

**The Land is Our Casebook:
Revitalizing Indigenous Law in Relation With the Living World**

by

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Abstract

This thesis addresses how we can learn about law from nature. People can learn from nature (such as plants, animals, rocks, water etc.) through careful observation. This practice is the foundation of science, and inspires the arts. “Reading” nature as a form of legal precedent embedded in the earth is not part of the current Canadian legal system. I draw from my experience learning Tsilhqot’in law as an articulated student, to show how legal stories can be embedded in the landscape and guide Tsilhqot’in understandings of how to live today. I look at academic literature from a range of disciplines to examine how various Indigenous legal traditions form law through relationships with the earth. I also consider the importance of embodied experiences and land-based learning in acquiring this form of legal knowledge. As legal professionals in Canada increasingly engage with Indigenous law, this thesis can help them understand an Indigenous theory of law that relies more on discernment and relationships, than on demands and norms.

Dedication

For Alice and Tom.

Learning comes not only from books but from the earth and our surroundings as well. Indeed, learning from the mountains, valleys, forest and meadows anteceded book knowledge. What our people know about life and living, good and evil, laws and the purposes of insects, birds, animals and fish comes from the earth, the weather, the seasons, the plants and the other beings. The earth is our book; the days its pages; the seasons, paragraphs; the years, chapters. The earth is a book, alive with events that occur over and over for our benefit. Mother earth has formed our beliefs, attitudes, insights, outlooks, values and institutions.¹

-Basil Johnston



¹ Basil Johnston, *Honour Earth Mother: Mino-Adujoudauh Mizzu-Kumik-Quae* (Cape Croker, ON: Kegedonce Press, 2003) at v. I took this photo of Neyaashiingmiing, Ontario, where my paternal grandmother's family is from. The late elder, Basil Johnston, lived in a small house nestled along this very shoreline of Georgian Bay, near the base of the shown escarpment. The photo is taken from my grandparents' and auntie's house. This quote from Basil reflects the sentiments of many, including myself, who find sustenance, meaning and patterns for living within our beautiful homelands.

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Throughout this thesis I reflect on teachings gained over ten years of experience working in the field of community-led Indigenous legal studies. I’m grateful to the University of Victoria Faculty of Law’s Indigenous Law Research Unit for hiring me as a researcher back in 2012, and for all of the subsequent opportunities to return for work. Val Napoleon, Rebecca Johnson, Jessica Asch, Simon Owen and the wonderful community of researchers and students who make up ILRU have greatly enhanced my intellectual and personal life. I’m grateful for the many community members themselves who were my teachers during these learning opportunities. I thank Jessica Clogg, Maxine Matilpi and the team of lawyers at West Coast Environmental Law for opening my mind to the kaleidoscope of possibilities for the practice of law, and for their thoughtful inquiry and action into the role common law trained practitioners can have in the revitalization of Indigenous law. I am thankful to the Tsilhqot’in Revitalizing Indigenous Law for Land, Air and Water (RELAW) Project team members, most especially Hannah Askew, Tom Dillabough, Alice M. William, and Linda Smith for sharing their expertise, and continued friendship. I hope the pages herein reflect a small portion of your wisdom for others to benefit from.

I thank my parents, John and Kim Borrows, for their endless encouragement and examples of continually lifting up everyone in their paths. I’m also grateful to my husband Sean Richey for not having even a moment of hesitation when I told him I wanted to return to student life, yet again. He ensured I had the time to complete my research and writing while caring for a busy toddler and navigating pregnancy followed by the arrival of our second daughter.

Finally, I’m grateful to the many beings who I’ve learned from that appear throughout these pages: the mountains, plants, landscapes, waters, the animals and weather. Miigwech nindinawemaaganidog—thank you to all of my relations for gifting me with possibilities for patterning my own life, and providing nourishment and forms of friendship.

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Introduction and Methodology

Law and the Juniper Bush

A group of thirty of us huddled in a circle around a juniper bush on the edge of the *Banff Centre for Arts and Creativity* campus. While we were focused on the small plant in front of us, the Rocky Mountains of Banff, Alberta, Canada towered above. People shifted their weight back and forth, snow crunching beneath their feet. Breath rose like clouds suspended in the air. The local knowledge-keeper crouched next to the juniper and introduced us to the bush. “The berries are high in vitamin C, full of antioxidants, and have antibacterial properties”, she said while gently stroking the branches between her fingers. I was grateful my own gloves were not fingerless, though she did not seem affected by the sub-zero temperature. It became harder for me to concentrate as the chill from a cold I’d been fighting since arriving a few days earlier finally overcame me. I’d been looking forward to this medicine walk for months. With disappointment, I quietly snuck away from the group to go back to my dorm room and assume a horizontal position in bed until some energy returned.

The medicine walk was part of the “Inherent Right to Indigenous Governance Program”² that I was co-facilitating for the week with two colleagues as part of the Banff Centre’s Indigenous Leadership Program.³ The purpose of the walk was to engage participants, who came from Indigenous communities and ally organizations all across Canada, in thinking through how we might look to the more-than-human world to learn law and revitalize our governance

² For information on the Inherent Right to Indigenous Governance program offered by the Banff Centre for Arts and Creativity see, online: <<https://www.banffcentre.ca/programs/inherent-right-indigenous-governance>>

³ For information on the Banff Centre for Arts and Creativity’s broader Indigenous Leadership Program see, online: <<https://www.banffcentre.ca/indigenous-leadership>>. See also generally, Cora Voyageur, Laura Brearley, and Brian Calliou (eds.), *Restorying Indigenous Leadership: Wise Practices in Community Development* (Banff: Banff Centre Press, 2015). I’m grateful to my colleagues Gina Starblanket and Wanda Dalla Costa for their teaching contributions to this program, and to Alexia McKinnon and Ericka Chemko for their overall vision and leadership.

practices. To prepare people for the experiential learning we'd be doing on the walk, the morning before heading outdoors I facilitated a session titled, "What is Law?". The activities were structured in a way that would get participants thinking expansively about law, so they could apply the ideas during the medicine walk.

First, I explained that law can be thought of as how we solve problems together, create safety, and nurture and maintain relationships.⁴ Law helps us know how to act in good or patterned ways, especially when challenges arise. Montreal-based legal theorist, the late Roderick Macdonald, wrote about a time he asked a group of elementary school children to figure out how to divide a chocolate Easter bunny fairly between two siblings. Given that chocolate bunnies are not symmetrical, the students offered many ideas, examined the limits of each, and in the process brought forward sophisticated ideas on distributive justice. Macdonald explains why this was a useful activity for legal education: "Law is not just about legislatures and courts. It is about developing fair rules and procedures so that people interact with each other harmoniously and resolve conflict peacefully. Carefully puzzling through the everyday problems of living together in society is just as important in before-school settings as it is in Parliament or in the Supreme Court of Canada."⁵ In the words of legal theorists Jutta Brunée (University of Toronto Law Dean) and Stephen Toope (Cambridge University Vice-Chancellor) "Law is not a product that is manufactured in centralized, hierarchical systems and meekly distributed to social actors for consumption."⁶ Rather law can be made when different people come together in

⁴ I learned this definition of law from Dr. Hadley Friedland through a slideshow presentation she prepared for participants of a workshop with the Indigenous Law Research Unit (University of Victoria Faculty of Law).

⁵ Roderick Macdonald, *Lessons of Everyday Law* (Montreal: McGill-Queen's University Press, 2002) at 22. I note that Macdonald focused on theories of legal pluralism, whereas Brunée and Toope (authors of the quote that follows) focused on interactional theories of law. I place these quotes together here to show the overlap between these schools of thought as they relate to all people's involvement in law (in other words, they share a vision that law is often a non-specialized activity).

⁶ Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law* (Cambridge: Cambridge University Press, 2010) at 55.

discussion, and take charge of reasoning through decision-making matters that affect them. I enjoy explaining law in these terms, and seeing people recognize how they frequently participate in a practice of law and that it is not always an externalized, hierarchical, or specialized domain of knowledge.

For the classroom portion of this medicine walk session at the Banff Centre, the participants were seated in small groups at round tables scattered throughout the room. Early in the morning I had placed different items on each table. I asked the participants to turn their attention to the items and discuss: “How do these items on your table connect to the concept of law, or not?” There were laminated images of the Parliament buildings in Ottawa, a group image of the Justices of the Supreme Court of Canada ornamented in their red robes, a speed limit sign, an RCMP officer on a horse, a speeding ticket, and a few large casebooks with titles such as “Criminal Law” and “Constitutional Law”. I had also placed on the tables my moose hide hand drum, beaded moccasins, a book of Nanabush stories⁷, a sprig of cedar, an image of a raven, a picture of a community potlatching, of elders gathered in council, and an image of some of the Heiltsuk Yímas (the hereditary chiefs of the Heiltsuk Nation) adorned in their red regalia. After discussion in their small groups, they reported back some incredible reflections on how these images and items connected to law. The participants were from seven different Indigenous legal traditions. They spoke with a rootedness in their particular tradition as they reflected back how songs could convey knowledge about territorial boundaries, or how raven and Nanabush are like law professors revealing patterns of decision-making through their disruptions, or about the use of cedar in ceremony and some of the associated principles rooted in sacred law. They explained

⁷ The Anishinaabe trickster, also known as Nanabozho. For a sample of Nanabush stories see generally, Basil Johnston, *Ojibway Tales* (Winnipeg: Bison Books, 1993); See also, Isaac Murdoch, *The Trail of Nenaboozho: And Other Creation Stories* (Neyaashiinigiing: Kegedonce Press, 2019)

how chiefs can be authoritative decision-makers, like the Supreme Court Justices (all wearing red regalia with white fur). The moccasins brought forward reflections on the “Walking with our Sisters” art installation that commemorates missing and murdered Indigenous women and girls, and the failure of law to protect these sisters.⁸

We discussed how these items symbolized a small few of the vast amount of resources available for engaging with law, both Canadian and Indigenous.⁹ It was revealing during the activity how interpretations varied based on people’s citizenship: Inuit, Cree, Haudenosaunee, Syilx, Anishinaabe, Métis, or Blackfoot citizens each had distinctive associations. It also became evident that within a single legal tradition there are a wide variety of possible interpretations, as the group of Cree participants (for example) had different insights from one another.¹⁰ After our discussion of these legal resources, we turned to examine a few of the sources of Indigenous law prior to heading out on our medicine walk.¹¹ Drawing from Anishinaabe law scholar John Borrows’ work, we discussed how the more-than-human world can be a source of law¹², or a site where “Indigenous peoples also find and develop law from observations of the physical world around them”.¹³ Many of the images and items on the classroom tables (cedar, raven, moose hide etc.) alongside the participants’ lived experiences had already opened their minds to the practice of forming ideas in relationship with the living world.

⁸ See online: < <http://walkingwithoursisters.ca/about/>>.

⁹ For further discussion on Indigenous legal resources see for example Hadley Friedland, “Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws” (2012) 11:1 Indigenous LJ 1 at 8-12.

¹⁰ For more on the point of diversity of opinions within Indigenous legal orders see Aaron Mills, “The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today” (2016) 61:4 McGill LJ at 850 (footnote 6). See also, Tuma Young, “L’nuwita’simk: A Foundational Worldview for a L’nuwey Justice System” (2016) 13 Indigenous LJ at 78-79.

¹¹ For a chapter theorizing some of the sources of Indigenous law see John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 23-58.

¹² “Sources” of law refers to where law comes from, which includes the context in which we make decisions or develop legal concepts.

¹³ Ibid at 28. The full section on “natural law” can be found at pages 28-35.

We talked about the chapter from Anishinaabe ecologist Dr. Robin Wall Kimmerer's book *Braiding Sweetgrass* called, "Maple Nation: A Citizenship Guide".¹⁴ Kimmerer reflects on the ways maple trees make good citizens, by sharing their sap, their shade, their beauty, producing oxygen and more, and all for free. Kimmerer writes, "When my kids were in school they had to memorize the Bill of Rights, but I would venture to guess that maple seedlings would be schooled instead in a Bill of Responsibilities."¹⁵ By looking at the maple trees, she observed a focus on responsibilities to one another that differs from the focus in U.S. politics on rights and freedoms.¹⁶ This observation allowed her to draw analogies, and think through how our society might be different if we learned from the maples.

Kimmerer further writes, "finding the words is another step in learning to see."¹⁷ I explained to the participants that in the Anishinaabe language, our verb to teach is "gikinoo'amaage".¹⁸ A variation of this term is "akinomaage", which is s/he teaches by gesturing to the earth.¹⁹ *Aki* means earth. *Noomaage* means gesturing/pointing towards. Put together, teaching can be thought of as literally "looking towards the earth". In Anishinaabe legal practice, the verb *akinomaage* reminds us to learn from more-than-human beings the potential

¹⁴ Robin Wall Kimmerer, *Braiding Sweetgrass: Indigenous Wisdom, Scientific Knowledge And The Teachings of Plants* (Minneapolis: Milkweed Editions, 2013) at 167-174.

¹⁵ *Ibid* at 173.

¹⁶ For scholarship looking at some of the alternatives to rights frameworks see for example: Jeff Comtassel, "Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous-Rights Discourse" (2008) 33:1 *Alternatives* at 105-132.

¹⁷ Robin Wall Kimmerer, *Gathering Moss: A Natural and Cultural History of Mosses* (Corvallis: Oregon State University Press, 2003) at 11.

¹⁸ John D Nichols and Earl Nyholm, *A Concise Dictionary of Minnesota Ojibwe* (Minneapolis: University of Minnesota Press, 2006) at 265. See online: <<https://ojibwe.lib.umn.edu/main-entry/gikinoo-amaage-vai>>.

¹⁹ Brock Pita wanakwat, "Anishinaabemodaa Pane Oodenang—A Qualitative Study of Anishinaabe Language Revitalization as Self-Determination in Manitoba and Ontario" (PhD Diss., University of Victoria, 2009) at 125 (quoting Basil Johnston from a research interview); Vern Northrup, *Akinomaage: Teaching From the Earth* (Duluth, MN: Duluth Art Institute, 2019); John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at 95; Gail Sarah Lafleur, "Ojibwe Elders' Experiences of Peace: To Teach Our Well-Being with the Earth" (PhD Diss., Brock University Department of Education) at 145-147 and 174. Note: Not all Anishinaabemowin speakers believe this is the best translation for the verb "akinomaage".

ways to pattern our own actions. Across many Indigenous legal traditions we see sophisticated ecological legal patterning. For example, in the north, the Gwich'in sometimes make analogies about leadership by looking to the caribou.²⁰ In the coastal west the Tsimshian have learned from orcas about the role of matriarchs in governance.²¹ In the prairies, Cree people can learn from the bison how to support people in need.²² And as Dr. Kimmerer explained, in the woodlands Anishinaabe people can look to maple trees to understand how to be good citizens by focusing on the obligations we owe to one another.²³ Cree author Louis Bird writes that in his legal tradition, "There were rules about respecting nature and the environment—the animals and the birds. If one of these were broken by a member of the family, a kid maybe, the punishment was a retraction of the benefits from the nature."²⁴ These rules were passed down or adapted between generations through their close observation of the living world. It is thus an essential legal question in my own tradition of Anishinaabe law and other Indigenous legal traditions to understand: *What does the more-than-human world teach us about how to govern ourselves?*²⁵ *How can we look to more-than-human beings to make better decisions and create patterns of law?* With these questions in mind we left the classroom to indulge together in a buffet lunch at Vistas Dining Room before convening on the edge of campus for our medicine walk.

²⁰ Craig Mishler et al., *Dinjii Vadzaih Dhidlit/The Man Who Became a Caribou: Gwich'in Stories and Conversations from Alaska and the Yukon* (Hanover, NH: International Polar Institute, 2019)

²¹ Christina Gray, "Being in Good Relations", The Belfry Theatre (24 January 2019). Online: <<https://www.belfry.bc.ca/being-in-good-relations/>>

²² Leroy Little Bear, "Twitter Bits from Buffalo Treaty", REDx Talks (29 September 2016). Online: <<https://vimeo.com/212279687>>

²³ Kimmerer, *Braiding Sweetgrass*, *supra* note 14 at 167-175.

²⁴ Louis Bird, *The Spirit Lives in the Mind: Omushkego Stories, Lives and Dreams* (Ontario: Broadview Press, 2005) at 75-76.

²⁵ For an excellent resource in thinking through this question see generally, Mary Siisip Geniusz, *Plants Have so Much to Give Us All We Have to do is Ask: Anishinaabe Botanical Teachings* (Minneapolis: University of Minnesota Press, 2015).

I was disappointed to miss out on the full medicine walk that day due to my cold. I enjoyed the way the knowledge-keeper interacted with the juniper bush. She had addressed the bush by name, lightly touched the branches in greeting like a tender handshake between people, and breathed in the citrusy smell. She showed us through example how to nurture and maintain the relationship with this plant.²⁶ The juniper freely provided important nutrients, and she explained some of these properties to us. The juniper was also involved in creating community safety by providing food and needed nutrition especially through the winter months to those in need. The juniper did not discriminate between humans and other animals who may need this nourishment. Its community was not just other junipers, but the whole system of living beings. The juniper draws nutrients from water, soil, and animal droppings, engaging in a process of both giving and taking. There were many lessons for how we too could structure our relationships, as we looked to the juniper.

I was feeling better the following days and returned to our programming for the subsequent learning sessions. We covered a vast array of information—treaties, the Royal Proclamation, the White Paper, RCAP, Aboriginal rights caselaw and section 35 of the Constitution Act, UNDRIP, community case studies in governance, and more. At the end of our packed week together, the participants all filled out a form to reflect on the program and give suggestions for the future. A few of them said they enjoyed the medicine walk, but it was hard to see how it connected to our topic of governance and law. *My heart sank!* I had attempted to carefully set up the walk to be an enriching connection to the more-than-human world as one source of Indigenous law. I had not been able to do the work *during* the walk to draw

²⁶ For more on the transformational role of relationality in law see generally, Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy and Law* (New York: Oxford University Press, 2011); Hadley Friedland, "Reclaiming the Language of Law: The Contemporary Articulation and Application of Cree Legal Principles in Canada" [forthcoming]; Matthew Wildcat, "Wahkohtowin in Action" (2018) 27:1 Constitutional Forum at 13-24.

connections in that moment to law, and then based on feedback we hadn't sufficiently picked up on the themes or topics from this walk again in the packed days that followed.

This is a teaching moment that has stayed with me. One of the lessons I draw from it is that there is more learning and practice that needs to happen for many of us, myself included, to develop the skills to adeptly explain, understand and apply this form of legal reasoning and practice. Deep understanding cannot be achieved in one half day session. Drawing appropriate meaning from common law casebooks takes years of specialized and dedicated work to learn. Likewise, we should not expect instant success in this method of drawing law from the more-than-human world. It is relational and requires patience, nuance, and attention to rootedness²⁷ as this thesis will show throughout its pages. Educators can provide opportunities for cumulative learning experiences in this legal method. Increasingly law schools are taking students outside in recognition that the more-than-human world is also a resource for learning.²⁸ This initiative within legal education will help deepen the transsystemic application of this practice. This work is not only transsystemic, but Indigenous peoples are also doing their own work within their communities to ensure these practices of law-making in relation with the living world inform contemporary decision-making.²⁹

After this experience I became even more aware of my need to further understand how law can work, as the theory and activities I had put forward were insufficient. One of the reasons I believe the participants had a hard time connecting with the juniper bush as law was because they did not have a relationship with the plant like our teacher did. This shift from law as

²⁷ My introductory definition of rootedness as used here is the "ground where we plant our sense of law".

²⁸ John Borrows, "Outsider Education: Indigenous Law and Land-Based Learning" (2017) 33:1 Windsor YB Access Just 1 at 1-27.

²⁹ See generally, Marianne Ignace et al, *Secwépemc People, Land and Laws* (Montreal: McGill-Queen's University Press, 2017).

normativity³⁰ to law as relationship was not made clear.³¹ I hope to take you as the reader on a legal medicine walk. Many of us begin this walk from a place of understanding law as ideas, and as something that is done to you, not something that you do. We can move together towards a vision that also sees law as a web of relationships. The interplay of obligation and response cultivates a deeper understanding of individual and group agency in our lives.

Back in the classroom when we looked at pictures of ceremonies, or elders, or casebooks people were able to analogize and contextualize these pieces to their own lives and therefore draw meaning from them. I do not suggest ignoring the role of norms or concepts, but the juniper activity brought forward the important role of rooting oneself in a set of relationships with legal implications.³² It proved more challenging for participants to find these relational connections to the juniper. We might further understand this shift from law as normative to law as relational by thinking about the traditions of religion and science. There is value in studying the doctrine of a religion. However, you would not gain access to other important layers of the tradition unless you became part of the community through various sets of relationships.³³ This would facilitate the internalization of the doctrine (norms) in unique ways as you attend ceremonies, sing, and wear certain clothes.³⁴ In the field of ecology, the scientist takes years to learn hundreds if not

³⁰ Normativity has different meanings across disciplines. I use “norm” here to mean law as a command, a standard, or principle. In thinking about law as not just normative but also as relational, I mean that there is a context in which we live law that is embodied and not just abstracted or ephemeral.

³¹ For an analysis of this type of relational Indigenous legal theory see Chapter 6 in Aaron Mills, “Miinigowiziwin: All That Has Been Given for Living Well Together, One Vision of Anishinaabe Constitutionalism” (PhD Diss., University of Victoria Faculty of Law, 2019); See also Hadley Friedland, “Reclaiming the Language of Law: The Contemporary Articulation and Application of Cree Legal Principles in Canada” [forthcoming].

³² Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy and Law* (Oxford: Oxford University Press, 2013). Nedelsky specifically considers the role of law's relations beyond the human-human to include what she terms “other living entities” at pages 194-199 of her book.

³³ For an example of how ceremony also reflects theories of law as relational see Darcy Lindberg, “Miyo Nēhiyāwiwin (Beautiful Creeness) Ceremonial Aesthetics and Nēhiyaw Legal Pedagogy” (2018) 16:17 *Indigenous Law Journal* 51.

³⁴ This is also true in the common-law legal world, apart from the singing. Attending court for example opens your eyes to the ceremony, regalia and unique language of this practice.

thousands of precise Latin names for various plants. Memorizing these names does not have much practical use if this knowledge is not coupled with a nuanced understanding of how these plants actually interact with one another and their environment. The Merriam-Webster Online Dictionary even defines ecology from this web-like lens, as “a branch of science concerned with the interrelationship of organisms and their environments”.³⁵ This thesis is my attempt to further understand how the relational aspect of law works, and manifests itself particularly in land-based pedagogies.

Another insight this juniper bush experience left me with is that in today’s busy world of constant pressure from and interaction with dominant institutions, it often does not feel relevant to communities to create law with the more-than-human world in their decision-making. The demands to respond to the pressing conditions created by section 35 caselaw or legislation requires so much focus that turning to legal sources distinctive from those primarily drawn upon in the western tradition will not be useful in every instance. As Val Napoleon writes, “[I]f these laws are not relevant and useful to real life, why bother?”³⁶ This thesis explores the contours of law as it is sourced in the more-than-human world, which is *one* of many approaches that can serve communities in their governance efforts.³⁷

The Path Ahead

I can identify only a few moments in my common law training where we looked to the more-than-human world for guidance in our legal work. For example in first year constitutional law

³⁵ Merriam-Webster Online Dictionary, definition of “Ecology”, online: <<https://www.merriam-webster.com/dictionary/ecology>>.

³⁶ Val Napoleon, “Ayook: Gitksan Legal Order, Law and Legal Theory” (PhD Diss., University of Victoria Faculty of Law, 2009) at 70 cited in Hadley Friedland and Val Napoleon, “Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions.” (2015) 1:1 Lakehead Law Journal at 20.

³⁷ For a discussion on some of the available approaches in the revitalization of Indigenous laws see generally, Friedland, “Reflective Frameworks”, *supra* note 9 at 8-12.

we talked about the living tree doctrine of constitutional interpretation to signal the importance of the constitution's "growth and expansion within its natural limits".³⁸ In Aboriginal law we learned about treaties signed between Indigenous peoples and the Crown, where Crown representatives invoked the promise "as long as the sun shines, the grass grows and the river flows" to indicate how long the agreement will last, and how we should live our treaties.³⁹ In *R v Pelletier*, Justice Nakatsuru analogized to the more-than-human world in his sentencing decision by reflecting back an elder's teaching to Ms. Pelletier that she needed to have strong roots like a tree to withstand the storms that come in life.⁴⁰ This encouragement was intended to rehabilitate and restore her sense of strength to move forward. Despite these few examples, it may still seem strange, and at this beginning point quite unclear what it looks like to approach the more-than-human world as a guide to inform decision-making. The land, waters, rocks, plants, animals, stars and weather (etc.) remain underutilized legal relations for common law or civil law trained individuals.⁴¹

In contrast, the following three chapters look at some of the many ways Indigenous people look to the more-than-human world, including as a normative site of "precedent, authority, standards, criteria, processes, and principles"⁴², as well as site of legal relationships that leads to discernment and decision-making.⁴³ I identified these layers of this land-based legal

³⁸ *Edwards v. Canada (Attorney General)*, 1929 CanLII 438 (UK JCPC) at 107.

³⁹ Harold Johnson, *Two Families: Treaties and Government* (Saskatoon: Purich Publishing, 2007) at 29; Harold Johnson and Walter Hildebrand, *Treaty Elders of Saskatchewan: Our Dream is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000) at 38 and 54.

⁴⁰ *R v Pelletier*, 2016 ONCJ 628 at para 24.

⁴¹ My purpose in sharing these short examples is to show that it is not *entirely* foreign to the common law to see the more-than-human world as a legal relation or resource for analogy. It may seem that I suggest here that the common law merely ignores the place of the more-than-human world within its structures. However, there is important scholarship that suggests our mainstream systems (legal and otherwise) are actually actively founded upon hostility and violence towards more-than-human beings. See for example Dinesh Wadiwel, *The War Against Animals* (Leiden, Netherlands: Brill Publishing, 2015).

⁴² John Borrows, "An Emphasis on Indigenous Law Could Help Shape a Future That's Brighter Than Our Past", *The Hill Times*, 28 June 2017, online: <<https://www.hilltimes.com/2017/06/28/emphasis-indigenous-law-help-shape-future-thats-brighter-past/111748>>.

⁴³ Aaron Mills, "Miinigowiziwin: All That Has Been Given for Living Well Together, One Vision of Anishinaabe Constitutionalism" (PhD Diss., University of Victoria Faculty of Law, 2019).

method through synthesizing the secondary research from Indigenous law scholars, and from primary research I've conducted in Indigenous communities across Canada over almost a decade of work as a researcher and eventually lawyer for both the Indigenous Law Research Unit, and West Coast Environmental Law.⁴⁴ I describe each layer using examples (stories and description), theory, analysis, and to a lesser extent photos. Notably there are other important layers to explore which I am unable to address within the space limits of this thesis.⁴⁵

My intended audience for this work is simultaneously broad and narrow. It is narrow because a Master's thesis in law is typically engaged with by legal academics, and potentially law students and practitioners such as lawyers and judges. The subset of this community that I am speaking to is those specifically interested in Indigenous law, environmental law, comparative legal studies, and those committed to the goals of reconciliation as stated in the Truth and Reconciliation Commission Calls to Action numbers 27, 28 and 50.⁴⁶ I view this important audience as colleagues with whom I'd be honoured to engage in a wide variety of ongoing discussions related to the themes addressed herein. We live in a time where heated challenges continually arise related to oil and gas development, logging, largescale hydroelectric dams and other environmental pressures.⁴⁷ Indigenous people are frequently entangled in these

⁴⁴ For more information about the methodology used by the Indigenous Law Research Unit, and West Coast Environmental Law see, Hadley Friedland and Val Napoleon, "Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions." (2015) 1(1) *Lakehead Law Journal* 33.

⁴⁵ For example, I was unable to address in a detailed way how some Indigenous laws are created when individuals join together in interpretive communities and discern how they might pattern their decision-making activities through analogizing and distinguishing to the more-than-human world. This would involve looking, for example, at what caribou have taught the Gwich'in about leadership, or what orcas teach the Tsimshian about matriarchal governance, or how the changing seasons inform Anishinaabe legal process. I plan to write about this next.

⁴⁶ Truth and Reconciliation Commission of Canada. *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015).

⁴⁷ See for example, Deborah Curran, Eugene Kung, and Marilyn Slett, "Ġvīlās and Snəwəyəl: Indigenous Laws, Economies, and Relationships with Place Speaking to State Extractions" (2020) 119:2 *South Atlantic Quarterly* 215; John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at 50-103.

exchanges, and questions around the interpretation and application of Indigenous laws appear.⁴⁸

This thesis provides another tool for the legal community to move through these challenges in thoughtful ways because of increased understanding of how some Indigenous peoples and their laws relate to and draw from the living world. My aim is to increase understanding of how some Indigenous laws are sourced in the more-than-human world, and to encourage more Indigenous law and Canadian law trained individuals to consider what could be added to their own legal practice by relating with the more-than-human world.

My intended audience is also broad. I have tried to write in a way that could engage individuals without a formal background in Canadian law. There are many people working in various types of governance institutions (Indigenous, and non-Indigenous) who are looking for further knowledge on how to support and engage with Indigenous laws for application in their own work.⁴⁹ They are striving to “decolonize”, “indigenize”, work towards “reconciliation”, return to ancestral pathways, or “revitalize” their ways of being and doing.⁵⁰ This broader audience spans multiple fields including governance, education, environmental activism, science, religion, journalism, or really any sphere with a nexus that requires engagement with Indigenous peoples.

⁴⁸ Gavin Smith, “The Invisible Thread? The Coastal GasLink Decision and Why We Must Do More to Recognize the Application of Indigenous Law” (15 January 2020) West Coast Environmental Law Blog, online: <<https://www.wcel.org/blog/invisible-thread-coastal-gaslink-decision-and-why-we-must-do-more-recognize-application>>.

⁴⁹ The Department of Justice announced in 2019 a \$10 million dollar budget spread out over five years to support various projects aimed at the revitalization of Indigenous laws across Canada. For the list of projects funded see online: <<https://www.canada.ca/en/department-justice/news/2021/05/revitalization-of-indigenous-laws-a-cross-canada.html>>.

⁵⁰ Following the Truth and Reconciliation Commission Calls to Action, these terms now frequently appear in different organizations’ strategic plans. For thoughts on the application of some of these concepts in the academic context see, Adam Gaudry and Danielle Lorenz, “Indigenization as Inclusion, Reconciliation and Decolonization: Navigating the Different Visions for Indigenizing the Canadian Academy” (2018) 14:3 *AlterNative: An International Journal of Indigenous Peoples* at 218-227.

While I illuminate the strengths of the pathways connecting the more-than-human world and law, confronting the critiques is also essential. Design researchers Norman and Verganti remind, “to create breakthroughs, it is necessary to leverage the contrasts that come from critique instead of escaping them.”⁵¹ Trickster, a prominent character in various Nations’ narratives, is full of contrast.⁵² Trickster often presents to us what we can do, by showing us what not to do. We all have some Trickster in us.⁵³ That is, we have subjectivities, limits, gaps, and partialities that we do not always see. Judgement is based on our perspectives, and can be more fully formed as we take account of different views. The approaches herein are also enmeshed with the presence of Trickster.⁵⁴ The aim of this thesis is to shine a light on this shadowed method and consider what is obscured as “[classroom] walls can hide important legal resources.”⁵⁵ The philosopher Charles Taylor writes about contrast, suggesting that we must observe and then give language to our differences to challenge our understandings of cultures beyond our own.⁵⁶ To look outside ourselves requires hard work, and it can be intimidating as we may recognize our own deficiencies. Encouragingly, some psychology research explores how this act of engaging in debate with people of differing opinions and backgrounds often encourages better ideas and creativity.⁵⁷ In the pages that follow, I suggest how knowledge in drawing out law with the more-than-human

⁵¹ Roberto Verganti and Don Norman, “Why Criticism Is Good for Creativity”, Harvard Business Review Article, 16 July 2019, online: <<https://hbr.org/2019/07/why-criticism-is-good-for-creativity>>.

⁵² Gerald Vizenor, “Trickster Discourse”, (1990) 14:3 American Indian Quarterly at 277-287.

⁵³ John Borrows, “The Trickster: Integral to a Distinctive Culture”, (1997) 8:2 Const F 27.

⁵⁴ For further reading on the role of Trickster as a creature of legal theory see Val Napoleon, “Tsilhqot’in Law of Consent” (2015) 48:3 UBC L Rev 873.

⁵⁵ Borrows, “Outsider Education”, *supra* note 28 at 3.

⁵⁶ Charles Taylor, *Philosophy and the Human Sciences: Philosophical Papers, Vol.2* (Cambridge: Cambridge University Press, 1985) at 116-133.

⁵⁷ See for example, CJ Nemeth, “Differential contributions of majority and minority influence” (1986) 93:1 Psychological Review at 23–32.

world can strengthen not only Indigenous legal traditions but the common and civil law traditions as well.⁵⁸

The common narrative and analytical reference throughout the following three chapters is my experience as an articulated student learning Tsilhqot'in law. Chapter one explores some ways that Indigenous people tell distant time stories about and embedded in their homelands and the various beings who live there. These narratives endure as relationships through time, and are sometimes relied upon as historical precedent (something done long ago that can serve as an example for how to act today). I also respond to potential critiques of anthropomorphism. Chapter two looks at some ways Indigenous people create contemporary stories about and embedded in their homelands and the various beings who live there. The new narratives people produce and share in community about the more-than-human world can also function as a form of legal precedent. I examine the 2010 Navajo Presidential election as an example of how some Navajo citizens looked to the weather during their election process and think through some of the complexities that may arise in this practice. I also blur some of the distinctions between chapters one and two by considering both the fixed and fluid nature of law, and connecting contemporary and historical precedent as found in new and distant time narratives. Chapter three shifts the focus towards articulating pedagogical elements of learning from the living world. I explore the importance of embodied direct experience as a core component of engaging in this legal method.

