from the Case of the British Columbia Great Bear Rainforest" (2009) 11 Forest Policy and Economics 383 at 387 [*Howlett et al*].

[435] Settler commercial logging operations have reduced the percentage of old growth of large trees in "highly productive" areas to approximately 1 per cent. Price et al 2017, *supra* note 431 at 296.

examples that arose during the interviews, and a reflection on what theoretical insights might be drawn. The interviews suggest that Haíłzaqv engagement in the GBR Agreement process has authoritative, spatial, and technical dimensions. Section 5.3 is a brief conclusion to this chapter. It suggests that Haíłzaqv indicators of what can be understood as jurisdiction are visible in the GBR Agreements, and that they show a jurisdiction that is independent of those agreements. This seems to be, in part, because the negotiated agreements themselves do not clearly recognize or empower Indigenous jurisdiction. For that reason, the exercise of Ǧvi'ilás requires additional work by the Haíłzaqv: internally, to reconstitute their own community in response to colonization; and externally, to assert their laws over colonial actors without colonially-recognized jurisdiction to do so.

5.1 Jurisdictions over Forests

5.1.1 Influx of Jurisdictions

Haíłzaqv land and forest territory encompasses 16,658 square kilometers of coastal mountains, including islands facing open ocean and inlets 100 kilometers inland.[436] From a Haíłzaqv perspective, Haíłzaqv jurisdiction - 7àxuài – derives from the ownership and connection with land and marine areas, which date back to creation times. According to oral tradition, original groups of Haíłzaqv were placed at various locations throughout the territory before the time of the "great flood,"[437] and ancient rights, teachings, and duties related to those tribal areas, which now make up the Traditional Territory, have been passed down for generations.[438] Historically, the Haíłzaqv occupied and related to the territory through approximately 55 permanent villages, as well as additional sites occupied or used

[436] See Whitehead, *supra* note 289 at 3, 14.
[437] See CIRRA, *supra* note 11.
[438] See Nathan E Stewart Report, *supra* note 13 at paras 4-8.

during seasonal harvests.[439] They used and related to forests as an important resource for housing, tools, and clothing,[440] and developed low-impact techniques for harvesting long strips of cedar,[441] and harvested monumental cedar for ceremonial poles and ocean-faring canoes.[442] Ğvi'ilás establishes protocols for resource use and for social relationships, including customs for granting permission for harvest by people who did not have a right to a particular place.[443] The territorial jurisdiction of these laws appears to have been in play when the first European ships to visit the Haíłzaqv arrived, and its sailors were not allowed to land.[444] By the beginning of the 19th century, Haíłzaqv laws and customs had evolved to establish a trading relationship with the outsiders, including for wood.[445]

Colonial jurisdiction began extending towards the central coast after a trade relationship had been established. It began with claims to land: in 1858, mainland BC was claimed by the Crown and colonial law was asserted; in 1859, colonial Crown ownership of BC land was proclaimed;[446] and in 1871, BC confederated with Canada, maintaining its jurisdiction and ownership of BC's lands under the colonial constitution (while jurisdiction over other matters, such as waterways and Indians, became

[439] Hogan et al, *supra* note 14 at 1.
[440] Interview 8. Hogan et al, *ibid* at 19. See also Brown & Brown, *supra* note 16 at 43.
[441] See Hogan et al, *supra* note 14 at 14. For an overview of Indigenous material uses of plant in the Northwest Coast, see Nancy J Turner, "Plant Use in Technology over Time and Space" in *Ancient Pathways, Ancestral Knowledge: Ethnobotany and Ecological Wisdom of Indigenous Peoples of Northwestern North America* (Montreal: McGill-Queen's University Press, 2014) 335.
[442] *Ibid*. See also Stella Maris Wenstob, *Canoes and Colony: The Dugout Canoe as a Site of Intercultural Engagement in the Colonial Context of British Columbia (1849-1871)* (MA Thesis, University of Victoria Department of Anthropology, 2015) [unpublished] at 245 (discussing Haíłzaqv contemporary involvement in political canoe journeys). See also Hogan et al, *supra* note 14 at 14.
[443] Interview 1; Interview 6.
[444] See *Harkin, supra* note 18 at 51, 124 (quoting Haíłzaqv historical narrative in which Haíłzaqv individuals who had been dressed in European clothes while on board a visiting ship were not allowed back on land until they changed back into their Haíłzaqv clothes, and quoting George Vancouver, respectively).
[445] *Ibid* at 136. See also Richard Rajala, *Up-Coast: Forests and Industry on British Columbia's North Coast, 1870-2005* (Victoria: Royal BC Museum, 2006) at 18 [*Rajala*].
[446] See Borrows, Nanabush, *supra* note 22 at 78 n 6, 84 (citing legislative instruments extending colonial legislation between 1803 and 1959).

a Federal concern).[447] Forestry laws followed. In 1865, the colony of BC passed an ordinance establishing logging licenses; in 1901, the Province amended the *Lands Act* to stimulate investment by offering more generous terms to pulp and paper mills;[448] and by 1907, such investors had claimed almost four million hectares of BC's forests.[449] In 1917, a pulp and paper mill was established 60 kilometers from Bella Bella, at Ocean Falls, and logging intensified in the area.[450] There – and across the province – hand logging was increasingly replaced by more efficient steam-powered clear-cutting, on an ever larger scale.[451]

5.1.2 Confluence of Jurisdictions

As colonial jurisdiction was extended unilaterally, without any treaties to authorize it under Indigenous laws, the Haíłzaqv grappled with the effects of colonial rule over the Traditional Territory. Expressions of Haíłzaqv jurisdiction over time and from context to context. For example, the Haíłzaqv initially selected Indian Reserves under colonial law, but then resisted their expansion once it became clear that the Reserve system did not protect territorial rights resource harvest areas outside of the Reserve itself.[452] At the 1913 McKenna-McBride commission, they spoke out against the Indian Reserve system. They also asserted ownership over their entire territory, and asked the colonial

[447] See Constitution Act, 1867, *supra* note 26, ss 92, 109.
[448] See Rajala*, supra* note 445 at 23 (discussing early conditions for forestry licenses, which made them renewable, transferrable, and inexpensive for speculators to hold; pulp and paper licenses gave long-term rights).
[449] See Richard Rajala, "'Streams Being Ruined from a Salmon Producing Standpoint': Clearcutting, Fish Habitat, and Forest Regulation in British Columbia, 1900-45" (2012/13) 176 BC Studies 93 at 105-106 (also noting that, since four pulp and paper mills were planned at that point, the incentives under the *Lands Act* were put on hold).
[450] Rajala, *supra* note 445 at 34-35, 44-45. Newsprint was shipped down the coast.
[451] *Ibid* at 20.
[452] See McKenna-McBride*, supra* note 30 at 57-78 (noting the expectation that the Haíłzaqv would have some control over harvests in fishing sites near a Reserve). See also Harkin*, supra* note 18 at 157-152.

government to control its settlers, who were "stealing" land.[453] At the same time, in the context of forestry, Haíłzaqv community members had begun participating in the wage-labour logging industry by hand-logging for the mill at Ocean Falls, as employees of settler businesses that was operating without any recognized Haíłzaqv jurisdiction.[454]

Over time, the impacts of forestry gave rise to a need for colonial environmental-protection laws. However, rather than exercise stewardship jurisdiction directly, the province created a legislative mechanism that offloaded stewardship to forestry companies, with some supervision. Under the system of "Tree Farm Licenses," it allocated long-term rights to manage entire forestry regions to private companies, on the assumption that they would manage the resources in those territories sustainably, so as to maximize their long-term yield.[455] Indigenous land rights were not accounted for under this system. As the 20th century advanced, increasingly globalized markets concentrated colonial Tree Farm Licenses into fewer and fewer private hands,[456] while mechanization and market pressures led to ever-more efficient and far-reaching logging. The mill at Ocean Falls, which employed some Haíłzaqv people, closed in 1980. Logging continued, but the logs were now processed outside of the Traditional Territory.[457]

[453] See McKenna-McBride*, ibid* at 59-60.
[454] *Ibid.* See also Rajala*, supra* note 445 at 21-22, 34-35, 44-45. See also Hogan et al*, supra* note 14 at 19.
[455] *Forest Act Amendment Act*, 1947, SBC 1947, c 38, consolidated as *Forest Act*, RSBC 1948, c 128. See also Richard Rajala, "'Nonsensical and a Contradiction in Terms': Multiple-Use Forestry, Clearcutting, and the Politics of Fish Habitat in British Columbia, 1945-1970" (2014) 183 BC Studies 89. See also Rajala*, ibid* at 7, 139-180.
[456] Rajala, *ibid*. See also RCAP, *supra* note 27, vol 2, s 4.3.
[457] Rajala*, ibid* at 195-197 (also noting that when it closed, the Crown permitted its forestry licenses to be redirected by the company that owned it towards a more distant mill, rather than reallocating the licenses).

5.1.3 Halocline of Jurisdictions

By the 1990s, the social context of colonial forestry regulation had shifted. Over the previous decades, clear cut logging had become politically contentious in the more populated areas of southern BC, leading to a number of globally-profiled demonstrations in old-growth forests, known as the "war in the woods." In the decades leading up to that time, Indigenous activism and legal action had resulted in the recognition of Aboriginal title by colonial law,[458] and then protection of those and other rights through the addition of Section 35 to the colonial *Constitution Act, 1982*.[459] The two movements were distinct. Due to differences between Haíłzaqv values and those of the settler environmentalist movement, the Haíłzaqv also protested, but limited their engagement in settler environmental demonstrated,[460] collaborating in particular instances.[461]

The Haíłzaqv were also hesitant to participate in colonial land-use planning, due to a concern that it might compromise their colonial constitutional rights.[462] Participation first became an option for the Haíłzaqv in 1996, when – faced with simultaneous changes in the ecosystems, industries, and political relationships of coastal forests – a new Provincial Consultation process for land use planning, which opened it up to non-government actors including First Nations, reached the central coast.[463]

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[458] See especially Calder, *supra* note 315. See also Delgamuukw, *supra* note 6.
[459] Constitution Act 1982, *supra* note 45, s 35.
[460] See Davis, *supra* note 335 at 21 (discussing Haíłzaqv involvement in blockades on King Island in 1995 and 1997, and then Haíłzaqv distancing from those activists).
[461] Interview 2.
[462] See Howlett et al, *supra* note 434. The central coast LRMP process was minimally supported by coastal First Nations, due to concerns about legitimizing colonial jurisdiction and jeopardizing the limited recognition of their own jurisdiction. Haíłzaqv involvement in the 1990s environmental protests was also limited. See Davis, *supra* note 335.
[463] This process began in 1989. See Howlett et al, *ibid* at 387-388. Among the political problems associated with forestry in the 1980s were the blockades enacted by Indigenous communities in northern BC, including the Gitxsan and the Haida. The province's experiment in consultative decision through the 1989 Land and Resource Management Plan process was initiated on the Central Coast in 1996. See also Margaret Low & Karena Shaw, "First Nations Rights and Environmental Governance: Lessons from the Great Bear Rainforest" (2012) 172 BC Studies 9.

The Haíłzaqv did not join the land use planning process at that time, and the environmental movement was not pacified either. Soon, the forests of southern BC became depleted and logging them became more politically difficult, so market pressures shifted to the central coast.[464] The environmental movement shifted its attention too. By 2000, a global boycott of forestry products from the central coast – which environmental non-governmental organizations ("ENGO") had, by then, publicly re-branded as the "Great Bear Rainforest" – had brought logging to a halt.[465] The forestry industry declared a moratorium and sat down to negotiate with the environmental movement.[466] Haíłzaqv Traditional Territory was at the centre of a powerful conversation about colonially-determined land use, whether the Haíłzaqv participated or not.

One way or another, these developments in forestry management would have an inevitable impact on traditional territories throughout BC, and First Nations along the coast began coordinating efforts to respond. In 2000, they entered into an alliance known as the Coastal First Nations, a collaboration that was intended to take a regional approach to Aboriginal rights and other shared issues.[467] The Province was suddenly faced with these two autonomous decision-making bodies: the ENGO and industry discussion table, which had shut down logging without Provincial consent, and the Coastal First Nations, who had organized autonomously. It moved to reassert its own authority by reconfiguring its jurisdiction in two ways: it established an advisory table that included the ENGO and forestry companies in implementing ecosystem-based management in forestry, and it also signed

[464] See generally Davis, *supra* note 335.
[465] For an overview of the environmentalist movement, see Karena Shaw, "The Global/Local Politics of the Great Bear Rainforest" (2007) 13 Environmental Politics 373 [*Shaw*] (noting, in particular, that it had been previously known to settler legal mechanisms as the "Mid Coast Timber Supply Area).
[466] See Smith et al, *supra* note 36 at 4 (this was known as the "Joint Solutions Project," or JSP. Industry had to commit to an 18-month logging moratorium to open negotiations).
[467] See "Declaration" (2017), online: *Coastal First Nations* <coastalfirstnations.ca/our-communities/cfn-declaration/>. The Coastal First Nations was originally alliance of 10 communities with a mandate to defend Aboriginal rights, promote economic development, and protect the natural world in their territories. They had begun liaising with environmental NGOs an organized body in 1999. See Howlett et al, *supra* note 434.

a framework agreement with the Coastal First Nations, under which it committed to enter into "government-to-government" negotiations for high-level decisions about forestry. This General Protocol Agreement ("2001 Protocol Agreement") aimed at reconciling Aboriginal rights with existing governance by developing joint land-use plans for many First Nations' traditional territories. It committed the Province to specific ecological and economic principles in land-use planning, and to the creation of administrative bodies to carry it out.[468] A new process for colonial legal regulation of forests in BC had emerged.

5.1.4 Jurisdictions Post-Negotiation

The 2001 Protocol Agreement set the stage for the negotiation of three other key GBR Agreements and set interim measures such as a halt on logging.[469] The agreements dealt with different aspects of the GBR. First, in 2006, the Haíłzaqv and the province signed a Strategic Land Use Plan Agreement[470] ("SLUPA"), which mapped all of the Traditional Territory into three land-use planning zones, where certain amounts of specific kinds of land uses were permitted.[471] In "protected" areas, commercial uses are prohibited; in "biodiversity" areas, mining and tourism are permitted but forestry is not; and in "management" areas, forestry and other uses are permitted, but must be guided by

[468] 2001 General Protocol*, supra* note 429. See Smith et al*, supra* note 36 at 6. For a discussion of the re-assemblage of colonial governmental authority, see Howlett et al*, supra* note 434. For a discussion of discussion of the environmental politics of the agreements, see Shaw*, supra* note 463.
[469] 2001 General Protocol, *ibid*. Key aspects of the 2001 agreement were: (a) strategic moratoriums on logging; (b) creating an independent body of scientists; (c) moving towards eco-system based management in forestry; (d) seeding a green economy on the coast; and (e) government to government relationships between First Nations and the Province. See Smith et al, *supra* note 36 at 6. The Nanwakolas Council and Haida Nation, with adjacent coastal territories to the south and north, respectively, have negotiated similar agreements. For an overview of the actors and final result, see Deborah Curran, "'Legalizing' the Great Bear Rainforest Agreements: Colonial Adaptations Toward Reconciliation and Conservation" (2017) 62:3 McGill LJ 813 [*Curran*].
[470] *Strategic Land Use Planning Agreement,* Heiltsuk First Nation and the Province of British Columbia (20 March 2006) [*SLUPA*]. Other First Nations signed their own SLUPAs with the Province.
[471] *Ibid,* Attachment b2.

ecosystem-based management.[472] The second agreement, signed the same year, was the *Land and Resource Protocol Agreement* ("LRP Agreement").[473] It established a regional decision-making framework for discussion of issues that had arisen out of the GBR Agreement framework, and for negotiation of rules about land management that would govern the zones identified in the SLUPAs of each First Nation.[474] In particular, it focussed on operationalizing ecosystem-based management, by identifying environmental standards, applying them through land-use planning and management requirements, and then adapting them as their results become known. To do so, it drew on existing research and decision-making structures, such as the recommendations of the forestry-ENGO advisory table, and the research team that had been established under the 2001 Protocol Agreement.[475]

These 2006 agreements set out a process for land use planning, by establishing land use zones and a process for determining exactly how those zones would operate. The missing piece was the approval of specific projects, which required compliance both with the terms of the earlier agreements

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[472] Ecosystem-based management is the principle that resources should be managed holistically so as to maintain healthy, functioning ecosystems upon which communities can rely. See generally Karen Price, Audrey Roburn & Andy MacKinnon, "Ecosystem-based Management in the Great Bear Rainforest" (2009) 258 Forest Ecology and Management 495. The 2001 General Protocol defines Ecosystem Based Management as **"**a strategic approach to managing human activities that seeks to ensure the co-existence of healthy, fully functioning ecosystems and human communities," based on recognition of Aboriginal rights, sustainability of ecosystems, socio-economic well-being, incorporating both science and local and traditional knowledge, and adaptive management based on ongoing monitoring of outcomes. See 2001 General Protocol, *supra* note 429, Appendix 1.

[473] *Land and Resource Protocol Agreement,* Gitga'at, Haisla, Heiltsuk, Kitasoo/Xaixais, Metlakatla, Wuikinuxv and British Columbia (Minister of Agriculture & Lands), 23 March 2006 [*LRP Agreement*].

[474] *Ibid*, arts 3-5.

[475] Laura Marie Bird, *Making the New Relationship Work: Crown-First Nation Shared Decision-Making in the Great Bear Rainforest* (MSc Thesis, University of British Columbia Faculty of Forestry, 2011) [unpublished] at 34-41 [*Bird*]. See also 2001 General Protocol, *supra* note 429, Appendix II (establishing an independent "Information Body" composed of both scientific and TEK experts, tasked with prescribing how to operationalize ecosystem-based management, or "EBM," known as the Coast Information Team). For insight into their process, see Dan Cardinall et al, *CIT Ecosystem-Based Management Planning Handbook* (Handbook of the Coast information Team, 2004) [*CIT Handbook*]. A framework for EBM had been established by 2009. For the most recent EBM update, see Nanwakolas Council, Coastal First Nations & BC Ministry of Forests, Lands and Natural Resource Operations, "Ecosystem Based Management on BC's Central and North Coast (Great Bear Rainforest) Implementation Update Report" (Report, 2012), online: *Coast Funds* <coastfunds.ca/wp-content/uploads/2016/05/EBM_Implementation-Update_report_July-31_2012-1.pdf> [*EBM Update*] (suggesting that adaptive management had been put on hold).

and with the constitutional duty to consult and accommodate Indigenous peoples about decisions that might impact them ("Consultation").[476] The Province had intended to deal with the Consultation requirement through a province-wide approach, and when it failed, the parties to the existing agreements signed a Reconciliation Protocol Agreement ("Reconciliation Protocol") to address it.[477] It establishes a framework for constitutional Consultation with members of the Coastal First Nations regarding specific operations in their respective territories.[478] The Schedule B Engagement Framework sets out specific actions that the Crown will take, and timelines that the First Nation must follow, when an application for a specific project is submitted.[479] It also establishes economic opportunities for the signatory First Nations: carbon credit revenue sharing (which would begin the following year), forestry tenures (which would be made available in the future), and tourism opportunities (which the Province would facilitate First Nations involvement in).[480]

In the result, the GBR Agreements set up participatory decision-making at three levels: for land use zoning, for establishing operating rules for land uses within those zones, and for approving specific operational plans.[481] In terms of jurisdiction, the Heiltsuk Nation's input into provincial

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[476] See Haida, *supra* note 337. For a comparison of the Agreements, see Bird*, supra* note 475 at 44.
[477] *Reconciliation Protocol*, Wuikinuxv Nation, Metlakatla First Nation, Kitasoo Indian Band, Heiltsuk Nation, Haisa Nation, Gitga'at First Nation, and British Columbia (Minister of Aboriginal Relations and Reconciliation), 10 December 2009 [*Reconciliation Protocol*]. For the political history of the RPA, see Bird, *ibid* at 41.
[478] Reconciliation Protocol, *ibid*, art 1 ("'Engagement' means the process in Schedule B (of the Reconciliation Protocol), designed by the Parties to assist them in satisfying the legal obligations of the Parties to consult and where appropriate accommodate, as described by the Supreme Court of Canada"). For the political history of the RPA, see Bird, *ibid* at 41.
[479] See Reconciliation Protocol, *ibid,* Schedule B ("Engagement Framework"). This process applies to any Provincial "administrative or operational decision, or the approval or renewal of a tenure, permit, or other authorizations. *Ibid*, Schedule B, ss 1.1, 3.2. If it is triggered, the Province must engage with affected First Nations, and the level of engagement varies depending on the level of the possible impact, from information sharing to discussions and dispute-resolution processes. First Nations can request a different level of engagement, and disputes over the level of engagement can be referred to a third party. *Ibid*, Schedule B, arts 3.3, 3.4, 4, 6.
[480] Reconciliation Protocol, *ibid*, arts 7.1, 7.2, 8, Schedule C, Schedule D, Schedule E.
[481] Compare Bird*, supra* note 475 at 4.

decisions is facilitated, its claims to rights and title are acknowledged,[482] and its ability to pass its own laws is noted;[483] however, colonial-recognized decision-making authority remains with the Province. The 2001 Protocol Agreement sets up a government-to-government process aimed at collaborative land-use planning, but does not change the jurisdiction of the parties.[484] The 2006 LRP Agreement similarly establishes a joint planning and dispute resolution process that does not affect existing jurisdiction.[485] The Reconciliation Protocol provides a framework for arriving at consensus decisions, but those decisions are only recommendations to the final decision-maker, which remains the province.[486] Under the GBR Agreements, Haíłzaqv jurisdiction is able to engage with colonial law, but only to the extent that colonial law permits it.

