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Porcupine and Other Stories: Legal Relations in Secwépemcúlecw

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Article abstract

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Hadley Friedland, Bonnie Leonard, Jessica Asch and Kelly Mortimer*

ABSTRACT

For thousands of years, Secwépemc laws (like other Indigenous laws) related to the Secwépemc lands, or "Secwépemcúlecw," developed and were learned and practiced within a context where the personhood of Secwépemc individuals, as well as animals and the earth itself, was not in dispute. Nor was the existence, legitimacy or efficacy of Secwépemc laws. All of these crucial legal relationships still exist, and are ongoing. However, for the past 150 years or so, Secwépemc laws, and people, have lived in relation to something quite distinct — a set of laws that were jurispathic in nature —laws that would not recognize or tolerate any other law but themselves. The Secwépemc Nation's resilience and perseverance in upholding and revitalizing Secwépemc laws in the face of this colonial disregard, attests to their strength and enduring value. In this article, the authors discuss the purpose, as well as some of the methods, outcomes and limits of the Secwépemc Lands and Resources Laws project produced in collaboration with the University of Victoria Indigenous Law Research Unit. They then examine present interactions between Secwépemc and state land and resources laws operating within Secwépemcúlecw, including the challenges and limited opportunities that exist within the way these legal and political relations are currently structured and implemented on the ground. Finally, they draw on the Secwépemc "Story of Porcupine" to suggest a constructive way forward towards a more mutually respectful Nation-to-Nation relationship between the Secwépemc people and the Canadian State.

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KEY-WORDS:

Indigenous law, lands, stewardship, reconciliation, Nation-to-Nation, legal pluralism.

RÉSUMÉ

Pendant des milliers d'années, les lois des Secwépemc (comme d'autres lois autochtones) relatives aux terres des Secwépemc, ou « Secwépemcúlecw », ont été élaborées, apprises et pratiquées dans un contexte où la personnalité des individus Secwépemc, ainsi que celle des animaux et de la terre elle-même, n'étaient pas en litige, pas plus que ne l'étaient l'existence, la légitimité ou l'efficacité des lois des Secwépemc. Toutes ces relations juridiques essentielles existent toujours et sont en cours à l'heure actuelle. Cependant, au cours des 150 dernières années environ, les lois et les individus Secwépemc ont eu à vivre en relation avec quelque chose de tout à fait distinct — un ensemble de lois de nature jurispathique — c'est-à-dire un corpus *de normes juridiques qui ne reconnaît ou ne tolère aucune autre loi que les siennes. La résilience et la persévérance de la Nation Secwépemc à maintenir et à revitaliser ses lois face au mépris colonial témoignent d'une force dont la valeur est durable. Dans cet article, les auteurs discutent du but, ainsi que de certains des méthodes, résultats et limites du projet de loi sur les terres et les ressources Secwépemc, produit en collaboration avec l'Unité de recherche en droit autochtone de l'Université de Victoria. Ils examinent ensuite les interactions actuelles entre les lois des Secwépemc et les lois de l'État sur les terres et les ressources au sein de Secwépemcúlecw, en tenant compte des défis et des possibilités limitées qui existent dans la façon dont les relations juridiques et politiques sont actuellement structurées et mises en œuvre sur le terrain. Enfin, les auteurs s'inspirent de l'« histoire du porc-épic » secwépemc pour suggérer une voie constructive vers une relation de Nation à Nation plus respectueuse entre les peuples Secwépemc et l'État canadien.*

MOTS-CLÉS :

Droit autochtone, terres, intendance, réconciliation, Nation à Nation, pluralisme juridique.

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A large number of people lived together at one place. Their chief was Swan. At another place — one long day's journey away and beyond a high range of mountains — lived another band of people, who were sometimes called the Deer People. They consisted of the Deer, Caribou, Moose, Goat, Sheep, and others, and their chief was the Elk. The two groups of people had been enemies for a long time. Each tried to interfere with the other, and to make their means of procuring a living as difficult as possible. Each people had a different kind of government and lived and worked differently. What one did well, the other did badly. The birds acted in some ways like mammals, and the mammals like birds. The Swan wished to remedy the defects of both parties, and to enable them to live without continual interference. He believed that their troubles all arose from ignorance.[1]

INTRODUCTION

There are some things all peoples have in common. We all depend on the land. The land has the power to influence and change us, and we have the power to influence and change the land.[2] We all make decisions about how to structure our relations to the land and resources

1. "Story of Porcupine" in James Teit, "The Shuswap" in Franz Boas, ed, *The Jesup North Pacific Expedition: Memoir of the American Museum of Natural History*, Vol II, Part VII (Leiden: EJ Brill/ New York: GE Stechert, 1909) at 658 [Teit, "Story of Porcupine"].

2. For ex see "Coyote and his Son" (at 622), "Liberation of the Chinook Wind" (at 624), "Origin of the Chilcotin Canyon" (at 642), "The War with the Sky People" (at 749), "The Fishes and the Cannibal" (at 670), and "Story of Coyote and the Swans" (at 638) in Teit, "Story of Porcupine", *ibid*.

we depend on for our survival.[3] The fact that all peoples must make these decisions, coordinate human actions and structure relations with the environment to the extent humans can do so, is the "common denominator" of all land and resources laws.[4]

How we do this is where we differ, oftentimes significantly. Laws could never neatly be extracted from culture, or from the global, political, social and economic context in which they are developed, implemented, changed, interpreted and enforced.[5] All land and resources laws must find a way to balance the satiation of current human needs (and wants) with maintaining the environmental resources we all rely upon. Who strikes this balance, and how they do so will vary according to societal worldviews, beliefs and values, as well as global and local circumstances, resources and pressures.

For example, what human and non-human beings do our laws define as persons with agency, rights and obligations? Do we include animals? Corporations?[6] Do we exclude the earth[7] or status Indians?[8] How do legal decision makers involve or engage with different people, and what weight do they place on said people's expressed or apparent needs and desires? Who has access to political and legal processes that lead to legal decisions, and what relative weight is placed on people's views, interests, well-being and survival? What are these processes, and how do they work and in which context? Who are the decision makers and what is their relation to those impacted by a particular decision? Who are those who have, and who are those who do not have decision-making authority? All of these issues, and more, will give shape to different land and resources laws in different societies, at

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3. Jeremy Webber, "The Grammar of Customary Law" (2009) 54 McGill LJ 579 at 583, 591 (using the example of the James Bay Cree regulation of hunting practices) [Webber, "The Grammar"].

4. *Ibid* at 584–85.

5. For an eloquent discussion of this reality, see Sarah Morales, "Stl'ul nup: Legal Landscapes of the Hul'Qumi'num mustimuhw" (2016) 33 Windsor YB Access Just 103 at 105–07 and generally.

6. In Canadian law, corporations possess the capacity, rights, powers and privileges of a natural person. See the *Canada Business Corporations Act*, RSC 1985, c C-44, s 15(1).

7. Most Indigenous legal traditions appear to proceed from the premise that the earth (along with water, plants and animals) is a living being with agency. See, for example, Nancy Sandy, "Laws from the Land" (2016) 33 Windsor YB Access Just 187; Morales, *supra* note 5 at 107; John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010), c 9 [Borrows, *Canada's Indigenous Constitution*]; C F Black, *The Land Is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (New York: Routledge, 2011).

8. Up until 1951, "person" and "Indian" in the *Indian Act* were defined separately, with person being defined as "an individual other than an Indian," *The Indian Act, 1927*, RSC 1927, c 98, s 2(i).

different points in history. None of these issues preclude the need to balance the complexity of human and non-human environmental relations, but their outcome will profoundly impact the necessary balancing within law making and decision-making processes.

For thousands of years, Secwépemc laws (like other Indigenous laws) related to lands and resources were developed and were learned and practiced within a context where the personhood of Secwépemc individuals, as well as animals' and the earth's itself, were not in dispute, even by neighbouring peoples. Nor were the existence, legitimacy or efficacy of Secwépemc laws. In this context, Secwépemc laws worked well enough (not perfectly, no doubt), but well enough to effectively manage Secwépemc people's relationships to the land and environment, to neighbouring peoples, and to each other. All of these crucial legal relationships still exist, and are ongoing.[9]

In addition to these relationships, for the past 150 years or so, Secwépemc laws, and people, have lived in relation to something quite distinct — a set of laws that were jurispathic in nature — laws that would not recognize or tolerate any other laws but themselves.[10] Successive generations of Euro-Canadian legal regimes enforced and reinforced this worldview through relentless encroachment, dispossession and denigration. These legal systems did not, for a significant period of time, characterize the Secwépemc people as persons.[11] The actual system still does not characterize and engage with Secwépemc law as *law*. Through force, fiat and stark disregard, it has disrupted the traditional promulgation of Secwépemc laws as well as Secwépemc legal education and enforcement mechanisms.[12] At the same time, it legislates and regulates all the lands and natural resources in Secwépemcúlecw (Secwépemc territory) without acknowledging Secwépemc jurisdiction or even working to harmonize federal, provincial and Secwépemc laws. It does so as if, in fact, Secwépemc laws, and the deeply rooted and enduring legal relationships they deal with, do not exist. Secwépemc legal actors may participate in state legal processes, and may even apply Secwépemc legal principles to their reasoning and assertions. However, within these state legal processes,

9. Sandy, *supra* note 7 at 190–94.

10. See Borrows' discussion of the possibility of Canadian law being multi-juridical or jurispathic in Borrows, *Canada's Indigenous Constitution*, *supra* note 7, c 1 at 8.

11. *Supra* note 8.

12. See discussion of this in Sandy, *supra* note 7 at 190–91.

Secwépemc law is not received as *law*, and certainly not upheld, resourced or enforced as such.

It is against this background context that the Secwépemc peoples formed the Secwépemc Nation Tribal Council (SNTC) and SNTC endeavoured to identify and articulate Secwépemc land and resources laws in a form that would be cognizable across legal cultures.

In this paper, we will first briefly describe the Secwépemc Nation and SNTC, then discuss the purpose, as well as some of the outcomes and limits of the Secwépemc Lands and Resources Laws project produced in collaboration with the Indigenous Law Research Unit at the University of Victoria. We will then turn to present interactions between Secwépemc land and resources laws and state land and resources laws operating within Secwépemcúlecw, including the challenges and limited opportunities that exist within the way these legal and political relations are currently structured and implemented at ground level. Finally, we will draw on the Secwépemc "Story of Porcupine" to suggest a constructive way forward towards a more mutually respectful Nation-to-Nation relationship between the Secwépemc people and the Canadian State. Although this Nation-to-Nation relationship is a relatively recently articulated goal on the Canadian side, the Secwépemc have had it in mind for a very long time. As there exist few precedents for such pluralistic legal relations within the Canadian State experience, it is fortunate we can draw on the Secwépemc legal tradition to extract lessons from their long experience of successfully building and maintaining mutually respectful relations between peoples with whom they share space and common resources.

I. THE SECWÉPEMC

Any discussion of Secwépemc laws should be contextualized by providing the reader with at least some basic understanding of who the Secwépemc people are and where they are located.[13] The Secwépemc are comprised of 17 bands located over approximately 18% of the total area of British Columbia (BC) and are geographically located in the South-Central interior of the province. In terms of

13. Val Napoleon notes it is important not to assume knowledge, and calls this basic information about an Indigenous society or community a "primer". For an example of a Gitksan Primer, see Valerie R Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (PhD Dissertation, University of Victoria, Faculty of Law, 2009) [unpublished] at 4–9 [Napoleon, *Ayook*].

traditional land base and population, the Secwépemc are one of the largest First Nations people in BC. Their traditional lands, Secwépemcúlecw, cover over 180 000 square kilometres and their approximate population is of 11 000 people.