Notably I often refer to Indigenous legal orders throughout this thesis instead of focusing on a specific tradition at every moment. Where I do concentrate on specific traditions, they are most often the Tsilhqot'in, Anishinaabe, Navajo and Coast Salish legal orders. I make this choice to

⁵⁸ For a discussion on the benefits of Indigenous law to Canadian law (and Canadians) more generally see, Borrows, *CIC*, *supra* note 11 at 107-113 and 125-129; For more on this idea of "drawing out law" see John Borrows, *Drawing Out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 2010).

engage in “Indigenous legal ordering” to show a breadth of examples of how law can be drawn from the more-than-human world. Some commonalities exist across Indigenous legal traditions that I find worthwhile to highlight, while practicing caution not to perpetuate overly broad pan-Indigenous approaches or insights. Even as there are some similarities, there is also great diversity within Indigenous communities. I have seen this in nearly every community I have interacted with, including the Chippewas of Nawash First Nation⁵⁹ of which I am a citizen. I look both within and beyond my own Anishinaabe legal tradition to advance my thesis.

Finding Language to Describe the More-Than-Human World

Kim TallBear writes, “Like our methodological choices, language choices are ethical choices and are key in this project of constituting more democratic relations and worlds.”⁶⁰ I have chosen primarily to use the term “more-than-human world or beings” throughout this thesis. This section explains why. In 1875 Austrian geologist Eduard Suess⁶¹ created the term biosphere to describe the part of the Earth “where living things thrive and live.”⁶² The term recognizes we (humans) inhabit a living sphere with all other living beings. It connects with related terms biodiversity⁶³ (which is necessary to sustain life and is currently decreasing drastically due to human activity), and biophilia⁶⁴ (coined by Erich Fromm in the 1950s to describe our natural

⁵⁹ The Chippewas of Nawash First Nation is an Anishinaabe (Ojibwe) community located on the shores of Georgian Bay in southwestern Ontario. Our membership is approximately 3,000 with about 700 people living on reserve. See online: <<https://www.nawash.ca/about-chippewas-of-nawash/>>.

⁶⁰ Kim TallBear, “Why Interspecies Thinking Needs Indigenous Standpoints” (18 November 2011) Society for Cultural Anthropology, From the Series: The Human is More than Human, online: <<http://mathewarthur.com/whats-new/pdf/tallbear-interspecies-thinking.pdf>>

⁶¹ Encyclopedia Britannica Online, “Life on Earth: The Biosphere”, online: <<https://www.britannica.com/science/life/Life-on-Earth#ref279345>>.

⁶² Biology Dictionary Online, “Biosphere Definition”, online: <<https://www.biologyonline.com/dictionary/biosphere>>

⁶³ Kevin Gaston and John Spicer, *Biodiversity: An Introduction, 2nd edition* (New Jersey: Wiley-Blackwell, 2013).

⁶⁴ Stephen Kellert and Edward Wilson (eds.), *The Biophilia Hypothesis* (Washington D.C.: Shearwater Press, 1995).

affinity for nature and various forms of life). The sum of all living forms that comprise the biosphere is called biota, and includes flora, fauna and microorganisms.⁶⁵ The challenge in applying these terms rooted in a genealogy of Western science to Indigenous thought, is that the biotic is often coupled dichotomously with the abiotic (or the non-living). For example, abiotic life often includes soil, rock, weather (wind, sun, rain) and water.⁶⁶ In contrast, these abiotic factors are frequently described as living by Indigenous peoples and may be more appropriately referred to as beings or even relations.⁶⁷ This is not to say that Indigenous people do not or cannot understand or adhere to the distinctions of biotic and abiotic factors. I want to be cautious of the danger of decreasing individual Indigenous thought into a uniform collective, and also of pan-Indigenous assertions. These scientific classifications of what constitutes life can be very useful in understanding the world in particular ways. I have ultimately chosen not to rely on these scientific terms describing the living world given the binary thought patterns they might invoke and their difference from the stories and ideas of Indigenous thinkers cited throughout this thesis.

I thought seriously about language, read widely, and reached out to colleagues as I made my decision about which terms to use. Some of the available terms include more-than-human beings/relations/world, other-than-human beings/relations/world, the natural world⁶⁸, the natural

⁶⁵ Encyclopedia Britannica Online, “Life on Earth: The Biosphere”, online: <<https://www.britannica.com/science/life/Life-on-Earth#ref279345>>.

⁶⁶ Biology Dictionary Online, “Abiotic Factors”, online: <<https://biologydictionary.net/abiotic-factors/>>

⁶⁷ For an example of water as relation see Aimée Craft, “Giving and Receiving Life from Anishinaabe Nibi Inaakonigewin (Our Water Law) Research” in Jocelyn Thorpe, Stephanie Rutherford and L. Anders Sandberg (eds.), *Methodological Challenges in Nature-Culture and Environmental History Research* (London: Routledge Press, 2016); See also Danika Littlechild, “Transformation and Re-formation: First Nations and Water in Canada” (LLM Diss., University of Victoria Faculty of Law, 2014).

⁶⁸ Though used by many Indigenous writers, I have ultimately chosen not to use this term because it may suggest that places/beings not influenced by humans are natural, and the part that is influenced by humans is “not-natural”. See generally critiques on the term wilderness (i.e. the natural): David Treuer, “Return the National Parks to the Tribes: The Jewels of America’s Landscape Should Belong To America’s Original Peoples”, *The Atlantic* (12 April 2021), online: <<https://www.theatlantic.com/magazine/archive/2021/05/return-the-national-parks-to-the-tribes/618395/>>.

environment, non-human⁶⁹, the biosphere or ecosphere, all beings⁷⁰, all creation⁷¹, Land⁷² (instead of land) and of course Indigenous language words can be put forward and defined as well. After all this work, I do not believe my word choices are the best. In fact, I often find them clunky and unsatisfying. I will explain why I have chosen some terms over others. Ultimately I hope readers will see the need we have in English to continue to develop our language. The terms I have primarily relied on include the “more-than-human world”⁷³ and the “living world”⁷⁴. I use these words to refer collectively to the land, animals, plants, rocks, sky beings (rainbows, stars, weather, clouds etc.), water, fungus, fire, and air etc. I do not include an

⁶⁹ This term seems to introduce more of a binary philosophy as it may suggest you’re human or you’re not human. On the other hand, more-than-human or other-than-human suggest a more fluid sense of what can possess human elements and what else there may be beyond ourselves.

⁷⁰ This term was used at the negotiation tables of the Commission on Resources and Environment. This was a collaborative planning effort used in British Columbia in the ‘90s. See, Tim Thielmann and Chris Tollefson, “Tears from an Onion: Layering, Exhaustion and Conversion in British Columbia Land Use Planning Policy,” (2009) 28 *Politics and Society* at 111–124. See also online: <<http://worldcat.org/identities/lccn-n93039028/>>

⁷¹ This term is used by many Indigenous peoples, and I have heard it frequently in community settings. It is expansive and can refer to existence beyond this earth, and include the sky worlds and spiritual worlds. One challenge with it may be that people apply Euro-Christian or other traditions of creationism which are distinctive from Indigenous definitions. For a nice of example of the application of this term see Deborah McGregor, “Honouring our Relations: An Anishinaabe Perspective on Environmental Justice” in Julian Agyeman, Peter Cole, Randolph Haluza-DeLay and Pat O’Riley (eds.), *Speaking For Ourselves: Environmental Justice in Canada* (Vancouver: UBC Press, 2009) at 27-41.

⁷² Sandra Styres and Dawn Zinga, “The Community-First Land-Centred Theoretical Framework: Bringing a ‘Good Mind’ to Indigenous Education Research?” (2013) 36:2 *Canadian Journal of Education* at 300-301. Quote: “We have chosen to capitalize Land when we are referring to it as a proper name indicating a primary relationship rather than when used in a more general sense. For us, land (the more general term) refers to landscapes as a fixed geographical and physical space that includes earth, rocks, and waterways; whereas, ‘Land’ (the proper name) extends beyond a material fixed space. Land is a spiritually infused place grounded in interconnected and interdependent relationships, cultural positioning, and is highly contextualized.” I have chosen not to rely on capitalization to distinguish the types of relationships I mean because I refer to more than Land/land in my writing.

⁷³ The term “more-than-human” was coined by David Abram in *The Spell of the Sensuous: Perception and Language in a More than Human World* (New York: Vintage Books Press, 1997). As an ecologist and philosopher, Abram’s work focuses on how to connect language to ecological thought (in line with the field of ecolinguistics). This term has been widely adopted by thinkers in or at the nexus of environmental studies, including Indigenous ecological thought. I like that it moves away from the binary of human/non-human as it holds a spaciousness to think about our many interactions as species. It also allows for a vision where humans are not superior to other living beings. The “more-than-human” can be followed by world, beings or relations to allow for nuanced shifts in meaning.

⁷⁴ See for example the following work of political theorist and philosopher Jane Bennett, *Vibrant Matter: A Political Ecology of Things* (Durham, NC: Duke University Press, 2010). Bennett’s work also thinks about how to put language to the more-than-human/living beings. Like the term “more-than-human” I find that living world also steers us away from binaries and anthropocentrism.

exhaustive list here of what the more-than-human world may refer to within Indigenous thought, because I do not know enough about each Indigenous Nation and what they may typically include in this concept of a living world. Many thinkers have discussed the inadequacy of current expressions of the English language to represent ecological worldviews marked by animacy and relationality.⁷⁵ For example, Kimmerer writes, “As a scientist, I have been trained to refer to our relatives, the plants and the animals...the water and the Earth herself as ‘it’...What I came to understand was that in [Anishinaabe] languages, we characterise the world into those who are alive and the things which are not. So we speak a grammar of animacy.”⁷⁶ She has proposed a different lexicon for English pronouns to include *ki* (singular) or *kin* (plural) to refer to the more-than-human world in a respectful and non-gendered way.⁷⁷

Maneesha Dechka also reflects on the limits of language in her scholarship in the field of animal law. She writes, “when I say ‘animal,’ I am referencing the dizzying array of life forms that comprise the biological kingdom Animalia, including vertebrates and invertebrates, as well as those animals, except the human, that most of us do not think of as animals, such as insects but also sea creatures such as sponges, corals, and anemones.”⁷⁸ Likewise I am asking the terms “more-than-human world” and “living world” to comprise an even more dizzying array of life forms. Worryingly, I may be “reducing them to a presumed unity and shared identity.”⁷⁹ I do this

⁷⁵Stephen Harding, *Animate Earth: Science, Intuition and Gaia*, 2nd ed. (Cambridge: Green Books, 2013); Kimmerer, *supra* note 14 at 48-63; David Treuer, “Language Carries More Than Words”, On Being with Krista Tippett Podcast, 19 June 2008, online: <<https://onbeing.org/programs/david-treuer-language-carries-more-than-words/>>

⁷⁶ CBC Tapestry, “Why Is The World So Beautiful? An Indigenous Botanist On The Spirit Of Life In Everything”, 27 November 2020, online: <<https://www.cbc.ca/radio/tapestry/why-is-the-world-so-beautiful-an-indigenous-botanist-on-the-spirit-of-life-in-everything-1.5817787>>

⁷⁷ Robin Wall Kimmerer, “Speaking of Nature: Finding Language That Affirms Our Kinship With the Natural World”, *Orion Magazine*, 12 June 2017, online: <<https://orionmagazine.org/article/speaking-of-nature/>>.

⁷⁸ Maneesha Deckha, *Animals as Legal Beings: Contesting Anthropocentric Legal Orders* (Toronto: University of Toronto Press, 2021) at 32.

⁷⁹ *Ibid* at 33.

not with the intent to erase the distinctions between them, but to recognize their collective animacy for many (but of course not all) Indigenous peoples,⁸⁰ and as beings who we can learn with in our work of creating law.

I have ultimately chosen not to use the Anishinaabemowin words partly because of the difficulty in teaching the polysemy of these words to others, and I hope to gently guide readers into these ideas with as much bridging terminology as possible. I also chose not to rely on Anishinaabemowin terms because I am referring to many other Indigenous legal traditions beyond the Anishinaabe which would require words I do not have access to at this time. Finally, I am not a fluent speaker of Anishinaabemowin and I may stumble in their application, so choosing the English terms more-than-human world and living world is my attempt to guide myself gently into these ideas as well.

Research Questions

The following four questions animate my research.

- 1) What are the different layers of legal methods, or approaches, Indigenous people use to pattern their lives in relationship with the more-than-human world? What are examples of each of these layers, and what do they teach us about how to govern ourselves? In other words, how are some Indigenous laws influenced by nature?
- 2) What are the opportunities and limitations of approaching the more-than-human world as a site of law? In other words, what do we gain or lose by learning from nature how to shape our laws?

⁸⁰ Kim TallBear, “Beyond the Life/Not-Life Binary: A Feminist-Indigenous Reading of Cryopreservation, Interspecies Thinking and New Materialism” in Joanna Radin and Emma Kowal (eds.), *Cryopolitics: Frozen Life in a Melting World* (Cambridge: MIT Press, 2017).

3) How might non-citizens of an Indigenous legal order engage in these methods?

In other words, how might we learn from people different than us about how our laws can be influenced by nature?

4) How might citizens of an Indigenous legal order teach these approaches, or involve others in their interpretive communities? In other words, how can we teach people different than us about how our laws can be influenced by nature?

My overarching goal is to consider how we might understand a legal order unique from our own, and how we might strengthen one another by forming embodied transsystemic bonds between our diverse legal sources and methods.⁸¹ In Canadian law, the Crown has a “duty to consult and accommodate” Indigenous peoples on matters that may affect Aboriginal or Treaty rights. This duty flows from the constitution, as well as case law.⁸² Building off of this obligation, the late chief justice Lance Finch suggested that legal professionals have a “duty to learn”.⁸³ Lawyers and judges within the Canadian legal system should have basic knowledge about how to engage in transsystemic interpretation when they are presented with Indigenous laws.⁸⁴ This will require guidance from Indigenous people, along with many other assets such as sufficient resourcing, patience, and humility etc. The obligations to learn how to find and interpret Indigenous laws flow from multiple sources including but not limited to ethical and professional responsibilities (i.e. formal codes of conduct)⁸⁵, legislation (Indigenous, federal,

⁸¹ For more information on the benefits of transsystemic legal analysis generally see, Roderick A. Macdonald and Jason MacLean, “Navigating the Transsystemic: No Toilets in the Park” (2005) 50 McGill LJ 721; Rosalie Jukier, “Where Law and Pedagogy Meet in the Transsystemic Contracts Classroom” (2005) McGill LJ 789.

⁸² *Haida Nation v British Columbia (Minister of Forests)* 2004 SCC 73; See more generally, Dwight Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon, SK: Purich Publishing, 2014).

⁸³ Lance Finch, “The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice” (2012) CLE BC Materials, online:

<https://www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Documents_deposes_a_la_Commission/P-253.pdf>.

⁸⁴ *Ibid.*

⁸⁵ Law Societies regulate these codes of conduct. In an effort to respond to the need for “cultural competency” training, law societies across Canada have been implementing mandatory training sessions as part of the CPD

provincial, and municipal)⁸⁶, treaties⁸⁷, the section 35 framework (case law)⁸⁸, and the Truth and Reconciliation Commission Calls to Action⁸⁹.

Some believe that Indigenous law should only be theorized, practiced, learned and lived by citizens of that legal order, otherwise there may be a risk of appropriation.⁹⁰ I, along with many others, disagree.⁹¹ Just as anyone can come to a Canadian law school and learn the common or civil law, anyone *can* learn an Indigenous legal order if they dedicate themselves to the work. There may be some legal knowledge unavailable to non-citizens given legal processes of confidentiality or privilege. Privileged access to legal knowledge also exists in Canadian law, yet does not preclude people from engaging at different levels.⁹² In the words of Doug S. White

program. Cultural competency of course includes the need to develop greater transsystemic awareness of the operation of Indigenous laws. See for example, News Release Law Society of British Columbia, “Law Society Adopts Indigenous Intercultural Competency Training, 6 December 2019, online: <<https://www.lawsociety.bc.ca/about-us/news-and-publications/news/2019/law-society-adopts-indigenous-intercultural-compet/>>; News Release Law Society of Alberta, “President’s Message: Introduction of Mandatory Indigenous Cultural Competency Training, 6 October 2020, online: < <https://www.lawsociety.ab.ca/presidents-message-introduction-of-mandatory-indigenous-cultural-competency-training/>>; Law Society of Ontario (with the Advocates’ Society and the Indigenous Bar Association), “Guide for Lawyers Working with Indigenous Peoples”, 8 May 2018, report online: <https://www.advocates.ca/Upload/Files/PDF/Advocacy/BestPracticesPublications/Guide_for_Lawyers_Working_with_Indigenous_Peoples_may16.pdf>

⁸⁶ For examples of legislation both federally and provincially with provisions that require consideration of Indigenous laws see for example, *Impact Assessment Act*, SC 2019, c 28, s 1; *Environmental Assessment Act*, SBC 2018, c 51; *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24; *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44.

⁸⁷ For examples of how treaties should incorporate Indigenous legal perspectives see generally, John Borrows and Michael Coyle (eds.), *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017); Janna Promislow, “Treaties in History and Law” (2014) 47:3 UBC L Rev 1085.

⁸⁸ See for example, *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para 42, “a morally and politically defensible conception of a aboriginal rights will incorporate both legal perspectives.”; at para 31, “the a boriginal rights recognized and affirmed by s.35 (1) must be directed towards the reconciliation of the pre-existence of a boriginal societies with the sovereignty of the Crown.”

⁸⁹ Truth and Reconciliation Commission of Canada, *supra* note 46. See especially calls to action numbers 27, 28 and 50.

⁹⁰ Concerns around appropriation speaks again to the importance of the relational. See, John Borrows and Kent McNeill (eds.), *Indigenous Voices, Cultural Appropriation and the Place of Non-Indigenous Academics* (Toronto: University of Toronto Press) [forthcoming].

⁹¹ Many scholars of Indigenous law write and teach about legal traditions to which they do not “biologically” belong including Dr. Andrée Boisselle (Coast Salish), Dr. John Borrows (various), Dr. Alan Hanna (Tsilhqot’in), Dr. Hadley Friedland (Cree), and Dr. Val Napoleon (Gitksan). Each has deep relational connections within these legal orders. Of course through solicitor-client relationships many lawyers are asked to understand Indigenous legal traditions to which they do not claim belonging. The same is true for judges.

⁹² Friedland and Napoleon, “Gathering the Threads”, *supra* note 44 at 11-12.

III (Kwulasultun), lawyer and leader from Snuneymuxw First Nation: “Indigenous law is the great project of Canada and it is the essential work of our time. It is not for the faint of heart, it is hard work. We need to create meaningful opportunities for Indigenous and non-Indigenous people to critically engage in this work because all our futures depend on it.”⁹³ The four research questions animating this thesis are meant to contribute a small pinch of soil to further nourish the work of growing these meaningful opportunities for engagement with Indigenous legal orders.

Methodology

To answer the questions posed above, I employ two primary research methodologies. First, I use an Anishinaabe research methodology by weaving experiential learning and story into conversation with existing academic literature on Indigenous law, especially as it relates to the living world.⁹⁴ Indigenous research methodologies often use a narrative approach to investigate the world, that allows for cyclical and layered interpretation that trusts the listener/reader as a primary agent in drawing meaning from the knowledge shared.⁹⁵ These narratives for inquiry can be rooted in life experience, and are “tools for thinking”.⁹⁶ Anishinaabe research methodologies are connected to these broader Indigenous research methods, though use Anishinaabe stories and worldviews as their base.

⁹³ Truth and Reconciliation Commission of Canada, “Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada” (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) at 207, online: <https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Executive_Summary_English_Web.pdf>.

⁹⁴ Jill Doerfler, Niigaanwewidam James Sinclair, and Heidi Kiiwetinepinesiik Stark eds., *Centering Anishinaabeg Studies: Understanding the World Through Stories* (Michigan State University Press, 2013).

⁹⁵ Jo-Ann Archibald (Q’um Q’um Xiim), *Indigenous Storywork: Educating the Heart, Mind, Body and Spirit* (Vancouver: UBC Press, 2008); For an example that focuses on *showing* an Indigenous research methodology (instead of telling it) see, Elsie Paul (with Paige Raibmon and Harmony Johnson), *Written as I Remember It: Teachings From the Life of a Sliammon Elder* (Vancouver: UBC Press, 2014). The free online interactive platform for this resource is available online: <<https://ravenspacepublishing.org/publications/as-i-remember-it/>>

⁹⁶ Hadley Friedland and Val Napoleon, “An Inside Job: Engaging with Indigenous Legal Traditions through Stories”, (2016) 61:4 McGill LJ at 735-739.

Between 2012-2020 I worked as a legal researcher, and eventually a lawyer, in partnership with various Indigenous communities across Turtle Island to support the work of revitalizing their legal traditions for application in contemporary contexts. I also began co-teaching Anishinaabe law camps in my community of Neyaashiinigiing (Chippewas of Nawash First Nation) in 2014.⁹⁷ This experiential learning in the field was rich with insight into the necessity of revitalizing Indigenous laws, as well as the challenges of engaging in this work. Given the differences in legal traditions, there were also differences in application of the various methods of revitalizing Indigenous laws.⁹⁸ I witnessed how some Indigenous people look to the living world in patterned ways as legal precedent, or in other words, how they “read” law from the land, waters, plants, rocks, animals, stars, weather, etc. Law is often thought of and practiced exclusively as an intellectual activity.⁹⁹ However, the practice of law can be embodied, and located and applied in particular places and communities.¹⁰⁰ Law can be a holistic activity.

Scholarship in the field of Indigenous law illuminates the many different resources from which Indigenous laws flow. This includes for example custom¹⁰¹, deliberation¹⁰², stories¹⁰³,

⁹⁷ See for example, Serena Dykstra, Zachary Donofrio & Jasleen Johal, “Anishinaabe Law Camp”, *Obiter Dicta*, 29 September 2014, online: <<http://obiter-dicta.ca/2014/09/29/anishinaabe-law-camp/>>; Allison Grandish, “The Stories Behind the Law: Anishinaabe Law Camp 2015,” *Obiter Dicta*, 13 October 2015, online: <<http://obiter-dicta.ca/2015/10/13/anishinaabe-law-camp-2015/>>.

⁹⁸ See generally, Friedland, “Reflective Frameworks”, *supra* note 9.

⁹⁹ Jennifer Nedelsky, “Embodied Diversity and the Challenges to Law” (1997) 42:1 McGill LJ 91.

¹⁰⁰ Benjamin Forest, “Placing the Law in Geography”, (2000) 28 *Historical Geography* at 5-12; Sarah Morales, “St’l’ul Nup: Legal Landscapes of the Hul’qumi’num Mustimuhw” (2016) 33:1 *Windsor YB Access Just* at 103-123.

¹⁰¹ James [Sákéj] Youngblood Henderson, “First Nations Legal Inheritances in Canada: The Mi’kmaq Model” (1995) 23:1 *Man L Rev* 1; Mathew Fletcher, “Rethinking Customary Law in Tribal Court Jurisprudence” (Occasional Paper delivered at Michigan State University College of Law, Indigenous Law and Policy Centre Occasional Paper Series, 2006)

¹⁰² Borrows, *CIC*, *supra* note 11 at 35-46.

¹⁰³ Hadley Friedland, *The Wetiko Legal Principles: Cree and Anishinaabek Responses to Violence and Victimization* (Toronto: University of Toronto Press, 2018).

songs¹⁰⁴, ceremony¹⁰⁵, dances¹⁰⁶, art¹⁰⁷, language¹⁰⁸, legislation¹⁰⁹, treaties¹¹⁰ etc. Drawing from multiple resources can help learners gain a fuller appreciation of a legal order. This thesis on the more-than-human world as a legal relationship or resource sits alongside the work of other scholars of Indigenous law including Andrée Boisselle¹¹¹ (Coast Salish, Stó:lö), John Borrows¹¹² (Anishinaabe), Robert Clifford¹¹³ (Coast Salish, WSÁNEĆ), Aimée Craft¹¹⁴ (Anishinaabe), Darcy Lindberg¹¹⁵ (Plains Cree), Aaron Mills¹¹⁶ (Anishinaabe), Sarah Morales¹¹⁷ (Coast Salish, Cowichan), Nancy Sandy¹¹⁸ (Secwepemc), and Tuma Young¹¹⁹ (Mi'kmaq). I will be referencing and building from their and others foundational work.¹²⁰

¹⁰⁴ Richard Overstall, “Encountering the Spirit in the Land: Property in a Kinship-Based Legal Order” in John McLaren, Andrew R Buck & Nancy E Wright (eds.), *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2004) at 29-31.

¹⁰⁵ Darcy Lindberg, *kihcitwâw kikway meskocipayiwin (sacred changes): Transforming Gendered Protocols in Cree Ceremonies through Cree Law* (LLM Thesis, University of Victoria Faculty of Law, 2017); D. Lindberg, “Miyo Nêhiyâwiwin (Beautiful Creeness)”, *supra* note 33.

¹⁰⁶ Joseph Masco, “‘It is a Strict Law That Bids Us Dance’: Cosmologies, Colonialism, Death and Ritual Authority in the Kwakwaka’wakw Potlatch, 1849-1922”, (1995) 37:1 *Comparative Studies in Society and History* at 41-75.

¹⁰⁷ See “Testify: A Project of the Indigenous Laws and the Arts Collective”, online: <<http://testifyindigenous.ca/>>

¹⁰⁸ Lindsay Borrows, *Otter’s Journey Through Indigenous Language and Law* (Vancouver: University of British Columbia Press, 2018).

¹⁰⁹ Kirsty Gover, *Tribal Constitutionalism: States, Tribes and the Governance of Membership* (Oxford: Oxford University Press, 2011).

¹¹⁰ Heidi Stark, “Marked by Fire: Anishinaabe Articulations of Nationhood in Treaty Making with the United States and Canada”, (Spring 2012) 36:2 *American Indian Quarterly* at 119-149.

¹¹¹ Andrée Boisselle, “Law’s Hidden Canvas Teasing Out the Threads of Coast Salish Legal Sensibility” (PhD Diss., University of Victoria Faculty of Law, 2017).

¹¹² Borrows, “Outsider Education”, *supra* note 28 at 1-27.

¹¹³ Robert YELKÁTFE Clifford, “Listening to Law” (2017) 33:1 *Windsor YB Access Just 1* at 47-63.

¹¹⁴ Aimée Craft, *Treaty Words: For As Long As the River Flows* (Toronto: Annick Press, 2021).

¹¹⁵ Darcy Lindberg, “Nêhiyaw Áskiy Wiya siwêwina: Plains Cree Earth Law and Constitutional/Ecological Reconciliation” (PhD Diss., University of Victoria Faculty of Law, 2020).

¹¹⁶ Mills, “Miinigowiziwin”, *supra* note 43.

¹¹⁷ Sarah Morales, “Stl’ul Nup: Legal Landscapes of the Hul’qumi’num Mustimuhw” (2016) 33:1 *Windsor YB Access Just 1* at 103-123.

¹¹⁸ Nancy Sandy, “Stsqey’ulecw Re St’exelcemc (St’exelemc Laws From the Land)” (2016) 33:1 *Windsor YB Access Just 1* at 187-219.

¹¹⁹ Tuma Young, “L’nuwita’simk: A Foundational Worldview for a L’nuwey Justice System” (2016) 13 *Indigenous LJ* 75 at 75-102.

¹²⁰ For example, beyond the more-than-human legal method question I rely on the work of Anna Flaminio, Hadley Friedland, Marianne Ignace, Ron Ignace, Johnny Mack, Sylvia McAdam, Naomi Metallic, Val Napoleon, and Kerry Sloan.

The second research methodology I draw from is rooted in the pursuit of beauty. In his legal research on Nêyhiyaw (Plains Cree) ceremonies, Darcy Lindberg writes about the role of beauty and aesthetics¹²¹ in law. He offers legal teachings about pipe ceremonies and sweat lodges partly as a “remedy to those who may carry an impoverished view of law in which, for example, creation stories about the land do not matter in legal reasoning. Law can be beautiful.”¹²² Nobel physicist Frank Wilczek likewise places beauty at the centre of his research, exploring how cosmic realities embody beautiful ideas.¹²³ Scholars across disciplines are focusing on the methodology of beauty to guide and shape their explorations of the world around us and how it works, or in the case of law, how it could work.¹²⁴ Diné/Mandan/Hidatsa/Arikara education scholar Charlotte Davidson also writes about beauty as methodology. Drawing from Diné philosophy and practice she says, “This chapter attempts to contribute to the search for an Indigenous research methodology upon which to reclaim a beauty-centred politic of research inquiry, and by so doing, to reassert the political vision to ‘walk in beauty.’”¹²⁵

These methodologies are connected. Both are centered on the subjective, and require persuasion. Beauty is in the eye of the beholder. Anishinaabe methods are often about the collective council more than the demand. They are subjective depending on who forms the council. We benefit from others’ appreciation and understandings of beauty and story as it may open our own eyes to the previously unnoticed. In coming together, we can talk and thicken our

¹²¹ Costas Douzinas and Lynda Nead (eds.), *Law and the Image: The Authority of Art and the Aesthetics of Law* (Chicago: University of Chicago Press, 1999).

¹²² D. Lindberg, “Miyo Nêyhiyâwiwin (Beautiful Creeness)”, *supra* note 33 at 53.

¹²³ Frank Wilczek, *A Beautiful Question: Finding Nature’s Deep Design* (New York: Penguin Books, 2016).

¹²⁴ See for another example the chapter “Asters and Goldenrods” in Kimmerer, *Braiding Sweetgrass*, *supra* note 14 at 39-47. She says she was initially dismissed by her botany professors when she stated that her reason in wanting to explore this field was: “I wanted to learn why asters and goldenrod looked so beautiful together.” See Also Kimmerer, *Gathering Moss*, *supra* note 17 at vi-vii.

¹²⁵ Charlotte Davidson, “A Methodology of Beauty” in Robin Starr Minthorn and Heather J. Shotton (eds.), *Reclaiming Indigenous Research in Higher Education* (New Brunswick, NJ: Rutgers University Press, 2018) at 36.

relationships to then form better judgement in our legal work. These methods are reflected in the substance of my thesis. They invite the question, how do you find law when there is not coercion? Beauty calls upon a form of compliance without a command because you want to preserve that beauty in all of its different forms. We try to heighten or deepen these dimensions of beauty by internalizing its teachings. Some might criticize these methods because of their ambiguity (which we do not like in law), but that is what makes them important. They require group participation, thereby moving us away from illusions of the objective. In thinking about the juniper bush story related earlier in this introduction, some participants did not yet appreciate the beauty or context of the bush. In looking at a Picasso painting, much of the beauty is found in the context of the piece (who is the artist, when and where did they paint etc.). The call of Anishinaabe law is to embed yourself in the context and the beauty of it, which will incentivize you to follow the patterns it promotes.

While writing this thesis, I presented to a group of J.D. students at the University of Alberta Faculty of Law about my articling experience in Tsilhqot'in territory. I described some of the ways law can be created through relationships between people and the living world. A law student reflected back, "I find myself trying not to romanticize what you're describing." I was grateful for her comment. There is harm in the romanticizing of Indigenous laws. As John Borrows says, "as Indigenous peoples we are beautiful, and we are messed up."¹²⁶ Returning to an earlier point, we all have Trickster in us. In reflecting on the purpose of one of her non-fiction novels, creative writer Katherine May says, "At its base, this is not a book about beauty, but about reality. It is about noticing what's going on, and living it. That's what the natural world

¹²⁶ John Borrows, *Our Way* Conference Presentation, University of Saskatchewan, 23 March 2012, cited in Val Napoleon and Hadley Friedland, "Indigenous Legal Traditions: Roots to Renaissance" in *Oxford Handbook of Criminal Law*, ed. Markus Dubber (London: Oxford University Press, 2014) at 225.

does: it carries on surviving. Sometimes it flourishes –lays on fat, garlands itself in leaves, makes abundant honey –and sometimes it pares back to the very basics of existence in order to keep living.”¹²⁷ I hope that in focusing on beauty as methodology, I do not move away from the cycles of reality, but instead keep this caution in mind and with curiosity see what happens when we still place beauty and pleasure¹²⁸ as a focus to guide our research.

At the end of my first summer working for the Indigenous Law Research Unit (in 2012) on the Accessing Justice and Reconciliation Project¹²⁹, I felt that learning Anishinaabe and Mi’kmaq law in community embedded ways left me a better person. I was uplifted and inspired by the possibilities to create safety, and good relations within our communities. Fast forward eight months to the end of my first year of law school at the University of Toronto and I was sick, worn down, and quite honestly had trouble regaining my sense that there was beauty in the world. They were two very different experiences in legal education. I continue to be curious about how law can facilitate our journey to become better people, and how Indigenous legal traditions use the beauty and richness of the more-than-human world to illuminate this principle. I don’t believe law’s primary effect should be to make us sick and worn down.¹³⁰ While a certain level of struggle cannot be fully eliminated, there is a baseline of wellness that we can create together when life is out of balance.