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[482] See SLUPA*, supra* note 470, art 1(q). See also Reconciliation Protocol*, supra* note 477, art 3.

[483] Under the SLUPA, both parties must implement land use plans within their respective legal systems – both colonial and Indigenous. SLUPA*, infra*, art f-g, 7.1, 7.2. The Reconciliation Protocol also notes that the First Nations will implement the agreement, but does not specifically include representations about Indigenous laws. See Reconciliation Protocol, *ibid*, art 4.1.

[484] See 2001 General Protocol*, supra* note 429, art 3(a)(v-vi) (establish that the parties will set up a government-to-government processes to resolve disputes about the land use planning of traditional territories, but that the province retains jurisdiction).

[485] LRP Agreement, *supra* note 473, arts 7, 12.4 (establishing that the parties commit to resolving differences at a government-to-government level, but that the province retains its jurisdiction).

[486] Reconciliation Protocol, *supra* note 477, arts 5, 6.3 (establishing that the aim of the protocol is to arrive at consensus decisions, but the decisions are only recommendations to the provincial decisions maker, and that the agreement is a "step towards shared decision making.") In respect of the non-binding quality of the decisions authorized by these agreements, the GBR Agreements are similar to most of the dozen co-management agreements signed by the BC government with First Nations throughout since 2009. For a discussion of the other agreements, see Julian Griggs & Jenna Dunsby, "Step By Step: Final Report for the Shared Decision Making in BC Project" (Report, 2015), online (pdf): *Simon Fraser University, Morris J Wosk Centre for Dialogue and Shared Decision Making in BC* <www.sfu.ca/content/dam/sfu/centre-for-dialogue/Watch-and-Discover/SDM/SDM_Final_Report.pdf> at 10, 26. An exception is the agreement with the Haida. *Ibid* at 27. For a discussion of non-bindingness, see Bird*, supra* note 475 at 13. See also Jessica Stronghill, *Evaluating Conservancy Area Governance: A New Approach to Protected Areas in Coast British Columbia* (MRM Thesis, Simon Fraser University School of Resource and Environmental Management, 2013) [unpublished] [*Stronghill*].

5.2 Haíłzaqv Perspectives

As in the previous chapter, interviewees asked about authority, spatiality, and techniques of exercising Ǧvi'ilás under the GBR Agreements offered insights suggesting that Haíłzaqv jurisdiction is at work. However, interviewees did not consider the agreements themselves to "jurisdictional." Although the GBR Agreements establish a new framework for forestry and Aboriginal Consultation on the coast, they do very little to recognize or empower expressions of Haíłzaqv jurisdiction; in some respects, they even "lock in" environmental and Consultation measures that do not meet Haíłzaqv standards or uphold Ǧvi'ilás. For interviewees, the most interesting impact that the GBR Agreements have had on jurisdiction is the passage of colonial laws that made enforceable the GBR Agreements and the various environmental standards established within them: this "co-development" of colonial law was seen as a victory. Overall, however, the GBR Agreements were not seen as the triumph of Ǧvi'ilás: instead, they were perceived to simply create a new colonial framework, based on which the Haíłzaqv would find their own ways to assert more authority over lands and forestry.

5.2.1 Authority in the Great Bear Rainforest

Jurisdiction authorizes law by connecting it to the underlying shared beliefs of a legal community, such as values and understandings about public or shared power. When they manifest as jurisdiction, these underlying connections constitute a legal community. As suggested above, the Haíłzaqv community may be partially constituted through ancient relationships with the Traditional Territory and spirit world, which define who the Haíłzaqv are, and which are expressed through hereditary forms of governance. At the same time, the Heiltsuk Tribal Council is constituted by

colonial laws designating Indian Status, and setting up a "band council" government with federal colonial authority under the *Indian Act*.[487]

Haíłzaqv participation in the GBR Agreements raises several questions of legal authority. First, since the community is overlaid by colonial and traditional laws, there is a question of how those laws flow through the same people and the same territory. How did the Haíłzaqv decide to participate in the GBR Agreements? Was the decision made under traditional law, colonial law, or both? Secondly, the fact that those agreements are signed by both colonial and Indigenous actors in the context of two legal systems raises the issue of their nature as legal instruments. What kind of legal authority is recognized or created by the GBR Agreements? Is it a re-assertion of colonial authority, a blend of Indigenous and colonial authority, recognition of Indigenous legal authority, or something else? The following subsections draw on Haíłzaqv perspectives on legal authority to explore each of these questions.

5.2.1.1 Subtheme – Constituting Haíłzaqv Governance

As members of a community that exercises and is governed by both colonial and Haíłzaqv laws, many interviewees noted the distinction and relationship between them, and stressed the importance of the resurgence of traditional Haíłzaqv governance in the lead up to the GBR Agreements. Haíłzaqv traditional governance responsibilities are carried by hereditary chiefs known as Yím̓as, who carry responsibility for certain areas through their families and tribal groups, and

[487] Indian Act*, supra* note 62, ss 74(1), 79, 80, 81, 82. Complicating matters further is the fact that colonial courts also recognize inherent Indigenous rights, and protects them under the colonial *Constitution Act, 1982*, but does not consider them explicitly jurisdictional. See Delgamuukw*, supra* note 6 at paras 189-190.

through direct connection to the land.[488] According to one interviewee, the Yím̓as became involved with the colonial Haíłzaqv government when old growth logging became an issue, in the 1990s. Until then, the Tribal Council, which was empowered under the colonial *Indian Act*,[489] tended to make decisions about colonial legal matters such as forestry. The Tribal Council had begun to support logging as a source of economic development (after the depletion of most fisheries); meanwhile, the Yím̓as began expressing concern about the long-term stewardship of the territory and the impact of clear cuts.[490]

When the effects of market pressures and the environmental movement began to more seriously impact the Haíłzaqv environment, the difference in opinion sparked a reorganization of political governance within the Haíłzaqv community. The Haíłzaqv created a separate governance body aimed at revitalizing traditional culture and law in the community, and began to make forestry-related decisions under the Ǧvi'ilás framework that was available to them. To express their decisions, they put up no-logging signs in important areas,[491] and attended front-line anti-logging demonstrations on the territory in regalia, where they danced traditional dances of their territories in front of bulldozers.[492] These public investments by the Yím̓as demonstrated a reaffirmation of the importance of Ǧvi'ilás in the Haíłzaqv community, and attracted the participation of more community members in exercising responsibility over land, including helping to stop logging projects that the Yím̓as opposed.[493]

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[488] Interview 5; Interview 9.
[489] Indian Act*, supra* note 62.
[490] Interview 5.
[491] Interview 5. For more on the Yím̓as' Dha'yaci society, see "About Us" (2017), online: *Qqs Projcts Society* <www.qqsprojects.org/about-us/>.
[492] Interview 5.
[493] Interview 5.

The resurgence of Ğvi'ilás in the context of forestry eventually required the Yím̓as to engage with the colonial legal structures of the *Indian Act*, which were recognized by colonial governments. Traditional chiefs therefore began regularly running for election to the Tribal Council.[494] At the same time, a broader re-imagining of the Haíɬzaqv legal community was taking place. In the early aughts, the Yím̓as and the Tribal Council formalized their relationship: Ğvi'ilás authority regarding day-to-day governance would be delegated to the Tribal Council, while any authority that Tribal Council holds regarding issues of colonial constitutional rights or title would be exercised in close collaboration with hereditary leaders,[495] effectively creating two legal authorities with different portfolios under the umbrella of a "Heiltsuk Nation" government. Under this governmental arrangement, the colonial Tribal Council government has worked directly with the Yím̓as on issues of rights, title, and relationships with neighbouring First Nations, which has led to the renewal of Indigenous treaties with neighbours, among other things.[496] It has also created an administrative entity called the Heiltsuk Integrated Resource Management Department ("HIRMD"), which deals with constitutional Consultation and other land and resource issues throughout the Traditional Territory, under the authority of the Heiltsuk Tribal Council but with the direction of the community, especially the Yím̓as and the youth, who are represented on its Board.[497]

[494] Interview 5; Interview 9; Interview 10.
[495] Interview 9; Interview 10.
[496] Interview 10.
[497] Interview 4; Interview 9. HIRMD was established as the stewardship arm of the broad-based Heiltsuk Nation in 2010, and is governed by members of both the Tribal Council and the Yím̓as, as well as representatives drawn directly from the broader community. In order to assist it in upholding traditional law through its decisions and programs, HIRMD involves Yím̓as representatives on all of its committees and technical teams, and consults the Yím̓as informally on a regular basis. See "About Us" (last modified 2 February 2018), online: *HIRMD* <www.hirmd.ca/about-us.html>. See also "Board of Directors" (last modified 2 February 2018), online: *HIRMD* <www.hirmd.ca/board-of-directors.html>.

As one interviewee explained, the resurgence of Ğvi'ilás authority in the colonial environment has led to delegation. Yím̓as authority can be exercised by colonial institutions:

> [Yím̓as] take that power and distribute it to departments like [HIRMD] and to the Tribal Council, telling the Tribal Council: even though you're elected leaders and you are restricted in what you can do with your ties to the government and funding, you are getting delegated the authority to use our laws, our power, same time and same way as you're using the power from [the colonial government].[498]

However, the interplay of colonial and Indigenous forms of authority within Haíłzaqv institutions raises questions. For interviewees, the delegation of Ğvi'ilás to HIRMD was clear,[499] while the delegation of Ğvi'ilás to the Tribal Council was more complicated. For one, the fact that the Tribal Council was also delegated colonial responsibilities and restrictions could interfere with its ability to uphold the Ğvi'ilás.[500] Nonetheless, the process of using Indigenous law to work with hybrid institutions continues, with the Heiltsuk Nation drafting a written constitution based on Ğvi'ilás, to be posted on the Tribal Council website.[501]

5.2.1.2 Subtheme – Authority of the GBR Agreements

Although the Haíłzaqv undertook significant efforts to reconnect with their underlying values and identity, and to delegate its legal authority with care, the enhanced authority of Ğvi'ilás within the community was not necessarily channelled into the GBR Agreements. In order to participate in the GBR Agreements, the Tribal Council had to delegate its colonial-recognized authority outside of the

[498] Interview 9.
[499] Interview 4; Interview 5; Interview 6; Interview 9.
[500] Interview 9.
[501] Interview 4; Interview 10 (stating, "being able to put [Ğvi'ilás jurisdiction] down into our Constitution will help us act and legislate. […] All the things we do here have to be connected to that, so how we make those connections is very important").

Haíłzaqv community altogether, to the Coastal First Nations, where it had only a few representatives on a larger political body.[502] It was the Coastal First Nations that negotiated the terms of land use plans, the parameters of land uses, and process of Indigenous-state engagement. Although the Haíłzaqv signed onto the Coastal First Nations and have ultimately agreed to the GBR Agreements as well, that does not mean that they uphold Ğvi'ilás. As one interviewee said:

> I don't think [the GBR Agreement framework] gives space for Haíłzaqv rules and laws. I think it pretends to… I'd use another term [than "jurisdiction"]: continue to assert our title and rights…. We don't get to decide what the law is. The Haíłzaqv concept of jurisdiction is what our laws are, but we [still just] keep trying to promote them.[503]

Except for its specific land use plans, the Haíłzaqv had a limited role in defining the terms of the GBR Agreements; as a result, the GBR Agreements have, in some cases, locked in terms that do not meet Haíłzaqv standards.[504] Those agreements also state that they do not change the colonial-recognized jurisdictions of the parties,[505] meaning that expressions of Haíłzaqv jurisdiction are not recognized by those agreements. At the same time, they do provide more recognition of Indigenous jurisdictions than most of Canadian law to date, by stating that both parties will implement land use plans within

[502] The Coastal First Nations appears to have a limited mandate to negotiate, because agreements it reaches are signed by individual First Nations, not the Coastal First Nations. This means that each individual First Nation must individually agree to the outcome. See Reconciliation Protocol, *supra* note 477, arts 4.2, 12.2, (indicating that "nations and first nations" signatories warrant that they have the authority to enter into the protocol).
[503] Interview 5.
[504] Interview 9.
[505] See 2001 General Protocol, *supra* note 429, art 3(a)iv. See also LRP Agreement, *supra* note 473, art 12.4. See SLUPA, *supra* note 470, art 14.15. See also Reconciliation Protocol, *supra* note 477, art 6.3.

their respective legal systems – both colonial and Indigenous.[506] They are also clear that they do not constitute a "treaty."[507]

Instead of relying upon the GBR Agreements for recognized jurisdiction, the Haíłzaqv leverage them to assert expressions of Haíłzaqv jurisdiction as much as possible. For example, Interviewees noted both that the Reconciliation Protocol has improved constitutional Consultation process, but does not actually afford the Haíłzaqv significant decision-making power over projects within their territory.[508] To get around its framework, the Haíłzaqv often ask forestry proponents to work with them directly rather than going through the Crown's process, and to sign a Consultation agreement setting out how direct Haíłzaqv-industry consultation will be carried out. The Haíłzaqv are able to convince proponents into these agreements partly because they are able to offer a letter of support if a direct consultation process is successful, stating that the constitutional Consultation has been completed successfully, which provides some legal protection to the project under colonial law.[509] Circumventing the Crown's role in Consultation better allows the Haíłzaqv to define the locations of projects and, in some cases, to raise environmental standards. It also increases Haíłzaqv authority among industry players, by building relationships with HIRMD, and enabling it to negotiate benefits through Consultation agreements, which can then be used to further resource HIRMD.[510]

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[506] See SLUPA*, ibid,* arts f-g, 7.1, 7.2. The Reconciliation Protocol also notes that the First Nations will implement the agreement, but does not specifically include representations about Indigenous laws. See also Reconciliation Protocol*, ibid*, art 4.1.

[507] See 2001 General Protocol, *supra* note 429, art 6. See also LRP Agreement, *supra* note 473, art 12.1. See also SLUPA, *ibid*, art 14.8. See also Reconciliation Protocol, *ibid*, art 15.8. A "treaty" would enter colonial law under Section 35 of the *Constitution Act, 1982*.

[508] Interview 9; Interview 2.

[509] Interview 4; Interview 9.

[510] Interview 9 (indicating, as well, that HIRMD was looking into implementing this strategy in conservancy areas, where the terms of recreational use – rather than industry projects – are at issue).

In the same way that the Haíłzaqv do not identify the GBR Agreements with Ğvi'ilás, but continue to carry out Ğvi'ilás authority independently though initiatives such as direct consultation, they also do not identify them with colonial law. Instead, interviewees indicated that they looked for implementation of the GBR Agreements through colonial legislation.[511] The GBR Agreements have led to several such outcomes. In particular, the designation of some land use areas as "conservancies" was considered an early and meaningful "win" because it required a change to colonial legislation:[512] as a new category of land use, conservancies required a new provision in the *Parks Act* in order to allow for the practice of Aboriginal rights under colonial law.[513] For interviewees, it was changes to the colonial legal regime that provide a meaningful extension of the impact of Ğvi'ilás, and give the GBR Agreements a purpose. Notwithstanding their clear focus on the need for separate legal enactments of Haíłzaqv and colonial authority under the GBR Agreements, one interviewee offered the perspective that they might also express Haíłzaqv law in a direct way: when "that law, that provincial law, is co-developed by First Nations… it makes everybody responsible."[514]

[511] Interview 3; Interview 4 (indicating that enactment in colonial law one of the only ways of holding the Crown accountable to its agreements). Legislation was preferred to other colonial legal instruments, because it requires a broader mandate and is harder to undo than regulations or other measures that can be implemented by a Minister. Interview 4.

[512] Interview 4.

[513] See *Parks Act*, RSBC 1996, c 344, esp s 5(3.1). See also See British Columbia, *Order in Council 002/2009* (9 January 2009), Schedule, made pursuant to the *Environment and Land Use Act*, RSBC 1996, c 117 s 7 [*BMTA Order*]. Schedule. There are at least 31 conservancies within Heiltsuk territory. *Ibid*. See also Stronghill*, supra* note 486 at 15. The purpose of conservancies is the protection and maintenance of biological diversity and natural environments, the social and cultural uses of First Nations, recreational values, and sustainable development. For an analysis of conservancies, see Stronghill, *ibid*. Biodiversity areas were given a colonial legal description through a ministerial order, instead. BMTAs permit First Nations' social and cultural uses, prohibit commercial forestry and hydroelectricity developments, and require consultation with all First Nations with claimed Aboriginal or Treaty rights within the BMTA before any land use management plan is approved. BMTA Order*, ibid,* ss 3-7.

[514] Interview 4.

5.2.1.3 Reflections on Authority Post-Negotiation

In the lead up to the GBR Agreements, disputes over forestry served as a trigger for not only the negotiations, but also the resurgence of Haíłzaqv law. After a period of re-grounding and reconstituting the community in traditional authority, the Yím̓as channelled Ğvi'ilás authority into the colonial Tribal Council, and entered into an agreement to receive colonial Tribal Council authority over lands, constitutionals, and inter-community matters. Together, they established hybrid entities – the Heiltsuk Nation and HIRMD – which carry both traditional and colonial authorities, and balance them by taking direction from either the Yím̓as, the community at large, or the Tribal Council, depending on the subject matter of the issue.

However, although the Heiltsuk Nation entity is partially empowered by Haíłzaqv law, entering the GBR Agreements did not necessarily uphold Ğvi'ilás or lend Ğvi'ilás authority to the colonial regime created by them. The GBR Agreements also did not directly empower Haíłzaqv legal authority in ways that interviewees found to be meaningfully jurisdictional. Instead, the GBR Agreements are seen as most meaningful when they lead to legislative changes within the colonial legal system, restraining colonial law from some of its impacts on Haíłzaqv land, law, and authority. For the Haíłzaqv, the GBR Agreements establish a new colonial context for the expression of Haíłzaqv legal authority – one that enables new independent expressions of Haíłzaqv authority, and may even express Haíłzaqv authority when it is formalized in colonial law.

5.2.2 Spatial Dimensions of the Great Bear Rainforest

The GBR Agreements define shared understandings of territorial spaces: they refer explicitly to the fact that both of Aboriginal and Crown parties claim exclusive rights to title and territory within the same landscape, and map Haíłzaqv Traditional Territory. They also zone the landscape, and

establish an agreement about how those claims will begin to be "reconciled" through joint land-use planning. However, this does not necessarily mean that the territoriality is itself shared. As noted above, the GBR Agreements explicitly avoid the status of a treaty, and do not shift the jurisdiction of the parties. Since colonial law understands itself to hold exclusive territorial sovereignty, the territorial jurisdiction of the various coastal First Nations – though acknowledged as something that they claim to hold – is not recognized or empowered by the GBR Agreements, and the colonial legal presumption of exclusive territorial jurisdiction of the Crown appears to remain.