The bands that comprise the Secwépemc Nation are:

"Esk'et" formerly known as Alkali Lake Indian Band;

"Kenpésq't" Shuswap Indian Band;

"Llenllenéy'ten" High Bar Indian Band;

"Pellt'iqt" Whispering Pines Indian Band;

"Qw7ewt" Little Shuswap Indian Band;

"Sexqeltqín" Adams Lake Indian Band;

"Simpcw" formerly known as North Thompson Indian Band;

"Skatsín" Neskonlith Indian Band;

"Skítsestn" Skeetchestn Indian Band;

"Splatsín" formerly known as Spallumcheen Indian Band;

"St'uxwtéws" Bonaparte Indian Band;

"Stswecem'c Xgat'tem" formerly known as Canoe Creek/Dog Creek Indian Band;

"T'exelc" Williams Lake Indian Band;

"Tk'emlúps" formerly known as Kamloops Indian Band;

"Ts'kw'aylaxw" formerly known as Pavilion Indian Band;

"Tsq'éscen" Canim Lake Indian Band;

"Xatsúll" Soda Creek Indian Band.

For thousands of years, the Secwépemc have held territorial authority and sovereignty over their lands and peoples. The Secwépemc have applied their own laws and governance processes to structure and manage their legal relationships within their communities, with others, and with the land itself. However, colonization has directly impeded the Secwépemc from exercising their laws and implementing traditional ways of organizing themselves, making decisions, and participating in processes that truly represent them as a people. The *Indian*

Act[14] introduced a foreign governance system that the Secwépemc have been forced to use for decades. Many Secwépemc leaders have made valiant and concerted efforts to serve and represent their people within and beyond the imposed confines of *Indian Act* governance structures. While Secwépemc individuals and groups have accomplished tremendous work for their people over the years, these hard-fought gains have been achieved in spite of this system, rather than because of it. The *Indian Act* has never worked for them. It cannot and never will.

The goal of the Secwépemc is to move beyond the *Indian Act* and return to their traditional ways of governing themselves. Just as it took decades for Secwépemc governance structures to be stripped away, it will take time to rebuild what has been broken. Moving forward, the Secwépemc are drawing on the wisdom of their ancestors and teachings of their elders to guide the national reconstruction of the Secwépemc Nation and revitalization of their legal orders. They are using stories that have been passed down for thousands of years, from generation to generation, as foundation from which to embark upon this work.

For a society like the Secwépemc, orality and the medium of storytelling are sophisticated ways to communicate proper and improper behaviours, and effective ways to demonstrate what happens to those who act in accordance with societal laws, as well as the repercussions for those who do not. Conveying these important messages through storytelling is and was effective because stories serve as pneumonic devices to aid in the remembering and retelling of detailed information contained within. Furthermore, the complexities of the stories are able to meaningfully validate and address the complexities of real life situations and problems, provide insights, and outline multiple possibilities for principled and effective courses of action. Therefore, when conducting research to increase our understanding on Secwépemc laws and specifically, in this case, legal principles regarding their relations to the land and its resources, we looked to Secwépemc stories as one particularly vital source of knowledge.[15]

Secwépemc stories are multilayered and multidimensional. When considering Secwépemc legal principles drawn from stories relating

14. *Indian Act*, RSC 1985, c I-5.

15. For an explanation on the value and use of stories in Secwépemc law, see Sandy, *supra* note 7 at 194–95 and 205–06.

to land and resources, we acknowledge that Secwépemc stories contain important teachings of all facets of Secwépemc law, and are not just limited to the specific area of law. Secwépemc legal orders involve all Secwépemc truths and are part of a larger comprehensive whole.[16] Thus, when we discuss Secwépemc land and resources legal concepts and laws in this paper, it is important to understand that these legal concepts and laws must not be understood, interpreted or applied in a vacuum.

Like most Indigenous peoples in Canada, the Secwépemc have also endured and survived the residential school system's terrible legacies.[17] One among many of this cultural genocide's terrible legacies lies in the fact that there are very few fluent speakers of Secwépemctsín remaining today, although Secwépemc people of all ages are determinedly working to regain knowledge. We acknowledge this poses a challenge to fully understanding the Secwépemc legal traditions communicated through stories. Ideally, in order to comprehend the fuller complexity of meanings and lessons communicated through oral medium, individuals would be well versed in the stories themselves and fluent speakers in Secwépemctsín. As the elder Nathan Matthew explains:

> [M]y father said, "you know, Nathan, there's so many things about our world we can explain better in Secwépemctsín than in English. So when you translate it, in some cases you lose the whole essence of what you're trying to talk about. You lose, in just a straight translation of words… the whole idea or understanding of words in Secwépemctsín."[18]

This language recovery and re-engagement with story are a work in progress that is occurring in tandem with, not in opposition to, the recovery and revitalization of Secwépemc law.[19] We recognize the Secwépemc laws being identified and imperfectly articulated are only a small fraction of the Secwépemc legal tradition. Continued work in this area is necessary.

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16. Napoleon, *Ayook*, *supra* note 13.

17. Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: Reconciliation: The Final Report of the Truth and Reconciliation Commission of Canada*, Vols 1 & 2 (Montréal & Kingston: McGill-Queen's University Press, 2015). See also Sandy, *supra* note 7 at 190.

18. 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) at 15 [*Secwépemc Analysis*].

19. Sandy, *supra* note 7 at 195–96.

We also recognize Secwépemc legal tradition is both deeply rooted and constantly growing as it is passed down through generations, so this work will be ongoing as Secwépemc laws develop, as all laws change with practice.[20] Secwépemc lands and resources laws are founded upon, inspired by and responsible for Secwépemcúlecw (Secwépemc territory). Many Secwépemc people teach, learn and practice these laws on a day-to-day basis as a part of their lives. As one of this paper's authors (Leonard) expresses, "Almost, like, naturally, because we were brought up in that way. But [our laws] were never codified in that way. Who makes our decisions on how we manage our resources in our traditional ways [...]."[21]

While many Secwépemc people have learned and deeply internalized Secwépemc legal reasoning so that it feels "natural" to think through and practice Secwépemc law, and traditional means of learning these laws continue, there is widespread understanding that there is also a need for more diverse and explicit methods of learning and expressing Secwépemc law today. This is needed for internal communication, accountability and enforcement at a tribal level, and needed for communicating Secwépemc law to outsiders, such as Canadian courts as well as federal and provincial governments, all of which hold power to impact, and live in relation with, Secwépemc people and Secwépemcúlecw. It is in this context that SNTC initiated the Secwépemc Lands and Resources Laws Project in 2015.

II. THE SECWÉPEMC LANDS AND RESOURCES LAWS PROJECT

The motivation for this collaborative research project was a direction put forward by Secwépemc elders, at various Elders Council meetings that took place at the Aboriginal Rights and Title Department inside the Shuswap Nation Tribal Council (SNTC), to establish a Secwépemc natural resources law regime.[22] The main goal underlying this research,

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20. *Ibid* at 201. Sandy explains: "Law and legal practice are subject to revision and refinement. It can move with the times as people learn more about the world and what is required of them." For the general importance of this idea, see also John Borrows, "Physical Philosophy: Mobility and the Future of Indigenous Rights" in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Hart Publishing, 2009) 403 [Borrows, "Physical Philosophy"].

21. *Secwépemc Analysis*, *supra* note 18 at 1.

22. *Ibid*.

as SNTC Tribal Director Bonnie Leonard noted, was to "prepare our Nation for managing our own natural resources in a way that the non-aboriginal people will understand [and] be able to create some Secwépemc natural resources laws."[23]

To undertake this initiative, the SNTC partnered with the University of Victoria's Indigenous Law Research Unit (ILRU), directed by Dr. Val Napoleon. The ILRU is a dedicated research unit at the University of Victoria's Faculty of Law, committed to the recovery and renaissance of Indigenous law.[24] The ILRU supports and partners with Indigenous peoples and communities to research, ascertain, articulate and restate their own legal principles and processes, on their own terms, in order to help them meet today's complex challenges. The premise underlying the ILRU's work is that Indigenous laws are *laws*, and that they deserve to be treated seriously. This major principle encompasses a recognition that Indigenous legal principles and processes are living and practiced by communities today, notwithstanding colonial attempts at destroying and erasing them. Although colonialism has left gaps, making Indigenous laws unevenly taught, practiced or visible today, there are methods of (re)articulation that can jump-start the process of addressing those challenges and rebuilding, as is necessary.

The main approach ILRU employs to (re)articulate Indigenous law is a rigorous and recursive methodology, developed by one of this paper's authors (Hadley Friedland) and Val Napoleon, now known as the "ILRU method."[25] The ILRU method builds on the ground breaking work of John Borrows,[26] and was developed over several years of conversation

23. *Ibid*.

24. For more information and resources see the Indigenous Law Research Unit website at <www.uvic.ca/ilru>.

25. For a more detailed description of the ILRU method, see Hadley Friedland & Val Napoleon, "Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions" (2015) 1:1 Lakehead LJ 17 [Friedland & Napoleon, "Gathering the Threads"]. See examples of how learning and applying this method led students to other methods within community placements in a national research project at 43. There are a growing number of Indigenous legal scholars engaging with and writing about different methods and methodologies for engaging and articulating Indigenous law. See, for example, Morales, *supra* note 5; Sandy (land-based methods), *supra* note 7; 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) at 17, online: <www.law.msu.edu/indigenous/papers/2006-04.pdf> (linguistic method).

26. John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002).

with a number of interested Indigenous communities.[27] It involves a community led, multiple-phase process that engages with both publicly available resources and community participants in a highly structured and methodical way, grounded in strong, reciprocal relationships between researchers and partner communities. Briefly, these phases include: (1) Identifying a specific research question; (2) Analyzing available resources, including cases, stories and oral histories; (3) Synthesizing and organizing the results into an accessible and usable format; and (4) Applying and evaluating the final outcomes.[28]

Each of these phases is implemented in a collaborative and transparent research process that requires intellectual rigour and recursive community engagement at every stage. Indigenous community partners formulate the research questions, identify which resources should be analyzed, contribute to, enrich, validate and amend the synthesis, and, ultimately, choose whether and how to apply and evaluate the final research outcomes, including whether they should be built on or changed. The final outcomes are not a codification of law or even an authoritative or comprehensive statement of law. Rather, they are most analogous to a legal memo from ILRU back to a community, synthesizing the legal researchers' best understanding of relevant legal principles after a serious and sustained analysis. They are meant to organize information in a way that makes those principles simpler for others to find, understand, and apply to current issues or activities. With community consent, the ILRU may share the final outcomes or use them to create academic and teaching materials.[29] The primary goal is for the research outcomes to provide communities with a starting point to use in their internal governance or legal work, and in conversations with other legal traditions. How and when this is done always remains, appropriately, in the community partner's hands.[30]

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27. Friedland & Napoleon, "Gathering the Threads", *supra* note 25 at 19.

28. *Ibid* at 20–33.

29. Ideally, further academic and teaching materials are co-created by ILRU and community partners. Where this is not possible or desired, ILRU still remains bound by university ethical standards and the specific terms of the research partnership agreements signed with community partners.

30. This fits with ILRU's overall vision that the work of revitalizing Indigenous law is about self-determination and "fundamentally about rebuilding citizenship": Val Napoleon, "Thinking About Indigenous Legal Orders" (Research Paper for National Centre for First Nations Governance, June 2007), online: <fngovernance.org/ncfng_research/val_napoleon.pdf> at 20. See also Christine Zuni Cruz, "Tribal Law as Indigenous Social Reality and Separate Consciousness: [Re]Incorporating Customs and Traditions into Tribal Law" (2001) 1 Tribal LJ at 11.

The ILRU partnership with STNC focused on the articulation of Secwépemc laws relating to lands and resources. The starting point was the shared recognition that Secwépemc people already understand and practice Secwépemc laws on a daily basis, but these laws and legal practices are not necessarily explicit or visible. In other words, this collaboration was centrally about formally identifying and articulating Secwépemc laws that may already be in practice for the purposes of translation for others, both inside and outside the community.