¹²⁷ Katherine May, *Wintering: The Power of Rest and Retreat in Difficult Times* (London: Penguin Random House Press, 2020) at 269.

¹²⁸ See the following work for an analysis of pleasure as methodology, Adrienne Maree Brown, *Pleasure Activism: The Politics of Feeling Good* (Chico, CA: AK Press, 2019).

¹²⁹ Hadley Friedland, “IBA Accessing Justice and Reconciliation Project: Final Report” (Victoria: University of Victoria Faculty of Law Publication, 2014), online: <https://dspace.library.uvic.ca/bitstream/handle/1828/12636/Friedland_Hadley_ILRU_2014.pdf?sequence=1&isAllowed=y>.

¹³⁰ Harold Johnson also makes the point that law schools assign unnecessarily onerous workloads and create unnecessary stressors that causes students to be “injured by stress.” Harold Johnson, *Peace and Good Order: The Case for Indigenous Justice in Canada* (Toronto: Penguin Random House McClelland & Stewart, 2019) at 27; Darena Muca, “Elevated Incidence of Mental Illness in the Legal Profession” 28 November 2019, McGill Journal of Law and Health Blog, online: <<https://mjhlh.mcgill.ca/2019/11/28/elevated-incidence-of-mental-illness-in-the-legal-profession/>>

In describing our first experience teaching an Anishinaabe law camp to Osgoode Hall Students in 2014 on our reserve, a dream long time in the making, my father recounted the following story. It lends an example of how I also try to blend the methodologies of Anishinaabe experiential and narrative learning, and beauty.

Like Otter and the young boy in the earlier story, [the Osgoode Hall law] students also learned from the earth. They gathered around a fire in the evenings. During the day we went out on the land and waters. We experienced what Anishinaabe people know about law from observations and stories related to the trees, plants, rocks, and animals. My daughter, who herself is a law student, was one of my teaching companions. As we were teaching in the forest a dragonfly circled around the group. Its brilliant colours caught our eye as it flew away. The dragonfly soon returned and landed on my daughter's vest. It rested on her heart as she was teaching. She taught for ten minutes with this little insect on her jacket. In Anishinaabemowin, the Ojibway language, we call insects manidoosag-little spirits. Nature was constantly being drawn upon to illustrate the seven grandmother and grandfather teachings. Students were able to experience a legal tradition that does not rely on written texts to transmit professional responsibility. Law is embodied in the earth, and we helped expose students to another legal literacy as they learned on my reserve.¹³¹

I was told by several elders that the dragonfly who landed on my heart that day was a message that I was using my gifts in the service of others, as well as myself. There was great beauty in the forest, in the gathering of family, community members and students, in the sparkling waters, and in the dragonfly that day. Of course not every day is like this. It couldn't be, as the world will never be without conflict. I do hope though that this thesis provides further insight into the way law can be guided at times by a sense of wonder rooted in the beauty of the living world around us.

As a reader interested in incorporating some of the teachings that will be recounted in these pages, you may wonder what are the standards or markers of success to reflect back on whether a shift in your perspective and action has taken place? What about the standards of

¹³¹ John Borrows, "Seven Gifts: Revitalizing Living Laws Through Indigenous Legal Practice" (2016)2:1 Lakehead LJ at 9.

judgement for lawyers and judges who are tasked to understand Indigenous laws in court? In an online presentation hosted by the University of British Columbia, the Anishinaabe ecologist Dr. Robin Wall Kimmerer was asked by a high school teacher in the audience, “How can I assess my students with an Indigenous lens? What do you consider an effective rubric [for this goal]?”¹³²

Dr. Kimmerer responded:

How do we hope students will be different by engagement with place-based knowledge? I want to know, do they come into a more just relationship with the more than human people who are around them? Have they learned to pay attention? Have they been motivated toward gratitude and reciprocity? Do they know the ground that they stand on, and the kin folk that are around them? To me those are the important questions that leads to...what does it mean to be an educated person?...An educated person knows what their gifts are and how to give them in the world...Can we put that in our syllabus, or rubrics, or assessments?¹³³

It is my hope, too, that by looking to the more-than-human world as a legal teacher, we can be supported in our efforts to come into more just relationships, learn to pay attention, and practice more gratitude and reciprocity. It is also my hope that we are confident and humble with our gifts in the world that we may notice (metaphorically) when the dragonfly lands on us to let us know our small place in this web of life has great meaning. Together we can explore another way of practicing law.

¹³² Robin Wall Kimmerer, “A Conversation with Dr. Robin Wall Kimmerer”, 29 January 2021, webinar hosted by the University of British Columbia, at time stamp 1:11:50-1:14:34. Online: <<https://about.library.ubc.ca/2021/01/12/upcoming-event-a-conversation-with-dr-robin-wall-kimmerer/>>

¹³³ Ibid.

We learned to make treaties from everything around us, listening and observing to see how good relationships are made.

-Aimée Craft, *Treaty Words: For As Long As The Rivers Flow*, (Toronto: Annick Press, 2021) at back cover.



A late afternoon of grazing for Rhino, Thunder, and Appy. Photo by Hannah Askew, taken in the Tchaikazan Valley in Ts'il'os Provincial Park.

Prologue

The Law Societies of British Columbia and Tsilhqot'in Territory: Articling Skills and Practice Checklist

If you want to become a licensed lawyer in Canada, the path is well-defined. First, you must attain a law degree from an accredited law school. Next, you complete a Law Society Admission Program typically from the province where you plan to practice. In British Columbia, the Admission Program can be completed in one year and requires an articling period—an apprenticeship-like experience under the supervision of a senior lawyer—and a final ten week course followed by licensing exams.

During my articling year with the not-for-profit organization West Coast Environmental Law (WCEL) based in Coast Salish Territories (Vancouver, British Columbia) the Revitalizing Indigenous Law for Land, Air and Water (RELAW) Project was launched.¹³⁴ RELAW “provides co-learning opportunities and legal support to Indigenous nations using their own laws to address environmental and other issues affecting their territories.”¹³⁵ As part of the inaugural cohort, WCEL was invited to partner with the Tsilhqot'in National Government.¹³⁶ A purpose of the partnership was to further articulate elements of Tsilhqot'in environmental laws, with an aim to

¹³⁴ Kamala Todd (director and editor), Joah Lui (Camera), and Ecko Aleck (sound), “RELAW: Living Indigenous Laws”, produced for and in collaboration with West Coast Environmental Law, 2017. Online: <<https://www.youtube.com/watch?v=3Q8zkz25Rj8>>.

¹³⁵ West Coast Environmental Law, “What is RELAW?”, online: <<https://www.wcel.org/what-relaw>>.

¹³⁶ “The Tsilhqot'in, or People of the River, are made up of six communities – ?Esdilagh, Tl'esqox, Tl'etinqox, Tl'etinqox-t'in, Tsi Del Del, Xeni Gwet'in and Yunesit'in – and these six communities are represented by the Tsilhqot'in National Government (TNG).” Online: <<https://www.wcel.org/program/sharing-stories/land>>; See also, online: <<https://www.tsilhqotin.ca/governance/>>.

co-create a contemporary Tsilhqot'in legal instrument¹³⁷ to support the governance of their Title territory.¹³⁸

My articling principle, Jessica Clogg, and I had in our minds the categories of legal competencies I needed to develop in order to successfully complete the Admission Program.¹³⁹ The checklist form from the Law Society of British Columbia (LSBC) is provided in advance to each student. However, as I went as a guest into Tsilhqot'in nen¹⁴⁰ to co-create a preliminary legal synthesis and instrument, the LSBC core competencies checklist transformed in my mind. It was no longer a document rooted solely in the common law tradition. I took on an obligation to learn Tsilhqot'in standards and criteria for judgement when thinking about ethics, practice management, and legal skills.

By the end of the year working with both Canadian and Tsilhqot'in law, it was obvious that the Articling Skills and Practice Checklist¹⁴¹ from the Law Society of British Columbia only

¹³⁷ See the following for a few written examples of contemporary Indigenous legal instruments: Tsleil-Waututh Nation (Treaty, Lands and Resources Department), "Assessment of the Trans Mountain Pipeline and Tanker Expansion Proposal" (Tsleil-Waututh Territory: TWN Sacred Trust, 2015), online: <https://twnsacredtrust.ca/wp-content/uploads/TWN_assessment_final_med-res_v2.pdf>. For context to this and other Indigenous led environmental assessments see Sarah Morales, "Indigenous-led Assessment Processes as a Way Forward" (4 July 2019) Centre for International Governance Innovation, online <<https://www.cigionline.org/articles/indigenous-led-assessment-processes-way-forward>>; Heiltsuk Tribal Council, "Dáduqv'la qntxv Ġv'lasax: To look at our traditional laws—Decision of the Heiltsuk (Haítzaqv) Dáduqv'la Committee Regarding the October 13, 2016 Nathan E. Stewart Spill" (Bella Bella: Heiltsuk Tribal Council, 2018), online: <http://www.heiltsuknation.ca/wp-content/uploads/2018/10/Heiltsuk_Adjudication_Report.pdf>; Tsilhqot'in Nation, *ʔELHDAQOX DECHEN TS'EDILHTAN: ʔEsdilagh Sturgeon River Law*, TNG 2020, online: <<http://www.esdilagh.com/PDF/Esdilagh%20Elhdaqox%20Law%20Final%20Version.pdf>>

¹³⁸ *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257.

¹³⁹ I'm grateful to Jessica Clogg for her personal mentorship, and for her deep commitment to Indigenous legal orders and their contemporary revitalization and application. For two of many examples of her applied work and thinking in this field see, Jessica Clogg, Hannah Askew, Eugene Kung and Gavin Smith, "Indigenous Legal Traditions and the Future of Environmental Governance in Canada" (2016) 29:227 *Journal of Environmental Law and Practice*, online: <https://www.wcel.org/sites/default/files/publications/2016_indigenouslegaltraditions_environmentalgovernance_jelp.pdf>; Hannah Askew, Deborah Carlson, Jessica Clogg, and Gavin Smith, "Paddling Together: Co-Governance Models for Regional Cumulative Effects Management" (Vancouver: West Coast Environmental Law, 2017), report online: <<https://www.wcel.org/sites/default/files/publications/2017-06-wcel-paddlingtogether-report.pdf>>.

¹⁴⁰ "Territory".

¹⁴¹ The following "Articling Skills and Practice Checklist" is adapted from the Law Society of British Columbia (LSBC) core competencies. See online: <<https://www.lawsociety.bc.ca/Website/media/Shared/docs/forms/MS-admissions/articling-check.pdf>>.

reflected one legal tradition’s ideals. Incorporating my modest and partial understanding of Tsilhqot’in law as taught by my colleagues, I would adapt the form in a transsystemic¹⁴² way to the following.¹⁴³ I provide the form here, so that as you travel metaphorically through the territory in the stories that follow, you can search for these legal competencies as if you too were responsible for proficiency in their application.

Application

(supporting document)

Articling Skills and Practice Checklist

The Law Societies of British Columbia and Tsilhqot’in Nen

During the Articling Term, [student’s name] shall obtain practical experience and training in the following:

1. **Ethics** — Practical experience and training in ethics including the following:
 - a. a lawyer’s duties to *deni* (people of all ages), animals, *nen-gwet’an* (plants), *nižt’an* (berries), *dželh* (mountains), *tu* (water), *aldzi* (moon), *šen* (stars), *untseniluy-nenaghinluy* (rainbows), *lhuy* (fish), birds and other small creatures, *Deyen* (leaders), community, other nations, sacred places, *esghaydam* (ancestors) and future generations, Councils, other members of the profession and themselves,¹⁴⁴

¹⁴² I use the term transsystemic to refer to the woven or intertwined expression of two or more legal traditions. If we were looking solely at Tsilhqot’in law, the configuration of this form may be entirely inaccurate, as ethics and legal skills may not appropriately be reduced to a checklist. I have kept the checklist format here to show a blended approach to a year dedicated to learning elements of both Canadian and Tsilhqot’in laws.

¹⁴³ The following is a piece of creative writing. I did not in fact submit this to any Law Society for my articles.

¹⁴⁴ The LSBC core competency bullet point one on ethical duties reads: “a lawyer’s duties to the courts, clients, the public, other members of the profession and him or herself”. People have particular obligations to the beings listed here under Tsilhqot’in law according to the following report, Linda Ruth Smith, “The Ways of our *Esgaydam* ‘Ancestors’: *Nenqayni* Laws of Respect” (Williams Lake and Vancouver: Tsilhqot’in National Government and West Coast Environmental Law, 2018) at iii-iv. These beings named here are listed in the report’s table of contents and are described in detail throughout the body of the report. They instruct us about who some of the important more-than-human relations are in the Tsilhqot’in worldview.

- b. a lawyer’s duty to adhere to the highest ethical standards, including respect in all dealings. As Nenqayni¹⁴⁵ elders explain: “Respect means being kind, honest, trusting, caring, loving and treating others the way you want to be treated... When you treat others with respect they in turn will treat you with respect and your journey through life and beyond will be made easier. To gain respect, you need to be respectful.”^{146;147}
- c. the ability to recognize circumstances that give rise to ethical problems, and to recognize that such problems benefit from prompt and serious attention with guidance from others including but not limited to elders¹⁴⁸, the land and other beings that live around you¹⁴⁹, *Deyen* (leaders)¹⁵⁰, and dreams^{151;152}
- d. a lawyer’s obligation to maintain and enhance the reputation of the profession, including acting in a respectful, non-discriminatory manner, protecting important information and fulfilling all obligations.¹⁵³

2. Practice Management — Practical experience and training in practice management, including the following:

¹⁴⁵ *Nenqayni* is another term *Tsilhqot’in* people use to identify themselves. See Alan Hanna, “*Dechen ts’edilhtan: Implementing Tsilhqot’in Law for Watershed Governance*” (PhD Diss., University of Victoria Faculty of Law, 2020) at 94. Hanna writes, “*Nenqayni* translates to *people of the land*, which is used to distinguish humans from other relatives that are also *of the land*. The first part of the word is *nen* (which should be obvious by this point in the dissertation) means ‘land’ or ‘ground’. *Qay* means ‘a surface’. Combined, *nenqay* means the earth (surface of the ground); and *ni* is a suffix of the word *deni*, meaning the people. People of the land, or people of the earth.” Hanna cites the work of Linda Smith for this linguistic analysis of *Nenqayni*. See, Linda Smith, *Súwh-t? ’éghèdúđinh: the Tsilhqút’in Níminh Spiritual Path* (MA Thesis, University of Victoria Department of Linguistics, 2004) at 9-10.

¹⁴⁶ William Myers (ed.), “Traditional Values”, *Nenqay Deni Yajelhg Law Centre* (A compilation of information from *Nenqayni* elders who gathered at *Tsi Deldel* December 1-3, 1998) cited in Smith, “The Ways of our *Esghaydam* ‘Ancestors’”, *supra* note 144 at 9.

¹⁴⁷ The LSBC core competency bullet point two on ethical duties reads: “a lawyer’s duty to adhere to the highest ethical standards, including demonstrating courtesy and good character in all dealings;”

¹⁴⁸ For a resource that draws extensively on Elders as one source of authority within the *Tsilhqot’in* legal tradition see Alan Hanna, “*Dechen ts’edilhtan: Implementing Tsilhqot’in Law for Watershed Governance*” (PhD Diss., University of Victoria Faculty of Law, 2020).

¹⁴⁹ Smith, “The Ways of our *Esghaydam* ‘Ancestors’”, *supra* note 144 at 9-52.

¹⁵⁰ *Ibid* at 52-55.

¹⁵¹ Hanna, *Dechen ts’edilhtan: Implementing Tsilhqot’in Law for Watershed Governance*, *supra* note 148 at 1. “In a conversation with Gilbert Solomon, a *Xeni Gwet’in* *deyen* (medicine person), he explained the importance of dreaming. He explained that when the spirits need us to know something, they will tell us in a dream. They may come to us in any form, as human, tree, landscape, and quite often as animals.”

¹⁵² The LSBC core competency bullet point three on ethical duties reads: “the ability to recognize circumstances that give rise to ethical problems and to recognize that such problems benefit from prompt and serious attention and from guidance from others; and”

¹⁵³ The LSBC core competency bullet point four on ethical duties reads: “a lawyer’s obligation to maintain and enhance the reputation of the profession, including acting in a respectful, non-discriminatory manner, protecting all client confidences and discharging all undertakings.”

- e. effective communication with all beings whom you interact with (including clients), thereby honouring the inherent relationality of all life and nourishing existing relationships;¹⁵⁴
- f. appropriate time management on a daily, monthly and yearly basis, including following seasonal cycles of rest and renewal, recognizing that the ebb and flow of your own energy and work is natural.¹⁵⁵ Also to have in place reminder systems to help continually ground your vision of what you're working towards, and to implement billing practices that support regenerative economies and honours your need to live as well as others' needs^{156,157}
- g. collaborative team work with those who support your role in substantive, administrative, emotional and/or spiritual ways;¹⁵⁸
- h. prioritizing what needs to get done and by when. Just as you cannot control when the snow comes, or when a horse becomes sick, you cannot always control when deadlines come and practicing responsive awareness and asking for help will allow for greater flexibility and success;¹⁵⁹
- i. keeping good records of important information, and taking care of files like they are a prized horse that needs careful attention;¹⁶⁰ and

¹⁵⁴ See for example Hanna, *Dechen ts'edilhtan: Implementing Tsilhqot'in Law for Watershed Governance*, *supra* note 148 at 110-114, 152. The LSBC core competency bullet point one on practice management reads: "effective client communication, development and relations;"

¹⁵⁵ Alan Hanna, "Making the Round: Aboriginal Title in the Common Law from a Tsilhqot'in Legal Perspective" (2013) 45:3 Ottawa L Rev at 368, 370, 388, 390-91.

¹⁵⁶ For an account of Tsilhqot'in stories on the importance of regenerative economies (as it relates to food and survival) see, Lauren McGuire-Wood, "'Waiting to Be Fed': Reading Memories of Hunger in the Tsilhqot'in Land Claim Trial Transcripts and Tracy Lindberg's *Birdie*" in Barbara Parker (et al, eds.), *Feminist Food Studies: Intersectional Perspectives* (Toronto: Women's Press, 2019) at 205-225.

¹⁵⁷ The LSBC core competency bullet point two on practice management reads: "appropriate timekeeping, reminder systems and billing practices;"

¹⁵⁸ The LSBC core competency bullet point three on practice management reads: "teamwork and good relations with office staff;"

¹⁵⁹ I learned this lesson after a steep morning of mountain riding with Alice, Tom, Norman, Sharon and Hannah in the summer of 2016. One of our packhorses, Rhino, stumbled and flipped over, rolling a few times before stopping. Apparently he had done this before on a previous trip and they thought he might have broken his neck. They let him rest for a day and then the next day he showed no sign of injury. On this occasion we stopped for a while to ensure he was okay. Once again, he pulled through and was able to continue with no signs of distress. Our plans for the day were changed because of Rhino's stumble, but it was never (openly) interpreted by anyone as an inconvenience. It simply was life, and through a calm response and flexibility we were still able to make it to our campsite with a bit of daylight to spare. We were faced with many surprises each day including trail conditions, minor injuries, decreasing food supply, tired energy levels etc. We were always working together and changing our plans to respond to our needs and the environment. The LSBC core competency bullet point four on practice management reads: "prioritizing deadlines and workload;"

¹⁶⁰ Tom knew exactly how much weight a horse could carry, how long they would need to rest given length of riding time and steepness of terrain as well as their access to forage and water. He discussed his disapproval of rodeo activities like at the Williams Lake Stampede because they push the horses to the limit. He felt that these activities quickly became abusive and interfered with the animals' agency. Likewise in law, you need to pay careful attention

- j. proper accounting of goods exchanged in return for services, and financial planning to sustain self and community for the long term.¹⁶¹

3. **Lawyering Skills** — Practical experience and training in the following lawyering skills:

Skill¹⁶²	Description/Example
<input type="checkbox"/> Research	Conduct legal research, including identifying issues, selecting resources (such as stories, ceremonies, songs and dreams as precedent) ¹⁶³ and recording, analyzing, applying and communicating research results.
<input type="checkbox"/> Trail Maintenance	The path is not always clear, and obstacles that obstruct the way must be confronted. On the trail, chainsaws are often the most effective way of efficiently clearing the path for you and your companions. Understand which tools might best help with the removal of other obstacles in your work and life, and how to operate these tools.
<input type="checkbox"/> Writing	Consider your audience. For example, if elders, youth, Tsilhqot'in speakers etc. are implicated in the issue at hand, when writing legal opinions and other communications ensure they understand. Be clear, organized, and succinct.
<input type="checkbox"/> Horseback Riding and Caretaking	Horses are important companions when travelling throughout Tsilhqot'in Nen. The animals, <i>nen-gwet'an</i> (plants), <i>nižt'an</i> (berries), <i>dželh</i> (mountains), <i>tu</i> (water), <i>aldzi</i> (moon), <i>šen</i> (stars), <i>untseniluy-nenaghinluy</i> (rainbows), <i>lhuy</i> (fish), birds and other small creatures, and sacred places are essential legal teachers and relations in your articling journey. ¹⁶⁴ Learn to tack up, ride and care

to the needs of your clients as recorded in their files. The LSBC core competency bullet point five on practice management reads: "record keeping and file maintenance; and"

¹⁶¹ Self-reliance as a form of community sustainability is an important Tsilhqot'in teaching. See for example, Smith, "The Ways of our *Esghaydam* 'Ancestors'", *supra* note 144 at 64-67. The LSBC core competency bullet point six on practice management reads: "trust and general accounting and financial planning."

¹⁶² Seven of the following skills are required by the LSBC. The other seven skills were taught to me and emphasized as essential skills during my articling period in Tsilhqot'in territory.

¹⁶³ Friedland and Napoleon, "Gathering the Threads", *supra* note 44 at 26.

¹⁶⁴ See again, Smith, "The Ways of our *Esghaydam* 'Ancestors'", *supra* note 144 at iii-iv. These beings named here are listed in the report's table of contents and are described in detail throughout the body of the report.

for your horse so you can appropriately access the teachings of creation.

- Drafting
Drafting legal documents (such as leases, syntheses, consent regimes, agreements and pleadings) that are well-organized, clear, succinct and that meet the intended purpose, both with and without the use of precedents. Understanding and explaining legal documents drafted by others.
- Navigation
The mountains, valleys, rivers and lakes are numerous across our *Nen*. Compasses, trail markers, skies, maps, stories, dreams, listening to those who have traveled the land before (including potentially your horse) and preparation are essential to learning law on the Land.
- Advocacy
Represent clients effectively, including arguing persuasively and with gentle power in accordance with the procedures and etiquette of the forum.
- Identifying Edibles
Food and water are essential for survival, and therefore are essential to the work of law (the practice of which is dependent on healthy and living beings). Find edibles on the land. Protect and learn from them.
- Negotiation/Mediation
Prepare for and negotiate a matter on behalf of a client.
- Starting and Maintaining a Fire
Fire is essential for survival, and therefore essential to the work of law. Learn how to gather the materials needed to bring warmth and light. Learn how to start and maintain your fire. Learn to see quiet messages within the glow of the flames in early hours of the morning while the land rests.

- | | |
|--|---|
| <input type="checkbox"/> Interviewing | Conduct interviews to help you understand the issue at hand, and craft the story needed to tell the decision-makers. Use appropriate questioning techniques, explaining the legal situation clearly and accurately and ensuring there is a mutual understanding with clients regarding what you and they are doing, and the costs involved. |
| <input type="checkbox"/> Setting up and Taking Down Camp | Camp is the place you set up to receive shelter from the elements. Cook, eat, drink, sleep, clean, sing and tell stories there. Tie the horses up around the perimeter of your camp so they'll notify you if grizzlies are getting too close. A good camp can determine how comfortable you are during the practice of law. |
| <input type="checkbox"/> Problem Solving | Analyze problems based on the law, the facts and circumstances, develop, assess and recommend options for resolution and prepare a plan for implementation. |
| <input type="checkbox"/> Selecting a Cowboy Hat | Select a good cowboy hat to protect you from the sun and rain, and stop branches and other debris from scraping your face. It should be weatherproof, and stiff enough to keep other debris away. It should also be stylish (like Brad Pitt in <i>Thelma and Louise</i>). Safety and style are important to the practice of law. |

4. Practice Areas — Practical experience and training in the following practice areas (**check all that apply**):

- Corporate and Securities
- Rocks (Mountains)
- Commercial
- Intellectual Property
- Plants
- Criminal
- Animals
- Administrative
- Fish
- Labour and Employment
- Water
- Immigration
- Family
- Real Estate
- Sky world
- Civil Litigation

- Creditors Remedies
- Berries
- Wills and Estates
- Tax
- Other

Signature of Applicant: _____ Date:

Signature of Guide: _____ Date:

“For many Indigenous people, the casebook for learning natural law requires an intimate knowledge of how to read the world,¹⁶⁵ understanding natural law from this point of view does not require an intimate knowledge of how to read legal philosophy.”¹⁶⁶
-John Borrows



¹⁶⁵ *Delgamuukw v. A.G.B.C.* (1991), 79 D.L.R. (4th) 185; [1991] 3 W.W.R. 97; [1991] 5 C.N.L.R. 5 (B.C.S.C).

¹⁶⁶ John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 29.

Chapter 1: The More-Than-Human World as Historical Precedent¹⁶⁷: Looking to Distant Time Stories People Tell About Their Homelands

Preparing to Learn Tsilhqot'in Law as an Articling Student: The Revitalizing Indigenous Law For Land, Air and Water Project

Despite the return of lush greenery and pink cherry blossoms flowering all over Victoria, British Columbia, when I finished law school in the spring of 2016 I felt tired and burned out.¹⁶⁸ The program's demanding hours, subject matter, and pressure of exams often left me feeling like I did not have a place in law. I did not actively pursue searching for an articling position, wondering how I could manage yet another year of immersion in this system. I understood the practice of law at a firm to require suits, consistently long hours of work most if not every day of the week, arguing, making sense of dense readings in large books, being indoors, stress, ego and lots of computer time, none of which seemed that appealing. Just as the landscape was transforming from greys to greens that spring, my mindset too was brushed with an infusion of colour and life when a dear friend and colleague shared with me the work she and other lawyers were engaged in at West Coast Environmental Law (WCEL), a not-for-profit legal organization based in Coast Salish Territories.¹⁶⁹

¹⁶⁷ The term precedent has specific legal meaning within the common law tradition. There is some risk in using this term throughout this thesis. Readers may conceptualize precedent exclusively on common law terms. Despite this possibility I have chosen to use the term precedent because I think it opens the door to see the living world and associated landscape embedded narratives as a form of law. I hope together we are able to walk through this opened door, and eventually begin to see the tiny taste of Tsilhqot'in law presented herein on its own terms. I like to focus on the "precede" within "precedent". To precede is to come before something in time. I invite you to think about the different ways the more-than-human world disrupts our understanding of precedent. See, John Borrows, "Heroes, Tricksters, Monsters and Caretakers: Indigenous Law and Legal Education" (2016) 61:4 McGill LJ 795.

¹⁶⁸ I noted earlier that I attended law school at the University of Toronto. I switched from U of T to the University of Victoria after my first year, only to find that the common law is the same between provinces (it should not have been a surprise, but I was somehow hopeful!). While there were notable differences in pedagogies employed between institutions, the required substantive courses were the same.

¹⁶⁹ I'm grateful to Hannah Askew for all of her friendship and wisdom during the difficult years of law school and beyond, and for the light she shines illuminating pathways for the many people who interact with her. For a sample of her important work see Hannah Askew, "Learning from Bear-Walker: Indigenous Legal Orders and Intercultural Legal Education in Canadian Law Schools" (2016) 33:1 Windsor YB Access Just 29. See also online: <<https://sierraclub.bc.ca/hannah-askew/>>.

At the time I finished law school, WCEL was about to launch the Revitalizing Indigenous Law for Land, Air and Water (RELAW) Project.¹⁷⁰ After “two decades of work with Indigenous peoples on Indigenous-law based approaches to land use planning, impact assessment and other aspects of environmental governance”¹⁷¹ Executive Director Jessica Clogg, saw the need to dedicate specific resources and expertise towards the revitalization and application of Indigenous laws. Some reasons for this need included the desire from Nations to engage in this type of work, and to further decolonize the Canadian environmental law landscape. It is often the case that when Indigenous peoples confront environmental demands in their territories (logging, oil and gas development, dams etc.), Canadian law is the default tool for negotiation. The sole application of Canadian law can result in heated protests and costly court challenges, as differing views about decision-making are contested.¹⁷² Industry proponents and governments may incorrectly believe any number of the following about Indigenous laws¹⁷³: (1) they do not exist; (2) they are non-binding; (3) they are unintelligible; (4) they are self-serving (do not take into account the public interest); (5) they are illegitimate; (6) they are inaccessible and (7) they are unfair (to settlers)¹⁷⁴. RELAW seeks to address these barriers through collaborative Indigenous-led partnerships.

¹⁷⁰ West Coast Environmental Law, “What is RELAW?”, online: <<https://www.wcel.org/what-relaw>>.

¹⁷¹ West Coast Environmental Law, RELAW Program Homepage, online: <<https://www.wcel.org/program/relaw>>.

¹⁷² A prominent example of this point came forward in the case *Coastal GasLink Pipeline Ltd. v Huson*, 2019 BCSC 2264 (CanLII). For an analysis of this case and the application of Indigenous law see Smith, “The Invisible Thread?”, *supra* note 48. See also Kent McNeil, “Indigenous Law, the Common Law and Pipelines” (8 April 2021) University of Calgary Faculty of Law Blog, online: <<https://ablawg.ca/2021/04/08/indigenous-law-the-common-law-and-pipelines/>>.

¹⁷³ The listed barriers to the recognition of Indigenous law are consistent with the barriers generally to recognizing Indigenous law. See Borrows, *CIC*, *supra* note 11 at 137-174.

¹⁷⁴ Here I refer to the concern that some settlers have that they might “lose” something (such as rights or property) if Indigenous law applied to them.

Hundreds of years of colonization, including *Indian Act* governance¹⁷⁵ and residential schools¹⁷⁶ that separated families and disrupted intergenerational relationships, has weakened knowledge of Indigenous laws internally within communities, as well as externally. Indigenous legal traditions require a thoughtful rebuilding.¹⁷⁷ With the support and mentorship of the Indigenous Law Research Unit at the University of Victoria Faculty of Law¹⁷⁸ and a council of advisors¹⁷⁹, the lawyers at WCEL were figuring out through RELAW how to situate themselves in this decolonial¹⁸⁰ process of thoughtful rebuilding, and bridging of legal orders.¹⁸¹ I applied for an articling position with this new team of RELAW lawyers, and with great fortune was hired. Just as the bare cherry blossom trees were swiftly cloaked in pink seemingly overnight, I quickly found myself on the other side of the Salish Sea with a fresh outlook. WCEL's Kitsilano office was remarkably devoid of suits, long hours of work, ego, expressions of consistent stress and while there was plenty of books and computer time, the bright windows and lunch breaks allowed for

¹⁷⁵ John Borrows, "Seven Generations, Seven Teachings: Ending the Indian Act" (2008) Research Paper for the National Centre for First Nations Governance, online: <https://epub.sub.uni-hamburg.de/epub/volltexte/2012/12723/pdf/john_borrows.pdf>.

¹⁷⁶ See, Truth and Reconciliation Commission of Canada, *supra* note 93.

¹⁷⁷ John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002); Jody Wilson-Raybould, *From Where I Stand: Rebuilding Indigenous Nations for a Stronger Canada* (Vancouver: UBC Press, 2019); Val Napoleon, "What is Indigenous Law?: A Small Discussion" (2016) The Indigenous Law Research Unit at the University of Victoria Faculty of Law, online: <<https://www.uvic.ca/law/assets/docs/ilru/What%20is%20Indigenous%20Law%20Oct%2028%202016.pdf>>.

¹⁷⁸ To understand more about the work of the Indigenous Law Research Unit, see online: <<http://ilru.ca/>>. There are multiple excellent publications from ILRU available on the website that contribute substantially to the revitalization of specific Indigenous legal traditions, as well as to educational curriculum on this topic.

¹⁷⁹ During my time at WCEL, the Ninogad Council (or Wisdom Council) membership included the generosity of Gordon Christie, Nia Emmanouil, Louise Mandell, June McCue, and Nicole Schabus. We chose the term Ninogad because our project lead, Maxine Matilpi, is Kwakiutl and suggested this Kwak'wala term which means "people of knowledge" or "knowledge-keepers".

¹⁸⁰ There is a large amount of scholarship dedicated to defining the verb, "decolonize". You may wonder as you continue reading, how "decolonial" this RELAW process truly is, given we are speaking in English, drawing from some common law methods (such as case briefing), and that we are seeking at various moments to write down the reflections of these laws. I would agree that there are many "colonial" elements to this work. At the same time, we were constantly bumped out of the colonial frame as we engaged in this work. We'd weave in and out of these colonized/decolonized worlds, at times existing in one or the other, and at other times existing in something syncretic, or entirely new. For a discussion of the entangled lives we lead in law and beyond see John Borrows, *Law's Indigenous Ethics* (Toronto: University of Toronto Press, 2019) at 114-149.