For the Haíłzaqv, securing the GBR Agreements and upholding Ǧvi'ilás under them has required repeated and creative assertions of territoriality. The lead up to the GBR Agreements involved Haíłzaqv assertions of legal power and authority throughout the territory, especially in specific places where traditional chiefs carried authority,[515] which disrupted colonial territoriality by manifesting places of Haíłzaqv territorial authority within it. The environmental movement also worked to disrupt the blank slate of colonial territorial jurisdiction, rebranding the central coast from the unknown, extractivist space of the "Mid Coast Timber Supply Area," into "the Great Bear Rainforest," home of the photogenic Kermode bear and Indigenous peoples.[516] Haíłzaqv participated in the global boycotts of forestry products associated with this shift towards the central coast as the Great Bear Rainforest, which used market pressures to disrupt the power of colonial boundaries by re-routing inter-territorial flows of capital away from BC businesses and governments. One Haíłzaqv interviewee recalled faxing a handwritten letter to a German paper purchasing company to state that a forestry company they were negotiating with had not treated them fairly, bringing negotiations to a

[515] Interview 5.
[516] See Jessica Dempsey, "The Politics of Nature in British Columbia's Great Bear Rainforest" (2010) 42 Geoforum 211.

halt.[517] However, after the GBR agreements were in place, Haíłzaqv activity shifted from troubling colonial territorial boundaries to finding ways to strengthen their own territorial boundaries within the framework of colonial laws.

5.2.2.1 Subtheme – Reconnecting with Place

As part of the resurgence of traditional governance and law, the Haíłzaqv invested heavily in reconnecting its people with places in the Traditional Territory. Under a program begun by the Yímas in the 1990s, the Haíłzaqv community has fundraised and built a number of cabins throughout the Traditional Territory,[518] for use by harvesters, youth groups, children's camps, restorative justice programs, family trips, and co-learning camps with allies, where people live and study for weeks at a time.[519] As described by one interviewee, the cabins and programming facilitate harvesting, bring people into the landscape, and "draw people's attention to the outside:" to the species, the impacts of resource extraction, and the stories and histories connecting them to the land.[520] This serves to revitalize Ǧvi'ilás stewardship relationships:

> In order to exert authority over a place, you have to know your responsibility and attachment to it…. [we] wanted people, when somebody came along and said we want to log there, to say no way, that's where we go, that's where we do things… the whole idea of authority really was about finding ways to get people back out on the land and using the territory.[521]

[517] Interview 2 (adding that, by chance, the fax arrived in the middle of a meeting between the two companies, and brought it to an end).
[518] Interview 5. For more on the Cabins project, see "Heiltsuk Cabins: Reconnecting with the Land and Water" (2019), online: Qqs Projects Society <www.qqsprojects.org/projects/heiltsuk-cabins/>.
[519] Interview 5; Interview 9.
[520] Interview 5.
[521] Interview 5.

The cabins and programming have contributed to a broader section of Haíłzaqv society engaging with places in the territory, and becoming invested in participating in and, if necessary, mobilizing to stop colonial decisions that could affect them.[522]

HIRMD has incorporated a similar approach into the constitutional Consultation framework. Once Haíłzaqv citizens were reconnecting with the land through the cabins and other Haíłzaqv, it became more common for community members to meet development proposals with concern about impacts on Haíłzaqv land use, leading to a more careful assessment of the location and the request.[523] HIRMD has increasingly used Consultation as an opportunity to secure resources in order to help them send community members to the site of the proposed development, to see it for themselves. Once there, HIRMD's delegates "ground truth" the area: they walk it, map evidence of archaeological and cultural sites, and identify ecological information of interest to the Haíłzaqv, such as medicinal plants, or evidence of grizzly bears or salmon.[524] That data is used by HIRMD to establish protocols under which the development can proceed, which are specific to each site -– for example, by mandating buffer zones around ecological or cultural features they have identified, or insisting on protected areas for wildlife corridors in certain areas.[525]

In the first few years of "ground truthing," HIRMD directed over a quarter of a million dollars towards compiling this kind of concrete knowledge about the specifics of particular place, which it maps.[526] As one interviewee noted, the detailed mapping of the human values of a specific place serves to counteract the conception of the Traditional Territory as an empty landscape:

[522] Interview 5.
[523] Interview 5 (raising the example of a berry-picking site).
[524] Interview 4.
[525] Interview 4.
[526] Interview 4.

> Where you look at the published maps of the area, they're mostly large blue areas and large green areas. We start showing them…where people are going. We're putting our people back on the land. And hopefully making them realize this is not an empty country, this is not an empty landscape.[527]

In addition to assisting the evaluation of specific development proposals, the data and re-connection to the land could become important evidence in future litigation for Aboriginal rights or title, and is therefore designed to meet the requirements of colonial legal tests.[528]

5.2.2.2 Subtheme – Flows Across Boundaries

Although the GBR Agreements establish a shared understanding of territoriality by identifying and mapping the Traditional Territory, the Haíłzaqv have not found that shared understanding to have enough of an impact, and still act independently to control flows across their boundaries. One example is with respect to the extraction of logs through forestry operations. Although the GBR Agreements set terms and limits for the flow of logs in and out of Haíłzaqv Traditional Territory, they do not apply to private land. This means that land owners are permitted by colonial law to sell logging rights that are not accompanied by GBR standards or processes, or simply to log their own lands with little oversight.[529] To exercise control over those forests within their territory, the Haíłzaqv have tried to purchase private land. To do so, they have worked with allies to raise funds, find and rank the importance of specific privately-held lots in the Traditional Territory, and secure long-term protection of purchased areas under the colonial legal system through contracts, trusts, and other colonial legal tools.[530]

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[527] Interview 3.
[528] Interview 3; Interview 4.
[529] Interview 5.
[530] Interview 5 (explaining that land purchased under this program is not all held by the Haíłzaqv: some is held by ENGOs or other interest groups with to mandates aligning with Haíłzaqv interest in those particular spaces).

Another difficult area for controlling flows across boundaries is waterways, many of which fall outside of the terms of the GBR Agreements with the provincial government. Helicopters and barges, for example, have been used by helicopter loggers to remove logs from private land without falling within jurisdiction over lands or waters.[531] Another issue is marine pollution, which affects lands and forests but also falls outside of provincial jurisdiction and the GBR Agreements. The Haíłzaqv have signed an additional marine management agreement with the Province,[532] but because the ocean itself falls within federal jurisdiction,[533] that agreement can have has limited effect. Oil barges are a particular concern. To exercise control over disasters which might be brought into territorial waters and wash up on territorial lands, the Haíłzaqv have attempted to insert emergency response systems into their conservancy land use planning, and have entered into agreements with neighbouring First Nations to oppose increased tanker traffic.[534]

In addition, the Haíłzaqv have tried to control the flow of relationships and information about the Traditional Territory out of its boundaries. Rather than permit development proponents to carry on Consultation processes from a distance, HIRMD insists that representatives physically come into Haíłzaqv Traditional Territory and meet with its officials, in order to create relationships and cultivate respect for Haíłzaqv authority.[535] They have also paid for BC Parks officials' travel to the Traditional

[531] Interview 5.
[532] Marine Plan, *supra* note 329.
[533] Although jurisdiction over oceans is not clearly designated in the Constitution Act, 1867, marine fisheries and general laws for the peace, order, and good governance of Canada ground significant federal jurisdiction over ocean waters. See Constitution Act, 1867, *supra* note 26, ss 91, 91(12). See also *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401 (marine pollution falls within federal jurisdiction over peace, order, and good governance).
[534] Interview 9; Interview 10. Since these interviews were conducted, the tug-barge Nathan E Stewart ran aground in Haíłzaqv territory in 2016, spilling over 110,000 litres of diesel into the waters around the ancient village site of Q'vúqvai. Heiltsuk Coastal Guardian Watchmen were the first responders. For a summary and the Haíłzaqv response, see Nathan E Stewart Report, *supra* note 13.
[535] Interview 4.

Territory, in order to discuss land management planning, on one occasion.[536] Additionally, data that is collected on cultural, archeological, and ecological features of the Traditional Territory is physically confined within its boundaries.[537] This means that if a provincial or industry representatives wants to know why the Haíłzaqv are insisting on a specific land use condition, they have to visit the HIRMD office in Bella Bella to look at the maps and data on which Consultation decisions are based, which are kept there and not distributed. This protocol has been found to enhance relationships, by requiring proponents and Crown officials to engage with the Haíłzaqv directly.[538]

5.2.2.3 Reflections on Space Post-Negotiation

One major component of Haíłzaqv territoriality is the re-engagement with the land as a web of places with which people share lived relationships. Ǧvi'ilás is strengthened when citizens know specific places on the land, care for them, and relate to the territory from that perspective. An upsurge in Haíłzaqv legal authority has occurred through projects to get people back out onto the land, where they can learn its qualities and contours, and engage with the particularities and cultural meanings of specific places: their history, their uses, their needs, and their special characteristics. The practice of "ground-truthing" represents an evolution of this strategy: it works replace the abstract, extractivist spaces of most maps a dense map of features, values, and characteristics of Haíłzaqv territory, place by place. Keeping the maps and baseline data physically within in the Traditional Territory, and pushing proponents and Crown officials to visit it, is certainly a strategic method for controlling

[536] Interview 9.
[537] Interview 4.
[538] Interview 4.

information and discourses, but it can also be seen as a symbolic way of re-embedding relationships with the land into the landscape.

Another central component of Haíłzaqv territoriality is the engagement with territory as a *bounded* space. Within colonial law, Haíłzaqv Traditional Territory is a small, unbounded piece of much broader colonial territories with colonial legal boundaries – namely, the nation and the Province. One challenge faced by Haíłzaqv territoriality is the powerful currents of incentives, threats, people, and resources that move in and out of the Haíłzaqv Traditional Territory, without consideration of Ğvi'ilás. Except on lands specifically zoned in the GBR Agreements, the Province does not control such flows, and Ğvi'ilás, therefore, must find other ways of dealing with them. One way the Haíłzaqv have pursued this is through colonial law: by purchasing land under the Provincial property law and land registration system, the Haíłzaqv can use colonial law to exert an influence over logging practices within their territory that are not covered by the GBR Agreements. They are also exploring other strategies for taking responsibility for what happens within the territory, such as establishing an emergency response system to try to control flows of oil in case of a tanker spill. The strategy of keeping information about ecological and land use sites within Bella Bella is another way of exerting control over a resource – information – that does not fall within the terms of the GBR Agreements.

5.2.3 Techniques of Ğvi'ilás in the Great Bear Rainforest

Techniques of Ğvi'ilás in the GBR Agreements echo techniques of the GBR Agreements themselves. Implementing high-level, multi-party agreements such as the GBR Agreement requires sophisticated techniques for sharing information. In particular, implementation of the GBR Agreements is mediated through the creation of an increasingly detailed series of maps. The SLUPA zoning map sets out the claimed Traditional Territory of the Haíłzaqv, and maps it into zones within

which the parties agree that particular uses can take place.[539] Once the SLUPA was in place, a second set of collaborative maps was required for each "landscape unit" within those zones: for example, a landscape unit zoned for ecosystem-based management forestry required the mapping of "strategic land reserve design," a detailed process of mapping particular ecological zones based on the values identified through ecosystem-based management, such as species distribution and wildlife protection areas, in order to identify what areas of that particular area were open to logging.[540] Finally, landscape units zoned for forestry would require a third layer of maps at specific sites where a development was proposed, setting out any sites or areas that required protection, and where forestry would take place.[541]

In addition to maps, the GBR Agreements contemplate the creation of multi-party institutions to administer the agreements through shared decision-making. At a broad level, the 2001 Protocol Agreement led to a two-level decision-making structure for land-use planning, with bodies constituted to make representational decisions at each level: a land use planning body that includes industry and ENGO representatives and provides recommended decisions, and a government-to-government body with First Nations and provincial officials, which makes final decisions. Serving the decision-

[539] See SLUPA, *supra* note 470, Attachment A, Attachment B.

[540] The ecosystem-based management area mapping process is discussed in the 2005 CIT Handbook, *supra* note 480. See also EBM Update, *supra* note 480. For the Haíłzaqv preliminary map, see SLUPA, *ibid*, Attachment C. For the more detailed map, see British Columbia, Ministry of Forests, Lands, and Natural Resource Operations, "Great Bear Rainforest Order", Ministerial Order (January 2016), online (pdf): *Government of British Columbia* <www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/forestry/timber-pricing/coast-timber-pricing/maps-and-graphics/great_bear_rainforest_order_-_jan_21_2016.pdf> [*2016 GBR Order*]. For information about the parameters of mapping, see British Columbia, "2016 Great Bear Rainforest Land Use Objectives Order: Background and Intent" (19 May 2016), online (pdf): *Government of British Columbia* <www.for.gov.bc.ca/TASB/SLRP/lrmp/nanaimo/CLUDI/GBR/Orders/B%20and%20I%20Doc%20final%20draft_Oct%2013.pdf>. As discussed in the following chapter, the Haíłzaqv are working on other ways to protect grizzly habitat outside of the constraints of the GBR Agreements.

[541] For information on the mapping process, see "Ecosystem Based Management Implementation in the Great Bear Rainforest: Landscape Reserve Design Methodology" (Report, 2016), vol 1, online (pdf): G*overnment of British Columbia* <www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/land-use-plans-and-objectives/westcoast-region/great-bear-rainforest/great_bear_rainforest_landscape_reserve_design_methodology.pdf>.

making process is a third body, which is made up of a technical team that is designed do research and also carry on representative negotiations between parties regarding what information is relevant to recommendations and decisions.[542] The GBR Agreements thus establish extensive mapping processes as well as the creation of administrative institutions to carry out their terms. Within Haíłzaqv territory, however, both of these collaborative techniques are paralleled by the development of Haíłzaqv techniques for implementing Ǧvi'ilás.

5.2.3.1 Subtheme – Mapping as a Tool of Law

Within the GBR Agreements, maps play an ambivalent role for Haíłzaqv authority. As one interviewee put it, what the GBR process has done is not recognized Haíłzaqv legal authority, but "allowed us to have input to people who were making decisions on how they were going to operate in our territory."[543] From this perspective, the Tribal Council was initially reluctant to enter into any GBR land use planning;[544] when it finally did so, in the 2001 General Protocol, it side-stepped the shared-decision making process set out for the creation of the SLUPA map that would guide land use planning within the Traditional Territory, and instead went through their own process that resulted in a Haíłzaqv-authored land use map. It was accepted into the SLUPA.[545] Once the SLUPA map was in

[542] See 2001 Protocol Agreement, *supra* note 426. See also Bird, *supra* note 475. To zoom in on a more specific example, the mapping of "landscape units" involves six actors playing five different roles, and requires an administrative process that takes a full colour page to illustrate. See British Columbia, "A Framework for Landscape Reserve Design in the Great Bear Rainforest" (July 4, 2016) at 8.
[543] Interview 2.
[544] Interview 2.
[545] See General Protocol, *supra* at 3. The Haíłzaqv had begun land use planning in 1997 during a foray into treaty negotiations. Notwithstanding the 2001 General Protocol, they refused government funds and they relied upon funding from ENGOs and philanthropists in order to continue the land use planning process on their own terms. The plan met agreed-upon objectives such as the percentage dedicated to conservancies, and was coordinated with neighbouring First Nations. When it was released in 2005, it was accompanied by a statement that the Heiltsuk "expect[ed] the Province…to respect this in their upcoming decision on wilderness protection and

place and more detailed collaborative maps were required, the Haíłzaqv again undertook their own process – this time, a scientific study that reflected their own knowledge of the behavior of grizzly bears, which was relevant to mapping grizzly bear corridors throughout the land use zones.[546] In 2015, the Haíłzaqv considered trying the strategy of unilateral mapping again, and began to create maps for detailed land uses within conservancies, after negotiations with the Province about land uses within those areas had broken down.[547]

In addition to the creation of external-facing and collaborative maps, the Haíłzaqv have heavily invested in internal mapping processes. The Haíłzaqv were already mapping the Traditional Territory in the 1970s, long before the GBR negotiations began; at the time, they focussed on place names and archaeological sites, which traced historical connections with the territory.[548] As one interviewee explained, maps are a crucial tool in pushing back against colonial understandings of Haíłzaqv territory as vacant Crown land:

> Maps have been used to take our rights away from us, they're something the outside world really relates to, and if we control maps, that's something people can relate to…. I showed…a map of recorded archaeological sites, and talked a bit about…how far back these sites go, to 10,000-12,000 years ago – and that the empty spaces are not necessarily where there are no sites, it's where archaeologists have not gone yet…. And then I showed a map composite map of our harvesting locations, where I could say this is where Haíłzaqv are still using today, and they looked almost identical. And it helped that it was a visual shock to people who could relate to maps.[549]

economic development in our territory." See "Historic land-use plan protects Great Bear Rainforest" (2005), online: *Ecotrust* <ecotrust.ca/project/historic-land-use-plan-protects-great-bear-rainforest/>. In 2006, some of the terminology was changed, but the Haíłzaqv map was otherwise adopted. See Hogan et al, supra note 14 at 24. Compare SLUPA*, supra* note 470*,* Attachment B. See also Hogan et al, *supra* note 14 at 29-33.

[546] See William G Housty et al, "Grizzly bear monitoring by the Heiltsuk people as a crucible for First Nation conservation practice" (2014) 19(2) *Ecology and Society* 70 [*Housty*].

[547] Interview 9.

[548] Interview 3.

[549] Interview 3.

More recently, they have engaged in a comprehensive series of traditional land use studies, designed to produce maps of past and ongoing land uses that are based on data and processes that could be accepted as evidence of Aboriginal rights or title in colonial courts.[550] In the early 2010s, they began compiling another series of maps based on cultural, environmental, and natural resource assessments done through "ground truthing" areas that were subject to forestry plans, in order to gather evidence of cultural and ecological features.[551] Data from each type of map is compiled into a software system that allows for different layers to be isolated, and different land uses to be searched.[552] In addition to assisting HIRMD in making land use decisions, the maps can be used in negotiations with industry, land users, and colonial legal authorities,[553] and the data can be used within GBR collaborative mapping processes for landscape units.[554]

5.2.3.2 Subtheme – Techniques of Bureaucracy

As the GBR negotiations shifted the Haíłzaqv from opposing colonial legal decisions to administering GBR-based decisions, the Haíłzaqv found themselves in the role of "bureaucrats."[555] The role was complex: the Haíłzaqv were responsible for many small-scale decision and processes,

[550] Interview 3. Traditional land use mapping engages the community in a mapping process of all the sites that community members go to harvest or for other cultural, or spiritual purposes, according to a methodology that incorporates social science methodologies and questions that relate to legal tests such as continuity of resource use into data collection. For one guide that the Haíłzaqv have used, see Terry N Tobias, *Chief Kerry's Moose: a guidebook to land use planning and occupancy mapping, research design and data collection* (Union of BC Indian Chiefs and Ecotrust Canada, 2000), online (pdf): *Centre for First Nations Governance* <www.fngovernance.org/resources_docs/Land_Use__Occupancy_Mapping_Guidebook.pdf>.
[551] Interview 4; Interview 5. This is often accomplished by way of funding allocated through consultations with industry about that site. See the discussion under discussion of "space" regarding "relationships with place," above. It is also being carried out through the GBR process for negotiating strategic land reserve designs.
[552] Interview 3.
[553] Interview 4; Interview 9.
[554] Interview 5.
[555] Interview 5.

both those imposed by the GBR and those that emerged to resist it, and they had to be carried out in ways that upheld both Indigenous and colonial law and reflected many different uses and values within the Traditional Territory. Not only this, but timelines and documentary requirements set up for Consultation under the GBR Agreements were tight, as discussed below. To handle it, they established HIRMD, a natural resource department with a delegated mandate to deal with all natural resource issues and constitutional Consultations.[556] It has a separate building, a staff including an in-house forester, and many departments tasked with stewarding specific resources or values.[557] It was founded in 2010, and as of 2015, it was handling approximately 10 Consultations per month, ranging from requests for permission to anchor barges in local waters to industrial logging permits.[558] The process for handling referrals has been revised several times, but in 2015, it followed these steps: proposals were received by a referrals department, which liaised with other HIRMD departments and the referee to determine a procedure and timeline; then, technical staff from all relevant departments carried out assessments; next, their research was presented to decision-making committees with representatives from different parts of Haíłzaqv society for consideration; and finally, HIRMD's position was presented to the proponent or Crown official who had brought the referral, and HIRMD representatives may have pushed to have it adopted.[559] In order to handle the referrals, HIRMD invested in mapping and data management software.[560]

[556] Interview 5; Interview 7; Interview 11 (also explaining that prior to HIRMD, consultation requests would be handled by the Tribal Council – which had limited funding to deal only with colonial legal issues such as the management of the reserve – or by the Yíḿas, who had no funding or official relationship to colonial law, and were often elderly. The interviewee also noted that different issues were each handled by different Haíłzaqv organizations, making the exercise of territorial jurisdiction challenging).
[557] Interview 4. In 2015, much of the funding came from industry and the GBR carbon offset program.
[558] Interview 4.
[559] Interview 2; Interview 9.
[560] Interview 4, Interview 9.