In the first phase of the ILRU-SNTC collaboration, we met to discuss project goals and refine research questions. ILRU and SNTC settled on two broad research questions to guide the creation of a foundational document meant to support Secwépemc governance work. First, how do people within the Secwépemc legal tradition respond to disputes or conflicts concerning lands or resources? Second, where there aren't clear disputes or conflicts concerning lands or resources, what relationships, responsibilities, and rights do people within the Secwépemc legal tradition have to land, water, animals, and plants? The intention behind the first question was to draw out legal principles relating to land and resources issues such as access, harvesting, use and inheritance. The second question was designed to explore more relational legal principles involving people, land and animals that do not involve conflict.

The second phase of the project started with an active engagement towards the analysis of published collections of Secwépemc stories and other publicly available resources by ILRU researchers.[31] The SNTC identified the most useful collections of published Secwépemc stories and led ILRU researchers towards them and away from other collections that were considered less reliable or respected.[32]

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31. The ILRU research team for this project included one the authors, namely Jessica Asch (ILRU Research Director and Lawyer), Simon Owen (Senior Researcher and Lawyer), articling student Georgia Lloyd-Smith (seconded from and now a lawyer at West Coast Environmental Law), and two summer law students, Kristy Broadhead and Adrienne MacMillan. Val Napoleon, Hadley Friedland and Jessica Asch provided supervision and support to the broader team.

32. The ILRU team's primary resource for the stories was Teit, "Story of Porcupine", *supra* note 1 at 443–813 (Teit was an anthropologist who journeyed to Secwépemcúlecw in 1887, 1888, 1892 and in the early 1900s, at 447). The ILRU also reviewed the *White Arrow of Peace*, originally recorded with Ike Willard by Randy Bouchard and Dorothy Kennedy and published in Sushwap Stories (1979) and re-transcribed by Dr. Ron Ignace, 2008. Reproduced from Tribal Case Book — Secwépemc Stories and Legal Traditions: Stsmémelt Project Tek'wémiple7 Research, Created by Kelly Ann Connor (4 July 2013) at 28–32 [*White Arrow of Peace*] and the *Fish Lake Accord*, researched by Bernadette Manual and Lynne Jorgesen in 2002 for submission to the Chief and Councils of the Upper Nicola and Okanagan Indian Bands (August 2002, amended August 2003) at 1–2 [The Fish Lake Accord].

Starting with publicly available stories provides ILRU researchers with a foothold to develop some vocabulary and understanding prior to engaging with community members. This process ensures some level of sustained intellectual engagement and helps focus points and stories needed for further discussion, in an effort to enable deeper conversations about the nuanced Secwépemc legal tradition and specific research questions relating to lands and resources used for the purpose of this project. Later on, ILRU researchers also analyzed stories shared by two community witnesses met during team visits to Secwépemcúlecw, Paul Michel and Leon Eustache.[33]

In other words, ILRU researchers analyzed publicly available stories and materials SNTC identified as applicable, as well as stories shared by community witnesses, using an adapted "case brief" method. This method is used to teach students how to analyze Canadian decisions made by judges in law school. The case brief method allows legally trained people to draw out the legal principles and reasoning contained in legal decisions. Using this same method for stories helps ILRU researchers to rigorously engage with these stories as legal resources that contain answers to their particular research questions, just as they would when seeking answers within Canadian state laws. It also provides them with a deeper understanding of the stories they have looked at, prior to visiting community members and engaging a conversation with them about law. This preliminary work is essential, as it is meant to demonstrate respect for the community partner's legal traditions, as well as community participants and elders' time. It avoids the historical dynamic of imbalanced efforts Indigenous people have had to make, in attempts to teach ill-prepared outsider researchers. ILRU researchers organized the legal principles they had identified through the case briefing exercise's preliminary analysis. With this analysis in mind, they then developed interview questions based on their work with the stories.

In the project's third phase, two ILRU student researchers visited Secwépemcúlecw to conduct interviews and focus group discussions on Secwépemc stories, to learn more and deepen their understanding of Secwépemc lands and resources laws. They met with a total of 24 witnesses, from 5 different SNTC communities, over 2 separate trips

33. Leon Eustache told *The Fox and Coyote and the Big Wind*, taught to him by his elder Chris Donald. Paul Michel, with permission from his people at Hust'alen (Adams Lake), gave a riveting retelling of the *Water Monster*.

in July 2015. The focus groups became safe spaces to discuss questions and learnings that arose from the different stories analyzed by the students, clarify points and misunderstandings, and understand how the newly found legal principles applied to everyday life. Two of us (Leonard, and/or Mortimer, then Senior Researcher for the SNTC's Aboriginal Rights and Title Department) were present and participated in all the interviews and focus groups. The student researchers also had the opportunity to travel around Secwépemcúlecw to discover some of the locations spoken of in the stories and attend a Secwépemc gathering in Williams Lake. This added an additional dimension of learning and grounded their understanding of Secwépemc laws in a background context, as ILRU researchers were able to learn from Secwépemc stories, Secwépemc people *and* from Secwépemcúlecw.[34]

The next phase of the work involved integrating all the learning extracted from the focus groups, interviews and the preliminary legal analysis into a more comprehensive analysis. At this stage, it became apparent to all of us that the original analytical framework ILRU was using, which developed around the legal subject of responses to harms and conflicts, did not adequately encompass the specific balancing of issues, responsibilities and consequences within the Secwépemc legal subject of lands and resources. One of us (Friedland) developed a new analytical framework that better reflected the deeply rooted and principled ways in which the Secwépemc people have always, and continue to balance and uphold multiple (and possibly conflicting) relationships, responsibilities and rights relating to lands and resources.[35] The discussion emerging through this framework provides a respectful and robust alternative to polarizing declarations and oversimplified reductionist arguments that too often dominate discussion about lands and resources. While still incomplete, it more adequately recounts the sophisticated Secwépemc legal tradition and its capacity for grappling with complex issues.

The integrated analysis, using the new framework, was written and edited by ILRU researchers, including one of us (Asch), over the fall of 2015, and provided to STNC for feedback. The ILRU team then returned to Secwépemcúlecw to participate in a validation process in spring 2016

34. For examples of learning Secwépemc legal principles from Secwépemcúlecw, see Sandy, *supra* note 7. For a discussion on the importance of land-based learning in Indigenous and other laws more generally, see John Borrows, "Outsider Education: Indigenous Law and Land-Based Learning" (2016) 33 Windsor YB Access Just 1.

35. *Infra*, Appendix A.

(this included three of us: Asch, Leonard and Mortimer). Throughout the process, ILRU and SNTC held large and small meetings with witnesses to review quotes and gather their feedback on the process and its outcomes.[36] During their visit to Secwépemcúlecw, the ILRU team also attended an Elders Council meeting to present and discuss the research to the attending elders, and answer the questions they had about the process and the outcomes.

There were three final outcomes, as a result of this collaboration and at this phase of the research: the final integrated analysis; a casebook of the analyzed Secwépemc stories; and a glossary of Secwépemctsín terms used in the analysis. The integrated analysis synthesized and organized Secwépemc lands and resources laws in an accessible and usable framework for their application. The casebook contained all the stories reviewed and the case briefs worked on by the ILRU research team, as well as a thematic index organizing the main issues analyzed in the stories. The glossary document arose as a needed companion to the analysis, which included quotes from community witnesses explaining important legal terms in Secwépemctsín.[37] While space does not permit us to reproduce these outcomes in their entirety, we will discuss them throughout this paper in relation to their ongoing operations and interactions with Canadian state laws.

The final phase of the project, application and evaluation, is in the capable hands and complete control of the SNTC, as it should be. Those of us on the ILRU team remain supportive from the sidelines and happily collaborate on smaller projects such as this article. The SNTC's application and evaluation of this project are ongoing and generative of new ideas for strategic political and legal uses. For example, the SNTC further edited the outcomes, and published the three components of the project in one book in the spring of 2017, which was distributed to Secwépemc chiefs, elders and members, Canadian government officials and other Indigenous governments at the Union of BC Indian Chiefs annual general meeting. Moving forward, the SNTC

36. The ILRU-SNTC team met in person with 16 of the 24 community members who participated in the interview process, to ensure that we had correctly recorded and understood what they had told us. Seven witnesses were sent the Analysis, Casebook and Glossary for review. Five of those witnesses provided feedback by email or phone. The remaining witnesses were not quoted in the Analysis.

37. The ILRU used components of an existing glossary from an earlier STNC project on child welfare laws, and the SNTC, with the assistance of Secwépemctsín experts within the community, further edited the document.

will utilize the research outcomes to develop a language, law, and education strategy that will be planned in an effort to revitalize Secwépemc laws. This research will also help form a foundational piece of the Nation-to-Nation governance work between Canada and the Secwépemc people. The Secwépemc people's vision is to re-establish their Nation's traditional governance processes, while being aware of, and thoughtful about, the evolution of their Aboriginal rights, as affirmed and protected by section 35 of the Canadian Constitution.

III. LEGAL RELATIONS: SECWÉPEMC AND CANADIAN LAW

The Secwépemc Lands and Resources Project was an intentional effort to re-centre Secwépemc legal authorities, principles and processes for managing relationships with land and resources, from an internal Secwépemc point of view. The results, while necessarily incomplete, still are resources to begin to understand the rich complexity of Secwépemc lands and resources laws, which themselves constitute only part of a larger Secwépemc legal tradition. Secwépemc laws continue to be promulgated and passed down through generations in Secwépemcúlecw. Many Secwépemc people currently reason with, and practice Secwépemc laws in everyday life. However, contemporaneously with these legal practices, and prior to, during and after this particular research project, Secwépemc laws and legal actors are forced to interact with Canadian laws and legal actors, which have an enormous impact on Secwépemcúlecw.

These relations are not currently structured, or even influenced by the Secwépemc legal principles or processes that guide relationships, rights and responsibilities between communities.[38] Instead, these relations are unilaterally structured by the Canadian State, and characterized by Secwépemc legal actors' reasoning through, and attempting to uphold Secwépemc laws to the best of their ability, while Canadian legal actors ignore Secwépemc legal reasoning, though they may or may not consider Secwépemc positions as they continuously impose Canadian legal and administrative decisions on Secwépemcúlecw. Secwépemc legal actors continue to uphold Secwépemc laws through legitimate decision-making processes,[39] education and long held

38. *Secwépemc Analysis*, *supra* note 18 at 46.
39. *Ibid* at 34.

methods of sanctions and consequences, but do not have access to means of enforcement.[40] On the other hand, Canadian state land and resources laws are resourced and enforced. This situation leads to a legal landscape that is decidedly uneven and results in frustrations and uncertainties for both legal orders, as well as predictable flashpoints of conflict on a relatively regular basis.

A. Worldviews: Canadian Law's Willful Blindness of Secwépemc Laws

Much time and energy is spent attempting to explain the differences between systems, and the unique aspects of Indigenous worldviews, while scant attention is paid to Euro-Canadian worldviews that deeply influence Canadian law and legal relationships with Indigenous peoples. We need to look more seriously at what specific aspects of Euro-Canadian worldviews prevent Canadian legal actors from recognizing, and respectfully relating to, Secwépemc land and resources laws.

It is trite to say a people's worldview and lived experience influence the principles and practices in any legal tradition, including the interaction with other legal traditions. Often time, Indigenous worldviews are focused on as homogenous and something, completely separate from, and incommensurable with a homogenous non-Indigenous worldview. This situation creates a risk of, both, a reifaction of certain aspects of Indigenous legal traditions, and an over-simplification of both legal traditions. It ignores the principled and complex balancing that Secwépemc and other Indigenous legal traditions have always engaged in and continue to engage in today. It erases thousands of years of successful intergovernmental relations between Indigenous Nations.