¹⁸¹ Clogg et al., "Indigenous Legal Traditions and the Future of Environmental Governance in Canada", *supra* note 139.

connections with the outdoors. I was excited to learn upon commencing that I would be supporting the partnership with the Tsilhqot'in National Government.

I first became aware of Tsilhqot'in territory¹⁸²—the Chilcotin region of the interior of British Columbia¹⁸³—as a child through a story from my father. His upbringing was spent almost entirely in his ancestral Anishinaabe territory in southwestern Ontario. His grandfather, Josh Jones, had left our reserve (Neyaashiinigiing) for a few years to act as a stuntman Indian in Hollywood during the depression in the 1930s. Josh earned a living by falling off of horses when the cowboys would “shoot”. My grandmother was born in Hollywood, along with several of her siblings. My great-grandpa Josh's stories captivated my dad as he was growing up, and some were passed to me. My family moved west to British Columbia for the first time in the early '90s. He went into the interior of the province to do some work, and upon returning he remarked with excitement, “in B.C., it turns out the Indians *are* the cowboys!”. It was a place of people who knew how to move skilfully through mountains and valleys on horseback, while wearing stylish cowboy hats. Dr. Alan Hanna writes:

Tsilhqot'in people have occupied their *nen* since the time of their *?esggidam* (ancestors). They have maintained control across time through a complex set of interconnected, interdependent relationships with all things connected to the *nen*, particularly water. These webs of interdependent relationships comprise Tsilhqot'in authority, and are governed through current Tsilhqot'in laws and *dechen ts'edilhtan* (laws of the ancestors) forming a

¹⁸² Tsilhqot'in territory extends beyond the formal boundaries recognized by the 2014 Aboriginal Title decision. For three different maps produced by the Tsilhqot'in National Government see: 1) Nenqay Deni Accord Map, online: <https://www.tsilhqotin.ca/wp-content/uploads/2020/11/2018_Map_NDA.pdf>. 2) Tsilhqot'in Aboriginal Title Area Map, online: <https://www.tsilhqotin.ca/wp-content/uploads/2020/11/2018_Map_DeclaredTitleArea.pdf>. 3) Cultural and Traditional Places within Tsilhqot'in Territory Map, online: <https://www.tsilhqotin.ca/wp-content/uploads/2020/11/2020_09_TsiGeography_V4.pdf>.

¹⁸³ Chilcotin is the anglicised version of Tsilhqot'in. It is also the name for the geographic region in the central interior of British Columbia between the Cariboo region (east of the Fraser River) and the Coast Mountains to the west. For travel oriented resources to the region see online: <<https://landwithoutlimits.com/places/chilcotin/>> and <<https://www.hellobc.com/places-to-go/cariboo-chilcotin-coast/>>. For some history books I recommend anything by local historian Sage Birchwater.

system of governance that reaches back from the present to the distant past known as *sadanx* (the time of Tsilhqot'in origins).¹⁸⁴

In 2014 the Tsilhqot'in Nation won the landmark Supreme Court of Canada decision *Tsilhqot'in Nation v British Columbia*.¹⁸⁵ The Supreme Court finally recognized under Canadian law that the Tsilhqot'in Nation has Aboriginal Title.¹⁸⁶ After many years of colonial imposition and denial of Tsilhqot'in law and jurisdiction, one of the many impacts this decision had for the Tsilhqot'in was to create uncontested space for the rebuilding of their internal legal structure so that, as Chief Roger William said, residents and visitors to the territory could have an even better experience being there than when under provincial jurisdiction.¹⁸⁷ The Nation applied to participate in the RELAW process as one tiny piece of the many larger projects underway to re-establish full governance of their homelands. After a series of discussions, our defined task was to co-create a legal synthesis on Tsilhqot'in consent laws, and co-develop a Consent Regime.¹⁸⁸

¹⁸⁴ Hanna, *Dechen ts'edilhtan: Implementing Tsilhqot'in Law for Watershed Governance*, *supra* note 148 at 8.

¹⁸⁵ *Tsilhqot'in Nation*, *supra* note 138.

¹⁸⁶ The SCC only recognized Tsilhqot'in Title to a portion of their territory. See for further analysis, John Borrows, "The Durability of Terra Nullius: Tsilhqot'in Nation v. British Columbia" (2015) 48:3 UBC L Rev 701.

¹⁸⁷ See John Borrows, *Law's Indigenous Ethics* (Toronto: University of Toronto Press, 2019) at 305. "In fact, I heard Chief Roger William of the Tsilhqot'in Nation state that Tsilhqot'in law recognizes private ownership interests within their territory. Chief Roger William said private ownership is a strongly protected interest under Tsilhqot'in law. He noted that the Tsilhqot'in people do not want to dispossess people who live on their traditional territory and claim ownership from a Crown source. They want to convert the source of this ownership from a Crown to an Aboriginal grant and thus desire to see this land have a stronger foundation. In fact, he said the Tsilhqot'in people want to treat these people better than the Crown did when it purported to hold the beneficial interest in Tsilhqot'in land. Chief William said his people understand that private ownership from a Crown source in British Columbia flows from a flawed original grant. The Tsilhqot'in people want to give non-native owners of their land even greater protection under the Tsilhqot'in legal system. Chief Roger William, Canadian Bar Association, Aboriginal Lawyers Forum, 2 May 2015, Tulalip Reservation, Washington State."

I notice that often settlers are worried that if Aboriginal Title is recognized, that their homes will be under threat and that they will lose full access to the places they love. While this has been happening to Indigenous people since settlers arrived, it will most often not be the case for settlers today that they will lose their private property rights through Title decisions, as two wrongs don't make a right. Unfortunately some newspaper headlines still convey the idea that Title recognition "will be a shock" to British Columbians. See for example, Alistair Taylor, "Lawyer: Large-scale Transfer of Crown Land to First Nations will Shock B.C.'s System" (24 March 2021) Vancouver Island Free Daily, online: <<https://www.vancouverislandfreedaily.com/news/lawyer-large-scale-transfer-of-crown-land-to-first-nations-will-shock-b-c-s-system/>>.

¹⁸⁸ A regime refers to a system or planned way of doing things. Consent in this instance refers to the permissions the Tsilhqot'in will give for certain activities on their lands. Together, this consent regime is meant to provide a clear system for all people to know what actions are permissible in the designated portions of Tsilhqot'in territory.

Through this partnership, Alice M. William, member of Xení Gwet'in, was hired by the Nation to be our community guide.¹⁸⁹ The snippets of oral stories and case law I was familiar with were about to come to life.

The First RELAW Retreat, Skwxwú7mesh Territory, June 2016

Alice M. William was wearing jeans, hiking boots, and a faded camo top that contrasted with her long, straight black hair. A duffle bag half her size was slung over her shoulder. She'd given up her knife at the Williams Lake airport because she forgot to take it out of her pocket. Airport security does not afford the same definition to safety as Alice does. For her, one should not leave home without a knife, as you never know when you might need to cut through rope, harvest some medicine, or help someone skin their dinner. She'd travelled to Squamish B.C. for the first Revitalizing Indigenous Law for Land, Air and Water (RELAW) retreat at the Cheakamus Centre. As the crow flies, the journey between her home in the Chilcotin region of British Columbia is not that far from the town of Squamish. Given that she is not a crow, her journey involved a six hour drive to Williams Lake (a significant portion down pot-holed roads), a flight from Williams Lake to Vancouver, then a one and a half hour drive to Cheakamus ultimately to meet a group of strangers for the first time to talk about law. As a hunting guide, silence is essential to Alice's profession so she doesn't scare game away. During the early portion of our first visit she employed these skills well, listening, observing and responding as

¹⁸⁹ For a sample of some publicly available writing from Alice see, Alice M. William, Submission to the Canadian Environmental Assessment Agency, online: <<https://www.ceaa-acee.gc.ca/050/documents/43019/43019E.pdf>>; Alice M. William, "Songs and Stories" and "I am But One Root in the Tsilhqot'in History of Eons" (2015) 34:3 Dasiqox Tribal Park, online: <https://www.wildernesscommittee.org/sites/all/files/publications/2015_DasiqoxTribalPark_paper-web.pdf>; Alice M. William, "Assessment of Human Health Risks for Country Food Consumption" (16 June 2013), online: <<https://www.ceaa.gc.ca/050/documents/p63928/90191E.pdf>>.

needed. Her first language is Tsilhqot'in and her English, while fully fluent, is marked by the unique inflections of Tsilhqot'in phonetics.

As our time together progressed, we got to know all the participants better.¹⁹⁰ There were representatives from the following Nations: Gitga'at, St'at'imc, Fort Nelson, Secwepemc, Cowichan, Lower Similkameen, Tsawout and Alice from Tsilhqot'in territory. All were gathered with a similar goal, to learn more about their responsibilities as new hires for their Nations on the RELAW project, and to learn methods and tools to work with their people's own laws and re-establish their rightful place in decision-making within their territories. The learning workshops held over the week at Cheakamus focused on questions such as: What is Indigenous law? Why is the work of revitalization so important at this time in our individual and collective history? How can Indigenous laws be explained, applied and enforced to create a healthier environment? What might we learn from each other about the options available to us?

On our final morning together at Cheakamus, Alice offered to lead us all in a water ceremony.¹⁹¹ After breakfast we walked from the dining hall down to the river. Our instructions

¹⁹⁰ For more information about this retreat, and to see some of the people involved, see Kamala Todd (director and editor), Joah Lui (Camera), and Ecko Aleck (sound), "RELAW: Living Indigenous Laws", produced for and in collaboration with West Coast Environmental Law, 2017. Online:

<<https://www.youtube.com/watch?v=3Q8zkz25Rj8>>; Lindsay Borrows, "Revitalizing Indigenous Law for Land, Air and Water: The Cheakamus Retreat" (18 June 2016) West Coast Environmental Law Blog, online:

<<https://www.wcel.org/blog/revitalizing-indigenous-law-land-air-and-water-cheakamus-retreat>>.

¹⁹¹ Water ceremonies can be an important part of legal process across Indigenous legal orders. See for example Aimée Craft and Lucas King, "Building the Treaty #3 Nibi Declaration Using an Anishinaabe Methodology of Ceremony, Language and Engagement" (2021) 13:4 Water at 1-15. "In summary, the entire process, from start to finish, was guided by ceremony. Throughout the planning, The Women's Council and planning team were engaged in ceremony and made offerings to Nibi" (at 9); Nicole Wilson and Jody Inkster, "Respecting Water: Indigenous Water Governance, Ontologies, and the Politics of Kinship on the ground" (2018) 1:4 Environment and Planning E: Nature and Space at 525 and 528-529; Rachel Arsenaault et al, "Shifting the Framework of Canadian Water Governance through Indigenous Research Methods: Acknowledging the Past with an Eye on the Future" (2018) 10:1 Water at 6; Leroy Little Bear, "Big Thinking and Rethinking: Blackfoot Metaphysics", (1 June 2016) Waiting in the Wings lecture at the Congress of the Humanities and Social Sciences, University of Calgary, online: <https://www.youtube.com/watch?v=o_txPA8CiA4>, "We as humans live in a very narrow spectrum of ideal conditions. Those ideal conditions have to be there for us to exist. That's why it's very important to talk about ecology, the relationship. If those ideal conditions are not there, you and I are not going to last for very long. Just

were to find an offering for the river to thank them for taking care of us while we were gathered together for the learning retreat. Some of us had berries, others cedar, others a special stone. I had brought some asemaa (tobacco) from home, and decided to use it to place in the water in thanksgiving. Alice went first. She stepped forward and said a few words in Tsilhqot'in. Then she threw her offering into the water. A waffle launched through the air and landed with a splash before floating for a moment, filling with water, then sinking. Without a change in expression she stepped back to make space for others to make their offerings. I smiled. Rivers, too, love waffles. It was the best water ceremony I'd been part of in a long time, shifting my preconceptions. There were many shifts yet to come.

Before returning to our different homes, we met with individual participants to come up with an initial plan for how to go about learning and articulating the laws of their own legal traditions. When we met with Alice she said simply: "we're going to need a boat, and horses."¹⁹² This articling experience would be even farther from the suits, offices, ego and computers that I had previously so narrowly envisioned as the practice of law. I was open and curious to gain a basic understanding of some of the key standards, principles, processes and relationships of Tsilhqot'in law, and *how* we would be invited into this knowledge. What I didn't know is that I was about to begin a lifelong friendship with a truly remarkable woman who exemplifies love for her relations. In Alice's own words: "I am a Tsilhqot'in woman; I am Nenqayni, I am a friend, I am from a family from Dadilin-yex, Nabas, Teztan, Yanah Biny, Gididzay and I have sworn

text Neanderthal. Ask the dinosaurs. What happened to them? We asked one of our elders, 'Why did those dinosaurs disappear?' He thought about it for a while and he said, 'Maybe they didn't do their ceremonies.'"

¹⁹² In personal email communication on July 17, 2021, Alice notes that she was "overwhelmed [by the RELAW project and] therefore I just went in blindly." She initially wanted to take us to Fish Lake, and Nabis country where her family specifically comes from. Tom suggested to bring us to Yohetta Valley, where he grew up and where their Guide Outfit was. Alice wanted to back out at first because of her busy schedule as a Guide Outfitter, but she says Hannah and I convinced her that her involvement in the project would not be too onerous.

through two environmental hearings to protect you from degradation, and I will to the end.”¹⁹³ If a core goal of law is to create a better world through making and maintaining relationships, by upholding community safety and through making decisions in a way that protects the most vulnerable, Alice, I would learn, is an expert law professor.

Preparing for Tsilhqot’in Law School: Learning New Methodologies

It was not easy finding a cowboy hat in my Kitsilano, Vancouver neighbourhood. I’d been looking for one since Alice told my colleague Hannah Askew and I that she had arranged to take us out on the land with her family on horseback for two weeks. The packing list for our first client¹⁹⁴ meeting was not typical. It included items like rope, water filter, tent, bear spray, notebook and pen, first aid kit, audio recorder, camera, sleeping bag, consent forms, and of course, a good hat. The horses we’d be riding belonged to Alice’s boss, the owner of Yoietta Lodge where Alice was a licensed hunting guide with her life partner Tom Dillabough. He allowed us the use of his horses and gear partially out of kindness, but also because they needed help with trail clearing for the upcoming hunting season, the main source of revenue for the lodge. Somehow they trusted two lawyers would be sufficient for the job.

Hannah and I had both worked together the summer of 2012 on the Accessing Justice and Reconciliation Project with the Indigenous Law Research Unit (ILRU).¹⁹⁵ The experience created

¹⁹³ This quote written by Alice M. William is part of her one page document called “Voices on the Land”. She wrote it for the purpose of posting on someone’s Facebook page to express her opposition to Prosperity Mine, which he was actively garnering support from others towards. I received permission to share it from Alice here through personal email correspondence dated December 23, 2020.

¹⁹⁴ In order to better cultivate decolonial models of “solicitor-client” relationships, we referred to our RELAW collaborators as partners instead of clients. We recognized that we were co-learners together, and that the hierarchical model of lawyer as expert was far from the truth. In the work of revitalizing Indigenous law, the lawyer is in fact often not the expert. Instead, they have the training to recognize law, which can help when working alongside a Nation to articulate and implement their laws. Ideally partnerships are a horizontal model that allows for agency of both parties to contribute ideas and work collaboratively.

¹⁹⁵ For information on the AJR Project see, Hadley Friedland, “IBA Accessing Justice and Reconciliation Project: Final Report”, (Victoria: University of Victoria Faculty of Law Publication, 2014), online:

a familial-type bond for us, with confidence in one another to take on new challenges and opportunities in a mutually supportive way. We both had some proficiency with the narrative analysis method, one of the approaches we'd use to begin learning Tsilhqot'in law.¹⁹⁶ The methodology typically involves first gathering publicly available stories from the legal tradition in question. Researchers then "case brief" the narratives, with an eye towards the main legal issues, key facts, decisions, and the reasoning.¹⁹⁷ Sometimes the narratives are about trickster raven, or the creation of the world. Other times they're snippets of people's own life stories. Immersing ourselves in these narratives was our homework before engaging in community conversations. We didn't want to show up and ask, "so, what are your laws?" As you can imagine if you were asked the same question, this could be met with blank stares. Where does one begin? This method allows researchers to have some preliminary insight and specific questions, to inform their time in community and guide conversations. Our research questions in this case included: what are Tsilhqot'in legal principles and processes related to access to territory and resources? What are some of the key relationships that guide how to act on the land? These were also questions in the Title case, and there were many court transcripts from the 339 days that this case was in trial.¹⁹⁸ On their website, the lawyers for the Tsilhqot'in write:

The trial finally began in 2002 and continued for 5 years with 339 days in court—14 of those days held in the Nemiah Valley. Special court sittings took place after sundown so that certain stories and legends could be told in their culturally appropriate context. Twenty-nine

<https://dspace.library.uvic.ca/bitstream/handle/1828/12636/Friedland_Hadley_ILRU_2014.pdf?sequence=1&isAllowed=y>.

¹⁹⁶ For more information on the narrative methodology see Napoleon and Friedland, "An Inside Job", *supra* note 96; Friedland and Napoleon, "Gathering the Threads", *supra* note 44.

¹⁹⁷ For an article supporting the benefits of the case brief method in legal education generally see, Leah M Christensen, "The Psychology behind Case Briefing: A Powerful Cognitive Schema" (2006) 29:1 Campbell L Rev 5. For an article critiquing the usefulness of the case briefing method see, Janeen Kerper, "Creative Problem Solving vs. the Case Method: A Marvelous Adventure in which Winnie-the-Pooh Meets Mrs. Palsgraf" (1998) 34:2 Cal W L Rev 351.

¹⁹⁸ Woodward & Company Lawyers LLP Blog, "Blazing a Trail for Reconciliation, Self-Determination, & Decolonization: Tsilhqot'in Nation v. British Columbia and Canada", online:

<[51](https://www.woodwardandcompany.com/tsilhqotin/#:~:text= Fighting%20the%20Good%20Fight&text=The%20trial%20finally%20began,in%20their%20culturally%20appropriate%20context.>.</p></div><div data-bbox=)

Tsilhqot'in witnesses gave evidence, many of whom spoke in the Tsilhqot'in language with the aid of interpreters. Nineteen non-Tsilhqot'in experts also gave evidence on the Plaintiffs' behalf. The documentary evidence was voluminous. Six-hundred and four exhibits were entered—exhibit 156 alone contained over 1,000 historical documents; exhibit 0250 contained 150-200 historical maps; and exhibit 450 comprised 58 volumes which contained 3,000-4,000 documents. When final arguments were submitted in April, 2007, the judge received about 7,000 pages of written submissions from the lawyers on all sides.¹⁹⁹

Given the knowledge-sharing fatigue this court process caused many of the elders, we looked primarily at information already available instead of conducting our own interviews.²⁰⁰ This was the beginning of a profound pivot. While we shifted our focus away from live community discussion, we were also placed in relationship with Alice M. William and her family through her position as community guide. We needed to move from a more focused narrative method into a Tsilhqot'in land-based method. Adapting our methodologies is important to ensure the local context is taken into account, and the research does not cause harm or further fatigue.²⁰¹ The community engagement element of the work was taking on a shape quite different from other projects in which I'd participated. Because we wouldn't be having many open community conversations, we instead took the information shared through publicly available narratives, including from elders during the Title trial, and put it into conversation with the teachings we were about to learn on the land with Alice and her family.²⁰² Ultimately we found that these

¹⁹⁹ Ibid.

²⁰⁰ Wise practices of Indigenous community engagement encourages flexibility in approach. See, Robert Hamilton et al (ed.), *Wise Practices: Exploring Indigenous Economic Justice* (Toronto: University of Toronto, 2021) [forthcoming].

²⁰¹ Ibid. See also the Tri-Council Policy Statement Course on Research Ethics (2nd ed., online). Module 9 focuses on ethics in the context of research “involving First Nations, Inuit and Métis Peoples of Canada”. See online: <https://ethics.gc.ca/eng/documents/Module9_en.pdf>. See also Patricia Wilson, *The Heart of Community Engagement: Practitioner Stories Across the Globe* (London: Routledge, 2019); For a resource in the field of Indigenous law with insights into community engagement woven throughout see Hadley Friedland, “Reclaiming the Language of Law: The Contemporary Articulation and Application of Cree Legal Principles in Canada” (PhD Diss., University of Alberta Faculty of Law, 2016).

²⁰² There are both benefits and limits to research conducted in the wake of knowledge-sharing fatigue. On the one hand, lots of research has already been done that can be drawn from and amplified, thereby honouring the sharing that already took place. It is beyond the scope of this thesis to discuss more extensively the specifics of how to ethically and attentively engage in this type of legal research, but I hope the stories contained herein show some of

methods (narrative analysis and Tsilhqot'in led land-based) were not mutually exclusive. My practice experience leads me to believe that it is more useful to distinguish particular elements of the different methods of revitalizing Indigenous laws, rather than the full methods themselves given they can be utilized simultaneously and often enhance one another through blending.²⁰³



Mountains at sunset in Tsilhqot'in territory. Photo by Lindsay Borrows.

the ways we adapted to directives from leadership, our working relationships, and abstracted wise practices in community engagement.

²⁰³ For example, learning Tsilhqot'in law through language, ceremony, narratives, and the land could happen in the same instance, even as Indigenous legal scholars sometimes choose to write about these as distinct methods for engaging with Indigenous law. I think it is valuable to write about each on their own to draw out their intricacies, and it is important to remember that placing them in conversation with one another can provide further options for communities too.

Mountains as Ancestors and Enforcement Officers: “Reading” Historical Precedent in the More-Than-Human World

Hannah Askew and I flew into Williams Lake on a late June afternoon. The walls of the small airport were filled with images from the Williams Lake Stampede. The Rodeo began in 1919, the same year the Pacific Great Eastern Railway was founded, creating a small dot for the town on the map.²⁰⁴ I was once told by a doctor who practiced medicine in Williams Lake in the 1980s, that the Chilcotin region brought the ranchers to town for medical appointments, while the Cariboo region brought the homesteaders into his office.²⁰⁵ The residents of neither area visited him often, typically only if something drastic happened like a bone was sticking out, and only after having continued to work for too long on the injury. He described self-sufficiency and hard work as key values of the region.²⁰⁶

Alice picked us up from the airport in her old Ford Explorer. Her cousin Sharon had driven down from Quesnel to join us. Sharon, a skilled herbalist and mother, had never been on horseback for multiple days through the mountains either. It was a bonding moment when the three of us realized this would be a new experience for us all. The roads were rough heading southwest of Williams Lake towards the Nemiah Valley. We stopped frequently—to pick up groceries for six people for two weeks, purchase drysacks and a few other camping goods, look for wild horses, take pictures of the fairy mushrooms speckled across the field, harvest labrador tea, and dip our hands into the healing turquoise waters of Taseko lake. Even though Alice spent all of her life (except residential school) in her homelands, she was equally as excited to pull over to appreciate an interesting rock. In fact, she typically initiated these small detours, taking

²⁰⁴ See online: <<https://williamslakestampede.com/>>.

²⁰⁵ See *supra* note 183 for more information on the Cariboo-Chilcotin region.

²⁰⁶ See for example, Sage Birchwater, *Chiwid* (Vancouver: New Star Books, 1995); Sage Birchwater, *Gumption & Grit: Women of the Cariboo-Chilcotin* (Halfmoon Bay, BC: Caitlin Press, 2009); Terry Glavin, *Nemiah: The Unconquered Country* (Vancouver: New Star Books, 1992).

the most photos of the mushrooms. She spent the longest in silence looking at the wild horses drinking from a large pond partially obscured by a grove of pines, bare and dying from the pine beetle and scarred further with black from the forest fires of the previous summer. It was nourishing to be around Alice's enthusiasm for the earth. It made me miss my Grandmother, who would have loved being with us, full of questions and singing to the new plants.

As we drove deeper into the territory, a rugged snow-capped mountain became visible on our left. We were then given one of our first legal teachings. Alice introduced us to this mountain named *T̄silʔūs* by telling us never to point at him.²⁰⁷ If we did, even accidentally, something difficult would befall us either individually or as a group. She explained that some *d̄zelh* (mountains) were once *deni* (people).²⁰⁸ As the ancestors of modern day Tsilhqot'in, these *d̄zelh* require proper treatment just as there are particular standards surrounding how we treat other humans. These ancestors that become mountains continue to influence their living descendants. Linda Ruth Smith of Yunešit'in explains how to act around *T̄silʔūs* as follows: "Pointing at *T̄silʔūs* is considered rude, and potentially dangerous for the disrespect it shows...For *Nenqayni* it is considered rude to point at *deni*. In their conversation about others, individuals describe where the person is standing or describe them so they don't have to point. [*T̄silʔūs* and other mountains] may cause it to rain, snow, sleet or hail on individuals who have shown them disrespect. The late elder Helena Meyers said, 'The same weather changes occur if *deni* are noisy

²⁰⁷ *T̄silʔūs* is named Mount Tatlow in English. For more information on him and the story that follows see John Schrieber, "Walking Ts'yí-os, Mt. Tatlow" (2013) 25:1 Mānoa, University of Hawai'i at 151-160; See also Nancy J. Turner, "Teztan Biny and Surrounding Area of British Columbia as a Cultural Keystone Place for the Tsilhqot'in Nation Report", prepared for independent Panel hearings on the New Prosperity Mine revised proposal, 31 July 2013 at 9. Online: <<https://sparcinla.org/wp-content/uploads/downloads/TeztanBiny.pdf>>.

²⁰⁸ For other traditions that relate to mountains as ancestors with legal implications see Jacinta Ruru, "Indigenous Peoples' Ownership and Management of Mountains: The Aotearoa/New Zealand Experience" (2004) 3 Indigenous LJ 111; Robert A Williams Jr, "Large Binocular Telescopes, Red Squirrel Piñatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World" (1994) 96:4 W Va L Rev 1133; Iokepa Casumbal-Salazar, "A Fictive Kinship: Making 'Modernity,' 'Ancient Hawaiians,' and the Telescopes on Mauna Kea", (2017) 4:2 Native American and Indigenous Studies at 1-30.

as they pass through a mountain corridor.”²⁰⁹ We learn from these explanations some of the particulars for *how* to act respectfully: don’t point at ancestral mountains or other people and conduct yourself quietly when passing through mountain corridors.²¹⁰

Alice let us know this precedent right away, as *T̓sil̓ʔu̓s*’ size makes him visible from many parts of the territory. Visitors to the land are obligated just as much as *Tsilhqot’in* people to act in accordance with these teachings because they are liable to the same consequences if they do not act properly. As we drove by *T̓sil̓ʔu̓s*, Alice told us of a man she knew who pointed at the mountain then lost his pointer finger in an accident shortly after. She also relayed stories of extreme weather occurrences that left people in great danger, again because they had pointed at *T̓sil̓ʔu̓s*. Hannah and I were worried we would make a mistake and accidentally engage in this prohibited behaviour. It was not a great time to be “directionally challenged”, as we were. We needed to learn the many important beings on the land quickly so we could practice safety and good relations as taught to us.

For further context Alice also told us the story of *T̓sil̓ʔu̓s*, as it is easier to know the *why* behind these obligations, than to follow rules blindly. She told us that a long time ago *T̓sil̓ʔu̓s*

²⁰⁹ Smith, “The Ways of our *Esg̓haydam* ‘Ancestors’”, *supra* note 144 at 12.

²¹⁰ It is not unusual in different Indigenous legal traditions for mountains to be considered ancestors/people. For example I discuss further in this chapter how Coast Salish legal traditions recognize the personhood (or “beingness”) of mountains and islands (given their coastal geography). Finger pointing at people is commonly considered a sign of disrespect in many Indigenous communities. The “directional lip pucker” is often practiced instead, where a person puckers their lips in the direction they are referring to. This has become the subject of comedy sketches across Indigenous communities given its prevalence and distinctiveness from the finger pointing of the west. See for example, “First Nations Man Breaks 100-Metre Lip Point Record” (20 February 2018) *Walking Eagle News*, online: <<https://walkingeaglenews.com/2018/02/20/first-nations-man-breaks-100-meter-lip-point-record/>>. See also, Kensy Cooperrider, “The Way Humans Point Isn’t As Universal As You Might Think” (21 February 2018) *The Conversation*, online: <<https://theconversation.com/the-way-humans-point-isnt-as-universal-as-you-might-think-91434>>. The fact that the ancestor/mountain *T̓sil̓ʔu̓s* requires the same treatment from people as other people can expect, highlights his continued personhood and reminds us that these directions about how to act are to enable us to treat *T̓sil̓ʔu̓s* the ancestor well in ongoing ways.

was married to *Eniyud* (another powerful ancestral mountain in the region).²¹¹ They had six children together. They lived south of Konni Lake (the lake next to the current community of Xeni Gwet'in). After a time the husband and wife began to struggle to get along. *Eniyud* eventually left with three of their children, and *T̄sil̄ʔūs̄* remained with three of the children. *T̄sil̄ʔūs̄* transformed into the mountain we see today along with his three children, one looks like a baby on his lap. *Eniyud* and the other three children left for Tatlayoko Valley, planting wild potatoes along the way. She is the reason there is an abundance of wild potatoes in Tsilhqot'in territory. *Eniyud* was also someone we needed to know our obligations towards, though we would not be travelling in her presence on this particular trip. An important element of following Tsilhqot'in laws as taught to us by Alice, was knowing the precedent setting stories about the various beings who live across the territory.²¹² Without this knowledge we might bring harm upon others or ourselves. Just as ignorance of the law is typically not an excuse within Canadian law, lack of knowledge does not shelter people from consequences within Tsilhqot'in law either.²¹³

Shortly after meeting *T̄sil̄ʔūs̄*, we were stopped by some Rangers employed by the Tsilhqot'in National Government at the Xeni Gwet'in border, a designated caretaker area of the declared Title region.²¹⁴ As we pulled up slowly in our Explorer towards the men, Alice

²¹¹ For a version of this story see "Ts'il̄ʔos Provincial Park: The Legend of Ts'il̄ʔos", online: <<http://bcparks.ca/explore/parkpgs/tsilos/legend.html>>; See also John Schrieber, "Walking Ts'yil-os, Mt. Tatlow" (2013) 25:1 *Mānoa*, University of Hawai'i at 151-160.

²¹² See at time stamp 2:03-2:48 in Kamala Todd (director and editor), Joah Lui (Camera), and Ecko Aleck (sound), "RELAW: Living Indigenous Laws", produced for and in collaboration with West Coast Environmental Law, 2017. Online: <<https://www.youtube.com/watch?v=3Q8zkz25Rj8>>.

²¹³ For contestation of this maxim see Dan M. Kahan, "Ignorance of Law Is an Excuse: But Only for the Virtuous" (1997) 96:1 *Michigan Law Review* 127.

²¹⁴ Calvin Sandborn et al, "The Case for a Guardian Network Initiative", A Report Prepared by BC First Nations Energy and Mining Council and UVic Environmental Law Centre, July 2020, at 21, 46, 61, 64, 78, 84, 102. Online: <https://elc.uvic.ca/wordpress/wp-content/uploads/2020/08/2020-01-01-Case-for-a-Guardian-Network-Initiative-compressed-for-email.pdf>>; See also Nation Talk, "Tsilhqot'in Nation Enhances Compliance and Education in Territory", (10 August 2018) online: <<https://nationtalk.ca/story/tsilhqotin-nation-enhances-compliance-and-education-in-territory>>.

explained that the Rangers had been hired to welcome people to their lands, and keep note of who is coming and leaving. This kind of watchfulness and diplomacy ensures people are taken care of, and the land is not harmed. The Rangers ensure visitors adhere to Tsilhqot'in laws of conservation, respect and use while in the area.²¹⁵ There was a large sign by the men explaining some of these protocols. Given that our visit was only two years after the Title case recognizing Tsilhqot'in ownership and governance over their lands, the formal Ranger program was new. It was still a time of transition away from provincial management and control. After so many years of *Indian Act* policies, the switch back to Tsilhqot'in governance in a modern context was not without bumps along the way (and they, of all people, know about bumpy roads). This encounter with the Rangers reminded us that it is not only ancestral mountains and their associated stories that foster relationships of influence and encourage enforcement of rules. People in contemporary positions play important enforcement roles as well. This was a good reminder that law functions more as a web than distinct pillars, with multiple integrated approaches serving connected functions.²¹⁶

There may be some discomfort for an outsider to this legal tradition that the directive “do not disrespect *T̓sil̓pu̓š* otherwise bad weather or other harm could befall you” invokes a consequence that comes from beyond human forces. On the one hand, of course mountains do, in fact, influence the weather.²¹⁷ Mountains provide a barrier for moving air, which affects wind, precipitation and temperature levels. What is distinctive about Tsilhqot'in relationships with

²¹⁵ The role of Indigenous guardians is important across the globe. For example, Australia has committed over \$650 million from 2015-2021 to the Indigenous Rangers Program (See Australian Government, National Indigenous Australians Agency (NIAA), “Project funding – Indigenous land and sea management, online:) and announced more than \$700 million in additional funding for the 2021-2028 period (See: Finbar O’Mallon & Rebecca Gredley “Indigenous ranger funds hailed as jobs win” (10 March 2020), online: <<https://www.transcontinental.com.au/story/6670275/indigenous-ranger-funds-hailed-as-jobs-win/?cs=7>>).

²¹⁶ John Borrows, *Law’s Indigenous Ethics* (Toronto: University of Toronto Press, 2019) at 117-120.