HIRMD became necessary because of the 2008 Reconciliation Protocol, under which the Haíłzaqv and other First Nations agreed to a "referral process" for constitutional Consultations that includes timelines. If the Haíłzaqv do not carry out their processes and respond within the timeframe, the Province may proceed without consulting further, and courts may conclude that the Haíłzaqv have no further rights to be Consulted because they chose not to participate.[561] The deadlines proved hard to meet: the Haíłzaqv community is small and under-resourced, and viewed Consultation as more than an administrative process. For the Haíłzaqv, Consultation was an avenue to reconnect with Traditional Territory, interpret Ǧvi'ilás, and enforce it. As one interviewee expressed:

> In our office we take the responsibility to review every one of those permits, set them against…traditional use information, any research we've done, ground-truthing salmon-bearing systems, sacred sites, you name it… in order to, when we look at a permit, say we don't think we can support it, or, if we do, these are the conditions required of industry or of the proponent looking to operate in the territory.[562]

In order to preserve their colonial-recognized right to Consultation and their own approach to it, the Haíłzaqv established the HIRMD department to meet the deadlines, or – if not – at least reliably dispute them.[563] Even with HIRMD, however, the timeline for turning around applications for consultation is short,[564] and missing a deadline means losing the colonially-recognized right to participate in the consultation process. For that reason, HIRMD has focussed on building the capacity to compete with the province for Consultation jurisdiction, by building an alternative to the GBR Agreement framework. As discussed above, it has used its preferred route of being consulted directly to negotiate agreements with forestry companies.[565] The ability to provide streamlined and predictable

[561] See Reconciliation Protocol, *supra* note 477, arts 3.5, 4.2, 7.2. See also *Da'naxda'xw/Awaetlala First Nation v British Columbia (Environment)* 2011 BCSC 620.
[562] Interview 4.
[563] Interview 4; Interview 9.
[564] Interview 4.
[565] Interview 4; Interview 9.

decision-making processes, and the amount of information that HIRMD has compiled to make those decisions, contribute to the Haíłzaqv community's ability to enter into Consultation agreements; those agreements, in turn, have enabled them to influence forestry projects and to further fund HIRMD and Consultation processes.[566]

5.2.3.3 Reflections on Techniques Post-Negotiation

Maps and institutions are key techniques for enacting the GBR Agreements in particular. Interviews show that both mapping and bureaucratization are also key techniques for the independent assertion and enforcement of Haíłzaqv law, notwithstanding their participation in the GBR Agreements. There are not only GBR maps, but an increasing number of Haíłzaqv-authorized maps, controlled by the Haíłzaqv as a way of maintaining epistemological authority within their territory. Similarly, there are not only Crown and GBR bureaucratic structures, but an increasingly capable Haíłzaqv bureaucracy, which not only interfaces with GBR structures but also circumvents proponents and decisions away from GBR processes and into Haíłzaqv processes.

The Haíłzaqv community's considerable investment in developing these technologies of jurisdiction makes sense because the two are leveraged to reinforce one another. The data collected for maps is only made available to industry representatives who will physically come to the table by visiting Bella Bella, and those interactions are leveraged as a new site of negotiation over the terms of Consultation. Control over the flow of information, and where that information is available, thus creates a new site for Consultation and negotiation, outside of the GBR Agreements. Negotiated

[566] Interview 5, Interview 9.

Consultation agreements, in turn, bring in new data for maps and new funding for HIRMD, and put HIRMD into a better position to attract new industry representatives and assert its jurisdiction.

5.3 Findings of Case Study 2

The GBR Agreements are high-level land-use management agreements between a regional representative of the Haíłzaqv and the provincial Crown. They do not recognize the force of Haíłzaqv jurisdiction, constitute a treaty, or satisfy Ǧvi'ilás. And yet interviewees reveal that the resurgence of Haíłzaqv traditional governance was central to negotiating them, and that it continues to guide their implementation on Haíłzaqv land. This resurgence has had extensive authoritative, territorial, and technical components; it appears to express jurisdiction. In the lead-up to the GBR Agreements, Haíłzaqv traditional chiefs led a movement to reconnect the community with its traditional values, laws, and governance structures, by reconnecting with the territory. Then, significant work had to be done to re-vitalize and re-allocate traditional Haíłzaqv jurisdiction alongside the delegated colonial jurisdiction of the Tribal Council. The result was the Haíłzaqv Nation and HIRMD, which are constituted by both Indigenous and colonial authorities. However, although these bodies engage with the GBR Agreements, those agreements do not necessarily reflect, channel, or even empower Ǧvi'ilás. Instead, the Haíłzaqv look for legislation implementing the GBR Agreements within the colonial legal system, and continue to express Ǧvi'ilás on their own terms, and often against the framework of the GBR Agreements – for example, by working to control flows through their territory, and by establishing independent mapping and bureaucratic practices that operate to bring decision-making out of the GBR Agreements framework and into Haíłzaqv jurisdiction.

The GBR Agreements were "finalized" in 2016, when the colonial provincial government enacted its own legislation codifying the outcomes of the land-use planning process, and making them

enforceable under colonial law. *The Great Bear Rainforest (Forest Management) Act* establishes the new forest management regime within colonial law by designating the GBR area as a specific management area, and limits the annual allowable cut for ten years, at which point the management regime will be revisited.[567] The *2016 Great Bear Rainforest Land Use Order* is a ministerial order accompanying it, which effectively sets out the requirements of ecosystem-based management forestry, and precisely defines where forestry may be possible, based on the more detailed "landscape unit" mapping that occurred.[568] It also authorizes companies to begin the process of applying to log coastal forests again, even while social and economic objectives of the GBR Agreements remain a work in progress. Hailed as the final resolution of a 20-year stand-off, it may be only the beginning of the Heiltsuk Nation's work. Going forward, the Haíłzaqv plan to ensure that they see and approve specific maps of logging areas prepared by logging companies,[569] and that Consultation letters will be sent to HIRMD whenever a company applies for specific cutting permits. It is the ability of HIRMD to bring the company to the table that will determine how well Ğvi'ilás is upheld under the GBR Agreements.

The strategies that HIMRD employs may well build upon the technical aspects of jurisdiction that have been developed up until this point. They may involve requiring that industry officials visit Bella Bella to meet with Haíłzaqv officials and compare their information with Haíłzaqv data; requesting that industry officials fund detailed mapping of specific logging sites through Haíłzaqv

[567] See *Great Bear Rainforest (Forest Management Act)*, SBC 2016, c 16. The Act establishes the GBR as a management area, constrains the annual allowable cut for 10 years. *Ibid*, ss 1, 3, 7, 9, 15, 16. For an overview of the content of the Act, see Curran, *supra* note 469.

[568] See 2016 GBR Order, *supra* note 540. The 2016 GBR Order establishes land use objectives in accordance with the *Land Act*. See *Land Act*, RSBC 1996 c 245, s 93.4. It also affects the application of the *Forest and Range Practices Act,* SBC 2002, c 69 [*FRPA*]. See Land Act, *ibid*, s 93.4. The 2016 GBR Order replaced previous ministerial orders. See 2016 GBR Order*, ibid,* Preamble. See also Curran, *supra* note 469.

[569] BC does not require land use plans to be approved by government officials, but only by independent contractors hired by the company. That practice was critiqued in *Shawnigan Residents Association v British Columbia (Director, Environmental Management Act),* 2017 BCSC 107.

"ground truthing;" negotiating to refine the forestry company's proposed logging land-use maps based on that data; and negotiating for other benefits. That industry officials begin this process is required by the GBR Agreements, but the rest is built on the ability of the Haíłzaqv to meet GBR Agreement-set timelines, manage and control information, and form relationships. To date, investing in HIRMD as a bureaucratic agency tasked with upholding Haíłzaqv law, and creating and controlling maps of the territory detailing knowledge unavailable to other parties, seem to have been key strategies. These enable the Haíłzaqv to persuade industry officials to attend face-to-face meetings in Bella Bella, allowing them to better form relationships, exercise epistemological control, assert expressions of Haíłzaqv jurisdiction early in the decision-making process, and seek further investment in HIRMD. Going forward, however, their success may depend on the ability of the Haíłzaqv to impose their jurisdiction unilaterally, if need be.

These sophisticated techniques of exercising jurisdiction in a colonial context are robustly interconnected with its authoritative aspects, and are inherently territorial. HIRMD is delegated its authority by both the Tribal Council and the Yímas, and has protocols for ensuring that it carries out its responsibilities in relation with traditional government, *Indian Act* government, and the community more generally. That balance is only possible because of the extensive work that the Haíłzaqv community did to reconnect with its inherent authority and find ways of channeling it into the governmental structures authorized by colonial law – much of which has been territorial, involving the reconnection of Haíłzaqv members and traditional chiefs with their hereditary territories, and rebuilding relationships with specific places. This takes place through protest activities, children's programs, harvesting camps, restorative justice activities, and other initiatives that give contemporary expression to relationships with land that had been disrupted by colonization. It also takes place through "ground truthing" carried out by HIRMD, and through strategies of controlling Haíłzaqv

Traditional Territory that falls outside of the GBR Agreements through purchasing property and through the creation of independent Haíłzaqv programs such as an oil spill response team. Engagement with the territory re-ignites traditional understandings of Haíłzaqv authority, and vice-versa. When both are active, jurisdiction slides into focus, as does the need to develop techniques for exercising it in the contemporary colonial context.

As a strategy for expressing Haíłzaqv jurisdiction, negotiation has produced a particular set of outcomes in the context of the GBR – though they are not entirely independent from the legal context of court decisions. One impactful positive outcome has been an early income stream through which the Haíłzaqv could empower their own jurisdictional practices and institutions by way of the creation of HIRMD. Notably, however, although the GBR Agreements do provide for funding they do not provide for HIRMD, and in fact set limits on the powers of HIRMD that the Crown will recognize as well as the timelines under which it must operate. This means that its ability to exercise jurisdiction does not only emerge from the GBR Agreement, but also out of the Haíłzaqv willingness to engage in litigation and direct action, and on the ongoing development of the constitutional Consultation requirements by colonial courts. More generally, although the GBR Agreements create new requirements for forestry that will do much more to protect the ecology, animal life, and culture of the Haíłzaqv Traditional Territory than the previous regime, they do not uphold Ǧvi'ilás. Exercising Ǧvi'ilás jurisdiction depends on further Haíłzaqv negotiations with proponents. Without colonial recognition of the force of Ǧvi'ilás, the terms of negotiation will be set, in part, by the Haíłzaqv ability to enforce it, if need be. At the moment, enforcement mechanisms include the implied threat of blockades, which had such an effect prior to the GBR Agreements, and through colonial legal challenges such as injunctions for insufficient Consultation.

CHAPTER 6: CASE STUDY 3
JURISDICTION OVER HUNTING AFTER A DECLARATION OF LAW

In September 2013, the Coastal First Nations announced a ban on the Provincially-licensed trophy bear hunt within their territories, and an intention to enforce it.[570] The BC coast is home to two rare and iconic bear species: grizzly bears,[571] which have long been a symbol of the American west but have been extirpated in most areas south of the Canadian border, and an endemic subspecies of black bear known as the Kermode bear, which includes rare individuals that are entirely white.[572] In the coastal rainforest, bears primarily feed off of plants, insects, mammals, berries, and salmon, and are known to play a crucial role in the ecosystem by spreading the remains of salmon into the forest, which are absorbed by the trees.[573] Haíłzaqv have a long relationship with bears in the Traditional

[570] See "Coastal Guardian Watchmen Ready to Uphold First Nations Ban on Trophy Hunting", Press Release (10 September 2013), online: *Coastal First Nations* <coastalfirstnations.ca> [*CFN Press Release 2013*].
[571] There are approximately 15,000 Grizzly Bears in British Columbia, which is a quarter of the North American population. See Ministry of Forests, Lands, and Natural Resource Operations, "2012 Grizzly bear population estimate for British Columbia" (Report, 2012), online (pdf): *Government of British Columbia* <www.env.gov.bc.ca/fw/wildlife/docs/Grizzly_Bear_Pop_Est_Report_Final_2012.pdf>. According to the Province, an estimated 2000 inhabit the Great Bear Rainforest region. See "Grizzly Bear Hunting: Frequently Asked Questions" (7 October 2010), online (pdf): *Government of British Columbia* <www.env.gov.bc.ca/fw/wildlife/management-issues/docs/grizzly_bear_faq.pdf> [*Grizzly Hunt FAQ*]. See also James Peek et al, "Management of Grizzly Bears in British Columbia: a review by an independent scientific panel" (Report, 2003), online: *Government of British Columbia* <www.env.gov.bc.ca/wld/documents/gbear_finalspr.pdf> [*Peek et al*].
[572] There are an estimated 120,000 to 160,000 black bears in British Columbia. See "Black Bears in British Columbia: Ecology, Conservation and Management" (2001), online (pdf): *Government of British Columbia* <www.env.gov.bc.ca/wld/documents/blackbear.pdf>. However, of those, only a subset are "Kermode" bears, which carry a recessive gene for white fur, and only about 10 to 25% of those bears are white. Estimates of the white bear population range between 100-500 bears. See Philip W Hedrick & Kermit Ritland, "Population Genetics of the White-Phased 'Spirit' Black Bear of British Columbia" (2011) 66(2) Evolution 305.
[573] See Peek et al, *supra* note 571 at 5.

Territory – one that does not include a trophy hunt, and is in many ways antithetical to it.[574] The provincial government, however, licences a trophy hunt for both grizzly bears and an open hunting season for black bears each year, under the colonial *Wildlife Act*.[575] When the Haíłzaqv and other First Nations announced a ban on the trophy hunt within their traditional territories, they did not attempt to do so through the courts, by leveraging Canadian law about constitutional Aboriginal rights. They also did not try to negotiate a treaty or other agreement, as they had done with the GBR Agreements. Instead, they released a statement of Indigenous law directly to the public.

This chapter explores the jurisdictional dimensions of that declaration. Section 6.1 overviews Haíłzaqv and colonial laws and jurisdictions regarding bears: from historic Haíłzaqv relationships with bears, to the colonial legalization of hunting, and finally the tension between trophy hunting and eco-tourism that sparked the statement of Indigenous law. Section 6.2 explores interviews conducted in May of 2015, when the trophy hunt ban had been underway for about two years. Although there were few interviewees who could speak to the trophy hunt ban, their interviews still suggested that expressions of Haíłzaqv legal authority, space, and techniques of enforcing law were at play in that conflict. For each of these aspects of jurisdiction, a brief introduction is provided, followed by a discussion of the central relevant issue raised by the trophy hunt ban, and then a short reflection. The interviews reveal that the trophy hunt ban involved jurisdictional expressions through authority, legal space, and enforcement techniques. Section 6.3 provides a brief conclusion to this chapter. It offers a

[574] See Central Coast Indigenous Resource Alliance, "Stop the Hunt: Coastal First Nations Work Together to Protect Bears" (Newsletter, 2015), online (pdf): *Bears Forever* <d3n8a8pro7vhmx.cloudfront.net/bearsforever/pages/42/attachments/original/1447203034/2015_Newsletter.pdf?1447203034> [*Bears Forever Newsletter*].

[575] *Wildlife Act*, RSBC 1996, c 488 [*Wildlife Act*]. For other legislation relevant to hunting season, see *Hunting Regulation,* BC Reg 190/84 [*Hunting Regulation*]. See also *Limited Entry Hunting Regulation*, BC Reg 134/93 (version in force between April 1 2015 and May 25, 2015, including amendments up to BC Reg. 266/2014, April 1, 2015) [*Limited Entry Hunting Regulation*].

short update since 2015, and concludes that the trophy hunt ban concerns a struggle of not just laws, but also jurisdictions

6.1 Jurisdictions over Bears

6.1.1 Influx of Jurisdictions

Haíłzaqv laws and customs regarding bears reaches back to creation times. Bears are considered relatives to humans in Haíłzaqv culture, and factor into ancient Haíłzaqv songs, dances, and crests.[576] Relationships with bears are important ones: Grizzlies are said to pass between the human and spirit worlds, and to transform into humans and back into bears within Haíłzaqv Traditional Territory.[577] Under Haíłzaqv law, rights to harvest and responsibilities to steward animals are linked, and distributed geographically by way of harvesting areas held by certain families.[578] Although Haíłzaqv culture and law does not prohibit the harvest of bears, bears were not often killed, since hunting was generally linked to eating and otherwise using the bodies of animals, not

[576] See "This debate is over" (last modified 2015), online: *Bears Forever* <www.centralcoastbears.org/this_debate_is_over> [*Bears Forever, Debate*] (referring to every First Nation on the coast). For a specific Haíłzaqv example, see Brown & Brown, *supra* note 16 at 23-24 (recounting how the name of a particular big house is linked to grizzly bear protection). Haíłzaqv creation stories include episodes of bear hunting, but also accounts of intermarriage with bears, with offspring. See Boas, *supra* note 58 at 67-70, 137-139.
[577] See Bears Forever, "Bear Witness: a film by BC's, Coastal First Nations" (2013), online (video): *Youtube* <www.youtube.com/watch?v=NDg24d8fF1Q> [*Bear Witness Film*]. For more on Indigenous Nations culture regarding bears in the Northwest coast, see Hiram Ng & Satinder Dhaliwal, "Protecting Granby Valley Grizzly Bears: A Report for the Friends and Residents of the North Fork" (Report, 2016), online (pdf): *University of Victoria Environmental Law Centre* <www.elc.uvic.ca/wordpress/wp-content/uploads/2016/07/Protecting-Granby-Valley-Grizzly-Bears.pdf> at 6-8 [*Ng & Dhaliwal*].
[578] Interview 2.

recreation.[579] To kill an animal for a trophy, and leave the body to decompose, is considered disrespectful by the Haíłzaqv, and out of step with a central value of respect in Ǧvi'ilás.[580]

Colonial relationships with the fur-bearing animals of the central coast were first mediated by coastal First Nations such as the Haíłzaqv through the fur trade. However, a year after British Columbia was established as a colony, its colonial government asserted jurisdiction over animals in a 1859 game ordinance that restricted hunting at certain times of the year.[581] After confederation, the Province consolidated the ordinance and its amendments as part of its jurisdiction over "property and civil rights."[582] It introduced hunting licenses into the legislation in 1905, as a way of generating revenue to pay for the administration and enforcement of game laws.[583] At that time, settlers in southern BC would leave the cities and head out onto the land during hunting season en masse, to hunt for food.[584] It was initially the police who were responsible for enforcing game laws, but a specialized force of volunteer conservation officers soon assumed the authority, eventually evolving into paid game wardens.[585] In the early 1900s, some settlers began marketing BC as a sports-hunting