It is obvious humans are capable of communicating while sharing radically different histories, ontologies and belief systems, because Indigenous peoples have been doing exactly this with non-Indigenous newcomers for centuries.

It is important to note that, as with other legal regimes, stories of both Secwépemc and Canadian legal decisions represent points of agreement against a backdrop of disagreement, and there are inevitable ongoing tensions and contradictions between law's aspirations

40. *Ibid* at 74.

and its performance.[41] In all living legal traditions, however deeply rooted in ancient truths or spiritual epiphany,[42] statements of law are provisional, not unchanging truths,[43] as exemplified here by Justice Hughes of the Federal Court:

> The federal law-making process and associated support activities are not something that is fixed in stone, whether by legislature or jurisprudence. It is a fluid political process that is continually adapting to the particular circumstances of the moment.[44]

Likewise, neither Secwépemc nor Canadian populations are homogenous in themselves, and there is a broad diversity of values concerning land, nature, property, and the larger environment. On the ground, Secwépemc people and Canadian people do not live in complete isolation from one another. In reality, through marriage, education, employment, mutual interests, and a myriad of other ordinary examples at an individual level, Secwépemc and Canadian people are intertwined in multiple ways. Both Secwépemc and Canadian law's legitimacy, including their meaning and efficacy, will determine the extent to which those diverse interests are maintained and participate in Secwépemc and Canadian legal processes and adhere to legal decisions and laws.

Historically, the relationship between colonial and Indigenous legal traditions has been marked by the suppression and erasure of Indigenous laws through the concerted imposition of colonial law. Assertions of Indigenous lands as being empty and Indigenous peoples as being lawless were carved long ago through notions such as the Doctrines of

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41. Jeremy Webber, "Legal Pluralism and Human Agency" (2006) 44 Osgoode Hall LJ 167 [Webber, "Legal Pluralism"].

42. Joseph Pieper argues that the only way to understand any tradition, including all legal traditions, as something in itself "irreducible," is to admit that the origin and authority of a tradition are always linked back, through "the wisdom of the ancients" to some sacred point of origin, some "divine revelation" which is the "indispensable core" of any tradition: Joseph Pieper, "The Concept of Tradition" (1958) 20:4 The Review of Politics 465 at 480. At the same time, in legal traditions, we are always making choices about what and how we use the origins and lessons from the past. See also Gerald J Postema, "On the Moral Presence of Our Past" (1991) 36 McGill LJ 1153 at 1170.

43. Webber, "Legal Pluralism", *supra* note 41.

44. *Mikisew Cree First Nation v Canada (Governor in Council)*, 2014 FC 1244 at 30, 270 FTR 243 (Hughes J).

Discovery[45] or *terra nullius*,[46] and legislation such as the 1858 *Proclamation of the Colony of British Columbia*.[47] These acts and assertions made by the English Crown, and then by Canada and the provinces, served not only to justify the taking of land and dispossession of the Indigenous peoples, but to erase recognition of laws that were, and are, practiced in what is known as Canada today. The underlying question of sovereignty and jurisdictional power resulting from imposition of colonial law and the attempted erasure of the Indigenous legal traditions continues to have implications for Secwépemc society, including the operation of the Secwépemc legal traditions.

The Supreme Court of Canada has recently affirmed that Canada never was a *terra nullius,* meaning that Indigenous peoples have jurisdiction over Indigenous territories.[48] Couched more recently in the language of reconciliation, there are broader legal and societal conversations taking place on the importance of both Indigenous law and Aboriginal rights and title within the Canadian legal system.[49] Nevertheless, the original, unlawful assertion of sovereignty seamlessly persists in the language woven through colonial law. This is most noticeable with pronouncements in legislation that articulates colonial government or Crown ownership of, control over, and decision-making respecting "resources," such as water or forest land.[50] These pieces of

45. The Doctrine of Discovery was a principle used to justify the colonization or taking of lands uninhabited by Christian people. A series of Papal Bulls were issued, starting in 1493 with Pope Alexander VI issuing the *Inter Cætera* (May 4, 1493), which divided lands previously unknown to Europeans amongst European sovereigns.

46. CED 4th (online), *International Law*, "Objects of International Law" at § 247.

47. Victoria R, *Proclamation of the Colony of British Columbia*, 2 August 1858, CAP. XCIX.

48. *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 256 at para 69 [*Tsilhqot'in*].

49. See for ex Lance Finch, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice" (Indigenous Legal Orders and the Canadian Law Conference delivered at the Continuing Legal Education Society of British Columbia, 15 November 2012), (2012) CLE BC 163, online: <www.cle.bc.ca/onlinestore/productdetails.aspx?cid=648>. See also, Calls to Action 27, 28, 42 and 50 in Canada, Truth and Reconciliation Commission of Canada, *Calls to Action* (Winnipeg: Truth and Reconciliation Commission, 2015).

50. *Water Sustainability Act*, SBC 2014, c 15, s 5 (the property in and the right to the use and flow of all the water at any time in a stream in British Columbia are for all purposes vested in the government, except insofar as private rights have been established under authorizations); *ibid*, ss 6 and 9 (the main decision makers, for issuing water licences or authorizing the diversion or use of water are the comptroller or a water manager, as well as the Minister of Environment, responsible for designating an area for the purpose of the development of a water sustainability plan); *Forest Act*, RSBC 1996, c 157, s 5(1) (provides that the Lieutenant Governor in council may designate any forest land as Provincial forest and may order that Provincial forests be consolidated or divided); *ibid*, s 5(7) (provides that the minister responsible for forests has the authority to delete land from a Provincial forest, except for land in a tree farm licence area, if the minister

legislation on land and "resources" fall silent on any recognition of Secwépemc (or any Indigenous) legal traditions or legal authority, and take the Crown's authority over Secwépemcúlecw for granted.

The unarticulated but fundamental premise that state laws can legitimately operate within Indigenous territory without any regard to Indigenous law is central to understanding more formal interactions between state and Indigenous legal traditions. This worldview is willfully blind to or openly dismissive of Secwépemc jurisdiction. As a result, legal actors carrying this worldview, however well-intentioned as individuals, are completely sightless to the existence and persistence of Secwépemc legal traditions. Within this colonial frame, there is no possible space for Secwépemc law, itself, to formally engage with colonial law, as *law*. The possibilities for engagement occur, instead, solely within the operation of colonial law. These possibilities will come either in the form of consultation (as state law defines it) related negotiation processes, or in opposition through Canadian Aboriginal law in Canadian courts. These are Canadian legal processes that typically translate Secwépemc laws into non-legal interests, positions and perspectives, cognizable to Canadian decision makers, be they judges, legislators or environmental review boards. The Canadian worldview that Indigenous lands and resources laws do not exist, is the most significant barrier to renewing mutually respectful relationships between the two legal traditions. There is no corresponding Secwépemc worldview we can identify that imposes a similar intellectual hurdle.

B. Lands and Resources Laws: Underlying Legal Values and Beliefs

The Secwépemc legal tradition is informed by a relational understanding of the world.[51] The relationships among people, between present and future generations, and between human and non-human

considers it will be to the social and economic benefit of British Columbia); *ibid*, s 12 (the minister may also enter, on behalf of the government, into an agreement granting rights to harvest Crown timber); British Columbia, Ministry of Energy, Mines and Petroleum Resources, *Guide to Processing a Mine Project Application* (Mining and Minerals Division, January 2009) at 16 [GPMPA] (the Chief Inspector of Mines from the Ministry of Energy and Mines is the key decision maker); *Environmental Assessment Act*, SBC 2002, c 43, ss 10–11, 13 and 17–19 [*Environmental Assessment Act*] (for environmental assessment, the main decision makers are the Executive Director of the Environmental Assessment Office and the Minister of Environment).

51. Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy and Law* (New York: Oxford University Press, 2011) at 19–22 [Nedelsky, *Law's Relations*].

life, including Secwépemcúlecw itself, are recognized, valued and considered in Secwépemc legal analysis. Most explicitly, this is apparent in Secwépemc legal principles underlying relationships to lands, including both the principle of *Qwenqwent*, which roughly translates into humility and human dependence on the land,[52] and the principle of interdependence between Secwépemc people and Secwépemcúlecw.[53] It also evidently appears in the acknowledgement that the natural world is in a constant flux, in which humans are both influential and influenced members,[54] that humans influence and are influenced by environmental change,[55] and the principle that respect should undergird all relationships and interactions among people and between people and the environment.[56]

The explicit acknowledgement of human dependence on the land, and the interdependence of human and non-human life throughout the passing of generations on earth are evident in Secwépemc people's reasoning of how human engagement with the world will impact future generations of human and non-human life, and the legal obligations that flow from this reasoning. As the elder Shirley Bird explained:

> I am scared of what's happening up to date. What's happening with mother earth… I worry about our animals, our trees, everything you know I look around. I worry about those poor animals, where are they going to get water? What about their homes, what about the food, what are their babies going to have? What about the next generation? What are my grandchildren going to have? What's going to be left for them? You know what's going to be in place for them? What am I going to have in place for them? What am I going to have ready for them?[57]

As evident from this elder's discussion, acknowledging relationships between present and future generations, as well as relationships between human and non-human life, orients legal obligations to explicitly consider long-term, as well as the short-term consequences of present decisions. For example, many Secwépemc legal obligations

52. *Secwépemc Analysis*, *supra* note 18 at 38–39.
53. *Ibid* at 40–41.
54. *Ibid* at 13–14.
55. *Ibid* at 12.
56. *Ibid* at 17.
57. *Ibid* at 40.

reflect their relationship to Secwépemcúlecw, such as the responsibility to not seek more resources when there is no need,[58] as well as the responsibility to protect the land and ensure that animals and other resources can sustain themselves and reproduce.[59] It also leads to the land being seen as a bearer of certain rights, such as the right not to be over harvested,[60] and the right to be protected for self-sustainability.[61]

This orientation towards deeply held legal obligations to both present and future generations, as well as both human and non-human life, animates many Secwépemc legal principles that apply to lands and resources. This can lead to risk adverse decision-making that takes into account a broader set of factors than typical state-based decision-making processes for the same issues.[62] However, it is vital to note that this relational and dialogical outlook does not demand or foreclose specific legal outcomes. That is because the relationships, rights and responsibilities with Secwépemcúlecw must be balanced with those with the Secwépemc people and other communities.[63] As will later be discussed in this paper, given a certain set of circumstances, Secwépemc people may reach a legitimate decision, based on Secwépemc legal principles, to log in Secwépemcúlecw. In another set of circumstances, Secwépemc people may reach a similarly principled and legitimate decision that a mining project in Secwépemcúlecw ought not to go ahead. In both cases, it is likely a relational and risk-adverse approach will deeply influence how various factors are weighed and considered within Secwépemc legal decision-making processes.

The private and public values spread throughout Canadian legal processes, policies and laws concerning lands and resources are most "obviously reflected in private property law [notions of scarcity over resources,] public parks, and through various environmental [decision-making] processes."[64] They are rooted in philosophical understandings

58. *Ibid* at 45–46.

59. *Ibid* at 47.

60. *Ibid*.

61. *Ibid*.

62. See generally Val Napoleon & Richard Overstall, "Indigenous Laws: Some Issues, Considerations and Experiences" (2007) CIER Opinion Paper, online: <caid.ca/LawIndIss2007.pdf> [Napoleon & Overstall].

63. *Secwépemc Analysis*, *supra* note 18 at 19.