²¹⁷ See for example Justin Minder et. al., “The Climatology of Small-Scale Orographic Precipitation Over the Olympic Mountains: Patterns and Processes”, (2008) *Quarterly Journal of the Royal Meteorological Society* 817.

Tsilʔuŝ, is that human agency intermingles with *Tsilʔuŝ*' agency and the resulting weather is viewed as a direct consequence of this interplay instead of merely climatological factors. Dr. Alan Hanna comments in his writing about *Tsilhqot'in* water law on these relationships between the human and more-than-human and how some consequences flow. He writes:

Sacred and natural forces serve to remind people that bad things can and do happen.²¹⁸ There is power in the earth and environment, much of which cannot be seen. Unseen forces are acting upon people at all times (e.g. gravity, wind, desire), and if not acting upon, then they are ready to act. The potential to bring on the invisible forces that accompany people in the human world compel adherence to law. As Gilbert Solomon explains, "your actions affect everything, and they are teaching you don't be doing that, don't be rolling a rock down the mountainside, don't roll a rock down the mountain and hear it crashing down, way down, having fun, don't do that, because other spirits going come here, you going to be stuck here, dealing with rain dude, and you not going to be happy about it."²¹⁹²²⁰

While there are many distinct differences between traditions, some concept of consequences that come from sources beyond humans is present across various philosophies. Some eastern traditions such as Buddhism and Hinduism explore karma as a concept to explain "that our past actions affect us, either positively or negatively, and that our present actions will affect us in the future".²²¹ Similarly in the western tradition of Christianity the Bible teaches that "whatsoever a man soweth, that shall he also reap."²²² I only offer these analogies as a doorway between spaces, to see a moment of connection, but ultimately these traditions must be understood on their own terms. The consequences that flow from disrespecting *Tsilʔuŝ* does not

²¹⁸ Borrows cautions against accepting authority of sacred sources of law without question. For example, there is a risk of creating an oligarchy if "a person or group were to make claims that they were the only ones able to understand, interpret or proclaim sacred or natural law, or were somehow indispensable to the process of law [...] No one person should be granted this degree of authority, but most legal systems struggle to contain powerful groups and individuals who proclaim the infallibility, necessity, or inevitability of their rules," [Borrows, *CIC*, *supra* note 11 at 50.]

²¹⁹ Interview of Gilbert Solomon at Xeni Gwet'in (4 July 2017, pm) at 8. [quote from Hanna, PhD Diss.]

²²⁰ Hanna, *Dechen ts'edilhtan: Implementing Tsilhqot'in Law for Watershed Governance*, *supra* note 148 at 221.

²²¹ BBC Religion, "Karma", (17 November 2009), online: <<https://www.bbc.co.uk/religion/religions/buddhism/beliefs/karma.shtml>>.

²²² *The Holy Bible: King James Version*, Galatians 6: 7, online: <<https://www.churchofjesuschrist.org/study/scriptures/nt/gal/6?lang=eng>>.

replace the enforcement work human agents perform, but expands our ideas of how law can operate. For the Tsilhqot'in, and many other Indigenous peoples, there is fluidity between humans and other living beings like mountains, animals and plants.²²³ If *Tsilpuš* is not just a mountain but an ancestor, I wondered how the weather or other consequences that may come from disrespecting him (such as pointing, climbing his peak, or camping on/by him) connect to the debate surrounding anthropomorphism.

Anthropomorphism in Law: A Concern?

Anthropomorphism refers to the “attribution of human personality or characteristics to something non-human, as an animal, object etc.”²²⁴ Dr. Nik Taylor describes it's history in Western thought as follows²²⁵:

Originally objected to when it pertained to attributing human characteristics to gods, anthropomorphism has come, in the modern era, to be a dirty word, specifically in scientific discourse.²²⁶ From seventeenth-century philosophic objections from the likes of Bacon and Spinoza through to the Cartesian idea that animals are merely machinic beings operating only at the level of impulse, and finally finding its pinnacle of expression in the radical behaviourism of Loeb, Watson and Skinner, anthropomorphism has come to be synonymous with un-scientific practices, with the attribution of emotions and mental states to animals that cannot be proven by scientific standards.²²⁷

These objections are culturally bounded, and anthropomorphism of course remains a consistent practice across modern cultures including in the West. Some remain critical of the practice, one of the main reasons being that “Anthropomorphism can lead to an inaccurate

²²³ See writing generally centered on “kincentric ecology”. For example Enrique Salmón, “Kincentric Ecology: Indigenous Perceptions of the Human-Nature Relationship” (2000) 10:5 *Ecological Applications* 1327.

²²⁴ Oxford English Dictionary Online, “Anthropomorphism” (definition ‘b’).

²²⁵ Nik Taylor, “Anthropomorphism And The Animals Subject” (2011) Brill: *Anthropocentrism* at 266.

²²⁶ Xenophanes, *Fragments*, trans J H Lesher (Toronto: University of Toronto press, 1992), fr. 7, 18–19. See Sax, ‘What is this Quintessence of Dust?’ and Silverman, ‘Anthropocentrism and the Medieval Problem of Religious Language’ this volume, for a more detailed overview.

²²⁷ See respectively, A. Horowitz, ‘Anthropomorphism’, *Encyclopedia of Human-Animal Relationships*, ed. M. Bekoff (Westport, Ct: Greenwood Publishing Group, 2007), 60–6; J.S. Kennedy, *The New Anthropomorphism* (Cambridge: Cambridge University Press, 1992); E. Crist, *Images of Animals: Anthropomorphism and Animal Mind* (Philadelphia, PA: Temple University Press, 1999), for a more detailed argument.

understanding of biological processes in the natural world”.²²⁸ In other words, their main concern is that objective fact is obscured if non-humans are described in human terms, and this moves us further away from truth or reality which should be the goal of our intellectual endeavours.

On the other hand there is a significant group of scholars and research that carefully works through and moves beyond some of the earlier concerns with anthropomorphism.²²⁹ They show that its “categorically wrong to say that animals don’t have thoughts and emotions, just like it’s wrong to say that they are completely the same as us” noting that empathy is a positive outcome of seeing ourselves in others including more-than-human beings.²³⁰ Of course rocks (such as mountains) are distinct from the animals that Dr. Safina and others typically refer to in their discourse. Some people may be even more uneasy with the idea that a mountain would be considered an ancestor.²³¹

Indigenous understandings of the diverse living beings present in their homelands comprises a distinct way of relating beyond the framework of western science.²³² I argue that Indigenous peoples are most often doing something different from the practice of

²²⁸ Dr. Patricia Ganea as quoted in Oliver Milman, “Anthropomorphism: How Much Humans and Animals Share is Still Contested” (15 January 2016) *The Guardian*, online: <<https://www.theguardian.com/science/2016/jan/15/anthropomorphism-danger-humans-animals-science#:~:text=%E2%80%9CAnthropomorphism%20can%20lead%20to%20an.actions%20of%20a%20wild%20animal.%E2%80%9D>>.

²²⁹ See for examples Barbara J. King, *How Animals Grieve*, (Chicago: The University of Chicago Press, 2013); Denise Herzing and Christine Johnson (eds.), *Dolphin Communication and Cognition: Past, Present and Future*, (Cambridge, MA: MIT Press, 2015); Frans de Waal, *Peacemaking Among Primates*, (Cambridge, MA: Harvard University Press, 1989); Carl Safina, *Beyond Words: What Animals Think and Feel, First Edition*, (New York: Henry Holt and Company, 2015).

²³⁰ Dr Carl Safina as quoted in Oliver Milman, “Anthropomorphism: How Much Humans and Animals Share is Still Contested” (15 January 2016) *The Guardian*, online: <<https://www.theguardian.com/science/2016/jan/15/anthropomorphism-danger-humans-animals-science#:~:text=%E2%80%9CAnthropomorphism%20can%20lead%20to%20an.actions%20of%20a%20wild%20animal.%E2%80%9D>>.

²³¹ For example, the student who first learned about Coast Salish law on the land, recounted at page 107-108 of this thesis.

²³² See ‘Cúagilákv (Jess Housty), “Thriving Together: Salmon, Berries and People” (27 April 2021) *Hakai Magazine*, online: <<https://www.hakaimagazine.com/features/thriving-together-salmon-berries-and-people/>>; Jess Housty, “Find Your Pod” (25 May 2020) *The Tye*, online: <<https://thetyee.ca/Culture/2020/05/25/Find-Your-Pod/>>.

anthropomorphism. Rather than projecting human thoughts/emotions onto more-than-human beings, they instead are carrying forward a long history of a unique understanding of sentience. It is different to project human characteristics onto the more-than-human after a history of Western theorizing about them as unthinking/objects, versus people rooted in practices and worldviews that have always theorized about the more-than-human world as having agency and animacy. Scholar of Coast Salish law and WSÁNEĆ citizen Dr. Robert Clifford writes about how his legal order understands ancestors as land and land as ancestors. In the Coast Salish legal world (situated on the west coast of North America in what is now known as British Columbia and Washington), stories illuminate that there used to be no islands in the Salish Sea.²³³ Creator eventually placed people (ancestors of contemporary Coast Salish) into the ocean, and they turned into the present day islands we can see today. The WSÁNEĆ language word for island is ŁEL,TOS, literally meaning “Relatives of the Deep”. Clifford acknowledges the importance of nuance and that different WSÁNEĆ citizens will relate to their homelands/waters and stories differently. He writes:

In speaking about ŁEL,TOS it was not that he imagined all WSÁNEĆ people understood “islands” as their “Relatives of the Deep”, or that such an understanding was essential for WSÁNEĆ identity. Some people had this understanding. Some did not. Some did not reflect upon it in any detail. And some understood it in a more metaphoric way. It was also true that some people may potentially emphasize certain interpretations of various stories in an effort to reinforce their own position of power in the community. Any given story didn’t hold all the answers. But for Cedar, all of that didn’t mean there was not something important to think about in the story.²³⁴

We see here that Clifford views the islands identity as relatives as an open framework for citizens to draw meaning from if they choose, instead of expounding upon the human characteristics (such as feelings or thoughts) of this ancestral island. The diversity of ways to

²³³ Clifford, “Listening to Law”, *supra* note 113 at 52.

²³⁴ *Ibid* at 58.

interpret law, including its expression through ancestors embodied in mountains or islands, should not be a threat to its legitimacy. Difference is a fact of life, and one of the reasons why we have law in the first place—to work through challenges that arise from differences in interpretation. In the common law, lawyers offer differing opinions on the facts, and the caselaw that may apply. Then judges offer their own opinions, then the decision may be appealed where yet another set of lawyers or judges continue to show difference in interpretation, reasoning and argument. This shows that law, like poetry or land, does not suffer from a diversity of opinions, but does require processes to work through the differences.²³⁵

Another scholar of Coast Salish law and Cowichan Tribes citizen Dr. Sarah Morales writes about some of the important mountains in her home, and how they are ancestors that have stories to guide us in the present.²³⁶ She writes that it is important to know the history of a place, in order to draw meaning from a place: "...landscape helps not only to make history but also to hold it in place 'as a repository of distilled wisdom, a stern but benevolent keeper of tradition.'²³⁷ These geomorphic landscapes can then be used as educational tools in that they can teach people about seeing multiple time-space scales simultaneously.²³⁸"²³⁹ When Morales is home in Coast Salish Territory, she can look outside and recall the stories and teachings of ancestors who are embedded/embodied in the landscape. "For example, Syalutsa was the first ancestor to fall from the sky. He fell to the warm ground of Quwutsun near present-day Koksilah Ridge. His younger

²³⁵ Jeremy Webber, "The Grammar of Customary Law" (2009) 54 McGill Law Journal/Revue de Droit de McGill 579.

²³⁶ Morales, "Stl'ul nup: Legal Landscapes of the Hul'Qumi'Num mustimuhw", *supra* note 117 at 111-112.

²³⁷ Keith Basso, *Wisdom Sits in Places: Landscape and Language among the Western Apache* (Albuquerque, NM: University of New Mexico Press, 1996) at 63.

²³⁸ Deirdre A Wilcock & Gary J Brierley, "It's About Time: Extending Time-Space Discussion in Geography Through Use of 'Ethnogeomorphology' As an Education and Communication Tool" (2012) 3 Journal of Sustainability Education 3, <<http://www.jsedimensions.org/wordpress/wp-content/uploads/2012/03/WilcockBrierleyJSE2012.pdf>>.

²³⁹ Morales, "Stl'ul nup: Legal Landscapes of the Hul'Qumi'Num mustimuhw", *supra* note 117 at 109.

brother St'uts'un was the second ancestor to be dropped from the sky. He landed in between the two majestic peaks of Swuq'us (Mount Prevost)...The places where these First Ancestors dropped from the sky serve as a reminder to the Hul'qumi'num communities of their historic and continuing relationships to each other."²⁴⁰ Knowing these distant time stories provides opportunities for people to be led by the relationships set forward in them, and apply the associated guiding principles.

Dr. Andrée Boisselle's scholarship on Coast Salish law also reflects on the legal implications of ancestral beings embedded in the land.²⁴¹ She writes:

The land is their ancestor not only in the specific places where a story marks the mythical petrification of an ancestor, or even in all the places where the animals and plants created from a Stó:lō person long ago, live and grow. Stó:lō Téméxw as a whole is a relative, an ancestor of the Stó:lō because it has literally absorbed the bodies of their ancestors for countless generations.²⁴²

The Tsilhqot'in and Coast Salish legal traditions (among others) have beautiful worldviews and sophisticated land-based practices of keeping alive distant time stories to act as historical precedent to guide modern people today. As Clifford reminds us, there will be diversity in how these narratives and associated obligations are interpreted. Returning directly to our consideration of anthropomorphism and whether this should be a concern in legal practice, I have argued that viewing mountains or islands as animate legal relations is distinctive. If there is still concern however around the objective fact element that concerns anthropomorphism, I would argue that law, while it can be concerned with factual truth, is also largely a social

²⁴⁰ Ibid at 110.

²⁴¹ For another resource in line with Boisselle's scholarship see, Keith Carlson and Albert Jules McHalsie, *A Stó:lō Coast Salish Historical Atlas* (Vancouver: Douglas & McIntyre, 2001).

²⁴² Boisselle, "Law's Hidden Canvas", *supra* note 111 at 134. I appreciate this quote from Boisselle's writing, because it reminds us of the literal absorption of ancestral bodies into the earth. We come from soil, and we go back to soil. See Lindsay Borrows, "Dabaadendziwin: Practices of Humility in a Multi-juridical Legal Landscape" (2016) 33 Windsor Y B Access Just at 153-154.

construct.²⁴³ It is often focused on how people experience their world.²⁴⁴ Climate law researcher Grace Nosek draws on scholarship about how science too is often a social construct, interpreting data to confirm biases or manufacture doubt in the wider population. She writes²⁴⁵:

Scholars like Sheila Jasanoff, Lisa Heinzerling, Elizabeth Fisher, and Douglas Kysar all examine how various levels and branches of law have used (or misused) scientific evidence and scientific certainty, providing important context for thinking about what it means to “manufacture” uncertainty from a legal standpoint.²⁴⁶ David Michaels and Celeste Monforton highlight how the uneasy fit between law and science has allowed manufactured uncertainty campaigns to stymie legislation for years.²⁴⁷

With this reminder we might practice caution in our attempts to categorize what is objective fact, and remember that human reasoning and motives are present across disciplines. Law has a different objective than science, namely to create persuasive ways to ensure people live together well and safely and have processes to resolve conflicts as they do arrive. The short examples from Clifford, Morales and Boisselle show the legal function that understanding the living world around us as ancestors, agents or actors, can play in guiding us through the associated stories/precedent to help us pattern our own actions lawfully. I hope we can beware of binary thinking, such as “inanimate behaviour of preprogrammed robots on the one hand, and that of

²⁴³ See for example, Carlo Focarelli, *International Law as Social Construct: The Struggle for Global Justice* (Oxford: Oxford University Press, 2012)

²⁴⁴ The literature on law as tradition argues that the common law does not necessarily change based on scientific evidence, but is committed to sustaining “timeless staples of jurisprudence”. See for example, Martin Krygier, “Law as Tradition” (1986) 5 *Law and Philosophy* 237-262.

²⁴⁵ Grace Nosek, Literature Review for her PhD Diss., “Defending Scientific Integrity: Harnessing the Power of Law to Defend Climate Change Science from Manufactured Doubt”, University of British Columbia Faculty of Law [forthcoming, 2022].

²⁴⁶ Sheila Jasanoff, *Science and Public Reason* (London: Routledge, 2012); Sheila Jasanoff, *Science at the Bar: Law, Science, and Technology in America* (Cambridge: Harvard University Press, 1995); Lisa Heinzerling, “Doubting Daubert” (2006) 14 *J.L. & Pol’y* 65-83; Elizabeth Fisher, *Risk Regulation and Administrative Constitutionalism* (Portland: Hart Publishing, 2010); and Douglas Kysar, *Regulating from Nowhere: Environmental Law and the Search for Objectivity* (New Haven: Yale University Press, 2010).

²⁴⁷ David Michaels & Celeste Monforton, “Scientific evidence in the regulatory system: manufacturing uncertainty and the demise of the formal regulatory system” (2005) 13 *J. Law Policy* 17.

rich, lived human experience on the other.”²⁴⁸ Biologist and fungi researcher Merlin Sheldrake writes,

Anthropomorphism is usually thought of as an illusion that arises like a blister in soft human minds: untrained, undisciplined, unhardened. There are good reasons for this: When we humanize the world, we may prevent ourselves from understanding the lives of other organisms on their own terms. But are there things this stance might lead us to pass over—or forget to notice?...Biological realities are never black-and-white. Why should the stories and metaphors we use to make sense of the world—our investigative tools—be so? Might we be able to expand some of our concepts such that speaking might not always require a mouth, hearing might not always require ears, and interpreting might not always require a nervous system?²⁴⁹

I appreciate the questions posed by Sheldrake. Just as there is a strong argument to approach biological questions with nuance and flexible categories, law can also benefit from such an approach. As John Borrows writes, his work in the field of Indigenous law is aimed at advancing “ideas related to agency, self-determination, entanglement, syncretism, pluralism, nuance, power and anti-essentialism.”²⁵⁰ Cultivating understandings of agency and animacy within the more-than-human world as represented in various Indigenous legal orders might be exactly what we need to infuse those of us situated in other traditions with a deeper capacity to realize these very goals.

Arriving at Yohetta Lodge

The sun set, and stars appeared for the final portion of the drive. All of us were quiet, lost in our own thoughts. Loretta Lynn played on the tape deck. Alice mentioned that Loretta visited the lodge a number of years ago, and that she was very nice.²⁵¹ Apparently Donald Trump’s son

²⁴⁸ Merlin Sheldrake, *Entangled Life: How Fungi Make our Worlds, Change our Minds, & Shape our Futures* (New York: Random House, 2020) at 41.

²⁴⁹ *Ibid* at 41-42.

²⁵⁰ Borrows, *Law’s Indigenous Ethics*, *supra* note 216 at 3.

²⁵¹ Alice informed me that Loretta Lynn used to have a cabin on Chilko Lake where Bobby Blachford had cabins and a resort for hunters.

also came at one point with his then fiancée. Some of the visitors that came weren't people she would choose to spend time with, their hunting and outdoor practices in stark contrast to her own. They rarely helped with chores around camp like cooking, cleaning or packing. Their primary interest was to harvest the biggest animal they could find to get a new record in Boone and Crockett. Alice was taught to let those animals' genes stay in the reproduction pool for future generations of their species. She also explained that out-of-country hunters sometimes only took a picture with the animal they killed and would leave the rest behind, instead of ensuring no part was wasted.²⁵² This created a lot of work for Alice. I wondered what the story of *Tsil?uû* meant to them when they were told, and how Alice felt hunting with them given that the hardship often falls upon the party, not just the individual who acts flippantly towards the mountain.²⁵³ When you're out on the land together, when one person is hurt, it affects everyone.²⁵⁴

I stepped out of the truck into the cool evening air to open the metal cattle gate, revealing the final stretch of road: the dirt path that led to Yohetta Lodge. The horse corral was on our left, and small log cabins dotted the way. Tuzcha lake sparkled under the clear sky painted with constellations. Tom (Alice's partner) and Nun²⁵⁵ (their dog) were waiting for us. Tom stood at the top of the stairs that led to the front entrance of the main lodge. He smiled at us from under the brim of his hat. It didn't matter that it was night time. Hats are not simply for sun or rain. They're like wearing pants in these parts. We exchanged names and shared a few words, then he

²⁵² Smith, "The Ways of our *Esghaydam* 'Ancestors'", *supra* note 144 at 31-32.

²⁵³ In response to reading this, Alice wrote in a personal email communication on July 17, 2021 that "I usually tell clients not to point at Mount Tatlow and they usually complied. Hunters are a superstitious lot and they do listen because they want luck in their hunt." She also wrote that growing up they were taught to jump into a body of water early in the morning for luck before a hunt.

²⁵⁴ This principle is often expressed through the concept of "interconnectedness". See for example, Hanna, *Dechen ts'edilhtan: Implementing Tsilhqot'in Law for Watershed Governance*, *supra* note 148 at 111-114.

²⁵⁵ Nun means "wolf" in Tsilhqot'in. He's a sleepy husky around the lodge, who explodes with energy as soon as he gets on the trail.

gave us instructions about where to put the groceries. No time to waste. We unloaded the food into the two fridges, powered by a noisy generator just outside the kitchen. Some food stayed in coolers, and the non-perishables went onto the shelves in the walk-in pantry. After the initial frenzy of arriving and unpacking, we settled around the wood table (that could seat over 16 people). Tom and Alice casually told us about all of the recent grizzly encounters they'd had in the area. As Hannah and I lay in our sleeping bags later that night, we wondered if we were cut out for this horseback trip after all. We decided rest was more important than worry, and with a final sleepy burst of optimism, we drifted into yet another landscape, this time of dreams.

“Stillness of Nature”, by Alice M. William

I stand here looking at the mountains in this quiet dusky morning; I feel like I am back in time, the stillness is deafening, the wind sighing in the mountains and each has a sound of its own. I can envision the ice age with underground houses on the near hillside and a man with a spear honouring the sunrise, and preparing for a mammoth hunt. I can envision a hunter in dark buckskins with his bow and arrow sitting, and waiting patiently.

I am a woman hunter of this generation; a woman who packs a rifle. In the past women were not allowed to touch hunting weapons, we were not allowed to fire weapons of any kind....we might do harm to others or ourselves, or offend the spirits. I have reawakened the need to make offerings, the need to thank the spirits for luck and thankfulness, and hope that I have opened the way for new generations. It is not a new ritual, it is ancient, and it is very effective.



Alice M. William standing in the Tchaikazan River Valley.
Photo by Lindsay Borrows

Chapter 2: The More-Than-Human World as New Precedent: Looking to Contemporary Stories People Tell About Their Homelands

Weather and Tradition in the 2010 Navajo Presidential Election

A few days into the horseback trip, I woke up to yet another morning of sunshine illuminating the walls of my two-person backpacking tent. It was cool enough in the mornings and evenings that we wore our jackets and toques. By early afternoon, the heat felt relentless. We wore long pants and sleeves for sun and bug protection. Tom needed to make sure the horses were getting enough water and rest to maintain resilience against the mid-day temperatures and mountainous terrain. Having spent a fair amount of time hiking in rainstorms on British Columbia's coast, I was personally grateful for the clear skies. Alice's caution kept coming to mind: we needed to act respectfully in the presence of *T̓sil̓ʔu̓s̓*, the ancestral mountain, so no harmful weather (or other consequences) would befall us. So far, *T̓sil̓ʔu̓s̓* was treating us well and we would continue to act in accordance with the teachings Alice and her family gave us about him in hopes this sunny fortune would continue.²⁵⁶

Another weather connection came to my mind from an Indigenous legal methodologies workshop I attended with the Indigenous Law Research Unit (ILRU) in the early winter of 2014 in a northern coastal town within Tsimshian territory.²⁵⁷ Prince Rupert British Columbia is known as Canada's wettest city with approximately 240 days of rain per year.²⁵⁸ True to the town's nature, it was mostly wet and grey during our stay there some

²⁵⁶ For the full story Alice William shared with us about *T̓sil̓ʔu̓s̓* (and citations of others who write about this ancestral mountain) see again pages 261-262 of this thesis.

²⁵⁷ Indigenous Law Research Unit, "Methodology Workshops and Teaching" at 2, online: <<https://www.uvic.ca/law/assets/docs/ilru/Methodology%20Workshops%20and%20Teaching.pdf>>.

²⁵⁸ The Weather Network, "Top Five Rainiest Cities in Canada", online: <<https://www.theweathernetwork.com/news/articles/top-five-rainiest-cities-in-canada/25184>>.

years ago. However, I found myself reflecting on a different weather story from that visit. In chapter one I focused on how distant time narratives can be embedded within the land, and function as historically sourced precedent. This chapter pivots to look more explicitly at how these narratives are necessarily re-interpreted and expanded into something new so they can remain relevant and applicable in contemporary contexts. After all, jam is for preserving, legal traditions are for living.²⁵⁹ The following story and analysis represents an additional layer of learning law in relation with the more-than-human world, while simultaneously blurring the distinctions between the layers as I've laid them out in this thesis.

During our three-day ILRU workshop with members from the Gitga'at, Kitkatla, Haida, Metlakatla and Haisla Nations we engaged in various activities to explore some of the contours of Indigenous law to support these Nations' revitalization efforts. On day one we dimmed the lights in the large meeting room and projected a YouTube video clip onto a screen. A reporter's voice came clearly from the speakers—"This is campaigning, Navajo style. No flashy T.V. ads, no multi-million dollar spending, no consultants. Just a candidate and a few dozen voters in a room. There are long speeches, and everybody gets a bowl of mutton stew".²⁶⁰ The room in this short piece of video journalism looked not unlike the one we had rented in Prince Rupert with a community centre gym vibe and people seated in foldable metal chairs listening to presenters. Though the video clip was only two and half minutes long, it was rich in content for thinking through some of the challenges present in interpreting the more-than-human world as law.

²⁵⁹ L. Borrows, *Otter's Journey*, *supra* note 108 at 14 and 68.

²⁶⁰ Al Jazeera News, "Navajo Could See Female President: Members of Native American Tribe Hope Candidate in Tuesday Poll will Tackle Domestic Violence", (31 October 2010) at time stamp 0:00-0:16. Online: <<https://www.aljazeera.com/news/2010/10/31/navajo-could-see-female-president>>.

The video centers around the 2010 candidacy of Lynda Lovejoy—a Navajo woman—running for president of the Navajo Nation, a position only ever held by men. Some Navajo citizens believe their laws instruct that only men should hold this position. In their reasoning for this view, they cited (among other things) the intense monsoons storms raging throughout their homelands during the primaries. They associated the storms as a consequence of Lovejoy’s candidacy and it’s disruption of Navajo law. Just as Alice told Hannah and I that *Tsil?uû* could bring about harmful weather as a consequence to our actions, this example shows that some Navajo also believe the weather is connected to people’s choices.²⁶¹

The purpose of this activity was to identify some sources of Indigenous law, and make explicit the unavoidable task of interpretation.²⁶² Usually all five sources from Borrows’ work are identified. From our prompting, participants also discussed what other interpretations of the weather are possible. We acknowledged the limitation that nobody in our group was Navajo, or proficient in the Navajo legal tradition. Some of the participants in the ILRU workshop (all from north coast First Nations) understandably felt uncomfortable speaking about the weather interpretation given their humility, outsider status and lack of overall knowledge about Navajo law. The men in our workshop spoke loudly about not questioning the male elder’s interpretation of the weather. The next day one elder stood up and apologized, saying his wife and sisters had talked to him about how important it was to push back against interpretations that belittle women, particularly in the context of violence against women in the community. I also felt very uncomfortable with the harm this interpretation had on women including but not limited to Lovejoy. I didn’t know at the time how to more fully

²⁶¹ Interestingly, though simply as a side note, the *Tsilhqot’in* and Navajo both share the same language family (Athabaskan).

²⁶² The five sources of law we referred to are found in Borrows, *CIC*, *supra* note 11 at 23-58.

communicate my discomfort with the weather-related conclusions in the 2010 election, so I will attempt to do so here. In the process I will show the ways new narratives are made building upon distant time stories, and the slipperiness of viewing tradition as something fully historical.

Navajo citizen and Professor of Native Studies, Dr. Lloyd Lee, looks at some of the complexities of the 2010 election in his scholarship.²⁶³ Lee describes the context for the election as follows:

Since 1923 when the first western Navajo government was formed by the Department of the Interior, the Navajo Nation has never elected a woman as council chair or President. In 2010, Lynda Lovejoy received the most votes of all the candidates in the primary and was favoured to win the general election but [ultimately] lost to Ben Shelly, vice-president of the Navajo Nation at the time. Several voters interviewed by the *Navajo Times* cited tradition as their main reason for not voting for Lovejoy.²⁶⁴

Lee constructs two categories of voters: the “traditionalists”, and the “non-traditionalists”. Each group of voters understood the implications of a woman running for president differently.²⁶⁵ The traditionalists pointed to their creation story and “other teachings” to support the conclusion of a likely development of “disharmony, instability and

²⁶³ Lloyd L. Lee, “Gender, Navajo Leadership and 'Retrospective Falsification'” (2012) 8:3 *AlterNative: An International Journal of Indigenous Peoples* at 277–289.

²⁶⁴ *Ibid* at 277.

²⁶⁵ Like any law, Indigenous law too must be attentive to gender. Dr. Emily Snyder is doing excellent work in this intersectional field. She articulated the following shifts in the questions we might ask about Indigenous law and gender. From “what are the ‘traditional’ roles in a legal order?” to “How do gendered power dynamics shape legal interpretations?”. From “What are the cultural values concerning gender?” to “What are the legal principles concerning gender?”. From “What are the ‘culturally appropriate’ ways for women and men to engage with law?” to “What assumptions are being made about the ways that gendered subjects engage with law, and why?”. The questions that might be asked to facilitate and overall shift include “What are the laws about gender?” to “How are Indigenous laws gendered?” and from “How can Indigenous people rebuild their legal orders -to be as they were in the past-so as to promote gender balance?” to “In what ways can a deliberative approach to Indigenous law -which include discussion, debate, dissent and change-help to promote anti-oppressive legal relations for everyone?”. You can find the chart outlining these shifts in Emily Snyder, “Gender Inside Indigenous Law Toolkit” (University of Victoria Faculty of Law, Indigenous Law Research Unit) at 31. Online: <<https://www.uvic.ca/law/assets/docs/ilru/Gender%20Inside%20Indigenous%20Law%20Toolkit%2001.01.16.pdf>>.

confusion” if women take on leadership roles.²⁶⁶ Lee describes the traditionalists’ interpretations of weather as follows:

On primary election day, 3 August 2010, intense monsoon storms hit the central part of the Navajo reservation causing floods in several areas and a tornado touched down near Many Farms, Arizona. Three people died from storm-related causes, two by lightning strikes. Some Diné people interpreted Lovejoy’s primary win and the monsoon storms occurring on the same day as a premonition for the people. Some people used the notion of “tradition” as the rationale for opposing Lovejoy and prognosticating chaos if she was elected.²⁶⁷

In the short video clip we shared at the ILRU workshop, Al Jazeera News also focused on the way some Navajo citizens interpreted the weather as a sign that Lovejoy’s campaign was disrupting their foundational laws.²⁶⁸ The reporter interviewed some voters including Navajo citizen Edward Little. He said, “We traditional people believe that we should comply with Mother Nature so we’re not going to let, we’re trying to say that we’ll not elect a women for Navajo Nation president.”²⁶⁹ In contrast another Navajo voter, Effie, says of Lovejoy, “She’s a strong woman, so I don’t think there’s nothing wrong with her being our president.”²⁷⁰ The reporter placed Effie’s statement in a broader context, saying “Non-traditional Navajos and women support Lovejoy as an agent of change.”²⁷¹ However, “many men and followers of traditional Navajo culture think a women shouldn’t lead. They point to unusual recent storms floods and fires as proof of disapproval from a higher power.”²⁷² We see that like Dr. Lee, Al Jazeera News journalists also separated voters into two primary groups using the labels “traditionalists” and “non-traditionalists”.

²⁶⁶ Lee, “Gender, Navajo Leadership and ‘Retrospective Falsification’”, *supra* note 263 at 277.

²⁶⁷ *Ibid* at 278.

²⁶⁸ Al Jazeera News, *supra* note 260.

²⁶⁹ *Ibid* at timestamp 1:14-1:24.

²⁷⁰ *Ibid* at timestamp 0:56-1:02.

²⁷¹ *Ibid* at time stamp 0:52-0:56.

²⁷² *Ibid* at time stamp 1:03-1:15.