[579] See Bears Forever Newsletter, *supra* note 574 at 2, 6, 9. See also Bear Witness Film, *supra* note 577.
[580] See Bear Witness Film, *ibid* (describing the practice as disrespectful and out of step with local Indigenous values). See also Brown & Brown *supra* note 16 at 30-35 (discussing the value of "respect" and centrality to coastal first nations, including the Haíłzaqv).
[581] See George W Colpitts, *Game in the Garden: A Human History of Wildlife in Western Canada to 1940* (Vancouver: UBC Press, 2007) [*Colpitts*] at 86-87 (citing *A Bill for the Passage of an Act for the Preservation of Game*, Victoria Gazette, 23 April 1859).
[582] Game laws are considered to fall within the jurisdiction of the Province because they are matters of "property and civil rights" and also "Matters of a merely local and private Nature." Constitution Act, 1867, *supra* note 26, ss 92.13, 92.16. See also *Rex v Morley*, [1932] 4 DLR 483, 1931 CanLII 319 (BCCA).
[583] "1905-1918, The Beginning" (2015), online: *Government of British Columbia* <www2.gov.bc.ca/assets/gov/environment/plants-animals-and-ecosystems/conservation-officer-service/the-beginning-1905-1918.pdf> [*BC, Beginning*]. See also Colpitts, *supra* note 581 at 89. Hunting licenses for non-residents were introduced into the legislation in 1905, and hunting licenses for residents were added in 1913. Although "Indians" fell under federal jurisdiction, they were issued licenses as well, and treated as subject to provincial hunting laws. See Harris, Colonialism*, supra* note 299 at 37. See also Keith Douglas Smith, *Liberalism, Surveillances, and Resistance: Indigenous Communities in Western Canada, 1877-1927* (Vancouver: UBC Press, 2009) at 56-57. See also BC, Beginning, *ibid*. See also Colpitts, *ibid* at 94-96.
[584] See Colpitts*, ibid* at 89, 116.
[585] See BC, Beginning, *supra* note 583.

paradise for large game like grizzlies,[586] which assisted a national shift, after World War I, towards treating hunting as a sport, rather than a subsistence activity. That shift was already taking place as Canada's economy was intentionally directed towards large-scale, industrialized food production, which also supported this reframing of hunting away from a source of food.[587]

Sport-oriented game laws continued to regulate hunting until the 1960s, when the Province passed the *Wildlife Act*, marking a shift towards an environmentalist framework and placing more restrictions on hunting, especially of grizzlies.[588] In the 1970s, the province began to regulate the southern grizzly bear hunt by limiting the number of licenses that were available. It was applying that system province-wide by 1996.[589] That licensing system was applied to regulate the hunting of both the grizzly[590] and the Kermode black bear.[591] By the 2000s, although grizzles were officially a species at risk under federal law, neither the federal nor the provincial colonial laws protected them from this hunt.[592] Under provincial law, it was illegal to kill white-coloured Kermode bears, but black-coloured

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[586] See Colpitts*, supra* note 581 at 89, 116.
[587] *Ibid* at 100-102.
[588] Peek et al, *supra* note 571 at 15. In 1966, the *Game Act* was replaced by a *Wildlife Act* and *Firearms Act*. These Acts prohibited bait hunting, and it closed two thirds of the interior of the province except in certain areas and certain months, and subject to the protection of mothers and cubs. For a chronology of restrictions on the hunt, see Grizzly Hunt FAQ, *supra* note 571.
[589] Peek et al, *supra* note 571 at 15, 17.
[590] Grizzlies have been extirpated in most of North America as well as parts of BC, and hunting and loss of habitat remain the two biggest threats to their survival. See "Conservation of Grizzly Bears in British Columbia: Background Report" (Report, 1995), online (pdf): *Province of British Columbia, Ministry of Environment, Lands and Parks* <www2.gov.bc.ca/assets/gov/environment/plants-animals-and-ecosystems/wildlife-wildlife-habitat/grizzly-bears/grizzly_background_report.pdf>.
[591] See Wildlife Act, *supra* note 575. See also Hunting Regulation*, supra* note 575. See also Limited Entry Hunting Regulation, *supra* note 575.
[592] Jurisdiction over the environment is not set out in the Constitution, so Courts have required that it be exercised cooperatively. See especially *Friends of the Oldman River Society v Canada (Minister of Transport),* [1992] 1 SCR 3. Both levels of government study the Grizzlies, with the province designating grizzlies a "species at risk" and the federal government a "species of special concern," but neither has provided them with complete legal protection. For provincial classifications, see *Government Actions Regulation*, BC Reg 582/2004, s 13(1), under the FRPA, *supra* note 568, s 149.1(1)(a)(ii). For federal classifications, see *Species at Risk Act*, SC 2002, c 29, s 27. In order to be federally protected, a species must be added to the Schedule 1. To receive protection under the *Wildlife Act*, a

Kermode bears could be hunted – even though they are part of the same population and carry the unique recessive gene for the white fur.[593] As an added conservation measure, a few areas important to the Kermode population were closed to such hunting.[594] However, each year, hunters legally killed approximately 262 grizzlies and 3965 black bears, province-wide.[595]

6.1.2 Confluence of Jurisdictions

Haíłzaqv legal relationships with wildlife were impacted by the assertion of colonial jurisdiction, but bears were not historically a site of conflict. In the late 1700s, Haíłzaqv participated in the fur trade, and, for a period of time during in the 1800s, they even controlled trade between European ships and inland tribes,[596] in a successful enforcement of territorial jurisdiction. When the McKenna-McBride Commission arrived in 1913, there was still "a lot of game" in the territory, but the Haíłzaqv main resource – its fisheries – had been depleted by over-harvesting. The Haíłzaqv asserted exclusive hunting and fishing rights in the vicinity of their reserves, which was not recognized

species must be categorized as "endangered" or "threatened." See Wildlife Act, *supra* note 575, ss 5, 6, 26, 78. See generally Ng & Dhaliwal, *supra* note 577 at 19-21.

[593] Hunting Regulation*, supra* note 575, s 13.2.

[594] *Ibid,* s 18(1).

[595] From 1993 to 2012, the Province reported that the number of grizzlies killed by hunters in BC each year was 262 on average, and the number of black bears was 3965. See Travic Lupick, "BC grizzly and black bear deaths stable despite hunting license surge" *The Georgia Straight* (1 April 2015), online: <www.straight.com>. In 2010, the Province released a different outline of data, stating that resident hunters harvested approximately 191 grizzlies per year throughout BC, while non-residents harvested approximately 106 grizzlies, for a total of 297. See Grizzly Hunt FAQ*, supra* note 571. However, license numbers have been climbing for both species, and there is some scientific evidence that, for grizzlies, mortality rates outstrip the targets set by the province. See Travic Lupick, "Statistics reveal decade-long increase in BC hunting licenses for grizzlies and black bears" *The Georgia Straight* (25 March 2015), online: <www.straight.com>. See also Kyle A Artelle et al, "Confronting Uncertainty in Wildlife Management: Performance of Grizzly Bear Management" (2013) 8(11) Plus One e78041.

[596] See Harkin, *supra* note 18 at 130-139 (indicating, however, that the fur trade revolved around sea otter and some elk, not bears).

by colonial actors.[597] Instead, game laws passed in the early 1900s were applied to "Indians," and Indians who had not signed treaties – such as the Haíłzaqv – had little legal protection from them.[598] The imposition of game laws on Indigenous communities had become restrictive enough by the time of World War I that First Nations began to push for provincial governments to respect Indian hunting rights, with the support of the federal government.[599] However, many First Nations only benefitted from recognized Aboriginal hunting rights after the constitutional enactment of Section 35 in 1982.[600]

Jurisdiction over bears became a flashpoint when the Haíłzaqv entered into the GBR agreement process in the 2001. Although Haíłzaqv had not historically taken a position regarding the trophy bear hunt, it had long been seen as wasteful and wasn't something that Haíłzaqv citizens typically participated in.[601] Under the Great Bear Rainforest negotiations, however, the Haíłzaqv had an opportunity to secure support for long-term development strategies in eco-tourism. The most promising eco-tourism market was bear watching. By the 2000s, there were already bear watching operations in the central coast, which took tourists out on boats to view sites frequented by both the rare grizzly and the unique Kermode.[602] However, many of the bear-favoured sites in Haíłzaqv territory were frequented by hunting parties. The situation was at odds with eco-tourism.

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[597] See McKenna & McBride, *supra* note 30 at 58, 62, 67. However, the commission did not have the jurisdiction to recognize territorial or harvesting rights or jurisdictions, and instead suggested that the Haíłzaqv take up farming in their small reserve – a suggestion that was resisted during the hearing.

[598] See *Kruger and al v The Queen*, [1978] 1 SCR 104 (finding that non-treaty Indians were subject to provincial laws of general application such as hunting laws).

[599] See Colpitts*, supra* note 581 at 98-101 (noting, however, a few exceptions).

[600] Constitution Act 1982, *supra* note 45, s 35.

[601] Interview 2 (noting, however, that the interviewee recalled that some Indigenous people had served as paid guides for trophy hunters in the 1950s and 1960s).

[602] For an overview of the bear-viewing industry that First Nations have developed under the GBR Agreements, see Center for Responsible Travel, "Economic Impact of Bear Viewing and Bear Hunting in The Great Bear Rainforest of Canada" (Report, 2014), online: *Center for Responsible Travel* <www.responsibletravel.org/docs/Economic_Impact_of_Bear_Viewing_and_Bear_Hunting_in_GBR_of_BC.pdf> at 17-18, 25-6 [*CREST Study*]. See also Bear Witness Film, *supra* note 577.

6.1.3 Halocline of Jurisdictions

In 2012, ten First Nations on the Central and North Coast released a statement banning the bear hunt from their territories under Indigenous law, throughout a contiguous area which included the GBR. It declared that they would "protect bears from cruel and unsustainable trophy hunts by any and all means."[603] The umbrella group of the Coastal First Nations had advocated for the end of the trophy bear hunt for years before the declaration was made.[604] Environmental groups had also called for a re-evaluation of the grizzly hunt, leading to a brief moratorium by the Province in 2001.[605] In 2012, however, the ten First Nations took a different stand, declaring the bear hunt illegal. Once they had done so, the colonial government quickly responded with an assertion of its own jurisdiction: in a press statement, it stated, "given that the province has the responsibility for setting the harvest limits, we'd ask them to respect that authority."[606]

The trophy hunt consisted of hunts for the black bear and grizzly under colonial law. Central coast grizzlies were subject to a "limited entry" hunt each spring and fall, during which a specific number of licenses for that year's estimated "allowable harvest" were issued to resident applicants by lottery, and to non-residents by sale through a resident hunting guide.[607] Black bears on the central coast were subject to an "open hunt" each spring and fall, during which any hunter with a hunting

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[603] See "First Nations on the Central and North Coast Say No to Trophy Bear Hunt", Press Release (18 September 2012), online: *Coastal Guardian Watchmen* <coastalguardianwatchmen.ca>.
[604] *Ibid*.
[605] See Grizzly Hunt FAQ, *supra* note 571 at 1.
[606] See "Bear hunting ban declared by 10 BC First Nations", *Canada Press* (13 September 2012), online: <www.cbc.ca>.
[607] The grizzly bear hunt is a "limited entry hunt," which requires a specific license that is only issued by lottery, out of a number of licenses identified as an "allowable harvest" by the Province for each resource management area, each year. See Peek et al, *supra* note 571 at 17, 41-43. For the legislative framework, see Wildlife Act, *supra* note 575, ss 16, 47. See also Limited Entry Hunting Regulation, *supra* note 575, ss 4(1)(c), Schedule 1. The limited entry hunt began in the 1970s, and was imposed province-wide in 1996; prior to that, grizzly bear hunting was administered out through an "open season" without a quota. See Peek et al, *ibid* at 15.

permit and black bear permit can kill two black bears, including black-phase Kermode bears, though no white ones.[608] There was a requirement to retrieve the meat of a black bear, but in the case of a grizzly bear, a hunter may choose to remove only the hide, instead.[609]

In 2013, the First Nations announced their intention to enforce the ban,[610] through a website hosted by a working group of the Coastal First Nations, called "Bears Forever."[611] That year, it released a short documentary about the death of a grizzly bear nick-named "Cheeky" that had been hunted by a National Hockey League player near Bella Bella, and left to rot in the estuary after the hunt.[612] It then sponsored a poll which found that BC citizens strongly supported the ban.[613] In 2014, the coalition announced an independent study showing that bear watching generated more economic

[608] During "open season," a hunter who has purchased a valid hunting license and black bear license may hunt for two black bears in any open management zone area; there is no cap on the number of hunters. Hunting Regulation, *supra* note 575, ss 4-6, 11(1)(b), Schedule 5 at Part 1. However, white phase bears are protected, as are bears under two years old and bears accompanying them. There are also limits on hunting methods and restrictions associated with the area of the hunt. *Ibid,* ss 13.7(b)-(c), 16(4)(b), 17(1)(e), 17(1)(m), 19. See also Ministry of Environment, Fish and Wildlife Branch "The Wildlife Act: Managing for Sustainability in the 21st Century" (Discussion Paper, 2007), online (pdf): *Government of British Columbia* <www.env.gov.bc.ca/fw/wildlifeactreview/discussion/discussionpaper_wildlifeact.pdf> at 21. See also "2018-2020 Hunting and Trapping Regulations Synopsis" (2018), online (pdf): *Ministry of the Environment* <www2.gov.bc.ca/assets/gov/sports-recreation-arts-and-culture/outdoor-recreation/fishing-and-hunting/hunting/regulations/2018-2020/hunting-trapping-synopsis-2018-2020.pdf> [*Hunting Synopsis*].

[609] See *Wildlife Act General Regulation*, BC Reg 340/82 (Past version: in force between Apr 1, 2013 and Mar 31, 2015), s 12.01.

[610] See CFN Press Release 2013, *supra* note 570.

[611] See "New Website Launches in Support of First Nations Ban on Trophy Hunting in BC's Great Bear Rainforest", Press Release (4 September 2013), online: *Coastal First Nations* <www.coastalfirstnations.ca>.

[612] See Bear Witness Film, *supra* note 577. See also "We're bringing the Bears Forever Project to you" (last modified 2015), online (blog): *Bears Forever* <www.centralcoastbears.org/bears_forever_is_coming_to_your_community> [*Bears Forever Tour*]. After the news was made public by Bears Forever, the player Clayton Stoner was charged with hunting without a permit and pled guilty when he could not convince the Crown that he still met the requirements of a BC "resident". See Yuliya Talmazan, "NHL player pleads guilty to killing grizzly bear in BC without a proper license", *Global News* (27 January 2016), online: <globalnews.ca> [*Talmazan*].

[613] See "New Poll shows overwhelming support for First Nations ban on Trophy Hunting in the Great Bear Rainforest", Press Release (4 September 2013), online: *Coastal First Nations* <www.coastalfirstnations.ca>.

development than trophy hunting,[614] and that 7200 BC people had signed a pledge to uphold the ban.[615] Many of the signatories were drawn from the BC public.

6.2 Haíłzaqv Perspectives

Interviews were conducted in May 2015, while the Haíłzaqv trophy hunt ban was underway. At the time of the interviews, there were fewer available individuals with knowledge of the relatively recent trophy hunt ban than there were individuals with knowledge of the other case studies, so there was less information available for this chapter. Individuals who were working within the Haíłzaqv community on bear hunting and enforcement of the ban were asked about jurisdiction over bears and hunting. In this case study, they did not take issue with the use of the term "jurisdiction" in the context of the statement of Indigenous law. Instead, they merely noted the difficulties they faced in enforcing it in the context of a hunt licensed under provincial jurisdiction.

6.2.1 Authority in the Trophy Hunt Ban

"Juris"-"diction" is both law's speaker – the site of enunciation pointing us to the authority to speak the law – and law's speech. The trophy hunt ban is clearly Haíłzaqv legal speech: it articulates what is and is not legal under Haíłzaqv law. It is explicitly a formulation of Haíłzaqv and other Indigenous laws that is based on traditional legal values but has evolved to respond to contemporary concerns. The trophy hunt ban is also a clear identification of law's speaker, but in a colonial legal

[614] See Heather Libby, "New Study: Coastal First Nations ban on trophy hunting bears benefits the BC economy" (last modified 2015), online (blog): *Bears Forever* <www.centralcoastbears.org/new_study_coastal_first_nations_ban_on_trophy_hunting_bears_benefits_the_b_c_economy>. See also CREST Study, *supra* note 602.

[615] See Heather Libby, "7,200 Strong!" (last modified 2015), online (blog): *Bears Forever* <www.centralcoastbears.org/7_200_strong> [*Libby*].

context, this is a more difficult assertion for Indigenous law to make. Interviewees revealed that some colonial actors relied on the authority of colonial law over themselves and the Provincial territory to ignore Indigenous law. Therefore, formulations of the trophy hunt ban focus as much on identifying and explaining the underlying values of Indigenous law as asserting it.

6.2.1.1 Subtheme – Underlying values

The coast-wide trophy hunt ban evolved out of an application of the underlying values of Ǧvi'ilás to contemporary circumstances that transcended Haíłzaqv Traditional Territory. Ǧvi'ilás did not altogether ban hunting bears, historically, but it has always included a law of not wasting animals: their meat and bodies should be consumed and put to use, and, if necessary, shared with others in order to do so.[616] According to one interviewee, although the Haíłzaqv did not historically oppose the trophy grizzly bear hunt, and members of another coastal First Nation had even served as guides, they did not participate in it.[617] As the community invested in a resurgence of traditional law, and considered the bear hunting situation within the contemporary ecological and economic context, understandings of the law evolved.[618] When the Haíłzaqv decided that the trophy hunt could no longer be ignored, they drafted a declaration banning it under tribal law that was circulated to other First Nations.[619] Ultimately it was adopted by the Coastal First Nations, with the following explanation:

> Times have changed on the BC coast. With fewer fish and smaller trees, both animals and people are trying to adapt…. [Bears] factor into the songs, dances and crests of every First Nation on the coast. They are more than neighbours; in many families, they are considered relatives. That's because bears move fluidly between the worlds in First Nations oral histories, transforming into people, even marrying humans. They are teachers, healers, and protectors. Killing a bear for no reason represents a grave breach of protocol…. Modern First Nations

[616] Interview 2. See also Brown & Brown, *supra* note 16 at 31. See also Bears Forever, Debate, *supra* note 576.
[617] Interview 2.
[618] Interview 2.
[619] Interview 5.

> governments are responsible for the health of our territories, now and for future generations.[620]

Following up on a declaration of Indigenous law, this statement provides a nuanced articulation of Indigenous authority to speak law about bears, which reveals the basis of the assertion of law to be related to relationships, history, responsibility, and contemporary concerns.

Although the ban was adopted and publicized by the Coastal First Nations, its assertion required reaching out to colonial settler communities as well. As one interviewee explained, a jurisdictional argument kept occurring: "the Guide Outfitters Association [would tell us we] need to respect colonial law; [we would tell them,] 'no, you know, please respect our law.' And you clash, and in the end you don't get anywhere because neither recognize each other's laws."[621] Bringing the broader, colonial community under within the jurisdiction of Ǧvi'ilás required coordination with the colonial settler community. Several allied ENGOs invested in Haíłzaqv efforts to steward grizzlies, and the Coastal First Nations project Bears Forever was founded specifically to communicate with the broader British Columbia settler population in order to appeal for its support.[622] On its website and in its materials, Bears Forever focussed on three reasons for the ban: first, that the practice of trophy hunting wastes bears and their role in the ecosystem; second, that it generates far less revenue for communities and governments than eco-tourism; and third, that it is taking place without a sound scientific understanding of bears, which are only now being truly studied.[623] These ecological,

[620] See Bears Forever, Debate, *supra* note 576. See also Bears Forever Newsletter, *supra* note 574 at 9 ("people across the province share these values. Trophy hunting for bears is wasteful and unfair"). See also Bears Witness Film, *supra* note 586.
[621] Interview 6.
[622] Interview 5. *Protecting Bears* (2017), online: *Coastal First Nations* <coastalfirstnations.ca/our-environment/protecting-bears/>.
[623] *Ibid*.

economic, and scientific values were shown to underlie the expression of Indigenous legal authority, and happen to be values shared by the colonial legal system as well.

6.2.1.2 Reflections on Authority Post-Declaration

The trophy hunt ban is a new expression of Ǧvi'ilás and other Indigenous legal systems, but it is one that builds upon traditional legal values. Instead of focussing on who is subject to Indigenous laws, and where and what happens when Indigenous and provincial law contradict, the publicity materials of the Coastal First Nations focus on the "why" of the law – the cultural, ecological, economic, and scientific values that underlie and are expressed in Indigenous law. Notably, those values are ones that are shared, to some extent, with the colonial legal system. The trophy hunt ban, then, is not only jurisdictional because it identifies law's speaker and articulates law's speech, but also because of the fact that it explicitly grounds itself in the pre-legal, shared understandings that give law its authority. By focussing on values that are shared by many legal cultures, it appeals for authority within colonial jurisdiction as well.