64. Val Napoleon, Hadley Friedland & Renée McBeth, "How Does Legal Pluralism Manifest Itself" (2015) Indigenous Law Research Unit Integration Report at 7, online: <www.legitimus.ca/static/uploaded/Files/Documents/Rapports/_Napoleon-Secwepmec-Report-April-30-2015.pdf> [Napoleon, Friedland & McBeth, "Pluralism"].

of human-to-human and human-to-nature relationships that date back to hundreds of years.[65] It is a peculiar development in Canadian law (and other legal systems in most of the western world) that the fact of human relationships to each other, non-humans, the land, and future generations is frequently either ignored or minimized, if not quite outright overlooked.[66] Certain non-human, indeed non-living entities, have been given the status of people (corporations), and their representatives have an inordinate influence on law makers and governmental decision-making, whether it be through lobbying, public relations and threats of withdrawal from a specific region or jurisdiction. Although individualism and independence are valorized in western legal systems, these same legal systems recognize and value their dependence on, and interdependence with "the economy," which is almost perceived as a natural force, as opposed to a human creation, and is heavily reliant on market forces and industry as a whole.

Canadian law's values and valued relationships have a deep impact in balancing various considerations for land and resources legal decision-making. The immediacy of corporate and market demands orients legal decision-making processes towards more "risk-centric" values, sometimes sacrificing long-term stability or the impacts on future generations, in pursuit of immediate political and economic gains.[67] Sometimes these values are explicitly expressed,[68] like in the provincial government's *Mineral Exploration and Mining Strategy*, which emphasizes

65. Alan Hanna, *Ties to Freedom: Seeking a Path to Reconciliation Through Relationality in Indigenous Legal Orders* (DRAFT PhD Thesis, University of Victoria, 2017) [unpublished] at 7.

66. Nedelsky points out that "the fact of human dependence" on others, and the earth itself, is a "truth claim" that is routinely denied in western law and politics, for an "illusory independence." See Nedelsky, *Law's Relations*, *supra* note 51 at 134–35.

67. Napoleon, Friedland & McBeth, "Pluralism", *supra* note 64 at 7.

68. Sometimes it is less explicit, but these values are apparent in the application of state laws. For example, as critics have identified in the new *Water Sustainability Act*, *supra* note 50, the Province of British Columbia has maintained the principle of "first-in-time, first-in-right" to allocate water rights, rather than using a more holistic ecosystem-based approach to water use. This principle of water allocation means that older licenses (perhaps issued 100 years ago to early ranchers or industrial operations) "when environmental flows were not considered — as well as licences that will be issued for existing groundwater uses (for example to Nestle for water bottling) — will continue to trump environmental flows (as well as First Nations uses and more recent licences for drinking water, agricultural use, etc.)"; see "Water for Fish and the *Water Sustainability Act*" (3 November 2013) *West Coast Environmental Law* (blog), online: <www.wcel.org/blog/water-fish-and-water-sustainability-act>. See also Laura Brandes & Oliver M Brandes, "BC Floats New Water Law" (2014) 40:5 Alt J 12 at 12, online: <www.alternativesjournal.ca/policy-and-politics/bc-floats-new-water-law>.

the economic importance of mineral exploration and mining as means to support job creation and funding for social programming.[69]

Neo-liberal economic values, including freedom of contract, economic growth and ownership, are woven throughout BC's forestry regime, which explicitly mandates the Ministry of Forestry, Land and Natural Resources Operations to encourage maximum productivity on forest resources through a vigorous, efficient, and world competitive timber industry, and assert the government's financial interest in its forest resources.[70] Similarly, section 4(b) of the *Ministry of Forests and Range Act* outlines the ministry's purpose as being to "manage, protect and conserve the forest and range resources of the government, having regard to the immediate and long-term economic and social benefits they may confer on British Columbia."[71] Logically, the words "long-term" should imply at least a limited invocation of some legal obligations towards intergenerational relationships. In reality, though, the Canadian state's legal actors tend to balance factors in a way that often favours short-term economic gains and accepts side effects such as pesticides, pollution, resource over-harvesting, and unsustainable fossil fuel use.[72]

It is unsurprising that, when state law perpetuates this risk-centric ethic, it becomes a flash point for much resistance.[73] This fact is exacerbated in the case of Indigenous peoples, such as the Secwépemc, because of this double erasure — first, a worldview that disregards Secwépemc's legal authority to initiate or participate in the balancing all legal decision-making regarding lands and resources requires, and second, the imposition of legal decisions that often apply a set of values that are counter-intuitive and, at times, diametrically opposed to Secwépemc legal values and principles.[74] Although the Secwépemc

69. British Columbia, Ministry of Energy and Mines, *British Columbia's Mineral Exploration and Mining Strategy (2012)*, at 5–6, online: <www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/mineral-exploration-mining/documents/permitting/miningstrategy2012.pdf>.

70. *Ministry of Forests and Range Act*, RBC 1996, c 300, s 4(a) (states that a purpose of the ministry is to "encourage maximum productivity of the forest and range resources in British Columbia." Another purpose is to "encourage a vigorous, efficient and world competitive timber processing industry in British Columbia.")

71. *Ibid*, s 4(b).

72. Napoleon, Friedland & McBeth, "Pluralism", *supra* note 64 at 7.

73. See generally the Community Environmental Legal Defense Fund, online: <celdf.org/community-rights/>; Napoleon, Friedland & McBeth, "Pluralism", *supra* note 64 at 8.

74. See above discussion of Secwépemc legal principles and relational outlook.

reactions may not be articulated as such, due to first erasure, we characterize the conflicts or resistance arising from these interactions as state law imposing itself without recognizing Secwépemc laws and Secwépemc legal actors reacting to those impositions out of necessity in order to fulfill their legal obligations and uphold Secwépemc law.

Responses to this interaction, of course, can take multiple forms. In many instances, however, we notice that Secwépemc people address unlawful state acts by educating others on Secwépemc legal obligations (and the values underlying them) when directly engaging with people giving effect to state legal decisions.[75] For example, as expressed by the elder Julianna Alexander:

> [I]t's our responsibility to make sure those things aren't getting damaged and it's not happening. We're trying to tell these hydro people no more dams, no more logging where sensitive habitat is… You know, you're putting trees up there that aren't worth anything. Because it takes 100 years for a tree to be 100 years old, but they're putting trees in there—they are ready what in… five years, ten years even and then you cut them down again. They don't give the trees a chance to give oxygen.[76]

Shirley Bird explained her understanding of Secwépemc legal responsibilities to protect the land in a similar manner:

> We can't wait for others; we need to do something today, to have something put in place. I see Mother Earth suffering. She needs a lot of help. And for the other races to help, [to] listen. To help us get things put into place to help us understand what we are trying to do. To understand… how to revive and to, to help… keep that life cycle going the way it used to be.[77]

Here, we can see Secwépemc legal actors demonstrating and articulating the dialogical values underlying the transmission and operation of Secwépemc laws and the articulation of the more "risk averse" values underpinning Secwépemc laws and legal processes.[78] However there is also sense of urgency and frustration from being stuck in the

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75. *Secwépemc Analysis*, *supra* note 18.

76. *Ibid* at 13. This is also an example of an enforcement mechanism of community pressure or embarrassment.

77. *Ibid* at 46.

78. Napoleon, Friedland & McBeth, "Pluralism", *supra* note 64 at 7.

unenviable position of having such statements often ignored and always characterized as something other than central Secwépemc legal principles by Canadian state legal actors, who have the power to resource and enforce their legal decisions in a way the Secwépemc currently do not. There is a genuine conflict in legal values, but this is something that can be worked on through mutually respectful legal relationships between communities, or Nation-to-Nation relationships. Indeed, however imperfectly, similar conflicts happen all the time between states, provinces, or federal-provincial governments. The worldview that prevents Canadian legal actors from recognizing Secwépemc jurisdiction, legal authority or laws also prevents a necessary change in approach towards more respectful and productive engagement between legal traditions.

IV. CURRENT SPACES FOR ENGAGEMENT: LEGAL PRINCIPLES, ENVIRONMENTAL ASSESSMENT PROCESSES, CONSULTATION AND LITIGATION

Despite the irreconcilable worldviews of the existence and validity of Secwépemc laws and jurisdiction in Secwépemcúlecw, and despite the differing, even conflicting legal values holding Canadian and Secwépemc lands and resources laws, there have been spaces within the current Canadian legal system that the Secwépemc people have utilized to apply and assert their laws, with varying effects.

A. The Continued Operation of Secwépemc Laws

Many Secwépemc legal principles, often characterized as protocols which demonstrate respect for the earth and non-human life, can, and *do* operate without any interaction (negative or positive) with state law. These are often legal practices that reflect a low-impact engagement with the land and care for non-human life forms, and abide as part of the general orientation of Secwépemc laws. For example, one community witness notes that when harvesting plant life, "you don't take every berry off that bush. You leave some for the bears and some for the animals that are there" and "you're taught which medicines and you don't over harvest."[79] Similarly, when discussing non-human life

79. *Secwépemc Analysis*, *supra* note 18 at 45.

forms' right to live and reproduce, one witness talks about trying to "target males" when gaff fishing.[80] A community witness echoes this right through a discussion of *Coyote and the Black Bears,*[81] a story in which Coyote attempts to kill a mother bear and her cubs for a robe he does not need. The witness's response: "if you need [a robe] you don't kill all three […] you have to make sure the cubs are going to — if you leave them — […] survive."[82] These comments reflect the individual actualization of Secwépemc laws by Secwépemc people, which has persisted throughout the history of the Secwépemc people.

Of course, it is of critical importance to restrain ourselves from presenting an overly romantic vision of how Secwépemc law operates in practice when not directly engaging with colonial law. It would be unhelpful to suggest that Secwépemc legal principles have operated without any intervention from Canadian law or colonialism, or that Secwépemc legal principles have never changed as a result of changing circumstances. As Julianna Alexander noted:

> Because we're witnessing a change in how we harvest […]. Like, for fish, even the fish, we're always supposed to only take what we need, not hoarding it, selling it, doing all those… we're doing it for all of the wrong reasons, but at the same time we're doing it because we have to survive and because we're forced to, because… we want to live this certain life… have to pay higher — pay your gas, and your phone and, you know, all that other stuff. It's like you're forced to do these things.[83]

Indeed, throughout our work, witnesses commented on how legal practices have changed over time as a result of changing circumstances. As one witness put it, when discussing the underlying principle that law evolves and is integrated into Secwépemc history: "[W]hat works, we keep — what doesn't, [we] don't. And they change according to the changes, I guess — might be different ways to deal with theft now than when they did long ago by implementing new and old laws."[84] This statement acts as an important reminder of the

80. *Ibid* at 47.
81. Teit, "Coyote and the Black Bears", *supra* note 1 at 638.
82. *Secwépemc Analysis*, *supra* note 18 at 47.
83. *Ibid* at 45.
84. *Ibid* at 15.

fact that we need to be thinking, and talking about the practice and operation of Secwépemc law using the present tense.[85]

Although individual actualizations of legal principles can be sites where no interactions occur, when people's living practices come into conflict with colonial law, they can become points of tension, extreme intervention, violence and contestation. For example, there is a current focus in the Secwépemc community on protecting grizzly bears because of outside hunters' greater access to them. One community member, Randy Williams, discussed this issue during a conversation about the responsibility to protect the land and non-human life: "Now we have the consequence of protecting the grizzly bear there because [people] come from Alberta and they take its life so they can sell its parts and everything… cause now there's road accesses into there."[86] He then goes on to talk about some of the consequences of not fulfilling this legal responsibility in the context of medicines:

> And so, if we don't protect our medicines and everything that are on those sacred mountains, they will be gone, too, and exploited, like they do with the mushrooms… and because we don't have the laws to protect it. And the non-natives have no laws. So those are some of the consequences for not responding [*sic*].[87]

When Canadian laws authorize unlawful activities pursuant to the Secwépemc legal tradition, the Secwépemc must engage with Canadian legal actors within the Canadian legal system in order to uphold Secwépemc law. The spaces for this engagement lie within environmental assessment processes, consultation processes, and litigation.