Some of the cited resources the “traditionalists” and “non-traditionalists” drew from to either create or refute these connections between Lovejoy’s campaign and the harmful weather included some distant time Navajo oral stories, teachings, ceremonies, songs and the influence of western ideas around gender roles.²⁷³ Depending on how you approach these resources there are many available interpretations one could give to the weather. Law hinges on interpretation. This should come as no surprise to people trained in the common law tradition, where lawyers and judges constantly approach a single case differently despite drawing from the same available body of resources. Navajo scholar Dr. Jennifer Nez Denetdale explores some of the gendered elements of modern Navajo politics. She describes the current hierarchical governance structure as far from the traditional one.²⁷⁴ She takes interest in the way people draw from tradition (such as distant time stories), knowing that it’s meaning is ever-shifting and it’s being applied in new contexts.²⁷⁵

Denetdale refers to a Navajo woman named Irene Stewart who unsuccessfully ran for tribal political positions in the 1950s. Stewart related a distant time narrative often relied upon to bar women from leadership. The story is about Asdzáá Naat’áani, or Woman Chief, whose authority was mostly over women.²⁷⁶ In the story, Asdzáá Naat’áani’s leadership allowed for a loosening of moral principles within the female population. Quarrels arose between the men and the women over this change, and the women ultimately decided they did not need the men and

²⁷³ Lee, “Gender, Navajo Leadership and 'Retrospective Falsification'”, *supra* note 263 at 279 . See also Noel Lyn Smith, “Few Undecided in Western Agency”, Navajo Times (3 November 2010), online: <<https://www.navajotimes.com/politics/election2010/110310western.php>>. This resource points primarily to “Navajo teachings” without the specifics of where those teachings come from.

²⁷⁴ Jennifer Nez Denetdale, “Chairmen, Presidents and Princesses: The Navajo Nation, Gender and the Politics of Traditions” (2006) 21:1 Wicazo Sa Review at 11-14. You’ll note that this paper was written in 2006, four years before Lynda Lovejoy’s campaign in discussion. In the past other women have attempted to run for political positions within the Nation and were met with similar forms of questioning.

²⁷⁵ *Ibid* at 16.

²⁷⁶ *Ibid*.

left. This made the men angry. In time life became hard for both sexes. After four years an owl told them that there would be no more Navajo if they kept living in foolishness like this. They admitted they were wrong and since then, men have taken over as rulers. Irene Stewart wrote, “My people have this story in mind when they criticize a woman leader. They say there will be confusion within the tribe whenever a Navajo woman takes office.”²⁷⁷ Denetdale adds “This narrative is a variation on stories that detail what happens when men and women fail to recognize that both their roles are important to the survival and perpetuation of the People. It is a narrative that has been interpreted in different ways.”²⁷⁸ As far as I know, this story of Asdzáá Naat’áani is not specifically embedded in some element of the more-than-human world like the story Alice told us of *Ṭsilʔụsḥ*, the ancestral mountain. However, it is relevant given its possible application to the more-than-human, such as during the monsoon storms of the 2010 Navajo primaries. Again, this is just one of many distant time stories (and other resources) that act as precedent.

Without directly addressing the weather herself, the “non-traditionalist” Lynda Lovejoy’s campaign focus could have suggested an alternative interpretation to why the harmful storms were occurring. Lovejoy did discuss the uranium mining legacy and the importance of cleaning up a scandal-plagued, dysfunctional tribal government stating, “There’s been such a divisiveness within our government for a long time, so we need to restore good government.”²⁷⁹ Lovejoy might instead interpret the harmful weather as a warning connected to violations of Navajo laws around women’s safety and/or environmental stewardship over their territories. She might

²⁷⁷ Irene Stewart, *A Voice in Her Tribe: A Navajo Woman's Own Story* (Socorro, New Mexico.: Ballena Press, 1980) at 61.

²⁷⁸ Denetdale, “Chairmen, Presidents and Princesses”, *supra* note 274 at 16.

²⁷⁹ Al Jazeera News, *supra* note 260 at time stamp 0:31-0:41.

specifically point to the epidemic of violence against Navajo women²⁸⁰, or current government support of destructive extractive industries.²⁸¹ Others might view the weather events in connection to climate change that is influenced by factors far beyond the Navajo Nation borders.

The point is that diverse groups of people within the Nation can and do interpret the more-than-human world differently. Diversity of interpretation exists across legal orders and contributes to the need for legitimate processes to work through differences of opinion.²⁸² Furthermore, law can face challenges if it is equated with history or tradition in inflexible ways. In a direct response to the problematic historicization of Indigenous peoples by Canadian courts, John Borrows writes that originalist interpretations of Indigeneity have actually harmed Indigenous peoples. He suggests that “Canadian constitutional law should regard the ‘past’ as a grab bag of possibilities for present reasoning, rather than as a constraint on present developments, because they do not have analogues in a bygone era”.²⁸³ If we are constantly searching for historically sound traditions of long ago in our legal frameworks, and seeing those as the pure or authentic moments of being Cree, Coast Salish, Tsilhqot’in, Navajo (etc.), then we

²⁸⁰ Diane McEachern et al, “Domestic Violence Among the Navajo: A Legacy of Colonization” (1998) 2:4 *Journal of Poverty* 31; Mary Rivers, “Navajo Women and Abuse: The Context for Their Troubled Relationship” (2005) 20 *Journal of Family Violence* 83. This epidemic extends beyond Navajo country to Indigenous women across the United States (and internationally). For further reading see the webpage from the Indian Law Resource Centre, “Ending Violence Against Native Women”, online: <<https://indianlaw.org/issue/ending-violence-against-native-women>>. For an excellent piece of fiction that address the jurisdictional complexities that are failing Indigenous women and peoples see Louise Erdrich, *The Roundhouse* (New York: Harper Collins, 2013). For an article that examines this tragedy from a Canadian perspective see Emily Snyder, Val Napoleon and John Borrows, “Gender and Violence: Drawing on Indigenous Legal Resources” (2015) 48:2 *UBC Law Review* 593.

²⁸¹ Women’s Earth Alliance and Native Youth Sexual Health Network, “Violence on the Land, Violence on our Bodies: Building an Indigenous Response to Environmental Violence” (2016), online: <<http://landbodydefense.org/uploads/files/VLVBReportToolkit2016.pdf>>.

²⁸² See for example, Morris Fiorina and Samuel Abrams, “Political Polarization in the American Public” (2008) 11 *Annual Review of Political Science* 563. For an analysis of the role of legal process in law see Val Napoleon, “Thinking About Indigenous Legal Orders” in René Provost and Colleen Sheppard (eds), *Dialogues on Human Rights and Legal Pluralism*, *Ius Gentium: Comparative Perspectives on Law and Justice* Vol. 17 (Dordrecht, Netherlands: Springer, 2013) at 229-247.

²⁸³ John Borrows, “Challenging Historical Frameworks: Aboriginal Rights, The Trickster and Originalism” (2017) 98:1 *The Canadian Historical Review* at 114.

might disempower present day Indigenous peoples by “freezing” them in the past.²⁸⁴ This type of application of history is a risk not just for Canadian courts, but for Indigenous peoples in our adjudication of contemporary issues and in our relations with one another.

Dr. Aaron Mills writes about the “lifeworlds” of law, that form the underlying belief systems animating the (legal) stories we create and pass down.²⁸⁵ Different cultures centre different stories about the world, and thus their constituting legal lifeworlds look distinctive. “(T)he story we tell powerfully conditions the constitutional order we bring into being.”²⁸⁶ He adds, “(l)aw as a discipline isn’t fully constituted in and of itself; like every field of practice and inquiry, it comes from and depends upon a story for meaning and coherence. Without first attending to how law is shaped by story, the rich analyses offered through the ‘law and’ approach risks obfuscating and even overlooking much of the work law does.”²⁸⁷ Mills’ point reminds us that storying law is not unique to Indigenous peoples, though I would add Indigenous stories do seem distinctive in their rootedness to particular places and their attentiveness to our relations with the living world. This brief inquiry into some of the legal reasoning of the Navajo citizenry during the 2010 election reminds us of the fluid way that the historic informs the contemporary, and vice versa given we often look at the past through the lens of the present.²⁸⁸ Just as the environment herself is dynamic and changing, so is law.

Fortunately during our horseback trip learning about Tsilhqot’in law, we were able to follow the teachings surrounding treatment of *T̓sil̓pu̓s̓* and no bad weather or other harm came to

²⁸⁴ John Borrows, “Frozen Rights in Canada: Constitutional Interpretation and the Trickster” (1998) 22:1 American Indian Law Review 37.

²⁸⁵ Aaron Mills, “The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today” (2016) 61:4 McGill LJ 847.

²⁸⁶ *Ibid* at 863.

²⁸⁷ *Ibid* at 869.

²⁸⁸ Borrows, “Challenging Historical Frameworks”, *supra* note 283.

us from this source. We did not have our own encounters with interpretation in relation to *Tsil'puš*. However, during a Tsilhqot'in law workshop we were part of it came forward that some people were uncomfortable about whether or not to discuss distant time Tsilhqot'in stories during the day. There are well documented teachings around evenings as the appropriate time to work with stories. During the Tsilhqot'in Title case for example, there was some effort by the common law lawyers and judges to ensure Tsilhqot'in legal process around storytelling was followed, and court was sometimes held in the evening in community.²⁸⁹ While some community members expressed during our workshop deep discomfort about discussing stories, others felt that time was in short supply and daytime worked best for everyone's schedules. During her drive home after day one of the workshop, Alice was side swiped by a semitruck heading the opposite direction, which knocked off her sideview mirror and broke her driver's side window. Very shaken, she drove the rest of the way to her trailer in 150 Mile House from Williams Lake in the cold evening with no window. The next day she also relayed the message that we should proceed in a way where we do not have to tell the stories. We listened, and adapted the workshop. While this "message of the semi-truck" was not rooted in the more-than-human world, it was nonetheless an external event that factored into human decision-making in an important way.

Dr. Val Napoleon cautions us that law is always interpreted by people, it does not interpret itself.²⁹⁰ The weather during the 2010 Navajo presidential election, the weather surrounding *Tsil'puš*, and Alice's drive home after our Indigenous Laws workshop reminds us of

²⁸⁹ Woodward & Company, "Blazing a Trail for Reconciliation, Self-Determination, & Decolonization: Tsilhqot'in Nation v. British Columbia and Canada", *supra* note 198; Arno Kopecky, "Title Fight" (22 July 2015) *The Walrus*, online: <<https://thewalrus.ca/title-fight/>>; Diana Wilson (ed.), *Heart of the Cariboo-Chilcotin: Stories Worth Keeping* (Victoria, BC: Heritage House, 2006) at 224.

²⁹⁰ Val Napoleon, "What is Indigenous Law? A Small Discussion" (2016) *The Indigenous Law Research Unit at the University of Victoria Faculty of Law*, at 4. Online: <<https://www.uvic.ca/law/assets/docs/ilru/What%20is%20Indigenous%20Law%20Oct%2028%202016.pdf>>.

Napoleon's point: it is humans who are consistently assigning meaning to events, including those embedded within the living world. This reality is important to center so we don't fall into situations where we cannot contextually discuss, question or contest interpretations. I hope we are cautious of false dichotomies that might suggest looking to the more-than-human world in our governance practices should be avoided because challenges exist. There are limitations in every legal method, and with awareness, we can thoughtfully engage and benefit from their strengths while simultaneously accounting for their limits. Interpretation is an imperfect and imprecise business.

Adding further to the richness of the Navajo election example, all of the secondary resources I examined exploring Indigenous law and land-based pedagogies discuss how the living world is partly animated through storied application. For example, Dr. Sarah Morales writes about telling her daughter a distant time story of their ancestral mountain Pi'paam (Mount Tzouhalem near Duncan, British Columbia). Part of her purpose in passing along this knowledge is so her daughter can feel a continued connection to this ancestor, receive the unique guidance available from Cowichan understandings of how to live, and to have the option to add her own lived experiences and stories to those told by her relatives.²⁹¹ These stories facilitate certain "readings" of the legal landscape for Cowichan people.

Dr. Darcy Lindberg also explains the storied way land can be a "casebook" in his description of Papamahaw Asinîy, the flying rock/meteor that some Cree people long ago saw fall to earth. He says, "Through the ceremonies that historically took place around the stone, we can infer that its landing spot was a site of land-based legal pedagogy [or a site of

²⁹¹ Morales, "Stl'ul nup: Legal Landscapes of the Hul'Qumi'Num mustimuhw", *supra* note 117 at 123.

interpretation].”²⁹² Though some of the stories associated with Papamahaw Asinîy would now be considered historic precedent, it was once a new feature in the landscape that required initial interpreting and weaving into the fabric of the Cree legal world. Overtime these stories have been adapted into modern iterations, and the site remains meaningful today. Dr. Robert Clifford’s scholarship on W̱SÁNEĆ law likewise reflects on how different W̱SÁNEĆ people today might understand their distant time stories differently, and apply them to their own lives in unique ways thorough contemporary interpretations.²⁹³

More Like a Mountain or the Weather?: Making Sense of the Stability and Fluidity of Law

Thus far we have primarily considered mountains (in the Tsilhqot’in legal order, and a lesser extent in the Coast Salish legal order) and weather (in the Navajo legal order) as the more-than-human beings people can look to as legal relations and resources in their work of decision-making and patterning their lives lawfully. We have considered mountains and weather in terms of both historical and contemporary precedent. It is interesting to note the similarities between the perception of mountains and historical precedent as stable, or slow to change. Mountains are formed on a timescale invisible to the human eye. Legal precedent from hundreds (perhaps thousands) of years ago likewise forms over a timescale not easily observable. On the other hand, we experience great flux in weather on a near daily basis. Likewise, some areas of law can be in great flux, changing frequently enough that people must work hard to keep up with new developments. While we acknowledge the important need for change, we simultaneously desire a level of certainty in law to ensure that citizens know how to abide by its precepts. We are

²⁹² D. Lindberg, *Néhiyaw Áskiy Wiyasiwêwina: Plains Cree Earth Law and Constitutional/Ecological Reconciliation*, *supra* note 115 at 93.

²⁹³ Clifford, “Listening to Law”, *supra* note 113 at 60.

currently living in the era of the Anthropocene.²⁹⁴ As humans, we are often responsible for the dramatic changes occurring in the landscape, at times rendering it uninhabitable for various lifeforms and unrecognizable from previous generations' experiences with the land. What does it mean for Indigenous laws if the living world, as a source of law, is changing at an unprecedented rate?

Anthropologist Keith Basso writes about Western Apache relationships to their territories. Basso identified three categories of place names, including descriptive names “bestowed at a time when [Apache] ancestors were exploring the land and deciding to make it their home.”²⁹⁵ These descriptive names contain images of what to expect when visiting that place. On one particular visit Basso takes with Apache citizens Charles Henry and Morley Cromwell to a place called Thiish Bi Tú'é (Snakes' Water), there is no water. Basso reflects:

...More is contained in Apache place-names than frozen ancestral quotes and ageless images of a new and striking landscape. In addition, place names can offer evidence of changes in the landscape, showing clearly that certain localities do not present the appearance they did in former times. More interesting still, some of this evidence points to major shifts in local climatic patterns, thus allowing inferences to be drawn about how—and possibly why—the environment of the ancestors differed in key respects from that of their modern descendants. And were this not enough, the theme of places' changing even as they endure sometimes finds expression in gripping Apache place-worlds.²⁹⁶

Charles Henry takes the opportunity to share a story with Basso about Thiish Bi Tú'é (Snakes' Water), explaining how the ancestors first encountered water here, but over time it disappeared, which he interpreted as a “punitive response, wrought by Water itself, to something the people had done...Water had been offended by acts of disrespect.”²⁹⁷ Henry guessed that maybe the people were greedy and took too much water, or they were wasteful, throwing it

²⁹⁴ Erle C. Ellis, *Anthropocene: A Very Short Introduction* (Oxford: Oxford University Press, 2018).

²⁹⁵ Basso, *Wisdom Sits in Places*, *supra* note 237 at 30.

²⁹⁶ *Ibid* at 13-14.

²⁹⁷ *Ibid* at 16-17.

away, or maybe they lacked gratitude and did not offer the necessary thanks to the Water for giving of herself. In other words, the changes in the land did not hinder his ability to think about law. The change actually provided him an opportunity to reflect upon why the transformation occurred, and coupled with the oral story he knew, he articulated responsibilities one must follow in relation to water.

Even as there are strategies to adapt to changing conditions, it is also reasonable to lament the permanent loss of diversity that accompanies this time of the Anthropocene. During my community work with the Indigenous Law Research Unit, and West Coast Environmental Law, I frequently heard elders talk about how different their territories were when they were younger. They could drink water from streams that have since disappeared or been polluted, harvest a year's supply of berries from thick expanses of bushes, and had more successful hunts with healthy animal populations and less competition. This of course is not unique to Indigenous communities, and we can listen to elders across cultures reflect on the different worlds of their youth. As the saying goes, change is the only constant. Many distant time stories (Indigenous and non-Indigenous) tell of conditions radically dissimilar to those experienced by any living person today.

For example, when sitting with various members of the St'át'imc Nation of the interior of British Columbia I learned about their “constitutional” stories of Transformers who travelled through the territory changing conditions to make them more similar to the present.²⁹⁸ During the epoch when Transformers were active, “There were no trees, no salmon or trout in the rivers and

²⁹⁸ Dean Billy, Lindsay Borrows, Jessica Clogg and Helen Copeland, “Revitalizing Indigenous Law for Land, Air and Water: St'át'imc Legal Traditions Report”, (2018) West Coast Environmental Law and St'át'imc Chiefs Council, online: <https://www.wcel.org/sites/default/files/publications/2018_statime_relaw_legaltraditionsreport.pdf

lakes, no berries and generally far fewer plants than exist presently.’²⁹⁹...The Transformers had to identify what was good, and transform the bad so the world would be safe. It is these acts of transformation long ago that set the stage for the various species (including humans) to thrive as we do to this day. The changes by the Transformers’ were specific, geographically rooted, and continue to define relationships in St’át’imc territory.’³⁰⁰ During engagement sessions informing the development of a legal report on water law, St’át’imc citizens reflected on what these stories of change long ago mean to them today. Some said “that when they travel the territory, they think about the Transformers and of the ancient and ongoing connection they have as St’át’imc to their territory.”³⁰¹ We see then that, again, despite drastic changes to their territories from the time of the Transformers to today, the St’át’imc continue to approach the more-than-human world as a site of law. Changes to the living world are no match for the flexibility of human thought and reasoning.

Mi’kmaq lawyer Tuma Young draws from his knowledge of Mi’kmaq (L’nu) language, ecology and stories to reflect on the constancy of change.³⁰² Young establishes that the ability to change is supported by linguistic structures which are responsive to new developments in the world, including the notion that ecologies are constantly in flux. He writes³⁰³:

²⁹⁹ “Creation of the World” in Trefor Smith, *Our Stories are Written on the Land: A Brief History of the Upper St’át’imc 1800-1940* (Lillooet, BC: Upper St’át’imc Language, Culture and Education Society, 1998) at 1-2.

³⁰⁰ West Coast Environmental Law and St’át’imc Chiefs Council, *St’át’imc Water Law Report*, *supra* note 298 at 13-14.

³⁰¹ *Ibid* at 14-15.

³⁰² A similar point was made in earlier writing by James (Sákéj) Youngblood Henderson, “Ayukpachi: Empowering Aboriginal Thought” in Marie Battiste (ed.), *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000) at 248-279. In this chapter Sákéj Henderson “explores the application of the Aboriginal mind, spirit, and language to modern challenges and explores how that application remains interrelated with their traditional ecology and the knowledge base developed within their worldview and language. Mapping out some of the “landscape” of those Indigenous worldview, he illustrates how an indeterminate yet empowered future can unfold from reliance on Indigenous thought, rather than from total reliance on Eurocentric thought” (at xxx). The idea of a *langscape* is similar to Young’s point, that the way we see the world/land flows from the language we use, which is also how we capture ideas about law itself.

³⁰³ Young, “L’nuwita’simk: A Foundational Worldview for a L’nuwey Justice System”, *supra* note 119 at 81.

The L'nuwey language is easy to change and adapt to new situations, a flexibility that reinforces the basic intuition of the L'nuwey worldview: that the sacred spaces of the ecology are in constant flux and motion. Thus the worldview can be seen as mirroring this ecological fluidity by a verb-dominated³⁰⁴ polysynthetic language using evidential endings on verbs to indicate relationships between the life forces in the waters, the forests and the skies, otherwise known as the sacred ecological spaces.³⁰⁵

Young then makes the connection that stories, and by extension law, are also responsive to change, given that they are told through the medium of language, and drawn from local ecologies.

Like the sacred ecological spaces themselves, L'nuwey stories are fluid, capable of adapting to dramatically changing circumstances. Many stories now incorporate outside influences such as Christianity or medieval fairy tales. Can these stories still inform and teach the reader (or listener) about L'nuwey Tplutaqan? The answer is yes: while the story's main elements, characters and mode of narration can all change³⁰⁶, this reflects, rather than refutes, the flux-in-form philosophy of the L'nu and indeed the structure and functioning of the L'nuwey language. What remains constant — like the spiritual energy underlying all life forms and forces — is the purpose of the stories: to remind and teach the L'nu how to establish and maintain relationships in the sacred ecological spaces.³⁰⁷

Young's insights on the way stories change in detail, but themes remain constant is helpful to think about change not always as loss, but providing new opportunity. When the land changes, the associated story might change, but there are many ways to ensure themes carry over and perhaps the change even allows for deepened relevance. The hard work of law is never done.³⁰⁸

Law can benefit from a level of certainty to be functional, but fluidity need not be a hurdle.

³⁰⁴ There are three main types of words in Mi'kmaq — nouns, verbs and particles — but most of the words are verbs. Personal communication with Stephanie Inglis, 2015.

³⁰⁵ Youngblood Henderson, "Ayukpachi: Empowering Aboriginal Thought", *supra* note 302 at 258.

³⁰⁶ RH Whitehead, *Tales from the Six Worlds: Micmac Legends* (Halifax: Nimbus, 1988) at 2.

³⁰⁷ Young, "L'nuwita'simk: A Foundational Worldview for a L'nuwey Justice System", *supra* note 119 at 90-91.

³⁰⁸ Brunnée and Toope, *supra* note 6 at 8.

Trail Clearing and Chainsaws



We woke knowing we had the longest day of trail riding yet ahead of us. We were all feeling tired because the day before, Sharon hit a branch and fell off her horse. She had a sizeable gash on her forehead that required some emergency first aid, and resulted in a persistent pounding headache. It was stressful. We decided it would be best to make our way back to the lodge a day early. We went about the breakfast routine quietly. I went to the creek and filled a couple of pots with water to boil for tea, coffee and dish washing. Alice got the fire going. Hannah searched the pack boxes for the remainder of our breakfast foods, and began to chop and stir. Tom and Norman tended the horses. Sharon remained resting in her tent with our collective encouragement.

It was different having horses as part of our close community. I was used to spending time in the mountains with my pint-sized backpacking gear—lightweight Therm-a-Rests, compact pots, jetboil stove, dried foods etc. With horses we could pack more items and give less attention to weight. It also invited an added level of slowness to the experience, even as we were constantly busy, engaged in different tasks. Tom announced our departure plan and schedule.

Everyone would pack up their stuff, Norman would arrange it in the pack boxes and tack up the pack horses, Alice would ensure all the other horses were tacked up properly, Hannah would clean up the group gear from breakfast, Sharon would rest. Tom informed me that I would come with him to help clear trail. He had taught me how to use the chainsaw on day one of our trip, and I spent a portion of our days prior throwing the debris off the trail after he cut down precarious trees and branches. After Sharon's accident yesterday, he didn't want to take chances with anyone else getting hurt, so going ahead to clear trail was an important safety choice.

Tom and I left camp around 11am. Initially I felt bad leaving everyone else behind to do all the heavy lifting with packing up, but as we got into the forest I could see why Tom made this choice. To my untrained eye, there was no trail. It seemed like we would be trail making, more than trail clearing. I questioned Tom on how we'd know where to begin. He explained that there were hundreds of trails to choose from in there. There were overgrown game trails, trails from when he was a youth, trails made 20 years ago, 10 years ago, or just last year. The trails were constantly evolving. New ones grew out of the old, and old ones disappeared for a time then eventually found new life in a refreshed iteration. Choices were made each year about the best paths given the changes brought by windstorms, forest fires, floods or other causes. It was persistent work: identifying the best trail options, ensuring you had good tools to get the job done, knowing how to operate the tools, putting in the time and effort (preferably with help) to actually perform the clearing. When the roar of the chainsaw started it seemed destructive. I imagined what the roar of the windstorms, wildfires or floods sounded like, and how this moment of human intervention was minimal in the grand scheme of it all. Even as the chainsaw hummed powerfully and cleared everything in its path, it also felt like a restoration as we saw old pathways take on new life that animals would also soon use.

After a solid hour of work, the trail opened up again. I was able to sit on my horse and hold onto Tom's horse and the packhorse we brought with us while Tom walked the final stretch cutting down any other potentially dangerous branches. We got to a lookout spot on a mountain side meadow and from that point forward there was no trail clearing needed. We ate lunch and waited for the rest of the group to arrive. Suddenly our horses started neighing and stomping. Their voices echoed into the expanse. About five minutes later our friends arrived. The horses were happy to be reunited and sang out in a chorus of whinnies and neighs. We all ate and lounged for a bit. We could see that Nun (the dog) was lying in a stream further down the mountain side to cool down from the heat. Sharon seemed to be in good spirits, which helped ease all of our anxiety. They thanked us for the trail to follow. I thought about how that version of the trail would never be followed in exactly the same way again.

The journey back to the lodge that day was long and tiring, as expected. The pack horse Rhino kept eating bunches of yellow wildflowers and when he'd look up from the ground he'd have a beautiful bouquet stuffed in his mouth. He could have been a flower carrier at a wedding. Unfortunately we couldn't get any photos on our descent of the mountain because we were hanging tightly to the reins. At one point we got off to walk our horses on a really narrow section of the trail. I trusted Soda, and felt for Sharon who might not feel the same way about her horse Grizzly after yesterday. At the base of the mountain we wound through a dense poplar forest, then we were on an old wagon road the rest of the way back to the lodge, cleared long ago and maintained to varying degrees ever since. It was easy riding, and for that we were grateful.

What non-native science and medicine dismisses as “anecdotal”, and therefore “suspect,” is in the Anishinaabe way the highest possible degree of credible information. It is like hearing about a land one has not seen for oneself: we take the word of someone who has been there, who has seen the lay of the country and can talk about the dangers or delights of the place. Personal experience is just valued more than so-called “objective” or “depersonalized” testimony. To us, source is all...Anishinaabe knowledge grows like crystals in rock. The process is slow, and it is beautiful.

-Mary Siisip Geniusz, *Plants Have So Much to Give Us All We Have to Do Is Ask* (Minneapolis: University of Minnesota Press, 2015) at 4.



An old moose antler shed, with Appy the horse grazing behind. Photo by Lindsay Borrows.

Chapter 3: Direct Experience with the More-Than-Human World: The Role of Relationships and Outdoor Learning

Different Perspectives on Consent Laws at Lastman Lake

June 26, 2016

It's a few days after solstice, and we don't want to miss out on any moments of light. I stumbled across Tom early this morning sitting at the outdoor table on the lodge patio looking out at Tuzcha lake. The radio was on. It was the Vancouver traffic report, detailing which highways were closed, which bridges were backed up and where any accidents had occurred. He looked at me. "It's like this every day. Makes ya feel glad to be here, doesn't it?" I was delighted to witness this interesting morning gratitude ritual.

Today we would finally head out on the land with the horses. We completed our chores at the lodge quickly and were ready by 9am. Tom chuckled at our eagerness and said we had to wait for the horses to come down to the corral from the mountain. "When will that be?" we asked. He simply shrugged in reply. Apparently horses don't operate on a precise schedule. We took to the books while waiting, and reviewed our materials. Our research question was written at the top of my notebook. "Consent Regime: What are Tsilhqot'in legal principles and processes related to access to territory and resources?" I re-read some of the publicly available, recorded Tsilhqot'in narratives and our accompanying case briefs. I came across an especially intriguing recent story. It was about a beloved horse who became sick while three Tsilhqot'in families were travelling up *Tsil'2uê* (Mount Tatlow) to pick beartooth and dry meat.³⁰⁹ With great sorrow, they made the difficult decision to leave him on the trail. They left one person behind to watch the horse. Not long after, the sick horse came running up behind them in the direction of the

³⁰⁹ Terry Glavin and the People of the Nemiah Valley, *Nemiah: The Unconquered Country* (Vancouver: New Star Books, 1992) at 10-11.

beartooth. He was full of vitality, power and beauty. They sped up to follow him but the horse was too fast, and soon disappeared into the distance. The next day the person who had been watching the sick horse caught up with the group and told them the horse died. They carried on with greater ease knowing that though the horse had died, his spirit was well, and headed to the mountains. I didn't know exactly how this might inform a consent regime, but it seemed to suggest at least that horses are another important relation (along with ancestral mountains) who should be considered in decision-making. I wondered who else in the more-than-human world might be considered a legal relation that the consent regime would need to consider.³¹⁰

Around noon we heard what sounded like thunder barrelling down the mountain. Tom informed us that the horses were now on their way. We went to the corral and watched them weave through the trees. Their weight shook the ground, and voices echoed through the forest. We were given instructions again on how to tie them up. We would travel with three packhorses, plus the six horses for riding. I was introduced to my horse, a mule named Soda. She had a gentle and calm demeanour, though I was warned because of her small size and age she was prone to tripping sometimes and struggled getting over downed logs. Alice's brother Norman arrived from Xeni Gwet'in around the same time as the horses (which made me wonder, was Tom joking when he said he wasn't sure when the horses would come down? Or maybe it was just coincidence). Norman planned to strengthen his packing skills so he could help take out hunters with Tom and Alice in the fall. He tied up the horses quickly and knew exactly what to do without being asked.

After the frenzy of getting our horses tacked and packed up, we took a leisurely ride for a couple of hours down a clear trail to our destination at Lastman Lake. Tom's aunt and uncle built

³¹⁰ This was eventually answered, at least in part, by the incredible work of Linda Smith in the report she produced through the RELAW Project. See Smith, "The Ways of our *Esghaydam* 'Ancestors'", *supra* note 144.

the cabin and ran a guide outfit nearby for about 15 years. Tom grew up with his aunt and uncle, not seeing much use in attending school in town if he could be guiding and learning on the land. He never did graduate. These days a man from Lake Cowichan area on Vancouver Island owns Tom's old family cabin at Lastman. The Islander comes out a few times a year, usually with his friends, to enjoy fishing and hunting. During our visit he had a group of friends staying with him. They all used to carpool together to work at the Pulp Mill near Duncan, B.C. They were very welcoming of us, and I could tell by the attentive way they listened to Tom that they had a great deal of respect for him. Hannah and I went out for some catch and release rainbow trout fishing. As someone who eats little meat, Hannah said she was hoping she didn't actually catch one, but was interested in the experience anyways. We looked back at the cabin towards the mountains we would be climbing the next morning. There was a double rainbow in the sky.

Later that night after dinner, we all gathered together inside around a table for games and conversation. Soon the topic of the *Tsilhqot'in Nation* Title decision came up. The Vancouver Islanders were uncertain about what it meant for continued access to their cabin here in Gun Valley. They drove through the same check point that we came through with Alice and Sharon on our way to the lodge, and they wondered if the Tsilhqot'in Rangers actually had the authority to turn them away. The research question written at the top of my notebook came to mind again: "what are Tsilhqot'in legal principles and processes related to access to territory and resources?" While I knew we would not learn much about the Tsilhqot'in laws themselves from this particular interaction, we would understand further part of the relational context in which the laws would operate. It was a wonderful opportunity to engage informally with some of the people who would be one of the primary audiences for the consent regime.

As I described in chapter one, in the *Tsilhqot'in Nation* decision the Supreme Court of Canada acknowledged that the Tsilhqot'in have Aboriginal Title over a portion of their traditional territory.³¹¹ The case arose because despite never ceding their lands, the Tsilhqot'in faced many external environmental pressures at odds with their own laws. In the 1980s British Columbia granted a lumber company a license to log within Tsilhqot'in territory, which led them into court to pursue a declaration of Aboriginal Title.³¹² The resulting decision is known as "one of the most important Indigenous rights cases the world has seen."³¹³ It provides a legal pathway under the common law for Tsilhqot'in³¹⁴ to own and use land for a wide variety of purposes.³¹⁵ Given that this case marked the first formal recognition of Aboriginal Title in Canada, implementation has been a process.

Each of us in the cabin were positioned differently to the Title territory. Tom is a non-Tsilhqot'in local, with Tsilhqot'in family through Alice. Alice and Norman are Tsilhqot'in locals. Sharon is Tsilhqot'in and lives outside the territory. The hosts at Gun Valley cabin are all non-Tsilhqot'in from outside the territory but with investment in the area because of their private property and their tradition of hunting and fishing there. As we chatted, different thoughts came forward. Tom was worried as a guide outfitter that their clients at the lodge would not be accommodated to enter the territory and hunt. If a tribal park was created where only members could hunt, and outsiders required permits from the Tsilhqot'in National Government (TNG) instead of the province, there would be uncertainty for Tom how exactly this would operate. If he could not take their paying clients out to hunt, he would lose his primary source of income.

³¹¹ *Tsilhqot'in Nation v British Columbia*, *supra* note 138.

³¹² Borrows, "The Durability of Terra Nullius", *supra* note 186.

³¹³ *Ibid* at 741.

³¹⁴ And eventually other Indigenous Nations in Canada who successfully pursue Aboriginal Title claims.

³¹⁵ Borrows, "The Durability of Terra Nullius", *supra* note 186 at 740-741.