6.2.2 Spatial Dimensions of the Trophy Hunt Ban

Jurisdiction organizes the space of a specific legal community. The trophy hunt ban engages multiple, overlapping jurisdictional spaces that do not directly engage with one another. The bear hunt is an expression of colonial territoriality, at a provincial scale, while the trophy hunt ban is an expression of Indigenous territoriality, at a regional scale. To the extent that they do not organize space through joint legal activities, they each map the same territory separately, without accounting for each other's overlapping claims to jurisdiction. In addition to these two territorialities, there is also the territories of bears: bears range, with grizzly populations roaming much of the province (though

not island territories such as Haida Gwaii) and into surrounding areas,[624] and black bears covering most of North America (though their Kermode subspecies are primarily restricted to the central coast, from Bella Bella in the south to the bottom of the Alaskan panhandle in the north).[625] Space is a central issue for the trophy hunt ban.

6.2.2.1 Subtheme – Territory and Scale

The trophy hunt ban references Indigenous territoriality on a regional scale all along the central coast. It is on the basis of un-ceded rights and authority to manage its Traditional Territory that the Haíłzaqv asserted jurisdiction over relationships with bears within their territory.[626] Eight other members of the coastal First Nations signed on with the same stance, asserting separate jurisdictions to enact the same laws within their own traditional territories, which make up at least 74,000 square kilometers, combined.[627] As explained by one interviewee, this was necessary because bears range over the territories of many Indigenous and settler communities, each of which have different laws:

> It's difficult because no one else knows about our…laws. You go to the next community south and the next community north, and nobody knows our Ǧvi'ilás. Prince Rupert, nobody knows. It's because we come from a small circle of people that ever own laws and own structure.[628]

In addition to exercising stewardship over bears on the basis of Indigenous-defined territorialities, the Haíłzaqv have attempted to exercise regional territorial jurisdiction over bears through the GBR

[624] See "Grizzly Bear Population Status in BC" (last modified November 2012), online: *Government of British Columbia*, <www.env.gov.bc.ca/soe/indicators/plants-and-animals/grizzly-bears.html>.
[625] See Ministry of Environment, Lands and Parks, "Black Bears in British Columbia: Ecology, Conservation and Management" (2001), online (pdf): *Government of British Columbia* <www.env.gov.bc.ca/wld/documents/blackbear.pdf>.
[626] See Bears Forever Newsletter, *supra* note 574 at 4.
[627] *Ibid* at 2, 4. See also "Place" (2017), online: *Coastal First Nations* <coastalfirstnations.ca/our-communities/place/>.
[628] Interview 9.

Agreements with the Province, where they pushed to increase the amount of habitat set aside for grizzlies and create corridors connecting mapped habitat polygons into a continuous space for the long-distance migrations that it has learned grizzles undertake.[629]

However, a regional territorial claim is smaller than the scale of the hunt. Kermode bears live only in the central coast, but black bears and grizzly bears range over most of BC, and it is on the scale of the province that the trophy bear hunt occurs.[630] After opening the black bear hunt province-wide, the Province issued black bear licenses on the basis of spatial resource management units, two of which overlay much of Haíłzaqv Traditional Territory.[631] For the grizzly bear hunt, licenses are issued by the Province on the basis of smaller zones within resource management units.[632] Since the GBR negotiations were regional in scale, they did not have the jurisdiction to address hunting in the GBR area, and the Haíłzaqv were unable to secure even a bear conservation zone where hunting would be banned.[633] The Bears Forever campaign addressed this gap: although it focussed on upholding the regional bear hunting ban, it began a tour through southern BC that called for a change

[629] The ecosystem-based management operating guidelines established under the GBR Agreements protect "Class 1" Grizzly Bear habitat from all logging, and "Class 2" habitat from some of that logging. During negotiations, the Haíłzaqv pushed for more "Class 1" habitat, as well as corridors connecting habitat. To do so, they tabled independent science based on snared grizzly bear fur, which established that grizzlies travel longer distances than previously thought, and require large protected areas. See Interview 5. See also Housty, *supra* note 546.
[630] See Wildlife Act, *supra* note 575. See also Hunting Regulation, *supra* note 575. See also Limited Entry Hunting Regulations, *supra* note 584.
[631] See Hunting Regulation, *ibid*, s 3(e), Schedule 5. Most of Haíłzaqv Traditional Territory is overlaid by Region 5, management units 5-8 and 5-9; a larger number of units is implicated in the trophy hunt ban overall. For a map of the management units, see Hunting Synopsis, *supra* note 608 at 2, 27, 57, 64. Note that Haíłzaqv Traditional Territory is also overlaid by two "Grizzly Bear Protection Units." See Grizzly Hunt FAQ, *supra* note 571 at 2-3.
[632] See Limited Entry Hunting Regulations, *supra* note 584, s 6, Appendix 1. Grizzly Hunt FAQ, *ibid.*
[633] Interview 5 (noting that a coordinated campaign to create a haven for bears in an area shared by different First Nations, outside of the terms of the GBR Agreements).

to hunting regulations at a provincial scale.[634] Polls were also sponsored to survey BC residents throughout the province about their attitudes towards the trophy hunt province-wide.[635]

6.2.2.2 Reflections on Space Post-Declaration

The bear hunting ban faces two key spatial problems. First, bears exceed Haíłzaqv Traditional Territory: the Kermode bears and grizzly bears that attract ecotourists both range into the territories of surrounding First Nations, while grizzlies and black bears, more generally, extend beyond even the boundaries of the province. Second, the Haíłzaqv organization of legal space is not generally recognized by the colonial legal community, and attempts at jointly organized space through the Great Bear Rainforest Agreements are too nascent and limited to address hunting. Combining efforts with other First Nations had a powerful effect in terms of the territory of the trophy hunt ban and the prominence of the issue to non-Indigenous residents, but it still did not speak to the range of many of the bears it sought to protect, or the Province-wide territory of the bear hunt. Therefore, a second territorial strategy asked colonial allies to engage with the territory of the bear hunt in their own legal community, Province-wide.

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[634] See Bears Forever Tour, *supra* note 612.

[635] See Heather Libby, "New poll shows overwhelming support for First Nations ban on trophy hunting in the Great Bear Rainforest" (4 September 2013), online (blog): *Bears Forever* <www.centralcoastbears.org/new_poll_shows_overwhelming_support_for_first_nations_ban_on_trophy_hunting_in_the_great_bear_rainforest> (finding that 87 per cent of British Columbians supported the trophy hunt ban, and 80 per cent supported a province-wide ban on grizzly bear hunting). See also "Survey on Animals in BC and Alberta", poll (5 October 2015) online (pdf): *Insights West* <insightswest.com/wp-content/uploads/2015/10/Animals2015_Tables.pdf> (finding that 90 per cent of British Columbians did not support trophy hunting).

6.2.3 Techniques of Ğvi'ilás in the Trophy Hunt Ban

Jurisdiction is a practice: it is a way of gesturing to and enacting the power of the law, through techniques that give law form. In the colonial legal system, one important way that law is enacted is through force: force can only be legitimized by law and, in a colonial state system, only enacted by the state. Uniformed police, court rooms, and prisons are important tools in enforcing law and in making it symbolically visible. In a colonial context, the use of force, the confiscation of property, or the removal of persons from non-private lands would be coded as a crime by the colonial legal system, and lead to detainment within that system. Haíłzaqv law, therefore, could not depend upon force of any kind to enforce its laws or make them symbolically visible. The trophy hunt ban had to find other forms of symbolic expression and coercive force.

6.2.3.1 Subtheme – Enforcement without Force

Giving force to the trophy hunt ban required a creative approach to making the law binding. It was not clear how the law could be enforced in a context where colonial law claimed a monopoly on both the authority to decide what was legal and on the use of force itself. As one interviewee stated, "I don't know how you get there. It's really complicated."[636] One main technique has been the "Estuary Guardian" program that hired community members to live at grizzly hunting inlets during the bear hunt.[637] Estuary guardians are instructed to maintain a presence in the area, notify any hunters that hunting is banned in Haíłzaqv Traditional Territory, and witness what happens with respect to

[636] Interview 5.
[637] Interview 5. Going forward, the Haíłzaqv were considering allocating Coastal Guardian Watchmen resources towards the estuaries. Coastal Guardian Watchmen have already been involved in monitoring commercial fishing and other fisheries activities in Haíłzaqv territory. *Ibid*; Interview 9.

the bears.[638] They have also erected signs in some of those same places, stating that the Wuikinuxv, Haíłzaqv, Kitasoo/Xai'Xais and Nuxalk had banned the trophy hunt under traditional laws.[639] Although Estuary Guardians are unable to interfere with the actual activity of any hunter without opening themselves up to various charges under colonial law, they are able to "stay there, he has a presence, same as we've always done," and call in additional support from any of the four nearby First Nations communities that have signed the ban, if need be.[640]

In addition, the Haíłzaqv have worked to reduce hunting among colonial allies through publicity campaigns that raise the profile of the hunt, the ban, and the problems underlying it. As one interviewee stated, "in terms of the trophy hunt, I don't know if [Estuary Guardians] can be much more than a presence…. [So t]he most effective tool is to expose it, because there is huge public opinion."[641] One important campaign was the petition pledging to uphold the trophy hunt ban on Coastal First Nations' territories, which was signed by over 7000 people.[642] Another encouraged people to apply for grizzly hunting licenses in the provincial lottery, and then surrender them to the Coastal First Nations so they could not be used.[643] At the same time, an ENGO worked to purchase grizzly bear hunt guiding licenses, at one point owning the rights to over 28,000 square kilometers of guiding territory, keeping guided hunts out of that area.[644]

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[638] Interview 5.
[639] Interview 5. See also Bear Witness Film, *supra* note 577.
[640] Interview 5.
[641] Interview 5.
[642] See Libby, *supra* note 615.
[643] "Bear Viewing Guides Set Deadline of September 10 for Chance to Trade Hunting Tags for Once-in-a-lifetime Trip" (1 September 2014), online (blog): *Bears Forever* <www.centralcoastbears.org/bear_viewing_guides_set_deadline_of_september_10_for_chance_to_trade_hunting_tags_for_once_in_a_lifetime_trip>.
[644] See "20 years of work to end the sport hunting of grizzly bears" (2018), online: *Raincoast Conservation Foundation* <www.raincoast.org/troph-hunting/>. However, in the end, the strategy had limited impact, according to one interviewee. Although the purchase of guiding licenses kept out guided operations through which non-

Another campaign revolved around raising shame, rather than support. One hunter who chose not to abide by Haíłzaqv law was willingly photographed by the Estuary Guardian with a grizzly he had shot.[645] He turned out to be a professional hockey player, which provided a platform for publicizing the issue in a graphic and high profile way.[646] The photos and the story made the news, and protestors attended hockey games with signs condemning the hunt.[647] The incident also led to charges under the colonial legal system.[648]

6.2.3.2 Reflections on Techniques Post-Declaration

In the case of the trophy hunt ban, upholding Ǧvi'ilás means stopping activities that are explicitly sanctioned by colonial law. Since colonial law does not recognize Haíłzaqv legal decision-making regarding hunting, and criminalizes force that might be used to enforce that ban, the Haíłzaqv have found other techniques of interrupting the hunt and implementing their jurisdiction. To address individual hunters, they placed a prominent sign as well as "watchmen" into an estuary where hunting often takes place, as a technique of symbolically asserting jurisdiction during the activity of hunting. To address the colonial legalization of hunting, they became involved in campaigns aimed at securing support among the colonial population, and putting them into the hands of allies of the ban, thereby coopting the colonial legalization of hunting and making it meaningless in those cases. Most visibly, they have publicized the hunt, the trophy hunt ban, and hunters who violate it through the use of

residents could have hunted, it did not prevent resident hunters who lived in BC from killing bears in those areas. Moreover, the NGO is understood to have had to run voluntary "hunts" in order to keep the licenses. Interview 5.

[645] Interview 5.

[646] See Mychaylo Prystupa, "NHL star's court fight over grizzly a 'tipping point' for trophy hunt ban", *National Observer* (9 October 2015), online: <www.nationalobserver.com>.

[647] Interview 5. See also "Animal activists protest outside Ducks home opener against Clayton Stoner over hunt charges" (13 October 2015), online: *National Hockey League* <www.nhl.com/news/animal-activists-protest-outside-ducks-home-opener-against-clayton-stoner-over-hunt-charges/c-782925>.

[648] See Talmazan, *supra* note 623.

video, photos, and media that could quickly transfer images and messages across time and space into the hands of allied communities: not only through an online film, but through photos of a hunter who was identified and publicly shamed in Vancouver, outside of the Haíłzaqv territory and community, in the colonial media and among citizens of the colonial legal regime.

6.3 Findings of Case Study 3

The trophy hunt ban is a unilateral assertion of Haíłzaqv law that is almost explicitly jurisdictional. Through signs, declarations, and websites, the Haíłzaqv and neighbouring Indigenous communities communicate not only the content of the trophy hunt ban, but also the fact that they are the communities who hold and assert those binding laws; that they are law's speaker. The trophy hunt ban itself reflects this: it has authoritative, territorial, and technical aspects. However, because Indigenous jurisdictions are not recognized by colonial law, and it is colonial law that licenses the trophy hunt and guides the behaviour of most people in BC, upholding the trophy hunt ban has required the Haíłzaqv to build on those qualities or aspects of jurisdiction in ways that engage the colonial legal system. This was done indirectly: rather than litigate or negotiate with the provincial government itself, this expression of Haíłzaqv jurisdiction engaged BC citizens, as a point of contact with the BC legal system.

The trophy hunt ban has authoritative, territorial, and technical aspects that were elaborated to engage colonial citizens within Haíłzaqv jurisdiction. In terms of authority, the trophy hunt ban is an explicit statement of the Haíłzaqv ability to determine the law, but it also references some of the pre-legal values from which the law derives authority within the Haíłzaqv legal system, such as respect, conservation, and sustainability. These values also underpin parts of the colonial legal system. Spatially, the trophy hunt ban is a claim premised on the Traditional Territory of the Haíłzaqv and similar

relationships of other Indigenous communities with surrounding territories. However, because the hunt is determined at the level of colonial provincial territoriality, efforts to enforce the ban have engaged with colonial spaces, as well as traditional territories: first, through the purchase of rights to specific hunting zones, and then through an appeal to citizens of the province to re-examine whether the hunt should continue to be licensed throughout their province. In terms of techniques, the trophy hunt ban represented itself through signs, statements, and other symbolic communications, but faced difficulties with enforcement in a colonial context. Through photography and media, attempts to communicate the ban and to deal face-to-face with individual hunters became a much broader public awareness campaign that attracted demonstrations in Vancouver and support province-wide. Each aspect of Haíłzaqv jurisdictional expression was thus tailored to engage with colonial citizens, who operate within the colonial legal framework.

Since the interviews in this chapter were completed, the campaign has had success. In 2017, the provincial government announced that the trophy hunt for grizzlies would be banned in BC, as well as all hunting for grizzlies in the GBR area.[649] After surveying its citizens, however, the government elected to cancel the grizzly hunt altogether.[650] There is no longer any licensed grizzly hunt in BC.[651] It has been ended within the territory of the province, under provincial authority, through provincial legislation and enforcement mechanisms, with no special provisions for the

[649] See "BC government putting an end to the grizzly bear trophy hunt", Press Release (14 August 2017), online: *Government of British Columbia* <news.gov.bc.ca>. See also "BC bans grizzly bear trophy hunting, will completely ban grizzly hunt in Great Bear Rainforest", *The Toronto Star* (14 August 2017), online: <www.thestar.com>.
[650] See "B.C. government ends grizzly bear hunt", Press Release (18 December 2017), online: <news.gov.bc.ca> [*BC Press Release*].
[651] BC's Limited Entry Hunting Regulations no longer mention grizzlies or provide for a hunting season for them. Limited Entry Hunting Regulation, *supra* note 575. However, Aboriginal people can hunt grizzles pursuant to their Aboriginal rights – such as for food, social, and ceremonial purposes. See BC Press Release, *ibid*.

territories of the First Nations who issued the trophy hunt ban. However, the black bear hunt has not been altered,[652] and allies of the trophy hunt ban remain concerned.[653]

As a unilateral assertion of jurisdiction, the trophy hunt ban had mixed outcomes. On the one hand, the territorial ban under Indigenous laws, including Ǧvi'ilás, required creative approaches to enforcement, since direct interference with the hunt could have attracted penalties under the colonial legal system. On the other hand, it attracted the collaboration of ENGO allies and the support of thousands of colonial citizens who promised to abide by it. Ultimately, it was most successful in its appeal to legal values that it shares with the colonial legal system, and in communicating through media. This strategy was neither focussed on legal remedies nor on negotiations, but on colonial politics at a grassroots level. It was ultimately successful, leading to changes to the colonial provincial legal system. The victory is an important one, but it did not acknowledge the existence of Indigenous jurisdiction. Changes to colonial law may be needed for the expressions of Haíłzaqv jurisdiction to effectively uphold Ǧvi'ilás in a colonial context, but as long as they are on colonial terms, they may be only partially effective.

[652] The regulations pertaining to the black bear hunt on the central coast are substantially unchanged. See Hunting Regulation, *supra* note 575.
[653] See Brian Falconer, "Save the Great Bears campaign update" (2017), online: *Raincoast Conservation Foundation* <www.raincoast.org/2017/11/save-the-great-bears-campaign-update/>.

CHAPTER 7: CONCLUSION

The Haíłzaqv have been living in their Traditional Territory since long before colonial jurisdiction flowed onto it. Today, Haíłzaqv land uses and stewardship practices come into conflict with colonial laws. In this project, I have asked whether and how such conflicts should be understood to take place between jurisdictions, reflecting the interaction of both the power of Indigenous legal systems as well as the power of state law over the same environment. Using indicators of jurisdiction derived from colonial critical legal theory – authority, territory, and technique – I have suggested a framework for identifying colonial jurisdiction outside of the framework of colonial law. I then applied that framework to three land and resource conflicts between Haíłzaqv and colonial actors. I found that, although it is not immediately visible from a colonial perspective, expressions of Haíłzaqv jurisdiction can be identified in each. From within the perspective of colonial law, the Crown holds exclusive territorial jurisdiction on the central coast; but from a different perspective, a stratification of separate, stratified jurisdictions can be seen.

This Chapter begins, in Section 7.1, with a recap of the project, and the findings of each of the case studies. In Section 7.2, I reflect upon what the case studies reveal about expressions of Haíłzaqv jurisdiction that appear in relation to colonial jurisdiction, across this project's three identified indicators of authority, space, and techniques. Next, in Section 7.3, I look at common themes that offer more insight into jurisdiction, such as the interdependence of each aspect with the others, the interrelationship of different strategies of engaging with the colonial legal system, and the

adaptability of Haíłzaqv jurisdictional expressions. In Section 7.4, I explore some of the differences between the case studies, and how they result in different expressions of Haíłzaqv jurisdiction. In Section 7.5, I look at how the Haíłzaqv have engaged with different points of colonial jurisdiction – courts, government, and citizenry – and how these engagements have produced different kinds of results. I suggest that there is a preferred point of engagement for expressions of Haíłzaqv jurisdiction, though no single point of engagement ever occurs in isolation. Finally, in Section 7.6, I offer some tentative conclusions: that expressions of Haíłzaqv jurisdiction are at work in the central coast, even if colonial law does not recognize them as such; that Haíłzaqv and colonial jurisdictions remain separate even as they overlap and interact; and that the result is a rich environment for the development of law, under the influence of two very different jurisdictions.

7.1 Review of Project and Findings

This project has applied a jurisdictional lens to conflicts between colonial and Haíłzaqv communities over land and resources. From the perspective of colonial law, these conflicts appear as Haíłzaqv challenges to the law: as civil unrest or political efforts to change the status quo. In this project, I have asked whether and in what ways these challenges to the law are better understood as the interaction of two legal systems, which overlap. In Chapter 1, I identified this question and positioned it within the context of colonization in BC as it was carried out through law, raising the strategic question of whether and how colonial law can assist with decolonization.