B. State Environmental Regulations, Principles and Assessment Processes

Many pieces of British Columbia's legislation speak to the importance of consulting with First Nations to make appropriate decisions within state law. In the legislative context, this means taking into consideration Aboriginal "interests," "perspectives," or seeing Indigenous

85. See the importance of this in Borrows, "Physical Philosophy", *supra* note 20. In *R v Sparrow*, [1990] 1 SCR 1075 at 27, the Supreme Court expressly rejected a "frozen rights" approach to Aboriginal rights on the basis that all practices and traditions evolve over time.

86. *Ibid* at 46.

87. *Ibid* at 46–47.

communities as one of the many stakeholders to inform of decision-making under British Columbian legislation. For example, the *Environmental Assessment Act* underscores the importance of an integrated review of a project's effects, including potential environmental, social, health, heritage and economic impacts.[88] This review includes ensuring a participation from diverse stakeholders, such as government agencies, First Nations, local governments and the public.[89] First Nations might be invited to take part in Regional Mine Development Review Committees, which are often involved in "sensitive" projects, however these committees also include representatives from other government agencies.[90] Mining proponents are also required to consult with potentially affected First Nations and include reports of this consultation in a report in support of any application.[91]

Secwépemc people can, and do bring their Secwépemc legal reasoning, with the outcomes of their legal decision-making processes,[92] to Canadian legal processes. Thus, these consultation processes may include conversations about Secwépemc law, however this does not mean Secwépemc legal principles or decisions will affect final decision-making on a project. Ultimately, it is the Chief Inspector, not the Secwépemc decision makers, who considers consultation and accommodation efforts and makes the final decision.[93] This makes these processes of engagement fraught. On the one hand, they may be the only space available to articulate Secwépemc law and legal priorities. On the other hand, in their erasure of Secwépemc law as *law*, these processes of interaction or consultation become yet another means of erasing Secwépemc legal authority, subsuming all conversations within the confines of Canadian law. Once again, the worldview preventing Canadian legal actors from engaging with Secwépemc lands and resources laws as *laws*, and the conflict in values shaping the orientation

88. *Environmental Assessment Act*, *supra* note 50, ss 6 and 10.

89. British Columbia, Environmental Assessment Office, *Environmental Assessment Office User Guide: An Overview of Environmental Assessment in British Columbia* (Victoria: Environmental Assessment Office, January 2018) at 4, online: <www.eao.gov.bc.ca/files/EAO-Guidance-EAO-User-Guide.pdf> [EAO User Guide].

90. British Columbia, Ministry of Energy and Mines, *Proponent Guide to Coordinated Authorizations for Major Mine Projects*, version 1.0 (Victoria: British Columbia, 2013) at 14–15, online: <www.for.gov.bc.ca/ftp/major_projects/external/!publish/web/mining/Proponent_Guide_Major_Mine_Projects.pdf>.

91. *Ibid* at 19–20.

92. *Secwépemc Analysis*, *supra* note 18 at 29–56.

93. *Ibid* at 51–56.

of legal decision-making in both legal traditions, impact the interpretation and application of legal principles found in both legal traditions which, on their face, sound quite similar.

At first glance, there are numerous similar legal principles in Secwépemc and Canadian law that appear to hold the promise of legal pluralism.[94] For example, Secwépemc lands and resources laws have a general underlying principle of respect. The foundational principle of respect underlies all relationships and interactions among people, as well as between people and the environment.[95] Respect is also a feature found in state law instruments such as the *Environmental Assessment Act*, particularly as that specific legislative framework relates to decisions affecting First Nations.[96] Transparency emerges as a principle in both legal traditions, particularly in relation to consultation or public participation in decision-making processes.[97] Commitments to relationship building are articulated in both Secwépemc and Canadian laws relating to lands and resources. For example, the BC government calls on mining proponents "[t]o engage with all potentially affected First Nations communities in meaningful dialogue and relationship building, to gain an understanding of the potential impacts of the project and First Nations' expectations for participation in the project."[98]

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94. There are undoubtedly quite a number of distinct principles in each legal tradition such as, most strikingly, the provisions which favour economic growth at the expense of ensuring the land, water and environment's long-term health. However, sometimes principles stated in state law are at odds with other state legislation as well. For example, although not explicitly stated in the legislation, the British Columbia's mining regime is based on the principle of free entry, which provides companies with: permission to access a large area of land for prospecting; the ability to claim the land with no consultation; exclusive rights to conduct exploration work and to extract and sell minerals found within the claim. The principle stands in stark contrast with environmental protection, relationships with First Nations and meaningful public participation. The free-entry system in BC allows proponents to acquire mineral rights simply by staking a claim. Furthermore, by staking a claim, mining companies are granted *exclusive* rights to the minerals in that area. This system gives mining priority over any other land uses in BC. See Jessica Clogg, "Modernizing BC's Free Entry Mining Laws for a Vibrant Sustainable Mining Sector" (Vancouver: West Coast Environmental Law, 2013), online: <www.wcel.org/sites/default/files/publications/WCEL_Mining_report_web.pdf>; Ramsey Hart (Mining Watch Canada) & Dawn Hoogeveen, *Introduction to the Legal Framework for Mining in Canada* (July 2012), online: <miningwatch.ca/publications/2012/7/18/introduction-legal-framework-mining-canada>.

95. *Secwépemc Analysis*, *supra* note 18 at 17.

96. EAO User Guide, *supra* note 89 at 7.

97. *Ibid* at 3, 6; *Mines Act*, RSBC 1996, c 293, s 34; *Forest and Range Practices Act*, SBC 2002 c C-69, s 18 (sets out that forest stewardship plans must be made available to the public for comments before being submitted for government approval); GPMPA, *supra* note 50 at 6, 15.

98. GPMPA, *ibid* at 10.

These principles are visible in Secwépemc laws regarding the responsibility to communicate their legal principles to outsiders,[99] teach law to community members[100] and build relationships of mutual legal understanding with neighbouring communities.[101] Secwépemc legal processes are also highly consultative, incorporating the broader community or parts of it in either consultation or decision-making, depending on the legal issue at hand.[102]

Unfortunately, there is no shared understanding of how these seemingly common legal principles are interpreted and applied in practice. Although both legal traditions invoke ideas surrounding "respect," "transparency," "consultation" and "relationship," their definitions and the way in which they are integrated in practice diverge dramatically. For example, the idea underlying the Secwépemc's principle of respectful relationships lies in mutual recognition. This requires people with different laws to understand the laws, needs and interests of one another and to respect those laws.[103] Arguably, mutual recognition is a prerequisite for developing mutually respectful agreements. Canadian law, however, often views the emergence of relationships and agreements through a completely different understanding. For instance, the Environmental Assessment Office's view is based on respect for the asserted and established Aboriginal rights, Aboriginal title and treaty rights of First Nations.[104] This wording invokes respect and does not preclude mutual recognition or learning. However, in practice, Canadian legal actors are only held accountable to *their* legal standards of what constitutes "respecting" a relationship, as opposed to standards based on Secwépemc legal principles or evaluated by Secwépemc legal decision makers. This is telling of the work that needs to be done to tease out the legal concepts that seem comparable at first glance, but may be false cognates in their operation.

Crossing this divide in legal understandings are informal interactions between participants in the two legal traditions. For example, Secwépemc principles respecting transparency and relationship building

99. *Secwépemc Analysis*, *supra* note 18 at 51–52.
100. *Ibid* at 66–67.
101. *Ibid* at 30–31, 48–49.
102. *Ibid* at 26–28.
103. *Ibid* at 29–31.
104. EAO User Guide, *supra* note 89.

appear in Tina Donald's discussion of her interactions with the Department of Fisheries and Oceans Canada (DFO) officials:

> [O]ne of the things that I try to do here, in our community, is invite those management people to come here. You know, the ones that are up here in DFO and forestry and the RCMP and whatnot, because there is always that negative impact that people pass on to their kids. Kids should know them as friends… to come here in our community, go out on the land you know. To our first fish ceremony to see the different things that we are doing with them in the community… so that they know how we live and how we depend on the fishing resource or the forestry resource, or what have you, so that they have an understanding of where we're coming from and not just always shaking our fist at them trying to get fish back here. You know, [get them to] talk to our elders or talk to our staff and our youth so that they have that understanding.[105]

This comment is similar to a subsequent one provided by another community member, Pat Matthews, on the importance of expressing Secwépemc legal principles in written form (in this case in fishing and hunting guidelines):

> I think [the guidelines are] more important when other nations come in to fish and hunt and stuff because… they don't know or understand what we're trying to do, right? But we've never really sent it out to them to say "here are our principles or our guidelines."[106]

As these quotes illustrate, finding ways to explain needs, interests and laws to outsiders also provides opportunities to build relationships with outsiders. In both cases, Secwépemc people are putting Secwépemc legal principles into effect, although it may not be understood as such by state legal actors. We can characterize these interactions as either a form of education or an attempt to respectfully collaborate with outsiders, such as state officials. We consistently see Secwépemc legal actors doing their best to communicate Secwépemc law, needs and interests in order to influence the operation of Canadian law and individual actions within Secwépemcúlecw. However, there has been very little uptake from Canadian state legal actors.

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105. *Secwépemc Analysis*, *supra* note 18 at 52.

106. *Ibid*.

It is, at least in part, this lack of reciprocal engagement that prompted the collaboration between SNTC and ILRU. SNTC leaders were directed by their Elders' Council to develop a natural resource law regime to manage "our own natural resources in a way that the non-aboriginal people will understand."[107] In other words, one of the principled Secwépemc legal responses to lack of state interaction and Canadian law's erasure or indifference to Secwépemc law, was this work on articulating their law. The goal was, undoubtedly, to create something that could help the Nation, but also provide practical means for state law to engage with Secwépemc law and the Secwépemc people. This is a direct attempt at interaction, through a process of synthesizing and organizing Secwépemc legal principles in a readily accessible and understandable form.

The outputs developed through ILRU-SNTC collaboration will be used to build internal governance instruments, including a code of ethics that can be applied when state government officials engage in consultation with Secwépemc leadership. Here, we see potential for Secwépemc law to influence the direction of Canadian law, potentially borrowing from it or tailoring the effect of state law within Secwépemcúlecw by seriously engaging with Secwépemc legal principles and processes. What remains to be seen, however, is whether these attempts will result in Secwépemc law being recognized and followed by state law. There is a legitimate concern that if these accessible restatements of Secwépemc lands and resources laws are only used within colonial law processes, the conversation will still be drawn within the state legal frame rather than meet somewhere in the middle.

C. Constitutional Consultation and Accommodation

In the Canadian constitutional law context, consultation has a more specific meaning reflecting the historical Aboriginal peoples' (as defined in the *Constitution Act, 1982*) relation to the Crown.[108] The duty to consult and accommodate, in the context of lands and resources, most often arises with outsiders' desire to engage in activities to extract or use resources on Indigenous lands. Many have criticized how the duty to consult is implemented in practice, but for our purposes, what is crucial to underscore, again, is that it is Canadian law, as

107. *Ibid* at 1.

108. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35(1).

opposed to the many Indigenous legal traditions across the country, that defines what consultation looks like and, most problematically, when and how it is necessary or fulfilled.[109] The Supreme Court has referred to pre-existing Indigenous law in Aboriginal rights cases,[110] and we can imagine conversations that include Secwépemc law in these spaces of engagement. However, they should not be confused with interactions between legal traditions that could exist within horizontal, Nation-to-Nation relationships. Yet again, the underlying worldview that there is authority to act on Indigenous territory unless state law, not Indigenous law, directs otherwise, continues to be a powerful obstacle to the promise of legal pluralism provided in section 35 of the *Constitution Act, 1982*.