Further, any year where guides don't harvest the animals they're given guide tags for by the province, they get fewer tags the following year.³¹⁶ With this provincial rule in place, he felt extra concern over any potential to miss a hunting year due to regulatory uncertainty. Alice was pleased that the court finally recognized Title over a portion of their territory. She hoped current leadership was up to the task of making decisions for the land. She believed women needed to be involved in high level and formal decision making at TNG. She shared Tom's worry about the unknowns of what their business might be like under control of a different government that is rebuilding after years of *Indian Act* rule.³¹⁷ Norman and Sharon both listened without weighing in. The non-Tsilhqot'in men from Vancouver Island wanted to maintain their private property rights, and to ensure they could access the cabin at Lastman Lake whenever they wanted to hunt, fish and recreate.³¹⁸ They also wanted to continue living in a remote area, so no further

³¹⁶ It seems like a strange system provincially that if an outfit doesn't harvest for a year, let's say for conservation purposes, then their stewardship over their guide area would prevent them from operating as successful of a business the following year despite their sacrifice to ensure the animals were healthy. Choosing to give the animals a break is especially important after summers with big fires that have harmed many of the animals and they need time to recover. The provincial system should incentivize guides to engage in conservation focused choices, instead of penalizing them.

³¹⁷ In a surprise twist, since this visit in 2016, TNG purchased the lodge off of the owner (Tom and Alice's boss) with plans to operate a tribal tourism business. Tom and Alice have been asked to work for the lodge under TNG's direction. The COVID-19 pandemic hit early in 2020, shutting down access nationwide to many Indigenous people's territories to keep vulnerable community members safe. This has created further change and unknown for this place where Tom and Alice make their livelihood. See Rebecca Dyok, "B.C. First Nation Hopes to Offer New Visitor Experiences in 2021" (13 July 2020) *The Williams Lake Tribune*, online: <<https://www.wltribune.com/news/b-c-first-nation-hopes-to-offer-new-visitor-experiences-in-2021/>>.

³¹⁸ They did not understand that the Title decision did not address claims to private property. See John Borrows, "Aboriginal Title and Private Property" (2015) 71 *Supreme Court Law Review* 91. They of course also did not know what Chief Roger William said. The following quote comes from Borrows, *Law's Indigenous Ethics*, *supra* note 216 at 305 (footnote 56), quoting Chief Roger William, Canadian Bar Association, Aboriginal Lawyers Forum, 2 May 2015, Tulalip Reservation, Washington State. "In fact, I heard Chief Roger William of the Tsilhqot'in Nation state that Tsilhqot'in law recognizes private ownership interests within their territory. Chief Roger William said private ownership is a strongly protected interest under Tsilhqot'in law. He noted that the Tsilhqot'in people do not want to dispossess people who live on their traditional territory and claim ownership from a Crown source. They want to convert the source of this ownership from a Crown to an Aboriginal grant and thus desire to see this land have a stronger foundation. In fact, he said the Tsilhqot'in people want to treat these people better than the Crown did when it purported to hold the beneficial interest in Tsilhqot'in land. Chief William said his people understand that private ownership from a Crown source in British Columbia flows from a flawed original grant. The Tsilhqot'in people want to give non-native owners of their land even greater protection under the Tsilhqot'in legal system."

infrastructure built for other visitors. In many ways, they wanted to maintain the status quo. The consent regime would need to provide guidance and certainty in different ways for each group.³¹⁹

I thought back again to the horses, and the story I read earlier this morning about the spirit of the deceased horse running into the mountains. If the horses were also legally relevant relations meant to be reflected in the consent regime, what had they shared today about consent from their perspective? They came down from the mountains when they were ready. They allowed us to tack them up. We brushed them and gave them treats. The farrier had come a couple of days earlier to clean up their feet and fit new shoes on them for their comfort. They willingly took off on this adventure together with us this afternoon. Once we arrived at Lastman Lake we tied them up on long ropes so they could happily roam eating grass, and drink water at their leisure from the lake. There were many acts of mutual appreciation and respect. Consent was grounded in our relationship of care with the horses. This reminded me again of Chief Roger Williams' words about the *Tsilhqot'in Nation* decision: with Tsilhqot'in laws (as directed by TNG) governing once again, people should have an even better experience in the territory than when it was under provincial jurisdiction.³²⁰ His vision of increased mutual benefits was partly because of the Tsilhqot'in legal tradition's sound normative principles and processes, and also because of these relationships of care that it fosters.

At one point during a safety talk before leaving the lodge, Tom said that if anything happened to him, Alice and Norman, all we needed to do was let the horses take us home, they knew the way. It was comforting to know that the horses could literally guide us home, and also guide us to important insights on our legal research and drafting task at hand.

³¹⁹ For a doctrinal article on this point see, Tanner Doerges, "The Right to Withhold Consent in *Tsilhqot'in Nation*" DGW Law Blog, online: <<http://www.dgwlaw.ca/web/wp-content/uploads/2017/11/Tanner-Doerges-The-Right-to-Withhold-Consent-in-Tsilhqot'in-Nation.pdf>>.

³²⁰ Borrows, *Law's Indigenous Ethics*, *supra* note 216 at 305 (footnote 56).

The Land is our Casebook: The Role of Direct Experience in “Reading” the Living World

Chapters one and two examined some of the ways distant time and contemporary narratives about, and embedded in, the more-than-human world contribute substantively to Indigenous legal orders. This substantive connection was made by exploring how the living world can act as legal precedent by revealing potential pathways for decision-making. In this chapter, I shift the focus towards some of the pedagogical (how we teach) considerations of land-based legal methods. I look primarily at the role of direct experience in “reading” the living world in ways that can influence how people create law. Direct experience refers to embodied, or multi-sensory perceptions and interactions with a given person, place or thing. It may seem ironic to write about the very thing I am suggesting is best learned and practiced in sensory ways. However, just as it can be helpful by way of background to read about skills such as meditation, running, music or other practices, I hope this chapter contributes in a small way to the theory and thinking surrounding land-based legal methods to further encourage this dynamic practice.

a. What is direct experience?

Direct experience influences our understanding of the world. For example, if you’ve never spent time near the ocean, it likely does not inform the way you think or relate to the world. In contrast, the Heiltsuk Nation have lived coastally for over 14,000 years in an area now known as the central coast of British Columbia.³²¹ Their deep connection to the ocean is partly reflected in the names associated with their main tribes, as described by Heiltsuk citizen Saul Brown: “the ‘Qvuqvaitxv, meaning people of the calm water; Wuyalitxv and Wuithitxv, meaning

³²¹ Roshini Nair, “Archeological Find Affirms Heiltsuk Nation’s Oral History”, (30 March 2017) CBC News, online: <<https://www.cbc.ca/news/canada/british-columbia/archeological-find-affirms-heiltsuk-nation-s-oral-history-1.4046088>>.

inside and outside water people; Xixis, meaning down river people and Yisdaitxv, meaning people of Yisda where mountains meet the sea.”³²² In addition to these tribal names, Heiltsuk linguistic structures also account for relationships with water as “verbs also change in terms of where we are in relation to the water, which fosters an intimate relationship and amplifies the importance of water in our everyday lives.”³²³ These consistent and embodied encounters with the more-than-human world (such as the ocean for many Heiltsuk people) can be significant when we meet them with thought and curiosity. They can also be insignificant if we choose not to treat them as teaching moments, or opportunities to inform our lived practices.

Dr. Darcy Lindberg writes about his rooted experience growing up in a specific place, and what this taught him about nêhiyaw (Plains Cree) legal relations and narrative. He says:

I was raised in Wetaskiwin, the city on the outskirts of the Maskwacîs communities (those of the Samson, Ermineskin, Montana, and Louis Bull Cree) in Central Alberta. The city’s name is a subtle corruption of the term wîtaskêwin. Aside from my knowledge of the treaty, I know the hills in other ways as well. I have rubbed dirt from them in my hands, have been chased by bees down paths that cut through them after coming too close to hives on summer days. I have gathered at night with friends on the hills and watched stars and generally *teen-aged* together amongst the poplar and aspen trees. I have tobogganed down one of its bumpier trails in winter time with my cousins. And in moments where I disregarded one of our older familial beliefs that causes us to avoid owls, I have gathered barn-owl feathers along the ground. Just as the land is stitched into a collective nêhiyaw narrative memory, my own personal history becomes a part of this context.³²⁴

Lindberg’s experience growing up in this particular place of ancestral connection and engaging in the “every day” type activities he describes puts him in relationship with not only the land, but with the many other beings (past, present and future) who have their own stories of that place.

³²² Saul Brown, “Indigenous Marine Response Centre Breathing Life Into Reconciliation” (6 April 2018) National Observer, online: <<https://www.nationalobserver.com/2018/04/06/opinion/indigenous-marine-response-centre-breathing-life-reconciliation>>.

³²³ Ibid.

³²⁴ D. Lindberg, *Nêhiyaw Áskiy Wiyasiwêwina: Plains Cree Earth Law and Constitutional/Ecological Reconciliation*, *supra* note 115 at 9.

These relationships inform action, as described by the Cree principle of wahkohtowin. Activist and artist Maria Campbell describes wahkohtowin as follows:

There is a word in my language it is “wahkotowin.” Today it is translated to mean kinship, relationship, family, as in human family. But once, from our place it meant the whole of creation. And our teachings tell us that all of creation is related and inter-connected to all things within it and Wahkootowin means honoring and respecting those relationships. There are stories, songs, ceremonies, and dances that taught us from birth to death, over and over again our responsibilities and reciprocal obligations to each other. Human to human, human to plants, to animals, to the water and especially to the earth. Our whole environment, our world in turn also had responsibilities and reciprocal obligations to us.³²⁵

Campbell also asserts that it is through embodied engagement in the world through practices such as storytelling, song, ceremony, and dance (etc.) that roots us in (legal) relations, including with the more-than-human world. Dr. Sarah Morales further emphasizes that “Unlike abstract spaces, places come to have meaning and value through the process of human experience.³²⁶ The events, feelings, and activities that characterize experience serve to construct places in our minds.³²⁷”³²⁸ She distinguishes between direct and indirect experience with place, and the benefits of each. Direct experience is one’s primary interaction with the landscape, and indirect experiences of place can be through “language, songs, stories, poems, names, art (etc.). Viewed together, these direct and indirect experiences with the landscape codify not only knowledge and conceptions of place but also one’s feelings and obligations towards place.”³²⁹

b. Why is direct experience important to legal education and practice?

³²⁵ Maria Campbell, “Human Rights Conference” (1 November 2007, Eagle Feather News) at 2, online: <<https://www.ualberta.ca/wahkohtowin/media-library/data-lists-pdfs/maria-campbell-wahkohtowin-2007.pdf>>.

³²⁶ Thomas T Thornton, *Being and Place among the Tlingit* (Seattle: University of Washington Press, 2008) at 22.

³²⁷ Ibid.

³²⁸ Morales, “Stl’ul nup: Legal Landscapes of the Hul’Qumi’Num mustimuhw”, *supra* note 117 at 110-111.

³²⁹ Ibid at 111.

My purpose in sharing the opening story in this chapter (about a visit at Lastman Lake that helped me reflect on the Tsilhqot'in Consent Regime) is to show that when we spend time engaged out in the world, or in this case on the land, we get to have unique learning experiences through the people and other beings we meet.³³⁰ This type of information is often unavailable in written form, or within the structures of indoor classrooms.³³¹ Even if it is available, the insights feel more profound when learned in context. Furthermore, as demonstrated by the introduction Alice gave us to *Tsil'puš*, direct experience can place certain obligations upon us that shapes how we act. This ability to practice *while* we learn can add important layers of understanding. Spending two weeks in *Tsil'puš*' presence, following the guidelines on how to be in respectful relationship with him shaped *how* we lived during the trip. We did not point, become loud or boisterous, we were careful to camp in designated places, and we never spoke ill of the mountain(s) or other beings.

There are many benefits that can come from learning law through direct experience. For example, the level of attentiveness we had when travelling in the company of *Tsil'puš* facilitated a mindful presence that led to increased connection to place and with our fellow travellers. I do not want to romanticize that this is how all Tsilhqot'in move through their territories or in their lives at all times. Knowing ancestral stories about where you live that contain obligations is simply one way people are encouraged to live good lives, and inevitably as humans we fall short of our ideals. However, I have witnessed how direct experience out on the land can remedy some of our "impoverished views of law", and even uplift us beyond our professional lives into our personal lives.³³²

³³⁰ Deborah Curran, Cameron Owens, Helga Thorson, and Elizabeth Vibert (eds.), *Out There Learning: Critical Reflections on Off-Campus Study Programs* (Toronto: University of Toronto Press, 2019).

³³¹ Borrows, "Outsider Education", *supra* note 28.

³³² D. Lindberg, "Miyo Nehiyawiwin (Beautiful Creeness)" *supra* note 33 at 53.

I referred earlier in this thesis to how I felt sick and worn down when I finished law school. It is significant to me that a few months later during my articles in a different legal tradition with direct experience on the land as a key pedagogy, I felt re-energized and full of curiosity.³³³ Should a primary purpose of law be to nurture our goodness and wellness as people, both individually and collectively? I argue it should be, and that we far too often fall short of this ideal.³³⁴ Hadley Friedland's book on Cree Wetiko legal principles begins with the research question, "how do we protect those we love *from* those we love?"³³⁵ Embodied interactions (direct experience) with those around us weaves our web of relationships, and blurs binaries that might "other" some people, or in the case of this thesis, the more-than-human beings that surround us. I argue that direct experience through land-based legal pedagogies can contribute to the further facilitation of law as a healing profession, particularly in connection to our relations with the more-than-human world as well as between people.³³⁶

Encouragingly, there are increasing opportunities for cumulative learning using this land-based pedagogy of learning law through direct experience.³³⁷ The University of Victoria Faculty of Law recently established a joint degree program in the common law and Indigenous law

³³³ Not everyone would have this experience. I do not want to suggest this should be the go-to method for strengthening law, and people's experience within the field of law. I do not suggest indoctrination, books, courts (etc.) should disappear, rather that they be enhanced through the addition of other models of learning and practice.

³³⁴ Sonia Smith and Mila Bozic Erkić, "Does a Wellness Collection Have a Place at a Law Library?" (2020) 45:1 Can L Libr Rev 10

³³⁵ Friedland, *The Wetiko Legal Principles*, *supra* note 103 at xv.

³³⁶ Heiltsuk citizen Frank Brown was sent out on the land by his leadership after he contravened Heiltsuk law as a young person. His experience speaks to land-based legal pedagogy in the realm of rehabilitation (distinct from the focus of this thesis, but referenced here to show potential application in different areas). See Heiltsuk Tribal Council, "Heiltsuk Adjudication Report, Dáduqvłá qntxv Ġvılásax: To look at our traditional laws" at 35-36, online: <http://www.heiltsuknation.ca/wpcontent/uploads/2018/10/Heiltsuk_Adjudication_Report.pdf>. For information on law as a healing profession see generally, Susan Daicoff, "Law as a Healing Profession: The Comprehensive Law Movement" (2006) 6:1 Pepp Disp Resol LJ 1.

³³⁷ Borrows, "Outsider Education", *supra* note 28 at 10-22.

(JD/JID).³³⁸ Part of its structure includes one year of field schools, where students get outside into community and onto different lands in order to expand their understandings of law and contribute to community identified needs.³³⁹ The University of Alberta offers the “wahkohtowin Project Intensive: miyo-wîcêhtowin Principles and Practice.” This course is centred on Cree law as expressed through the pedagogy of hide tanning.³⁴⁰ Since 2014 I have been fortunate to co-facilitate Anishinaabe law camps alongside family, friends and colleagues for a number of law faculties including Osgoode Hall, the University of Toronto, Western and Windsor. These camps typically take place over four days, and involve Anishinaabe legal teachings delivered outdoors with our daily themes centred on rocks, plants, animals and water. Law students, professors, lawyers, and occasionally judges are invited to participate in swimming, canoeing, gardening, medicine walks, listening to and analyzing narratives, learning some words of Anishinaabemowin, building a sweat lodge, taking part in ceremony, tending the sacred fire, beading, moon time teachings, being gently teased and more. The days are full from sun up to sun down (though anyone is welcome to rest at any time) with opportunities for multi-sensory engagement with both law itself, and the “lifeworlds” that make up this law.³⁴¹ There are various other opportunities that exist in the field of law to engage with Indigenous legal traditions through direct experience that I do not cover here.³⁴²

c. What challenges arise with the pedagogy of direct experience?

³³⁸ See “Backgrounder: World’s first Indigenous Law degree to be offered at Uvic” (21 February 2018,) University of Victoria News, online: <<https://www.uvic.ca/news/topics/2018+jid-indigenous-law+backgrounder>>.

³³⁹ University of Victoria Faculty of Law, “Joint Program in Canadian Common Law and Indigenous Legal Orders” (26 January 2016) at 4, online: <<http://www.uviclss.ca/blog/wp-content/uploads/2016/02/JID-Scope-and-Components-26-January-2016-1.pdf>>.

³⁴⁰ Shalene Jobin, Hadley Friedland, Renee Beausoleil and Tara Kappo, “Wahkohtowin: Principles, Process and Practices” [forthcoming, 2021] Canadian Legal Education Annual Review 75.

³⁴¹ Mills, “The Lifeworlds of Law”, *supra* note 285.

³⁴² Borrows, “Outsider Education”, *supra* note 28.

Dr. Lindberg recounts an experience he had learning on the land with Dr. Morales when he was a first year law student at the University of Victoria.³⁴³ He went to the Cowichan Valley along with other first years to be introduced to the legal traditions of Professor Morales' community, the Hul'qumi'num' people. When they were in the presence of Swuq'us (Mount Prevost), Morales told a story about Stuts'un (the second ancestor) who was dropped from the sky at Swuq'us. Later, Lindberg overheard a fellow student question how this was relevant to his own legal education. The idea that law can be "written" into the land and that mountains can be legal relations troubled this student's understanding of law. I do not know the tone of this student's questioning, but I am reminded of the story I recounted at the beginning of the introduction to this thesis. I led a session on "what is law?" prior to taking a group of (mostly Indigenous) people outside for a medicine walk as part of the "Inherent Right to Indigenous Governance Program" at the Banff Centre for the Arts. Some people were simply unable to make connections to how the teachings of the juniper bush connected to law. It was not because of some inherent skepticism, but because law rooted in relationality and layered experiences requires patience to see, nuance in interpretation and it can be hard to connect to dominant themes of Western legal theorizing. This reminds us of the importance of consistent exposure to Indigenous land-based legal methods including through direct experience. In other words, law requires relationality to be activated.

An essential point that has arisen for me in this work of teaching and learning about Indigenous legal traditions within my own community, and in communities that are not my own, is the role of the interpretive community. When learners have opportunities to engage in both direct and indirect experiences with Indigenous laws they often wonder: who am I to participate

³⁴³ D. Lindberg, "Miyo Nehiyawiwini (Beautiful Greenness)", *supra* note 33 at 52.

in these discussions about or practices of Anishinaabe law? What is the relevance of my ideas? Am I damaging the purity of the law in some way if I participate?³⁴⁴ Am I at risk of appropriation if I engage? While these are indeed important and thoughtful questions, unfortunately, I have seen them derail learning environments and halt individual and collective learning. I offer the following section on interpretive communities as one set of ideas for these careful individuals to consider, with the hope of persuading them not to shy away from engaging with Indigenous legal traditions after an invitation is extended. I hope it facilitates further clarity for the Canadian legal community in thinking through elements of their own positioning with Indigenous legal traditions. My other aim is that this section contributes to further engagement around the role the living world can play in human interpretive communities, and to help us understand some of the deeper considerations of direct experience as a legal pedagogy.

The Role of the Interpretive Community in Law-Making

Animating question: Who interprets and assigns legal meaning to the more-than-human world, and why does this matter?

a) What is an interpretive community?

An interpretive community typically refers to a “group* that shares understandings because of common cultural commitments.”³⁴⁵ We can acknowledge that when a tourist visits Tsilhqot’in territory and looks at *T̓sil̓pu̓š*, they draw very different associations with the mountain

³⁴⁴ Val Napoleon, “Did I Break It? Recording Indigenous (Customary) Law” (2019) 22:1 PER/PELJ 1, online: <<http://www.scielo.org.za/pdf/pej/v22n1/69.pdf>>.

³⁴⁵ Lauren Robel, “The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community” (2002) 35:2 Ind L Rev 399 at 400 (footnote 7). Note: *I replaced the phrase “group of readers” in Robel’s original definition with “group”. The context for my thesis involves the interpretation of information beyond textual sources, so the idea of readers as forming the interpretive community is limiting. I cannot say a group of people either, as some Indigenous legal orders create space for non-human beings as part of the interpretive community.

than the Tsilhoq'tin who are rooted in particular narratives and teachings of the power of *Tsil'wus*, who is one of their ancestors and is understood to require specific ongoing practices of respect.³⁴⁶ Stanley Fish is an American literary theorist and legal scholar who is often cited as an exemplar in prompting and participating in discussions about interpretive communities.³⁴⁷ He highlights the active role of readers, proposing that they have more control over the interpretation of a piece of writing than the author.³⁴⁸ His reasoning is that readers approach a text from their own subjective experience rooted in one or more communities, and they draw meaning based on their particular context, which often differs from the interpretive lens of the author. William Blatt applies this theory to statutory interpretation, a field concerned with precision and clarity of language. He writes, "The word 'spirit', for example, means one thing to a painter and another to a minister."³⁴⁹ Of course interpretive communities also form beyond textual resources, in art and politics for example, as well as drawing meaning from the more-than-human world.

The concept of the interpretive community has been taken up by various scholars of Indigenous law. They each acknowledge that Indigenous peoples typically have distinct perspectives from other Canadian citizens, yet just like any group of people, Indigenous peoples within a given community do not always share one another's views.³⁵⁰ In the 1980s, Cree legal

³⁴⁶ Xeni Gwet'in and BC Parks, "The Legend of Ts'ilos", online: <<https://bcparks.ca/explore/parkpgs/tsilos/legend.html>>.

³⁴⁷ See, The Editors of Encyclopaedia Britannica, "Stanley Fish", (15 April 2021) Britannica Online, <<https://www.britannica.com/biography/Stanley-Fish>>.

³⁴⁸ Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham: Duke University Press, 1989).

³⁴⁹ William S Blatt, "Interpretive Communities: The Missing Element in Statutory Interpretation" (2001) 95:2 Nw U L Rev at 629.

³⁵⁰ *R v Van der Peet* [1996] 2 SCR 507 at para 42: "a morally and politically defensible conception of a aboriginal rights will incorporate both legal perspectives." *Van der Peet* and other case law acknowledges the distinctive views of Indigenous peoples, however whose voices are heard within these legal traditions remains an important question. See for example, Emily Luther, "Whose Distinctive Culture - Aboriginal Feminism and R. v. Van der Peet" (2010) 8:1 Indigenous LJ 27; See also, Michael Asch, "The Judicial Conceptualization of Culture after Delgamuukw and Van Der Peet" (2000) 5:2 Rev Const Stud 119.

scholar Mary Ellen Turpel-Lafond wrote, “the Charter and conceptions of rights at Canadian law can be situated culturally...they are by no means universal or progressive, especially insofar as they affect Aboriginal people.”³⁵¹ Her point is that Charter rights may look very different if situated within a specific (i.e. Cree, Mi’kmaq, Coast Salish etc.) Indigenous legal perspective.³⁵² Because conceptions of rights are culturally situated, the strong interpretive authority of the Canadian judicial and legislative system often serves to harm Indigenous people who have different interpretive frameworks.

Dr. Aaron Mills takes up the term “lifeworlds”³⁵³ to describe “the ontological, epistemological, and cosmological framework through which the world appears to a people.”³⁵⁴ Importantly he notes, “Of course, within a people, individual persons will always have unique perspectives; none is determined by their lifeworld. This is to say that life-world establishes a range of possibility, not a set of determinate ends.”³⁵⁵ In thinking about interpretive communities, we should remember that no community is homogenous. To return to Blatt’s example, even as ministers may differ from artists in how they approach the term “spirit”, interpretive variations between sects and individual ministers will still exist. The articulations around distinctive Indigenous worldviews may have people wondering what they might be able to contribute to an interpretive community centred on specific Indigenous legal traditions of

³⁵¹ Mary Ellen Turpel-Lafond, “Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences” (1989-1990) 1989 Can Hum Rts YB 3 at 3.

³⁵² David Milward, *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights* (Vancouver: UBC Press, 2013).

³⁵³ This concept is closely connected to the work of legal scholar Robert Cover who proposed that we constantly create our worlds of what is right and wrong, largely by the stories we tell within interpretive communities. Two polities could have the same “laws”, but apply them differently depending on their foundational relationships to those laws (i.e. if they are just or unjust). See, Robert M. Cover, “Foreword: Nomos and Narrative” (1983) 97:1 *Harvard Law Review* 4.

³⁵⁴ Mills, “The Lifeworlds of Law”, *supra* note 285 at 850.

³⁵⁵ *Ibid.*

which they are not citizens. Again, this is connected to the questions that often arise for learners of Indigenous law including: who am I to participate in these discussions about or practices of Indigenous law? What is the relevance of my ideas? Am I damaging the purity of the law in some way if I participate? Am I at risk of appropriation if I engage?

b) What types of people compose interpretive communities in Indigenous societies?

I suggest that interpretive communities that form within Indigenous societies can be composed in countless ways by any variety of people. They can be made up of some combination of matriarchs, hereditary chiefs, youth both on and off reserve, people who have married in or been adopted, *Indian Act* elected councillors, employees of the Nation who are non-citizens yet have significant decision-making influence in their hired professional capacity, people of different genders, ages, skills and capacities. These communities are dynamic and living, even Tricksters, as they break stereotypical visions of who influences the governance of a Nation.³⁵⁶ The “shared understandings because of common cultural commitments”³⁵⁷ that an interpretive community holds is fluid, with individuals coming in and out of the commitments at multiple points.

I am persuaded by John Borrows’ expression of the beneficial role an expansive interpretive community could play in both Canadian law and Indigenous law.³⁵⁸ His vision is

³⁵⁶ For examples of trickster as a creature of legal theory see, Lara Ulrich and David Gill, “The Tricksters Speak: Klooscap and Wesakechak, Indigenous Law and the New Brunswick Land Use Negotiation” (2016) 61:4 McGill LJ 979; Val Napoleon, “Tsilhqot’in Law of Consent” (2015) 48:3 UBC L Rev 873; Robin Kundis Craig, “Trickster Law: Promoting Resilience and Adaptive Governance by Allowing Other Perspectives on Natural Resource Management” (2019) 9:2 Ariz J Envtl L & Pol’y 140 at 147-156; See also this interesting and relevant article on “compositional flexibility”. This term refers to the ability of tribes to arrange their politics in dynamic ways that suit their needs instead of following rigid structures. Raymond Orr and Yancey Orr, “Compositional Stasis and Flexibility in American Indian Tribes” (2021) 68:2 Ethnohistory 191.

³⁵⁷ Robel, “The Practice of Precedent”, *supra* note 345.

³⁵⁸ Borrows, *CIC*, *supra* note 11 at 9-10.

founded on the thinking that we come to know ourselves and our potential more deeply by interacting with those who are not necessarily like us.³⁵⁹ Just as non-Indigenous peoples would benefit greatly from Indigenous participation in legal interpretation, so too would Indigenous peoples benefit from humbly situated non-Indigenous peoples within their interpretive communities. Borrows writes:³⁶⁰

Another important way to ensure that our legal traditions remain open to new and healthy influences is to regard them as being situated within interpretive communities in which those who are affected by them are able to participate in their continued construction.³⁶¹ ...[This book] explores the potential scope of Canada's interpretive communities in relation to its varied legal traditions...It is my hope that this work represents a further invitation for those interested in this topic to join with me and other willing scholars, practitioners, politicians, policy analysts, Elders, chiefs and leaders in the identification, recognition, questioning, and further development of our legal traditions.³⁶² Law is, among other things, a social experience that requires us to associate with one another and communicate about how we should best conduct our affairs. We should always remember that law is a practice, not just an idea.³⁶³ Our constitutional arrangements are best worked out through 'a continuous process of discussion...compromise, negotiation and deliberation,' as the Supreme Court counselled.³⁶⁴ As more people participate in understanding and applying Indigenous norms, the potential exists for the widening of our interpretive legal communities and the improvement of each legal tradition.³⁶⁵

Alongside this expansive vision of interpretive communities exists the important caution of Cree legal scholar Sylvia McAdam (Saysewahum). She affirms that in some instances the interpretive community should be narrowed, such as with certain sacred stories or ceremonies,

³⁵⁹ Charles Taylor, "Understanding the Other: A Gadamerian View on Conceptual Schemes" in Jeff Malpas, Ulrich Arnsward and Jens Kertscher (eds.), *Gadamer's Century: Essays in Honor of Hans-Georg Gadamer* (Cambridge: MIT Press, 2002) at 279-297.

³⁶⁰ Borrows, *CIC*, *supra* note 11 at 9-10.

³⁶¹ William Twining, "Law and Anthropology: A Case in Inter-Disciplinary Collaboration" (1972) 7 *Law and Society Review* 561. For a general discussion of how communities can function as interpretive bodies, see Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983).

³⁶² Law Commission of Canada, *Indigenous Legal Traditions* (Vancouver: UBC Press, 2007).

³⁶³ James Tully, *Public Philosophy in a New Key, vol.1, Democracy and Civic Freedom* (Cambridge: Cambridge University Press, 2008) at 185-219.

³⁶⁴ *Quebec Secession Reference*, [1998] 2 S.C.R. 217 at para 68.

³⁶⁵ H Patrick Glenn, "Are Legal Traditions Incommensurable?" (2001) 49 *American Journal of Comparative Law* 133.

particularly in light of historic and ongoing colonization and associated trauma.³⁶⁶ McAdam limits sharing to “preserve the integrity of First Nations’ knowledge and practices.”³⁶⁷ It is important to think through when and why this need for closely held knowledge or decision-making might exist. For example, if you’ve ever had the opportunity to attend a ceremony in a Bighouse on the west coast, you can understand why the Canadian government banned these proceedings through the *Indian Act* from 1884-1951.³⁶⁸ The Bighouse was seen by the government of the time as a competing system of power that would disrupt their colonial rule. The Bighouse is a place of authority and order.³⁶⁹ It is a place where laws are created, re-articulated, and lived. Wealth is redistributed. Individuals receive names. Families hold one another up, and correct what must be made right. Ancestors who have passed on are honoured. Guests are cared for. Cleansing, mourning, celebrating and learning occurs. Many communities found alternate ways to perform these important governance practices despite the ban under Canadian law.³⁷⁰ It is not hard to understand why today this legal knowledge is not freely shared with people outside of particular interpretive communities, especially with actors of colonial law.³⁷¹ There are also important Indigenous laws of confidentiality, or the legal process of

³⁶⁶ Sylvia McAdam (Saysewahum), *Cultural Teachings: First Nations Protocols and Methodologies*, (Saskatoon: Saskatchewan Indian Cultural Centre, 2009).

³⁶⁷ Ibid at ix.

³⁶⁸ René R. Gadacz, “Potlatch” (24 October 2019) The Canadian Encyclopedia, online: <<https://www.thecanadianencyclopedia.ca/en/article/potlatch>>; “Living Tradition: The Kwakwaka’wakw Potlatch on the Northwest Coast, Potlatch Ban”, online: <https://umistapotlatch.ca/potlatch_interdire-potlatch_ban-eng.php>.

³⁶⁹ For contemporary news on Bighouses see: Emilee Gilpin, “‘The Heartbeat of Our Community’: Heiltsuk Open Historic Big House” (10 October 2019) The Narwhal, online: <<https://thenarwhal.ca/the-heartbeat-of-our-community-heiltsuk-open-historic-big-house/>>.

³⁷⁰ See for example, Chapter 4 “Legal History Reflected in Land” in Sarah Morales, *Snuw’uyulh: Fostering an Understanding of the Hul’Qumi’Num Legal Tradition* (Phd Diss., University of Victoria Faculty of Law, 2014) at 138-197.

³⁷¹ The issue of cross cultural legal information sharing became a factor in *Thomas v Norris*, 1992 CanLii 354 (BCSC). Sufficient knowledge of the Coast Salish Spirit Dance was required for the common law judge to adequately assess the case before him. With the limited information the judge had, he decided the Spirit Dance could not survive given its “criminal” elements. It is possible that even if he had the best information available on the dance, he still may have decided in a way that did not take into account Coast Salish law. For more information on this case see Ibid at 279-289, 329-331.

withholding knowledge in patterned and reasoned ways. Canadian law has many similar rules around privilege, and confidentiality. We see then it is not just acts of injustice and the resulting mistrust and trauma that necessitates speaking about Indigenous laws in different ways with different people. However, just because we cannot know everything about a legal tradition (arguably this is never possible) it does not mean that we cannot or should not know *something*.

It is also valuable to consider what may be lost by holding legal knowledge in a space where it cannot be openly discussed.³⁷² Dr. Emily Snyder's research examines in detail eleven publicly available resources (such as texts and videos) that explain elements of Cree law, including several resources by McAdam. Snyder notes, "Disagreement, asking questions, and multiple interpretations of Cree law are overwhelmingly absent from the resources... This finding is unsettling overall but is especially troublesome in relation to gender, as this absence of deliberation creates a narrative about Cree law in which asking questions about power, interpretation, and tradition is not part of educational and legal engagement. Of course, questions can be asked about the materials, and they serve as meaningful starting points for discussion. But why not portray Cree law more complexly from the beginning?"³⁷³ Snyder's insight reminds us that putting up interpretive boundaries around law could (even unintentionally) serve to disempower some individuals affected by the legal order. With these competing cautions in mind, I believe there is often, though not always, a place for people of many persuasions and backgrounds to both formally and informally participate within interpretive communities connected to specific Indigenous legal orders. This is especially the case if an invitation to

³⁷² Cree legal scholar Tracey Lindberg writes, "particularizing our philosophies, understandings and laws in light of Canada's legal history would be foolish." See, Tracey Lindberg, *Critical Indigenous Legal Theory* (LLD Diss., University of Ottawa Faculty of Law, 2007) at 4. Yet, while withholding certain information at particular times, she also finds it useful to expand upon Cree law for broader audiences through her teaching and writing.