In Chapter 2, I discussed the methodological approach used to investigate this question, based on institutional ethnography. First, criteria indicative of jurisdiction were identified through theory; then, semi-structured, qualitative interviews were conducted with individuals within the Haíłzaqv community about three different conflicts over land and resource conflicts between the Haíłzaqv and

the state; finally, the criteria indicative of jurisdiction were applied to each of those case studies, to explore whether and how Haíłzaqv expressions of jurisdiction was at work. The first case study was conflict over herring fisheries, a struggle that has been adjudicated by colonial courts in the *R v Gladstone* case, but continues. The second was with respect to logging, a conflict over clear-cutting on the central coast that resulted in negotiated government-to-government land use planning agreements known as the GBR Agreements. The third was with respect to trophy hunting for bears, where a grassroots campaign for the implementation of Indigenous law shaped citizen engagement in politics and law-making.

In Chapter 3, I identified the criteria that would be treated as indicators of jurisdiction through a literature review of critical legal theory on jurisdiction and related scholarship. First, however, I looked at work in legal pluralism and Indigenous legal traditions which deals with jurisdiction, and found that although those fields have not dealt with it in any depth, they provide important grounding and orientation. Legal pluralism demonstrates that concepts taken from theoretical work can be used to study law from an external perspective, defining it in ways that it would not define itself, and illuminating aspects of law that would not otherwise be visible. Work from the study of Indigenous legal traditions demonstrates how some Indigenous legal systems and their jurisdictions operate, and also offers the insight that Indigenous legal systems cannot be understood simply by studying them from such an outsider perspective. The idea of jurisdiction that has been applied in this project, then, is developed based on a critical, external approach to colonial law, crafted to resonate with work from within Indigenous legal traditions. It is not necessarily the Haíłzaqv concept of jurisdiction or 7àxuài, but it is the concept of jurisdiction as derived from colonial law and critical theory, applied analogically to Haíłzaqv legal struggles. What this project has explored is how expressions of Haíłzaqv jurisdiction

manifest in the context of colonial jurisdiction. That exploration may also resonate with Haíłzaqv understandings of jurisdiction – but it may not.

From there I moved on to review work in critical legal theory, from which I derived three different aspects of jurisdiction. First, jurisdiction is a technique; second, it authorizes law; and third, it has a spatial dimension. Each of these qualities of jurisdiction was explored in turn, through critical theory and related scholarship, alongside work from Indigenous legal traditions that resonates with that work. Critical legal theory and related work in critical theory and legal history offer the perspective that jurisdiction is a technique, or a way of doing things. The etymology of the word "jurisdiction" directs our attention towards how we come to know the law: it indicates that the law ("juris") is being articulated ("dicto"). Jurisdiction can thus be understood as a way of speaking, and of giving law reality and force in social life. Critical legal theory also points out that jurisdiction "authorizes" law, invoking the power and authority to speak in the name of the law as well as the authority of the law itself. Legal and political theory flesh out what it means for jurisdiction to give law authority or legitimacy, pre-legally, constitutionally, and in specific legal transactions. Finally, critical legal geography explores the spatiality of law, and how jurisdiction maps law and the spaces that law produces. Work in social geography offers other possibilities for understanding how jurisdiction can be spatial, including through territory.

In Chapters 4, 5, and 6, I applied an analysis of authority, space, and techniques to the three case studies, using them as indicators per the methodology of Part Two. Struggles around herring management, forestry, and bear hunting each provided a case study of conflict between Haíłzaqv and the colonial government over land and resources, which have different orientations towards state law. The first case study deals with the struggle over the herring fishery. In 1996, the Haíłzaqv asserted Ǧvi'ilás through colonial courts, and won recognition of a constitutional, commercial harvesting right

for herring SOK. However, ongoing struggles over herring continue, especially with respect to management: the DFO has licensed a number of other herring fisheries that substantially reduce stocks, putting the Haíłzaqv's constitutional rights into jeopary much of the time. The second case study deals with the GBR negotiations. In 2001, the Haíłzaqv were drawing on Ǧvi'ilás at the start of negotiations with the province towards a government-to-government agreement establishing joint land-use planning, economic benefits, and a protocol for constitutional Consultation. The GBR Agreements establish a different framework for development and political relationships in Haíłzaqv Traditional Territory. The third case study deals with the trophy hunt ban. In 2015, the Haíłzaqv and other First Nations asserted that Indigenous law prohibited the provincial government's trophy hunt for grizzly bears and black bears, appealing directly to the public through media and grass roots activism. That campaign was ongoing when interviews were conducted in 2015.

Members of the Haíłzaqv community who engaged in qualitative, semi-structured interviews were asked to share their perspectives on Haíłzaqv law and jurisdiction in the case studies with which they were most familiar, with particular attention to their understanding of how authority, spatial concepts, and techniques factored into that case study. During analysis, these three indicators of jurisdiction were coded in all interviews. A review of the history of the conflict, documents governing it such as court decisions and negotiated agreements, and scholarship on it was also undertaken. Each of the case study chapters – Chapters 4, 5, and 6 – provides a jurisdiction-focussed overview of the history of the struggle, and then discusses what interviewees said about each of the three indicators of jurisdiction. In each, all three indicators were found to be present, in a variety of formations which were related to the theoretical discussion in the literature review. These findings are reviewed in turn, below.

7.1.1 Review Case Study 1 – Herring Fishery Case

In the case of the herring fishery, the *R v Gladstone* decision seems no longer central to the conflict over the herring. Although that decision recognizes that the Haíłzaqv have a constitutional right to harvest herring SOK on a commercial scale, and that harvesting right continues to be a point of contention, conflict continues over management. In particular, management at a level that will allow a sustainable food harvest for the Haíłzaqv, as well as management that will ensure that their commercial fishing quota is met. For the Haíłzaqv, legal authority does not depend on *R v Gladstone* but emerges from relationships with the herring, is understood as a form of responsibility rather than authority, and anchored in ancient stewardship practices that are central to Haíłzaqv culture and identity. This form of authority might be thought of as constitutional: constitutive of who the Haíłzaqv are, their relationship with the territory, and their jurisdiction. In the contemporary context, this form of authority is expressed in relation to DFO management decisions that undermine the wellbeing of the herring, and resistance to those decisions based on responsibility and relationship.

Haíłzaqv relationships with herring are also spatial. Both colonial and Haíłzaqv jurisdictions are expressed territorially; within those territories, they have smaller spaces used for regulating herring harvest. However, the ocean territory of the Haíłzaqv is smaller than that claimed by the Crown, and Haíłzaqv management differ from Crown management areas: they measure the health of a population and control access to it at specific sites, rather than in subdivided pieces of ocean territory. The legitimacy of the management units used by the DFO have become a key concern for the Haíłzaqv, after decades of stock depletion while they have been used. Another key concern for the Haíłzaqv is the DFO's physical distance from the herring, leading to a perceived lack of on-the-ground knowledge and accountability. For many interviewees, spatial proximity to and interdependence with a resource

appeared to be an indicator of legitimate management. For this reason, Haíłzaqv jurisdiction may be expressed more strongly as Haíłzaqv actors become more intimate with the herring, while Crown jurisdiction may seem to weaken due to cutbacks reducing its presence in the territory.

Haíłzaqv techniques of upholding Ğvi'ilás with respect to herring are evolving, and in the contemporary context, they are focused on mitigating the negative impact of colonial management on herring. The Haíłzaqv employ direct action and science to that end. Within the colonial legal framework, these techniques are not seen as jurisdictional, but are coded as "protests" or "research;" however, in the context of Haíłzaqv engagement with the herring SOK fishery, they can be seen as intentional, impactful ways of asserting and upholding Haíłzaqv law by interrupting colonial jurisdiction. The "herring uprising," for example, was aimed at affecting DFO management decisions by winning a seat at the table where those decisions are made. Similarly, Haíłzaqv-sponsored scientific studies on herring well-being are aimed at bringing new facts to that decision-making framework, which reflect what the Haíłzaqv traditionally know to be true, translated into the epistemic language of colonial resource management.

7.1.2 Review of Case Study 2 – Forestry Agreements

In the case of the GBR Agreements, which involves long-term engagement with the provincial government through negotiations, governance-oriented expressions of Haíłzaqv authority are revealed. The GBR Agreements do not recognize Haíłzaqv legal authority over the Traditional Territory, but do empower Haíłzaqv decision-making with respect to specific land-use decisions, helping to define ecosystem-based management standards, and setting conditions for projects in the territory. The workings of Haíłzaqv authority can also be seen in the community's exercise of self-

governance. In the lead-up to the GBR negotiations, Haíłzaqv traditional chiefs, or Yím̓as, led a movement to reconnect the community with its traditional values, laws, and governance structures. Then, significant work was undertaken to channel Ǧvi'ilás authority into newer institutions, including the colonial-authorized Tribal Council, the bureaucracy of HIRMD, authorized under both colonial and Indigenous law, and the overarching representational body of the Coastal First Nations. These entities have shaped Haíłzaqv engagement in the GBR negotiations, and have developed ways of upholding Ǧvi'ilás outside of the GBR framework.

Territory is a central concept of the GBR Agreements. Haíłzaqv territoriality is expressed in the map of the Traditional Territory under the GBR Agreements, as well as through the Haíłzaqv response to the holes left in its territoriality by those agreements. For example, the Haíłzaqv are seeking ways to purchase private properties that are not encompassed by the GBR Agreements, in order to have a say in how those lands are used for purposes such as logging. They are also developing an oil spill response team for ocean waterways within the GBR, which are not covered by provincial jurisdiction or the GBR Agreements. In order to reinforce territoriality, they also try to keep information about the territory physically within its space, requiring outsiders who wish to view it to visit. In addition to territoriality, Haíłzaqv law is expressed through a spatial orientation towards embodied connection with specific places. Over the span of the GBR process, the Haíłzaqv have worked to reconnect community members with hereditary areas through protest activities, children's programs, harvesting camps, restorative justice activities, and other initiatives that rebuild relationships with specific places, often led by Yím̓as. They have also leveraged industry Consultation obligations to carry out "ground truthing," putting local people on the land to collect detailed information about the territory further out.

Finally, the GBR Agreements are highly technical: they establish multi-level decision-making processes to generate information, create science-based forest management practices, and impose Consultation requirements on companies operating in the Traditional Territory. Alongside this technical GBR framework, however, the Haíłzaqv have built their own techniques for upholding Ǧvi'ilás. HIRMD plays a central role by engaging with companies under the Consultation requirements of the GBR Agreements, and then rerouting them into Haíłzaqv requirements wherever possible. To do this, it employs a bureaucratic structure that aims at not only meeting the requirements of the Consultation process, and also at establishing relationships by requiring proponents to visit HIRMD in person, in part by collecting and organizing sufficient information to incentivize them to do so. Mapping – the compilation of detailed information about the territory – is another central technique employed by HIRMD, and one that feeds back into its bureaucratic abilities. By compiling geographic information unavailable to other parties and holding it specifically in Bella Bella, the Haíłzaqv can leverage their knowledge into face-to-face meetings, and then – ideally – into negotiated agreements that uphold Ǧvi'ilás, benefit the community, and support the next expression of Haíłzaqv jurisdiction outside of the GBR framework.

7.1.3 Review of Case Study 3 – Trophy Hunt Declaration

As a unilateral declaration of Indigenous laws directed to the public, the trophy hunt ban is explicit about claiming Haíłzaqv legal authority. The trophy hunt ban also references some of the pre-legal values on which the law is based, however: respect, conservation, and sustainability. These values are articulated in a way that bolsters the authority of Indigenous jurisdiction, by offering a bridge to citizens of colonial law who might share those values, convincing them to either accept the jurisdiction of Indigenous laws directly, or to work to ensure that those values are expressed in the colonial legal

system as well, by bringing it into alignment with Indigenous law. In this way, Haíłzaqv and other Indigenous jurisdictions are communicated directly to the public, in an appeal for the recognition of Indigenous authority, and for assistance in having it recognized.

Spatially, the trophy hunt ban is premised on the Traditional Territory of the Haíłzaqv, as well as the traditional territories of other Indigenous communities. However, because the hunt is authorized at the scale of colonial provincial territoriality, efforts to enforce the ban have refocused from the Traditional Territory onto smaller and larger areas, in order to engage with provincially produced legal spaces that occur at those other scales. Through the purchase of guiding rights to specific hunting zones, Indigenous territoriality is re-formed at the scale of colonial legal spaces designated for hunting. And by appealing to citizens to change provincial law, it is re-formed at a provincial scale – not by claiming jurisdiction over the entire province, but by pressing for a change in province-wide law, in order to uphold jurisdiction within smaller traditional territories.

In terms of techniques, the trophy hunt ban emphasizes communicative technologies, such as signs, websites, and videos. It faced difficulties with enforcement, which could only be done by putting community members into bear hunting areas in order to watch and communicate with hunters, many of whom had no interest in following Indigenous laws. However, strong images such as photographs and videos of bears and bear hunters were able to become an informal enforcement mechanism, by identifying and bringing public attention to specific hunters, and by creating awareness and public support for the ban. The outcome was a partial win for the Haíłzaqv and other Indigenous communities, as well as the public supporting the ban.

7.2 Seeing a Halocline of Jurisdictions

In each case study, expressions of Haíłzaqv jurisdiction can be discerned, even if only colonial jurisdiction seemed visible at the outset. Though colonial mechanisms and members of the Haíłzaqv community do not always use the terms "jurisdiction" to describe Haíłzaqv involvement in those struggles, each case study demonstrated clear arrangements of Haíłzaqv legal authority, spatial constructions, and techniques, which were connected to Ǧvi'ilás. Within the framework of this project's critical lens, this can be understood as Haíłzaqv jurisdiction as it manifests in relation to colonial law. It is law's power, anchored in authority and the ability to authorize law, producing legal spaces, and operating through techniques that transmit legality into social relationships and bind law to life. Haíłzaqv jurisdictional expression can be seen in each of the case studies, and in this Section 7.2, each of these aspects of jurisdiction is explored separately, weaving in information drawn from each of the case studies.

Authority is highlighted differently in each case study, but in each, Haíłzaqv authority is framed to be connected to longstanding shared values and beliefs: about the land, about community and nationhood, and about relationship with the environment. In the struggle over herring fisheries, where colonial courts have explicitly failed to recognize Haíłzaqv authority over fisheries, Haíłzaqv expressions about the legitimacy of their laws are connected to sacred and ancient relationship with the herring, their responsibility to steward the herring, and their interdependence. In the GBR Agreements, which required intensive engagement with colonial governments, the Haíłzaqv undertook to constitute their governance structures in a way that would give that engagement the force of Ǧvi'ilás. It did this by reconnecting with traditional laws and governance systems, and creating the Tribal Council and HIRMD, which operate under both colonial and Haíłzaqv authority. In the case of the trophy hunt ban, the legitimacy of the Indigenous legal pronouncement banning the

provincially-licensed hunt is explicitly anchored in Indigenous law and its underlying values, which offers settler citizens a way to reorient themselves to Indigenous jurisdiction, and re-shape their own colonial laws around shared, pre-legal values.

Spatially, all three case studies include a claim to territoriality. In general, then, expressions of jurisdiction seem to engage the Traditional Territory. In addition, however, each of the case studies reveals a jurisdictional emphasis on specific places, in different ways. In the context of the herring fishery, Haíłzaqv herring management focusses on specific spawning grounds and their distinct populations. Haíłzaqv ideas about legitimacy emphasize the local decision-making and knowledge, in contrast to the Crown's distant "arm chair" management, which is perceived to be unaccountable. In the context of the GBR Agreements, the Haíłzaqv are working to reconnect with the territory by putting people back on the land at important hereditary sites, and by collecting place-specific data. In the case of the trophy hunt ban, Indigenous law is asserted within the territory, but in addition, the Coastal Guardian Watchmen are deployed onto the land to gather knowledge, document what was happening, communicate with the public, and – importantly – broadcast images of these particular places and occurrences to the public, bringing the specific places and dwellings of the central coast to the public throughout BC.

In terms of techniques, the Haíłzaqv have adopted and developed a wide range of methods for upholding Ǧvi'ilás in the context of a colonial legal system that considers its own jurisdiction to be exclusive. Many of these are similar to the methods of colonial governments or citizen activists, combined with Haíłzaqv traditional legal techniques. In the case of the herring fishery, the Haíłzaqv employed non-violent forms of protest such as an occupation of the DFO's office, which – under Haíłzaqv law – was also expressed as an "eviction" of the DFO from the Traditional Territory. The Haíłzaqv also increasingly focus their attention on collaborating with environmental researchers to

produce science on herring that can contest the DFO science underlying poor management decisions, in order to urge the DFO towards a management framework that is more in line with Haíłzaqv knowledge. In the case of the GBR Agreements, Ǧvi'ilás is channeled through a bureaucratic institution, HIRMD, which works to administer Haíłzaqv law in the context of the GBR Agreements by establishing an independent, direct consultation process. HIRMD also has intensive mapping practices, which serve to empower Ǧvi'ilás decision-making outside of the GBR framework, and to enhance connection with the land itself through the mapping process. In the case of the trophy hunt ban, Ǧvi'ilás is activated primarily through traditional and social media campaigns: filming and distributing images of trophy hunts, circulating images and petitions, carrying out tours and talks, and planning demonstrations aimed at bringing awareness to the ban and building alliances with the public, in the manner of a social movement.

Each case study demonstrates that Haíłzaqv engagement in struggles with colonial land and resource management has clear authoritative, territorial, and technical dimensions, anchored in Ǧvi'ilás. Read together, the case studies can be seen as illustrations of Haíłzaqv jurisdiction, as it has been defined in this project. They also suggest some insights into how Haíłzaqv jurisdiction tends to manifest in conflicts with colonial legal encroachment. For example, Haíłzaqv legal authority flows out of tradition, which is separate from the source of colonial jurisdiction, even if the two systems interact. As a spatial example, territoriality is a consistent expression of Haíłzaqv jurisdiction, but so too is intimacy with the territory and specific places within it. In terms of technique, expressions of Haíłzaqv jurisdiction are adaptable, and often combine techniques in the colonial legal context – science, activism, media – with Haíłzaqv tradition, into hybrid jurisdictional tools.

7.3 Similarities Between Case Studies

In addition to the central insight that jurisdiction can be discerned in Haíłzaqv struggles with colonial land and resource law, the three case studies together offer some common themes. In each one, jurisdiction is expressed in ways that reveal distinct qualities of Haíłzaqv jurisdictional expression, as defined by this project, when Haíłzaqv law is engaging with colonial law. One such quality is the interdependence of all three aspects of jurisdiction, which speaks to their underlying unity as expressions of a single thing: jurisdiction. Another is the interrelationship between different strategies of Haíłzaqv engagement with colonial jurisdiction, through litigation, negotiation, and unilateral action. A third is the adaptability of all aspects of Haíłzaqv jurisdictional expression, to deal with contemporary realities, adapting contemporary ways of managing them.

The interdependence of the authoritative, technical, and spatial aspects of jurisdiction can be seen in each case study: a clear expression of one aspect of jurisdiction typically expresses the other aspects as well. For example, the "herring uprising" not only used sophisticated protest techniques to enforce Haíłzaqv law, but also included an "eviction," clearly expressing Haíłzaqv authority, and a strategy of changing how a specific spatial area was being mapped and studied under colonial law. Similarly, the resurgence and reorganization of Haíłzaqv traditional authority that took place prior to the GBR Agreements was also a resurgence in the community's connection with the land and traditional governance, ultimately leading to the HIRMD's bureaucratic structure. In putting people back out onto the land and re-building connections that were interrupted by colonization, Haíłzaqv legal authority is strengthened and Haíłzaqv techniques for upholding that authority emerge. In the case of the trophy hunt ban, a simple technique of signs communicating it simultaneously communicated the existence of a Haíłzaqv legal space, and the basis of Haíłzaqv legal authority. These examples demonstrate how each aspect of jurisdiction highlighted in the case studies is linked to the

other aspects, as part of an expression of something larger and multifaceted. This may be what makes it jurisdiction.