D. Aboriginal Title Claims and Litigation

Secwépemc people have strategically engaged in litigation within Canadian courts in order to uphold legitimate Secwépemc legal decisions over how to use lands and resources in Secwépemcúlecw. Again, in litigation contexts we notice some interaction between legal traditions, albeit within the context of state law. For example, after there was a legitimate Secwépemc legal decision to log in Secwépemcúlecw, the Province of British Columbia asked Secwépemc communities to stop logging their own territory, which provincial legislation had designated Crown forest land. In that case, the Ministry of Forests ignored their jurisdiction and ordered them to stop. Ultimately the Ministry obtained an injunction to prevent further logging, not because they opposed logging per se, but because they opposed the Secwépemc logging.[111] The Secwépemc defended themselves by filing an Aboriginal Rights

109. See *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511. In British Columbia, many First Nations have sought to work within state law through litigation when consultation or relationship-building measures have been inadequate. See *Gitxaala Nation v Canada*, 2016 FCA 187, wherein the Coastal First Nations and the Gitga'at Nation filed a suit against the BC government, challenging the Province's ability to delegate assessment duties to the federal government without consulting with First Nations. They won their case in July 2016. See also "Gitga'at First Nation Celebrates Federal Court of Appeal Victory Overturning Approval of Enbridge Northern Gateway Pipeline," *Vancouver Observer* (1 July 2016), online: <www.vancouverobserver.com/news/gitgaat-first-nation-celebrates-federal-court-appeal-victory-overturning-approval-enbridge>.

110. *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 66 BCLR (3d) 285; *R v Marshall*, [1999] 3 SCR 456, 246 NR 83; *Tsilhqot'in*, *supra* note 48.

111. *British Columbia (Minister of Forests) v Westbank First Nation*, 2000 BCCA 316, 75 BCLR (3d) 250.

and Title claim. Throughout litigation, the Province of British Columbia fought the basic premise that the province's forest legislation was unconstitutional based on the Secwépemc people's Aboriginal Rights and Title.[112] Although the debate occurred entirely within the context of a Canadian court, ultimately to the detriment of the Secwépemc, this was a case where the Secwépemc communities asserted their ownership of the trees and thus their own jurisdiction to make legal decisions regarding the use of those trees, based on Secwépemc legal principles and processes for balancing all the necessary factors to make a legitimate decision.

Perhaps the most striking example of the operation and assertion of Secwépemc lands and resources laws within Secwépemcúlecw in recent years is the Stk'emlúpsemc te Secwépemc Nation's (SSN) Indigenous Environmental Assessment Process and Plan. This process was developed in response to the KGHM Ajax Mining Inc's application for an environmental certificate for the Ajax Project to the provincial and federal governments. The mining site, Pipsell, near Jacko Lake, is a significant historical site for the Secwépemc people and is embedded in oral narratives outlining Secwépemc law.[113] The SSN created a timeline that would enable the process to occur alongside and collaboratively with the federal/provincial process,[114] and allow the SSN to release its decision to Canada before the end of its process. The SSN set out the purpose of the process as to "[f]acilitate informed decision-making by the SSN communities in a manner which is consistent with our laws, traditions, and customs and assesses project impacts in a way that respects our knowledge and perspectives."[115]

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112. *Ibid*.

113. Some of the reasons given for the SSN Project Assessment Process include: the exclusion of Secwépemc law and land tenure; the exclusion of Indigenous resources such as oral tradition; the exclusion of important voices, such as youth, elders and families; the exclusion of ceremony; the lack of examination of historical impacts on the land and the legacy or wrongs; the use of western methods alone to assess solely environmental and socio-economic impacts of the mine; no examination of the spiritual, cultural, traditional or First Nation perspectives; the premise that the corporation is the title holder of the mineral, land and water claims; and the perpetuation of the concept that cultural practices can simply be practiced in other areas or that impacts can be justified. See Chief Ron Ignace, "Pipsell Decision: Yiri7 re Stsq'ey's-kucw—Our Ancient Deeds to the Land," (presentation delivered to the UBCIC Chiefs Council Meeting, 2 June 2016) [unpublished] [Ron Ignace, UBCIC Presentation].

114. Stk'emlúpsemc te Secwépemc, Media Release, "Stk'emlupsemc t Secwépemc Nation Implements its Own Assessment Process for the Proposed Ajax Project" (10 September 2015) online: <stkemlups.ca/files/2015/09/SSN-Media-Release-SSN-Project-Assessment-Process-for-Ajax-Project_Sept-10-2015.pdf>.

115. *Ibid*.

The SSN process took into consideration Secwépemc law, allowed oral and written evidence, used both western and Secwépemc methods, and examined both historical context and discussed "intangible" impacts to spirit and culture, thereby capturing important legal principles within Secwépemc law. The review process was built on the "Walking on Two Legs" principle — Secwépemc and Western sources of knowledge presented in both oral and written formats. The SSN panel had 46 members, incorporating elders, youth, families, chiefs and council, capturing important aspects of Secwépemc legal process and procedure. The SSN, constrained by the concurrent Environmental Assessment Process, set the time period to have a decision made before the final state law assessment.[116] On 4 March 2017, the SSN announced its decision not to give free prior and informed consent to the development of lands and resources at Pipsell for the purposes of the Ajax Mine Project.[117] Chief Fred Seymour said it does not make sense to sacrifice the Nation's land in a sacred area for a project that will only span 20–25 years.[118]

As the SSN example shows, there are ways to engage multiple legal traditions in decision-making. In this case, the SSN laid out a transparent, comprehensive, achievable process that could easily be recognized by people working with state environmental assessment processes. By doing this hard work, it revealed potential for overlap, as well as points of difference between the legal traditions. This process can, could and should inform future environmental processes by highlighting means for discussion, collaboration and proper consultation, or by providing a template for how Canadian law itself can be amended and grow.

The SSN process operated according to Secwépemc legal principles and processes and international legal instruments above and beyond Canadian law. However aspirational and inspiring, within the current legal environment, the SSN's separate process was not enough to halt

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116. Cam Fortems, "Chiefs to Declare Aboriginal Title of Ajax Mine Site," *Kamloops this Week* (18 June 2015), online: <www.kamloopsthisweek.com/chiefs-to-declare-aboriginal-title-of-ajax-mine-site/>.

117. Stk'emlúpsemc te Secwépemc, Press Release, "Honouring Our Sacred Connection to Pípsell: Stk'emlúpsemc te Secwépmc Says Yes to Healthy People and the Environment" (4 March 2017) online: SSN <stkemlups.ca/files/2013/11/2017-03-ssnajaxdecisionsummary_0.pdf>.

118. Brent Patterson, "Stk'emlupsemc te Secwépemc Nation Rejects Ajax Mine in Kamloops" (19 March 2017) *Brent Patterson's* (blog), online: <canadians.org/blog/stk'emlupsemc-te-secwepemc-nation-rejects-ajax-mine-kamloops>.

the mining project at Pipsell. By the end of June 2016, SSN also made a declaration of title on Pipsell (Jacko Lake)[119] and the adjacent area—lands that, according to state law, are owned by KGHM Ajax.[120] The title claim was meant to protect Pipsell and Secwépemcúlecw.[121] In this particular case, because Canadian state legal actors were not willing or able to engage with the Secwépemc legal process, the Secwépemc were left with little choice but to strategically use litigation in Canadian courts, in conjunction with other strategies, in order to uphold Secwépemc law and protect Secwépemcúlecw.

V. A WAY FORWARD: WHAT THE "STORY OF PORCUPINE" AND COLLABORATIVE LEGAL RESEARCH TEACH ABOUT LEGAL PLURALISM AND NATION-TO-NATION RELATIONSHIPS?

> When Elk and his people arrived, Swan feasted them and when the feast was over, he and all his people knelt down before Elk. Swan told him all he knew of the affairs of both people and told him in what way he thought they did wrong. Swan gave Elk all his knowledge and all his advice.
>
> Then Elk and his people all knelt down before Swan, and Elk gave him all his ideas and knowledge. Each people gained full knowledge of the other, and together became able to plan doing what was right. After this they lived much easier and happier than before and the methods of one party did not come into conflict with those of the other.
>
> The laws made at the council are those which govern animals and birds at the present day. Porcupine got his rich present of dentalia, and was much envied by Coyote.[122]

The "Story of Porcupine" starts with two groups of people at odds: operating in the world without recognizing one another, and thinking

119. Daybreak Kamloops, "Declaration of Title Over Jacko Lake Officially Signed by Local First Nations", *CBC* (22 June 2015), online: <www.cbc.ca/news/canada/kamloops/declaration-of-title-over-jacko-lake-officially-signed-by-local-first-nations-1.3122750>.

120. Andrew Findlay, "Kamloops at the Crossroads," *BC Business* (22 September 2016), online: <www.bcbusiness.ca/kamloops-at-the-crossroads>.

121. Ron Ignace, UBCIC Presentation, *supra* note 113.

122. Teit, "Story of Porcupine", *supra* note 1 at 659.

badly of one another. Of course, this story is not an entirely fair analogy to the relations between Canada and the Secwépemc. That story of Canada and the Secwépemc, rather, is marked by the resistance and persistence of Secwépemc law in spite of Canadian law's resolve to erase it. Notwithstanding that difference in context, the story provides direction on how two groups of people whom, as a result of their historical relations, have been placed into oppositional positions, might come together and resolve their differences.

The two main protagonists of the story start off with, arguably, extremely different worldviews. Swan and the birds, as opposed to Elk and the mammals, have different kinds of governments and live and work differently. The birds fail at what the mammals do well, and the mammals fail at what the birds do well. Their points of view and gifts to the world are unique. However, instead addressing their differences, they interfere with one another, making life difficult for everyone sharing the land.

This continue until one day, Swan decides to "remedy the defects of both parties" so they can live without "continual interference." His belief? That ignorance is the cause for all their troubles. Through a community-engaged process, a delegate is chosen to bring an invitation for reconciliation to Elk. Eventually Porcupine takes up the challenge. Elk responds to the invitation favourably and arrives, with all his people, to where Swan and his people are the next morning.

We would like to stop here to mention an important intervention we experienced during our conversations about this story. In one of our focus groups, a community member, Paul Michel, raised an issue he had with the English translation of the story, which characterizes the two groups as "enemies":

> Now, they were, kind of, separated from each other, but they weren't necessarily enemies. But that's where [James Teit] got "well why would they be separated, why wouldn't they talk?" so he put the English word "enemies" in. And then he believed that the troubles all arose from "ignorance"—but really not. It's similar, but it's not ignorance, so that he just used [*sic*] an English word. And then at the end it goes "the methods of one party…" well it would be the philosophy, right. It's a really profound philosophy, not methods. But that's an English word. There are English words and thoughts because he didn't

> have, necessarily, the grasp [*sic*] because he was coming from the English language.[123]

This comment is a critical piece for learning in the "Story of Porcupine." Moving forward, as people, or as legal traditions in search of pluralism, means to critically engage with, and question, first, and premises of history, worldview and language. It's a reminder of the folly in assertion and assumption, and of the requirement to make our assumptions transparent, to the best of our ability.

However, as demonstrated through our collaborative process, it is equally important to not let our fear of missing key differences paralyze the conversation. Whether or not the two people are enemies, whether or not the two are ignorant or something else, the critical step is to find a process for engagement. In the broader context of relationship between the Secwépemc and Canada, the "Story of Porcupine" provides a road map to move forward towards a true Nation-to-Nation relationship within a pluralistic legal system. As depicted in the story, the first step towards reconciliation between the Swan and Elk people is achieved when a leader expresses the desire "to remedy the defects of both parties, and to enable them to live without continual interference."[124]

In the "Story of Porcupine," the two groups came together to create laws that govern animals and birds to this day. They feasted, kneeled down before one another, and gave each other all their knowledge, ideas and advice. It was once "each people gained full knowledge of the other," "they became able to plan doing what was right."[125] This enabled both groups to live easier and happier than before, and their methods no longer came into conflict with one another.

Looking back on the collaborative research project, there is no doubt that starting from a place of humility and understanding one's own lack of knowledge is critical for developing mutually beneficial relationships with positive outcomes. It is also critically important to understand where one's gifts are in a relationship and be willing to offer those as readily as accepting what is gifted back. This is our understanding of the "Story of Porcupine"; a story where space is made to respectfully acknowledge one another, not just for the purpose of

123. *Secwépemc Analysis*, *supra* note 18 at 16.