³⁷³ See Emily Snyder, *Gender, Power and Representations of Cree Law* (Vancouver: UBC Press, 2018) at 61.

engage has been extended to you through your community work, or in your capacity as a legal professional.

c) How do more-than-human beings interact within interpretive communities?

An important layer of depth is added to our considerations of interpretive communities through an analysis of Anishinaabe treaty-making and narratives. Political scientist Heidi Kiiwetinepinesiik Stark's research shows that animals, stars, plants and other more-than-human beings also compose Anishinaabe law-making communities.³⁷⁴ Stark reflects on how the Anishinaabe story of "The Woman Who Married a Beaver" teaches us about the "reciprocal relationship between the Anishinaabe and the beavers".³⁷⁵ In the story a young woman went fasting. She was approached by someone, and she eventually went to live with and marry him. Eventually the young woman finds out he was a beaver, and she was living amongst his beaver people. During her time with the beavers, an agreement was made between the beaver people and the Anishinaabe regarding how they should implement principles of good relations with one another. Eventually the young woman brought the details of this agreement with the beavers back to her people who then agree to abide by its principles. Stark makes the analogy: "These early treaties between indigenous peoples and the Animal and Star nations are perhaps the oldest recorded treaties; they are contained in stories that lay out many foundational principles of treaty making."³⁷⁶

³⁷⁴ See 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 and Research Journal at 145-159; Stark, "Marked by Fire", *supra* note 110.

³⁷⁵ *Ibid* [Foundations of Anishinaabe Treaty Making] at 146.

³⁷⁶ *Ibid* at 147.

This story of the Anishinaabe and the beavers is just one of thousands of stories in the Anishinaabe legal tradition that speaks to the idea that humans are not the only ones who make up a community of neighbours.³⁷⁷ There are many other important relations in the places we call home, to whom we owe obligations similar to the treatment required between people.³⁷⁸ To compliment this knowledge, we know from scientific studies that plants communicate with one another through series of complex electrical signals sent through roots and across fungi networks.³⁷⁹ Many animals, too, communicate with one another in various ways.³⁸⁰ They have their own parallel communities of meaning-making that occur alongside ours, though they often go unnoticed in our walks through the woods or along shorelines as they occur in a language unlike our own. We nonetheless influence each other. We are currently seeing a global movement towards designating legal personhood to elements of nature.³⁸¹ While the *form* of recognition in the common law may be new to both Indigenous and non-Indigenous peoples, the underlying worldview is not new, as agency has been accorded to the more-than-human world

³⁷⁷ There are many recorded versions Anishinaabe narratives, in addition to those passed on orally. See for example the work of Basil Johnston generally, and the various volumes of William Jones' *Ojibway Texts* (1917).

³⁷⁸ See Heidi Bohaker, *Doodem and Council Fire: Anishinaabe Governance Through Alliance* (Toronto: University of Toronto Press, 2020). In a Mi'kmaq context, Tuma Young writes a version of their creation story and says, "First, the story introduces most of the sacred ecological spaces that are at the base of the L'nu worldview...In addition, a strong symbolic emphasis is placed on developing and maintaining relationships with other life forces. All of the ecological spaces have contributed to the Creation of L'nuwe'katik, and Kluskap is taught that in order to sustain himself, he must obtain consent and give thanks to the animals that gave him human life form... Everywhere in the story, life forms are accorded kinship relationships." (Young, "L'nuwita'simk: A Foundational Worldview for a L'nuwey Justice System", *supra* note 119 at 86.)

³⁷⁹ Peter Wohlleben, *The Hidden Life of Trees: What They Feel, How They Communicate* (Vancouver: Greystone Books, 2016).

³⁸⁰ Peter McGregor (ed.), *Animal Communication Networks* (Cambridge: Cambridge University Press, 2005).

³⁸¹ For example, the following beings have legal recognition as either "persons" or "living entities" in different countries: the Magpie River (Canada), the Yarra River (Australia), the Whanganui River (Aotearoa NZ), Te Urewera (Aotearoa NZ), the Atrato River (Colombia), and the Klamath River (United States). For an early piece of theoretical work from a common law perspective surrounding personhood and non-humans see Christopher Stone, *Should Trees Have Standing?: Law, Morality and the Environment*, 3rd edition (Oxford: Oxford University Press, 2010). For a more recent piece drawing on similar ideas see David Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World* (Toronto: ECW Press, 2017); Geneva Thompson, "Codifying the Rights of Nature: The Growing Indigenous Movement" (2020) 59:2 *The Judges' Journal* 12.

through Indigenous legal orders for a long time.³⁸² It does cause us to reflect though, what does it really mean for trees, mountains or rivers to have “personhood”, and what does this mean for our interpretive communities?³⁸³

While working with a group of youth on this topic at an environmental justice summer camp on Denman Island, British Columbia in 2018 I asked them, “how might we know who should speak for a river?” A 13-year old creatively responded that the person in the community who most acts like or embodies the personality of the river should speak on their behalf! I’m interested in seeing how specific Indigenous legal orders will conceptualize the decision-making structures needed to breathe life into the designation of legal person. How might Innu law and interpretive structures for the Muteshekau/Magpie river be different from the Māori towards the Whanganui river, the Wurundjeri towards the Yarra river, or the Yurok tribe towards the Klamath river?³⁸⁴ Unique stewardship arrangements should continue to come forward that can help us as both Indigenous and non-Indigenous people to think through how this transsystemic work of weaving distinct worldviews and associated laws can occur.

In the case of legal personhood designations in the common law, we see the formalization of interpretive communities to create law.³⁸⁵ This is in contrast to informal process found in the

³⁸² Robin Wall Kimmerer, “Learning the Grammar of Animacy” (2017) *Anthropology of Consciousness* 128; Jarrad Reddekop, “Thinking Across Worlds: Indigenous Thought, Relational Ontology, and the Politics of Nature; Or, If Only Nietzsche Could Meet A Yachaj” (PhD Diss., The University of Western Ontario, 2014).

³⁸³ In her recent book, Maneesha Deckha argues that “beingness” is a better legal category than “personhood” to move away from anthropocentricity in the common law. See Deckha, *Animals As Legal Beings*, *supra* note 73 at 121-143. Law professor Catherine Iorns Magallanes sees personhood more as a legal tool than an ideology. She makes the point that in the New Zealand context, very little emphasis is given to the rights bestowed to the river, and the focus is instead on the responsibilities of the Iwi caretakers to uphold their obligations toward the river through the creation of guardianship bodies. See for example, Catherine Iorns Magallanes, “From Rights to Responsibilities: Using Legal Personhood and Guardianship for Rivers”, in B Martin et. al. (eds.), *ResponsAbility: Law and Governance for Living Well With the Earth* (New York: Routledge, 2019) at 216-239.

³⁸⁴ For some examples of differences generally between Indigenous legal orders see John Borrows, “Indigenous Legal Traditions in Canada” (2005) 19 *Wash U JL & Pol’y* 167.

³⁸⁵ See for example the board decision-making structure in Aotearoa: Catherine Iorns Magallanes, “Nature as an Ancestor: Two Examples of Legal Personality for Nature in New Zealand” (2015) 22 *Vertigo*; In Canada a legal guardianship structure has been created. See, Sean Nixon, “A Quebec river now has legal personhood -what that

2010 Navajo presidential election example, where organic interpretive communities developed and assigned different meanings to the weather events. This is also an important source of law to recognize: the ways social interaction influences individuals towards certain positions.³⁸⁶ In contrast, in New Zealand the Pākehā (settlers) and Māori decision-makers chose to give voice to the Whanganui River through legislation that formalized a governing body (a board) to “act as the human face of the river”.³⁸⁷ The body is made up of one representative nominated by each Iwi (tribe) that is connected to the Whanganui river, and one representative from the Crown.³⁸⁸ This co-governance structure takes into account the different Māori iwi, with their unique tribal interests, as well as the Crown’s interests. The board comprises the formal interpretive community of the river’s interests, and there are opportunities to hear from other concerned citizens through public forums that make up the informal, but nonetheless influential, groups.³⁸⁹ It should be noted that this model has been labeled as an example of compromise, where Māori law had to bend to form something new alongside Pākehā law, instead of receiving recognition of sovereignty and full relational opportunities with their ancestral river.³⁹⁰

means for granting nature rights” (14 April 2021) EcoJustice Law Blog, online: <<https://ecojustice.ca/quebec-river-legal-personhood-rights-of-nature/>>.

³⁸⁶ Val Napoleon draws from theorist Lon Fuller to describe law as social interaction in her work on the Gitksan legal order. She says, “Fuller describes customary law as a ‘language of interaction’ that is necessary for people to meaningfully engage in effective and anticipatory social behaviour. In other words, it is this language of interaction that enables the creation of social environments where people are generally able to discern and predict repertoires and patterns of behaviours.” See, Lon Fuller, “Human Interaction and the Law” in Kenneth I Winston (ed.), *The Principles of Social Order: Selected Essays of Lon L. Fuller* (Portland: Hart Publishing, 2001) in Val Napoleon, “Ayook: Gitksan Legal Order, Law and Legal Theory” (PhD Diss., University of Victoria Faculty of Law, 2009) at 262; For an analysis of this theory of social interaction applied to Cree law see D. Lindberg, *kihciwāw kīkway meskocipayiwin (sacred changes)*, *supra* note 105 at 54-61.

³⁸⁷ Dan Cheater, “I am the River and the River is me: Legal personhood and emerging rights of nature” (22 March 2018) West Coast Environmental Law Blog, online: <<https://www.wcel.org/blog/i-am-river-and-river-me-legal-personhood-and-emerging-rights-nature>>.

³⁸⁸ *Ibid.*

³⁸⁹ Aikaterini Argyrou and Harry Hummels, “Legal personality and economic livelihood of the Whanganui River: a call for community entrepreneurship” (2019) 44:6 *Water International* 1752.

³⁹⁰ Andrew Geddis and Jacinta Ruru, “Places as Persons: Creating a New Framework for Māori-Crown Relations” in Jason Varuhas and Shona Wilson Stark (eds.), *The Frontiers of Public Law* (London: Hart Publishing, 2020) at chapter 11; Brad Coombes, “Nature’s Rights as Indigenous Rights? Mis/recognition Through Personhood for Te Urewera” (2020) *Space Populations Society*, online: <<https://journals.openedition.org/eps/9857#quotation>>.

What does it *really* mean though that the more-than-human world is also part of an interpretive community? Again, Val Napoleon wisely cautions us that law is always interpreted by people.³⁹¹ I agree: there is no denying that as humans we filter the living world, and any legal teachings we may glean from it, through our own languages and perspectives. I also think that there are careful and useful ways to challenge anthropocentric views of interpretation.³⁹² There are important reasons to look beyond human-centred decision-making. These ways include the way many Indigenous peoples view their territories as animate, and that they are in various forms of relationships with the different beings who share their homes.³⁹³ In my life time of exposure to Anishinaabe law, and after ten years of working with various Nations across Canada³⁹⁴, I continually hear remarks from knowledge-keepers such as “we should ask the river what she thinks”, or “the salmon will tell us when they’re unwell, and what they need”, or “the mountain is the storyteller”.³⁹⁵ Given this prevalence in thought surrounding the animacy and essential

³⁹¹ Val Napoleon, “Thinking about Indigenous Legal Orders” in René Provost & Colleen Sheppard (eds.), *Dialogues on Human Rights and Legal Pluralism* (New York: Springer, 2013) at 234-235.

³⁹² Maneesha Deckha, “Unsettling Anthropocentric Legal Systems: Reconciliation, Indigenous Laws, and Animal Personhood” (2020) 41:1 *Journal of Intercultural Studies* 77; Maneesha Deckha, “Initiating a Non-Anthropocentric Jurisprudence: The Rule of Law and Animal Vulnerability Under a Property Paradigm” (2013) 50:4 *Alberta Law Review* 783.

³⁹³ Hadley Friedland, Bonnie Leonard, Jessica Asch and Kelly Mortimer, “Porcupine and Other Stories: Legal Relations in Secwépemcúlcw” (2018) 48:1 *Revue général de droit* 153; See also for example the entire collection of articles in the 2014, Volume 3 Issue 3, edition of the journal “Decolonization: Indigeneity, Education & Society”. The opening article introduces the collection. See, Matthew Wildcat, Mandee McDonald, Stephanie Irlbacher-Fox, Glen Coulthard, “Learning from the land: Indigenous land based pedagogy and decolonization”, (2014) 3:3 *Decolonization: Indigeneity, Education & Society* I-XV.

³⁹⁴ Specifically this includes the following legal orders: Anishinaabe, Hałtzaqv, Māori, Mi’kmaq, nuučaanuł, St’át’imc, Hän, Nlaka’pamux, Syilx, Gitksan, Secwépemc and Tsilhqot’i

³⁹⁵ For example, Robert Clifford quotes his late grandfather speaking to him while visiting a river. “He said that ‘the river is a living thing, and if you listen, he will speak to you.’ In the same way, a southern resident killer whale named J35, who carried the body of her dead calf for 17 days, was telling us something. For those who were listening, she was telling us that we have responsibilities we are not meeting. There are signs all around us that we need to stop recklessly burning through fossil fuels, depleting salmon stocks and carrying out other destructive behaviours. These are the larger issues that are at stake, and the fundamental changes that have to be made.” In Robert Clifford, “Saanich Law and the Trans Mountain Pipeline Expansion” (4 July 2019) *Environmental Challenges on Indigenous Lands*, Centre for International Governance Innovation, online: <<https://www.cigionline.org/articles/saanich-law-and-trans-mountain-pipeline-expansion/>>; See also, Bird, *The Spirit Lives in the Mind*, *supra* note 24 at 74 “...that is the reason the caribous tell us that there is something wrong.”

voice of the living world, there is a gap that is important to reconcile with the reminder that it is always humans who interpret the law.

The more-than-human world undoubtedly influences people within various Indigenous interpretive communities, such that they become part of the community. The plants, rocks, animals (etc.) are agents within the same life-worlds as human interpreters. I argue however that their belonging is in a different capacity than say a matriarch, a hereditary chief or a hunting expert, who all utilize a common language (whether an Indigenous language or English, French etc.). While I do not view more-than-human beings as equivalent dialogue partners within a human interpretive community, they can have an essential presence as an influencer of dialogue. A river, salmon, and mountain do not participate in decision-making with a human linguistic presence and thought process. They contribute by influencing people's understanding of the world around them, and thus the decisions they make.³⁹⁶ Over the years, there have been various laws around who has the capacity to speak in common law settings, such as a court proceeding. Children and neuro-diverse peoples have particular accommodations to ensure they can be represented in court given their capacities are different from the envisioned "legal person".³⁹⁷ Advocacy by various groups has led to increased clarity and presence from a diversity of voices within the Canadian legal system, and this work continues. Likewise we need to find ways to

³⁹⁶ See for example Kimmerer, *Gathering Moss*, *supra* note 17 at 2. She writes: "These past few summers, I've been conducting research on rocks, trying to learn what I can about how communities form, by observing the way that moss species gather together on boulders... We're trying to figure out why on one rock ten or more species of moss may comfortably co-exist, while a nearby boulder, outwardly the same, is completely dominated by a single moss, living alone. What are the conditions that foster diverse communities rather than isolated individuals? The question is very complex for mosses, let alone for humans." Kimmerer's ecological research allows us to think about how we as humans work, by analogizing and distinguishing our habits to mosses (in this case). This has relevance to law as we think about the importance of interpretive communities in law making.

³⁹⁷ Anne Grafam Walker, "Questioning Young Children in Court: A Linguistic Case Study" (1993) 17:1 *Law and Human Behaviour* 59; Andrea Lollini, "Brain Equality: Legal Implications of Neurodiversity in a Comparative Perspective" (2018) 51:1 *NYU J Int'l L & Pol* 69.

skillfully incorporate the messages of the more-than-human into our decision-making processes that takes account of their difference. We have much to learn from Indigenous legal practice.³⁹⁸

Even if the Canadian legal system does not draw upon the living world as a source of law, it should nonetheless hold the space to both understand and recognize as valid the ways some Indigenous laws find their source in relationship to the living world from which they flow. Former Chief Justice Lance Finch of the British Columbia Court of Appeal wrote, “The danger in retaining and imposing our ideas of what constitutes ‘law,’ according to our training and established habits of mind, is that we may inadvertently give weight only to those elements of an Aboriginal legal system which are recognizable in Canadian law, rendering the Canadian legal framework determinative.”³⁹⁹ Finch recognizes there are risks if Canadian legal practitioners do not fulfil the duty to learn about Indigenous laws, and instead mold them into their own preconceived notions of what constitutes law. He acknowledges that it is not an easy task to look beyond one’s own worldview, but that it is necessary for the goal of reconciliation that “the current Canadian legal system must reconcile itself to co-existence with pre-existing Indigenous legal orders.”⁴⁰⁰ He inverts the question “How can we make space within the legal landscape for Indigenous legal orders?”⁴⁰¹ to become how do we “find space for ourselves, as strangers and newcomers, within the Indigenous legal orders themselves.” Given the significance of the more-than-human world to Indigenous legal orders, I argue that learning how Indigenous peoples

³⁹⁸ Michael Asch, John Borrows and James Tully (eds.), *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018).

³⁹⁹ Finch, “The Duty to Learn”, *supra* note 83.

⁴⁰⁰ *Ibid* at 2.1.9.

⁴⁰¹ *Ibid*.

approach the living world as a legal relation is one important part of the ongoing work of reconciliation.

In summary, in this section I have suggested that the more-than-human world has an important legal voice that, while filtered through human understandings and language, still influences interpretive communities in important ways given their animacy and relationships. As Stark and others show in the context of Anishinaabe law, there are longstanding treaties to uphold that require us to include the living world in our law-full lives.⁴⁰² I also argue that in many (but not all) instances interpretive communities can benefit greatly from diversity, both within the context of Canadian law as well as Indigenous law. As such, I hope that people with questions about their place to engage with Indigenous law take up this invitation with thoughtful humility, recognizing the gifts they can bring to the deliberation.⁴⁰³

Hunting with Norman: A Final Reflection About Learning Through Direct Experience

The morning light spilled softly through the pines as I followed Norman up the hillside. His movements were quiet and nimble, even though he had a heavy hunting rifle slung over his shoulder. I tried my best to follow in his footsteps so I wouldn't make any unnecessary noise. Occasionally I would step in a slightly different spot and a twig would crack, or leaves would crunch. These otherwise miniscule sounds could be enough to scare the game away. While I did my best to follow in his tracks, he followed a set of fresh deer tracks that he noticed in our camp when he awoke at dawn. His simple observation led us up this mountain.

⁴⁰² Stark, "Respect, Responsibility, and Renewal", *supra* note 374 at 145-159

⁴⁰³ See generally, Kirsten Anker, "Teaching 'Indigenous Peoples and the Law': Whose Law?" (2008) 33:3 Alt LJ 132.

Norman stopped often to point out the different scat on the ground—deer, rabbit, bear and moose. He would whisper short stories in broken English. Through these stories I began to see yet another set of tracks he followed: those set by his parents long ago, no longer visible to the eye, but nonetheless a guide for his path.⁴⁰⁴ Norman and Alice’s parents were both skilled hunters.⁴⁰⁵ “Dad told me never to walk too fast on the trail, because you don’t know when you’ll come across game.” I couldn’t help but think about the lessons many of my friends were learning in their articling experiences at big firms in large city centres. The message was the opposite: “work quickly, and make yourself known”. Certainly there are benefits to moving quickly at times, and shining a light on your own skills. The message to slow down, and be discreet was less common however, despite its importance.

Norman explained that you might not *feel* optimistic because a successful hunt is never guaranteed, but you could still *act* with optimism. The animals are there, and will often enough offer themselves to you. A grouse darted from the side of the game trail. It frightened me and Norman laughed. In her efforts of protection, the mother grouse revealed a nest filled with shiny eggs. There is so much to witness and enjoy when you slow down. We continued to walk, observe, and quietly exchange a few words until the sun was high above. Deer typically bed down during the day and are harder to find, so we returned to camp along a different trail through an open hillside of red, purple and yellow wildflowers.

⁴⁰⁴ This reminds me of one Anishinaabe teaching for the word ‘father’, *noo-se*. My own father writes about it as follows: “I have become intrigued by the old Anishinaabe word for father. My friend Basil defines the word *noo-se* as meaning ‘one that creates paths which make it easier for his family to follow’. When I learned this word, I was asked to imagine a man walking through deep snow. As he blazed a trail through snow or ice encrusted terrains, his children would find it easier to move. They would find sustenance as a result of his efforts. Fathers who were successful in helping to nurture their children in this way would eventually see them move onto their own paths, strengthened by their experiences in walking with him. At this point, children would make their own trails, thus helping others who followed in their wake too, and renewing the cycle of life once again.” John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at 207.

⁴⁰⁵ Alice told me that it was her mother who taught her to shoot, and they are both known for being skilled with their rifles.

What if we created more space for slowness, patience, humility, hope, optimism, observation, listening, and reflection in our practice of law?⁴⁰⁶ Living in conscious relationship with more-than-human beings, as Norman and his family were showing me, was about all of these things. We never found the deer who left their tracks on the trail, but we did not come home empty handed. The nourishment of learning from Norman filled me in ways physical sustenance could not.⁴⁰⁷

⁴⁰⁶ For examples of how some Indigenous legal traditions centre these practices in law see: West Coast Environmental Law and St'át'imc Chiefs Council, St'át'imc Water Law Report, *supra* note 298 at 13-14; Hannah Askew and Lindsay Borrows, "Anishinaabek Legal Traditions Report" Accessing Justice and Reconciliation Project, University of Victoria Faculty of Law Indigenous Law Research Unit, 2012. Summary document available online at:

<https://indigenoubar.ca/indigenoulaw/wp-content/uploads/2012/12/anishinabek_summary.pdf>.

Secwépemcúlecw, Shuswap Nation Tribal Council, Secwépemc Lands and Resources Law Research Project, in collaboration with the Indigenous Law Research Unit at the University of Victoria (Tk'emlúps: Shuswap Nation Tribal Council, 2017). Online:

<<https://www.uvic.ca/law/assets/docs/ilru/SNTC%20Law%20Book%20July%202018.pdf>>.

⁴⁰⁷ On the wholistic importance of food gathering and food sovereignty within Indigenous communities see for example, Erica Pufall (et al), "Perception of the Importance of Traditional Country Foods to the Physical, Mental, and Spiritual Health of Labrador Inuit" (2011) 64:2 Arctic Institute of North America 242.



Norman William enjoying a cup of tea at camp. Photo by Lindsay Borrows.

Conclusion

After two weeks out on the land in Tsilhqot'in territory with Alice and her family, Hannah and I finally had to catch our flight from Williams Lake back to Vancouver. It was an adjustment returning to the hum of our urban office, spending full days on the computer again. Whenever I drove during rush hour, I thought about Tom in those peaceful mornings at the lodge listening to the Vancouver traffic report from a safe distance through the radio.⁴⁰⁸ I would see a leashed dog, and think about how unusual their dog life would seem to Nun. I thought differently about the trails I frequented around the city, typically paved and guided by pedestrian lights.⁴⁰⁹ For a time, I kept wearing my cowboy hat.

Learning about how Tsilhqot'in law emerges from their relationships with the more-than-human world, and how Alice, Tom, and Norman taught us through land-based methods is an experience that never actually ended. It continues to grow and layer within me as I reflect on the many teachings I received, and put them into conversation with more recent experiences or things I read. Hannah and I went back one more time that summer of 2016 for a second horseback trip, slightly more confident in our abilities both in law and life on the land. I was fortunate to return again one final time during my vacation in the summer of 2018. I note that we never did complete the consent regime during our period of partnership between West Coast Environmental Law and the Tsilhqot'in National Government for various reasons. A tangible deliverable that came forward was Linda Ruth Smith, of Yunesit'in, produced a wonderful report

⁴⁰⁸ I do not mean to suggest that Tom's days were free from stress, there was plenty of work to keep the lodge running smoothly! Bears would break into the cabins, water lines would fail, mice would find their way into the food storage and wreak havoc, wood had to be chopped, horses fell ill (etc.). It was just a different rhythm.

⁴⁰⁹ Coast Salish peoples who called Vancouver home long before the concrete came often experience a profound sense of place and continued connection despite contemporary changes. If I had been engaged in learning Coast Salish law I would have interacted with the city in yet a different way. See Brian David Thom, "Coast Salish Senses of Place: Dwelling, Meaning, Power, Property and Territory in the Coast Salish World" (PhD Diss., McGill University Department of Anthropology, 2005).

with compilations of teachings from elders and photos of the territory entitled “The Ways of Our Esghaydam ‘Ancestors’: *Nenqayni* Laws of Respect”.⁴¹⁰ It has been my experience working in the field of Indigenous legal revitalization that often what we produce is different than what we set out to do. This can be hard for those of us (like me) who like control, and seeing something tangible from our work. I love the story from my friend and colleague Helen Copeland, of the St’át’imc Nation. While at WCEL I worked with Helen on a St’át’imc water law project.⁴¹¹ She was simultaneously working for her Nation on another project focused on developing their constitution. At one point, they realized with disappointment that only a few people would actually read their constitution after all that work of deliberation and drafting. So, they decided to gather their drummers and singers and make a constitution song. This song could be sung by anyone in the community. It could live inside their hearts and minds, instead of just on paper. There is power in finding alternate expressions of law beyond the written form. I try to keep this in mind when a large report I’ve worked on is not made publicly available in the end.⁴¹² Perhaps it was the community conversations that were actually the most important, or the art project the youth did, or the feasts that were hosted during the process.

I asked four primary questions at the outset of this thesis. First, “What are some of the different layers of legal methods, or approaches, Indigenous people use to pattern their lives in relationship with the more-than-human world? What are examples of each of these layers, and what do they teach us about how to govern ourselves?” In response, I explored the ways distant time and contemporary narratives in the Tsilhqot’in legal tradition can act as earth-embedded

⁴¹⁰ Smith, “The Ways of our *Esghaydam* ‘Ancestors’”, *supra* note 144.

⁴¹¹ West Coast Environmental Law and St’át’imc Chiefs Council, “St’át’imc Water Law Report”, *supra* note 298.

⁴¹² This goes to an earlier point made in this thesis about Indigenous legal process around confidentiality. See pages 28-29 and 114. It also speaks to contemporary politics, and different opinions around what should be accessed by whom, how and when.

legal precedent. I also considered examples from the Navajo, Coast Salish, Cree and Anishinaabe legal traditions to add further depth and nuance to understanding how the more-than-human world plays a role in law-making.

Second, I asked “What are the opportunities and limitations of approaching the more-than-human world as a site of law?” While I won’t provide a laundry list of each and every point here (the body of the thesis explores these in detail), I note that the opportunities are many and I have made the case that greater harmony between legal orders can occur where there is respectful deference to difference, including increased appreciation of the land-based methods of Indigenous legal traditions.

Third I asked, “how might non-citizens of an Indigenous legal order engage in these methods?” I am not a citizen of the Tsilhqot’in Nation, yet I was able to begin (admittedly in a *very* preliminary way) learning some elements of Tsilhqot’in law through my time as an articled student.⁴¹³ Engaging across legal orders is an essential part of reconciliation,⁴¹⁴ and learning through direct experience at the invitation of a Nation can be an important part of this work. The prologue sets out a transsystemic Articling Skills checklist as I envisioned it might look if issued by both the Law Society of British Columbia and the Tsilhqot’in Nation together. It reflects the unique but complimentary ethical standards, practice management techniques, lawyering skills and practice areas I focused on during my articling year. I argue that it could benefit any person

⁴¹³ I hope I have been very transparent that my learning primarily took place with a small handful of individuals who do not purport in any way to be authorities on Tsilhqot’in law. They do not speak on behalf of the Nation (or the Tsilhqot’in National Government). I view them as teachers of one thread of the tapestry of the overall Tsilhqot’in legal order. Hannah and I placed their teachings in context with the publicly available materials from the Title decision, and other published secondary resources and found them consistent. Our learning would have taken on a different image if we had a wider variety of teachers. That said, I do not believe the reality that there is more to learn diminishes the richness of what we were able to learn from Alice M. William and her family and close connections.

⁴¹⁴ Alan Hanna, “Reconciliation through Relationality in Indigenous Legal Orders” (2019) 56:3 Alta L Rev 817; Napoleon and Friedland, “An Inside Job”, *supra* note 96.

working in the field of law to transsystemically engage across legal orders, as we come to know ourselves better by learning from those different from us.⁴¹⁵

Finally, I answer the fourth question by considering how citizens of an Indigenous legal order might teach their laws to outsiders. I do this by looking at some of the pedagogical aspects of land-based legal methods, especially the power of direct experience (that is, actually being out on the land) in learning law. I have argued that there is beauty in this land-based approach to law that can facilitate healthier legal systems, the people it affects, and positively impact the living world as part of our community too.

A lot has changed at Yohetta lodge and beyond since I last visited in 2018. The lodge is now owned by TNG⁴¹⁶, we are in the midst of a global pandemic, we are all getting older, and I now have two little children to care for. A lot has remained the same too. *Tsil?uŝ* stands where he has for countless generations. The sun still shines, the plants still grow, and the mighty rivers still flow. Likewise the field of Canadian and Indigenous law has seen both stability and change over the past five years since I articulated. Canadian law continues to devalue the more-than-human world as a normative site of “precedent, authority, standards, criteria, processes, and principles”⁴¹⁷, or as a site of legal relationships that leads to discernment and decision-making.⁴¹⁸ I’ve shown throughout this thesis some of the ways Indigenous legal traditions (primarily the *Tsilhqot’in*, Anishinaabe, Cree and Coast Salish traditions) actively cultivate legal meaning from the living world through narratives and practices of relationship that outline respectful action and obligations.

⁴¹⁵ Taylor, *Philosophy and the Human Sciences*, *supra* note 56 at 116-133.

⁴¹⁶ Rebecca Dyok, “B.C. First Nation Hopes to Offer New Visitor Experiences in 2021” (13 July 2020) The Williams Lake Tribune, online: <<https://www.wltribune.com/news/b-c-first-nation-hopes-to-offer-new-visitor-experiences-in-2021/>>.

⁴¹⁷ Borrows, “An Emphasis on Indigenous Law Could Help Shape a Future That’s Brighter Than Our Past”, *supra* note 42.

⁴¹⁸ Mills, “Miinigowiziwin”, *supra* note 43.

There continue to be heated challenges over issues of environmental governance between non-Indigenous and Indigenous land users. Some examples include the Coastal GasLink pipeline dispute in northern B.C. (Wet'suwet'en territory)⁴¹⁹, the Fairy Creek blockades around old growth logging on Vancouver Island (Pacheedaht and Ditidaht territories)⁴²⁰, the lobster fishery challenges in Atlantic Canada (Mi'kmaq territory)⁴²¹ among others. As stated in my introduction, I hope this thesis provides another tool for the legal community to move through these challenges in thoughtful ways through an increased understanding of how Indigenous lives, livelihoods, and laws flow from the living world. While Canadian law could be enhanced greatly by incorporating similar practices of applying relational theories of law with the more-than-human, at the very least it can learn to understand and create space for the ways Indigenous legal orders engage in this type of law.⁴²² It is my hope that by looking to the more-than-human world as a law professor, we can be supported in our efforts to come into more just relationships, learn to pay attention, practice more gratitude and reciprocity, and be both confident and humble with our gifts in the world that we may notice (metaphorically) when the dragonfly lands on us to let us know our small place in this web of life has great meaning.

⁴¹⁹ Betsy Trumpener, "A year after Wet'suwet'en blockades, Coastal GasLink pipeline pushes on through pandemic" (5 February 2021) CBC News, online: <<https://www.cbc.ca/news/canada/british-columbia/coastal-gaslink-pipeline-bc-wet-suwet-en-pandemic-1.5898219>>.

⁴²⁰ Rochelle Baker, "More Arrests at Fairy Creek Blockade and Protest in Victoria" (20 May 2021) The Tyee, online: <<https://thetyee.ca/News/2021/05/20/More-Arrests-Fairy-Creek-Blockade-Victoria/>>.

⁴²¹ Megan Bailey, "Nova Scotia lobster dispute: Mi'kmaw fishery isn't a threat to conservation, say scientists" (20 October 2020) The Conversation, online: <<https://theconversation.com/nova-scotia-lobster-dispute-mikmaw-fishery-isnt-a-threat-to-conservation-say-scientists-148396>>.

⁴²² In personal communication with my supervisor Dr. Hadley Friedland, she made the point that just because she doesn't understand the principle of unjust enrichment any more, she does not question that it is in fact a guiding principle of contract law. Likewise, even if Canadian law practitioners do not fully understand elements of Indigenous legal traditions, there can at least be respectful deference that acknowledge it exists in principle and if given the opportunity they could learn the contours of its content and application.



**Above: Tom Dillabough looking at the trail ahead, on our way back to the lodge.
Below: Sunset in Tsilhqot'in Territory. Photos by Lindsay Borrows.**



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