In addition to demonstrating the interconnectedness of different aspects of jurisdiction, the case studies also reveal an interdependence of different strategies for asserting it. The case studies revolve around three distinct strategies: litigation, in the case of the herring fishery; negotiation, in the case of forestry; and unilateral action, in the case of the trophy hunt. However, despite the distinctness of the strategies between the case studies, closer look reveals that the Haíłzaqv use all of these strategies within all of case studies, in different ways. For example, the herring fisheries case study has centred around litigation, but the *R v Gladstone* decision was followed by a series of unilateral actions – protests and scientific studies – which were ultimately aimed at securing a government-to-government table of negotiated management. In the second case study, the GBR Agreements are the outcome of negotiations, but those negotiations were preceded by direct actions against forestry operations and court challenges by other First Nations, which set the groundwork for the Crown to begin to negotiate. Even now, the Haíłzaqv ability to uphold Ǧvi'ilás under the GBR Agreements may depend on the availability of court challenges and direct actions. In the third case study, the trophy hunt ban was a unilateral statement of law aimed at the public. However, it took place after litigated Aboriginal title and the negotiated GBR Agreements had both entered mainstream government and citizen consciousness, setting the groundwork for colonial receptivity and positioning the Haíłzaqv to benefit from, and be better resourced to enforce, the hunting ban. The expression of Haíłzaqv jurisdiction can be seen engaging with colonial law, with different strategies of engagement becoming more visible depending on the context, and the ability of colonial law to see it.

In addition, the case studies demonstrate the adaptability of Haíłzaqv jurisdictional expressions. While Haíłzaqv authority may be connected to tradition, it has been channelled through

contemporary organizational structures such as the Tribal Council and HIRMD, and can take on new meanings in the contemporary world, such as a requirement to forcibly interrupt the herring fishery or to ban trophy hunting. Spatial constructions also evolve. Adaptability in spatiality can be seen through the development of new ways to re-connect people with land, via a range of land use practices and programs within the Haíłzaqv community, from children's camps to detailed mapping. It can also be seen in the use of images and video to connect non-Haíłzaqv citizens with the bears in the territory, and in the mutation of Haíłzaqv jurisdictional spaces to interact with colonial legal spaces, such as herring management units, land use plans, and the provincial scale of legislative changes. In terms of techniques, Haíłzaqv jurisdictional expressions exhibit not only adaptability, but also emergence. The hybrid governmental and bureaucratic institutions of the Heiltsuk Tribal Council and HIRMD were innovations that emerged out of an interest in bringing traditional governance and law back into positions of authority recognized within a colonial context, which began with Yím̓as running for election to the Tribal Council, and evolved into new structures and ways of delegating jurisdictions. Similarly, the 2015 "herring uprising" began as a group of community members determined to close the fishery, and evolved into a coordinated, cross-city protest with specific political goals around collaborative management and shared science. Haíłzaqv jurisdictional expressions adapt and shape-shift, meeting colonial jurisdictional encroachments where they find them.

Similarities between the case studies show that expressions of Haíłzaqv jurisdiction are in play during Haíłzaqv struggles with state land and resource law, the case studies offer material for reflecting on how these jurisdictional expressions form in relation to colonial law. In each, the three aspects of jurisdiction were interconnected with the others, suggesting their interdependence, and possibly the underlying existence of jurisdiction itself. Haíłzaqv strategies of engagement with colonial jurisdiction are also interdependent, with litigation, negotiation, and direct action being used in tandem. Haíłzaqv

jurisdictional expressions are also highly adaptive, taking on new forms of authority, inventing new ways to connect with place, and evolving a range of techniques of engagement with the colonial government and citizenry, which adapt continually. The case studies offer a rich framework for reflecting on jurisdiction, and on how Indigenous jurisdiction might be expressed in a colonial context.

7.4 Differences Between Case Studies

In addition to overall similarities and trends in how jurisdiction manifests in Haíłzaqv struggles with colonial jurisdiction, there are also differences. In each case study, the Haíłzaqv exert jurisdiction over a different subject matter: fish, trees, and bears. In each, the struggle can be situated in specific historical moment when it took its contemporary form: the herring, from at least the mid-century; forestry, from the late twentieth century; and bear hunting, from the early 2010s. Finally, each case study exhibits the results of having engaged with different branches of the colonial government – federal or provincial – as well as different colonial legal mechanisms; courts, negotiations, and the public. Tracking how different aspects of Haíłzaqv jurisdictional expression manifest differently across the different case studies offers lens for understanding how, when, and why expressions of Haíłzaqv jurisdiction interact with colonial law in the way that they do.

The first difference between the case studies differ is their subject matter. In colonial legal terms, the herring fishery concerns jurisdiction over oceans, while the GBR Agreements concerns jurisdiction over lands and forests, and the trophy hunt ban concerns jurisdiction over wildlife. In environmental terms, these things differ: land and trees stay still, but water and wildlife flow. Such flows trouble boundaries. This difference seems to be reflected in the reception of Haíłzaqv jurisdictional expressions into colonial law. Haíłzaqv territory is more easily recognized by colonial actors on land than on water. Ocean territory went unrecognized in *R v Gladstone*, whereas land-based

territoriality was explicitly identified in the GBR Agreements. In expressions of jurisdiction over water and wildlife, where Haíłzaqv boundaries are less easily established in the eyes of colonial actors, the Haíłzaqv now focus on manifesting their law at the scale of colonially-defined spaces. In herring fisheries, they focus on the colonial management units within which specific herring populations were thought to congregate, and how those might be changed or better understood; similarly, in the trophy hunt ban, they allied with neighbours to expand the jurisdiction of the ban across multiple territories, and then focused on a province-wide legislative change.

Another way that the three case studies demonstrate differences is in terms of what branch of colonial government they engage. The herring fishery interfaces with the federal branch of colonial government, while the GBR Agreement and trophy hunt ban concern provincial branches. Overall, the Haíłzaqv appear to have had much more success dealing with the provincial Crown: the GBR Agreements and grizzly hunting ban have both resulted in changes to colonial legislation, which bring the Crown and other colonial actors bound by that legislation more in line with Ǧvi'ilás. In contrast, the federal government has only begun to involve the Haíłzaqv in management decisions, and only as a matter of policy, not of law. The different outcomes available from provincial and federal governments are reflected in different forms of Haíłzaqv jurisdictional expression. In the federal context, Haíłzaqv techniques of jurisdiction are focused on affecting the exercise of federal jurisdiction itself, whether through direct action causing it to change its decisions or through science that infiltrates its decisions; in contrast, in the case of the GBR Agreements and trophy hunt ban, Haíłzaqv jurisdictional techniques focus on engaging with settler entities – industry or the citizenry – more than the Crown. There appears to be a difference in Haíłzaqv jurisdictional expressions and outcomes, depending on the branch of government engaged.

A third difference between the case studies is the time at which each one first arose. The dispute over the herring fisheries is the oldest: it was already an issue when the McKenna-McBride commission visited Bella Bella in 1913, and reached a turning point in the 1996 Supreme Court decision *R v Gladstone*. In contrast, although colonial uses of land have long been a source of tension in Haíłzaqv Traditional Territory, the dispute over forests appears to have crystalized in the 1990s. In turn, the trophy hunting ban only entered into Haíłzaqv law in the early 2000s. Comparing the case studies, it appears that, over time, expressions of Haíłzaqv jurisdiction have become more clearly articulated as "jurisdiction." Early fisheries-related claims related to ownership and licensing powers, were framed in *R v Gladstone* as constitutional harvesting rights, and are now expressed through exploration of collaborative management. Under the GBR Agreements, which came later, there is a clear assertion of Haíłzaqv rights, title, and internal decision-making power, and practices of collaborative management are enshrined, even if Haíłzaqv decision-making power is not fully protected. Finally, the trophy hunt ban was articulated explicitly as an assertion of Indigenous law, which is tantamount to a statement of unilateral jurisdiction. Stepping back, there appears to be a shift in Haíłzaqv assertions and colonial recognition of them, from claims made in colonial legal terms, to claims about governance, to claims about Indigenous legal authority explicitly. This shift towards the language of jurisdiction may reflect strategies of Haíłzaqv players, the ability of the Crown to hear such claims due to changes in the colonial culture and legal system, or both.

An examination of the differences between the three case studies offers some tentative observations about how Haíłzaqv expressions of jurisdiction manifest over different subject matters, in relation to different colonial jurisdictions, and at different times – and, importantly, about how they are received by colonial law. Colonial recognition of Haíłzaqv expressions of territorial jurisdiction seem to be more easily won in the context of land-based subject matter than in the context of subject

matters that flow, such as water or animals. However, regardless of the level of recognition of Haíłzaqv jurisdiction offered by the Crown, the Province appears more likely to substantively change its laws to reconcile with Indigenous jurisdiction than the federal government. Finally, as time passes, claims to Haíłzaqv jurisdiction are becoming more explicit, moving from claims framed in colonial legal terms, to claims about shared governance, to claims framed in the terms of Indigenous laws and jurisdictions.

7.5 Jurisdictional Stratification with Colonial Law

In addition to the similarities and differences between them, the case studies can be compared in terms of their interface of engagement with colonial law. In the herring fisheries case study, the most distinct point of engagement is the colonial court system: in *R v Gladstone*, the Haíłzaqv claimed a constitutional right through litigation. In the GBR case study, the point of engagement is negotiation with the Crown: through the GBR Agreements, the Haíłzaqv entered into "government to government" land use planning. Finally, in the bear hunt case study, there was no direct point of contact with the colonial legal system: instead, the trophy hunt ban was a direct action targeted towards colonial citizens, and thus indirectly towards the legislative system that is democratically accountable to them.

Comparing Haíłzaqv expressions of jurisdiction based on their point of engagement with colonial jurisdiction suggests that, for the Haíłzaqv, intervention through negotiation has proven to be a more productive avenue for jurisdictional expression than intervention through litigation. *R v Gladstone*, in the herring case study, led to decades of disagreement about management, sparking both direct action and negotiated collaborative management initiatives on the part of the Haíłzaqv. Litigation, then, was not enough. In contrast, the GBR Agreements seem – for the moment – to have

achieved an outcome that both parties are finding ways to live with. This move from court engagement to governmental engagement – which occurs in both of those case studies – suggests that litigation has not provided as much recognition of Haíłzaqv jurisdictional expression as the Haíłzaqv are able to secure through negotiations.

The attraction of negotiation may be simply that it offers the Haíłzaqv some measure of ongoing control over how colonial jurisdiction impacts the territories. Litigation results in a one-off court pronouncement, which does not necessarily reflect Haíłzaqv jurisdiction or create space for it to be recognized going forward. In contrast, negotiation requires colonial governmental negotiating partners, and changes to their behaviour that reflect the Haíłzaqv negotiating position. Indeed, it may be that this outcome – changes to colonial legal mechanisms – is the most attractive, since the Haíłzaqv express a focus on this in all three case studies, and their trajectory seems to reveal preference for direct action over negotiation, where it has that same effect. In the case of the GBR Agreements, several Haíłzaqv community members mentioned that an important indicator of their value was that they had led to legislative changes: the colonial government had changed its own law in response to the negotiated outcomes. In the case of the herring fisheries, the Haíłzaqv continue to push for a role in colonial management decisions in order to change how those decisions are made. In the case of the trophy hunt ban, the Haíłzaqv changed their strategy from negotiating for legislative changes to imposing their own laws directly, which resulted in colonial legislative change. Similarly, in the GBR Agreements, they have moved from negotiating for legislative changes to imposing their own conditions on projects, which results in changes in the behaviour of proponents, if not colonial governments. If jurisdiction is law's power, the preferred strategy for the Haíłzaqv seems to be whichever one gives Ǧvi'ilás the most substantive effect in the struggle with colonial laws.

In a colonial legal context, then, Haíłzaqv expressions of jurisdiction appear to be focused on interrupting how the environment is impacted by humans who operate under colonial law. It targets colonial governmental mechanisms for changes, such as legislative amendments, and sometimes finds meaningful expression of Ğvi'ilás through that process. However, where possible, it targets colonial actors directly, such as proponents or members of the public at large. Litigation, too, can have such an effect. The impact of title litigation on the behaviour of the Province has not been explored by this project, but has been clear at various times. The utility of targeted litigation can be most clearly seen in the herring SOK fishery case study, where ongoing litigation for damages and other concessions was underway, claims for violation of constitutional harvesting rights were contemplated, and direct action was empowered by the perception that there was some degree of colonial legal justification for it. Court cases – and direct action – may be an important source of leverage with which to push for negotiations, or even to directly initiate change. Given the way that articulations of jurisdiction have changed over time, it seems likely that the most favoured strategy for Haíłzaqv may well shift, depending on the context, from negotiation towards litigation, direct action, or some other strategy.

The current, apparent focus on having an impact on colonial governance mechanisms, most prominently through negotiation, appears to reflect the colonial context. For the Haíłzaqv, it is no longer enough to know and uphold Ğvi'ilás: since at least 1913, there has also been a population within the Traditional Territory that does not follow Ğvi'ilás when operating there, but is instead hears a different jurisdictional voice. This means that the ability to uphold Ğvi'ilás depends on the Haíłzaqv ability to express jurisdiction from within the colonial structures that influence colonial actors. In particular, it depends upon changes to colonial law, which are most often carried out by colonial governments. This means that Haíłzaqv jurisdictional expression depends on its ability to speak to colonial jurisdiction, and on the ability of colonial law to hear and receive it, and then speak in the

name of Haíłzaqv law to its own legal community – whether through a government enacting legislation or collaborative management initiative, a proponent using a Haíłzaqv-authored letter as proof of Consultation under colonial law, or the citizenry hearing resonance between Indigenous and colonial legal systems, and pushing for alignment within colonial law. When this happens, it does not necessarily mean that resulting changes to colonial law reflect a co-optation or indigenization of it, or that the parties have developed a new, shared jurisdictional language. Rather, it may simply mean that colonial jurisdiction speaks less about certain matters, or listens more, or makes legal pronouncements that have less of an infringement of Haíłzaqv law.

7.6 Final Conclusions

The framework of critical legal theory and the three case studies in this project offer rich material for reflecting on jurisdiction. The case studies contain three different illustrations of Haíłzaqv jurisdictional expression, which are continuous with ancient Haíłzaqv laws but take shape to address colonization of Haíłzaqv lands today. They show different forms of engagement with colonial jurisdiction: through litigation in colonial courts, through negotiations with colonial government, and through direct or unilateral action, including appeals to the public. They occur at different times, and they deal with various forms of Crown jurisdiction. They address a range of environmental subject matters, and they illustrate many permutations and possibilities of Haíłzaqv legal activity, offering less of a clear conclusion about jurisdiction than an opening of possibilities.

One clear conclusion of this project, however, is that all three case studies demonstrate that expressions of Haíłzaqv jurisdiction can be seen in these conflicts with colonial law over land and resources. Each case study exposes a range of expressions of authority, territoriality, and techniques, which are interrelated and grounded in Ǧvi'ilás. The source of Haíłzaqv jurisdictional authority may

be understood to be connected to traditions and long-standing values, responsibilities, and relationships, which may be expressed in traditional, novel, or hybrid forms, including contemporary governance structures that also carry colonial jurisdiction. It flows throughout the legal space of Haíłzaqv Traditional Territory, but it circulates at spaces at other scales, if necessary – and with the most force when it is connected and proximate to the specific place of which it speaks. It shifts the shape of its engagement with colonial law from direct action and science, to bureaucracy and media – which may not all appear legal at first glance, but which are all aimed at upholding Ǧvi'ilás, depending on what kinds of opportunities are presented by the currents.

Within the meaning of this project, these interrelated expressions of Ǧvi'ilás through authority, territoriality, and techniques can be understood as jurisdiction. This perspective on jurisdiction is derived from a critical understanding of colonial law, and it focusses on the manifestation of Haíłzaqv jurisdiction in conflicts with colonial law by analogy. For that reason, it does not necessarily offer any conclusions about Haíłzaqv jurisdiction from within the context of the Haíłzaqv legal system, or about the concept of 7àxuài. What it does offer is the observation that, in a colonial context, Haíłzaqv expressions of law operate similarly to colonial expressions of law, in that they are jurisdictional. Haíłzaqv assertions of Ǧvi'ilás have authoritative, spatial, and technical dimensions, which parallel but can be radically different from colonial assertions of law. These aspects of jurisdiction are interrelated, are expressed through different strategies of engaging with colonial law, and evolve.

Overall then, the case studies reveal that Haíłzaqv and colonial jurisdictions flow separately over the environment, applying to the same individuals and many of the same subject matters. However, because colonial law does not recognize Haíłzaqv jurisdiction, and continues to legislate unilaterally, Haíłzaqv expressions of jurisdiction appear as political struggles of various kinds, from a colonial point of view. On one level, this is accurate: they are political struggles, between two different

governments. But that perspective misses the full picture. It is not just that a First Nation community objects to its treatment by the colonial state. In addition, a legal system that predates the colonial one is being impacted and often violated by colonial actors, and the colonial government itself.

A comparison of the case studies in this project has suggested a number of other findings about how expressions of Haíłzaqv jurisdiction interact with colonial jurisdiction. First, Colonial governments seem more likely to recognize expressions of Haíłzaqv jurisdiction over the fixed subject matter of land and trees, than over waters, fish, and wildlife, which flow. Second, The British Columbia provincial government has been more effective at implementing Haíłzaqv jurisdiction than the federal government, even if both have failed to recognize it. Third, although litigation, negotiation, and unilateral action are all used by the Haíłzaqv, and depend upon one another, the most successful outcome of Haíłzaqv expressions of jurisdiction right now appears to be a change in colonial government practices or law. In addition, collaborative herring management, changes to provincial legislation and laws under the GBR agreements, and legislative changes in respect of the trophy hunt ban are all examples of imperfect outcomes that have been staunchly pursued and then celebrated by the Haíłzaqv. These outcomes have twice occurred through negotiations, with direct action and litigation playing a supporting role, making negotiation the most effective-seeming strategy at this time. However, the relative utility of that strategy could change.

Overall, the relationship between Haíłzaqv expressions of jurisdiction and colonial reception of it appears to be one of separateness. There is little evidence of combined jurisdiction in these case studies; instead, they reflect two jurisdictional systems that operate independently, within a dramatic power imbalance. In a colonial context, the power of Haíłzaqv law depends upon its ability to influence colonial law. This means that, in each of the case studies, significant jurisdictional effort has gone not into upholding Ǧvi'ilás over the subject matter of the jurisdiction – stewarding herring,

making decisions about forests, and stopping the trophy hunt for bears – but rather into getting colonial governments to pull back their jurisdiction in a specific way. Only when those infringements are minimized or circumvented can Haíłzaqv jurisdiction begin to be expressed over the subject matter of the environment. In a certain light, Haíłzaqv struggles with colonial jurisdiction appear to have come full circle from the McKenna-McBride commission, when the Haíłzaqv demanded that the Crown restrain colonial citizens fishing in Haíłzaqv waters, through efforts in litigation, negotiation, and direct action, which ultimately turn out to reflect that original strategy. A primary concern of Haíłzaqv jurisdictional expression is still how to deal with settlers and governments who are operating under colonial jurisdiction within the Traditional Territory. Changes to colonial law can enhance Haíłzaqv jurisdiction – but they do not empower them, or blend jurisdictions together. Instead, colonial law and colonial activities simply becomes more aligned with Haíłzaqv law. In certain situations, it may be possible for colonial jurisdiction to express Haíłzaqv jurisdiction – making "everyone responsible," in the words of one interviewee – but the need to express Haíłzaqv jurisdiction does not abate; instead, attention shifts to the next pressing colonial legal infringement.

As a space for jurisdiction, Haíłzaqv Traditional Territory is an especially rich one. Where rivers of one legal system converge with the sea of another legal system, the waters are stratified, remaining separate and also producing something new. The fresh and salt water intermingle, but from above, two separate colours of water are visible, with a clear line between them. In the natural world, estuaries are one of the earth's most ecologically productive ecosystems, offering influences and nutrients from two different and individually rich environments. In this project, jurisdictional intermingling reveals itself to be a similarly dense habitat for law. Collaborative management of herring, the GBR land management area, and the trophy hunt ban are all innovative developments in law that were produced by the combined forces of both legal systems – through conflict, through

collaboration, and through the necessity of building something new. Within this legal estuary, inflows of Haíłzaqv and colonial law remain separate but continue to mix. The harms of ongoing colonialism continue; at the same time, however, the people and environment of the central coast find ways to shape their socio-political systems so as to allow them to flourish, using new forms of human behaviour and new structures of law.

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