124. Teit, "Story of Porcupine", *supra* note 1 at 658.

125. *Ibid* at 659.

respecting each other's laws, but because there is an understanding that it is in everyone's best interest to find ways to work together.

Prior to engaging in this collaboration, some of the ILRU researchers would not have so readily recognized instances of Secwépemc law, let alone its interactions with Canadian law. All of them would have been exposed to the dominant colonial narratives that limit notions about what law is and perpetuate the colonial myth on the absence or extinction of Indigenous (including Secwépemc) legal traditions. However, all of them began from the perspective that Secwépemc laws do exist and should be engaged with, respectfully and seriously, as *laws*. Through a deeper engagement with oral stories and conversations with the community, the outsider researchers gained a greater ability to see, and a greater vocabulary to articulate, Secwépemc law. This reinforced our collective view that legal researchers engaging in revitalization efforts need to commit to a period of sustained, rigorous immersion in the resources of an Indigenous legal tradition prior to, and in addition to engaging with knowledgeable community members.

Legal processes and procedure also make visible both the existing operation of Secwépemc law and the potential for healthy interaction with state law. Within the Secwépemc legal tradition, respect for neighbours is tied to acknowledging them as self-governing communities with authority over their own laws and practices.[126] Publicly creating agreements, fostering and respecting these agreements,[127] and providing opportunities to consult with different peoples, are key components of legitimate decision-making processes.[128] Processes only move from being consultative to protective when there is a need to take a more protective stance towards law. However, like many operational principles, it is within this shift towards the protection of a community that interactions between legal systems begin to become visible to those standing outside of a legal system.

One example stands out from our direct experience with this project. In the midst of one of the ILRU-SNTC focus groups' activities, an issue arose involving a person's ability to access resources. Specifically, a person harvesting resources was stopped by conservation officers. This is an everyday example of how Canadian law continues to

126. *Secwépemc Analysis*, *supra* note 18 at 48–49.

127. *Ibid* at 20.

128. *Ibid* at 27–28.

assert its authority on, and attempts to erase Secwépemc law, around peoples' authority to access and harvest resources. At that point in the focus group, the direction of the conversation changed, as one of the elders, Ronnie Jules, articulated his thoughts on how to proceed to resolve the pressing legal issue at hand. In his description, we see many types of potential interventions with Canadian law through a process that resonates with the decision-making processes we identified in our engagement with Secwépemc law:[129]

> [W]e should… have some of the tribal council, chiefs or […] [the witness] and meet with the parks, top parks personnel, RCMP, even […] have a two-day workshop where everybody has tables and then presents [*sic*] their interests: conservation officers and fisheries, DFO, forestry. And [there]… we [can] put forth our… history [and] laws, in a nice two-page newsletter [that] goes out to everybody… RCMP, fisheries, elders, conservation officers, which shows where we fish, hunt and gather. Everybody stating that this is where you can [harvest], we're not in treaty [*sic*]. And you will not be harassed if you go to… the old… areas where there [are] fences — now there [are] "no trespass" signs. Some of them could be taken down, even those gates.[130]

Take note that the first intervention is to educate the outsiders on Secwépemc history and laws and tell them where the Secwépemc people have rights to fish, hunt and gather, which is a Secwépemc legal principle for upholding Secwépemc law.[131] The opportunity to consult, explain, and collaborate enables the enforcement of Secwépemc law. Ronnie Jules continues:

> In the North, they started the treaty, what 25 years ago? This has slowed development in the North. And in the meantime, this has sped up development in the South, in areas historically used by Secwépemc for fishing, hunting and gathering.
>
> In the last 15 years those gates have been blocking our people from going in there… and now we can't… teach the kids

129. *Ibid* at 26–33: some of these steps are consultation with community, identifying key individuals to act, identifying interests, listening to all sides, negotiating, and the intention to act to ensure long-term community survival if negotiation is not successful.

130. *Ibid* at 32.

131. *Ibid.*

> because they can't go in there. Our gathering areas are now "out of bounds" for us and it hurts our elders' hearts. We don't want to lose that—we can gain it back… the elders will put the names, the native names to the mountains…[132]

Here we also hear the elder's views on the consequences of not interacting with Canadian law through the modern BC Treaty Process. His reflection, to the effect that the development of lands has slowed in places where the community is negotiating a treaty with state governments, is reflective of the punitive response of Canadian law and legal agents to those who reject its processes and authority. In his final comment above, he talks about reclaiming the lands and putting "the native names to the mountains." Although not explicitly, this sentence reflects a more protective orientation to process, which undoubtedly would engage the state's legal system in a more direct fashion.[133] These are all legal processes that were encountered in our engagement with Secwépemc law.

We see possibilities for legal pluralism in these interactions. As others have posited, and demonstrated, although it is fundamentally more helpful to start from a place of mutual understanding, we believe some principles and processes can be negotiated productively prior to reconciling the broad, more abstract paths to those principles.[134] As Val Napoleon explains:

> At a practical and accessible level,[135] a legal pluralist approach could begin with [something tangible]: a river, a caribou herd, a mountain valley, or other geographic site. The indigenous laws for that site, river, or caribou herd must be ascertained, substantively articulated or restated. Corresponding state law must also be identified. A plurality of law could flow from first, identifying those aspects of Indigenous law that converge with state law and could be interfaced. Second, coming to a mutual agreement to continue Indigenous law that does not require

132. *Ibid.*

133. *Ibid*.

134. Jeremy Webber, *Strategies of Justice* (2009) [unpublished] (Webber calls it "carpenter's justice"). Perhaps the most striking example for this is the co-management regime negotiated between the Haida, BC and Canada on Haida Gwaii, which begins with all parties stating the broad issues they disagree on (e.g. sovereignty, a sea goddess) and then proceed to develop what has been a workable and successful forestry co-management regime.

135. Napoleon, Friedland & McBeth, "Pluralism", *supra* note 64 at 11.

> State recognition or acknowledgement for an implicit coexistence of law. Ongoing attention to the dialectic of Indigenous/State relations could ensure that both internal and external legal interactions are brought into focus by generating both a normative and functioning understanding of both state and non-state legal orders.[136]

CONCLUSION

The leaders of the Secwépemc Nation have expressed their desire to live in a mutually beneficial and cooperative manner since first contact. This intent was perhaps best expressed in the Memorial to the then Prime Minister, Sir Wilfrid Laurier, written by Chiefs of the Shuswap, Okanagan and Thompson Tribes in 1910:

> Some of our Chiefs said, "These people wish to be partners with us in our country. We must, therefore, be the same as brothers to them, and live as one family. We will share equally in everything—half and half—in land, water and timber, etc. What is ours will be theirs, and what is theirs will be ours. We will help each other to be great and good."[137]

This memorial symbolizes the Porcupine. It was sent by the three Nations in BC to Canada as a statement of intention to reconcile their outstanding and ongoing grievances. However, unlike the leadership of Elk, this olive branch has not been embraced in good faith. For over a century, the Secwépemc's desire to engage in true Nation-to-Nation relations has been ignored and denied.

While decades of historical relations have put the relationship between the Secwépemc Nation and Canada in a precarious state, there is hope for a new discussion to emerge which would allow the fulsome exchange of information and knowledge sharing to occur, and ultimately for understanding to be achieved. It is Elk's receptiveness to Swan's proposed reconciliation that led to their ability to come together as equals, humbled before one another, coming to a place where their differences could be settled and their respective legal orders work together, rather than in opposition to one another.

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136. *Ibid*.

137. Letter from the Chiefs of the Shuswap, Okanagan and Couteau or Thompson Tribes, "To Sir Wilfrid Laurier, Premier of the Dominion of Canada" (25 August 1910), online: <shuswapnation.org/to-sir-wilfrid-laurier/>.

Similarly, while we move towards the ideal of mutual understanding of legal traditions, we do not believe it is a prerequisite for legal pluralism. Indeed, it might be achieved through processes of respectful engagement, as our research collaboration demonstrates, which enable the exchange of such knowledge by visibilizing the law. Unlike the "Story of Porcupine," we recognize that full knowledge may not be shared in one meaningful event, but rather in a series of events, where people can share their ideas and develop methods to work together or not to come in conflict with one another.

The current Canadian government earnestly wants to work towards a mutually respectful relationship between legal traditions and peoples, as stated by Prime Minister Justin Trudeau:

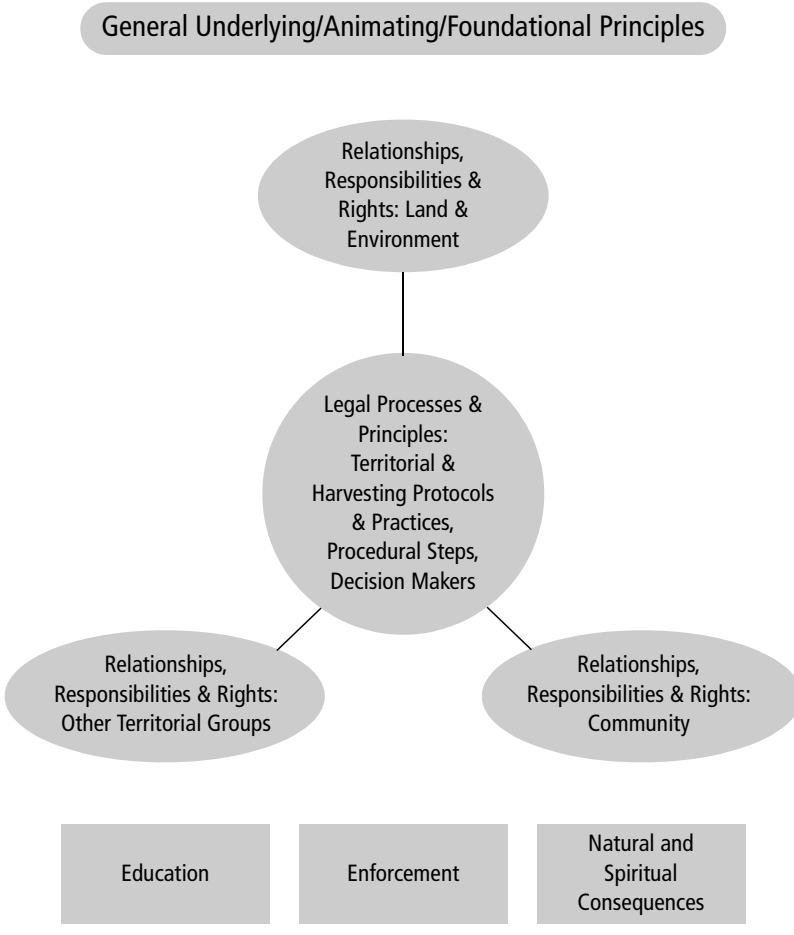
> No relationship is more important to our government and to Canada than the one with Indigenous peoples. Today, we reaffirm our government's commitment to a renewed nation-to-nation relationship between Canada and Indigenous peoples, one based on the recognition of rights, respect, trust, cooperation, and partnership.[138]

Despite these good words, we have to accept that Canadian state law may continue to struggle with the worldviews, values and a lack of experience we have identified in this paper. Fortunately, Secwépemc law provides many rich resources and precedents to proceed towards renewing and building respectful relationships.

138. Justin Trudeau, "Statement by the Prime Minister of Canada on National Aboriginal Day" (Ottawa, 21 June 2017), online: <pm.gc.ca/eng/news/2017/06/21/statement-prime-minister-canada-national-aboriginal-day>.

APPENDIX A — ILRU ENVIRONMENTAL ISSUES FRAMEWORK[139]

Visual Representation:



139. The ILRU Original Analytical Framework (2009) and the ILRU Environmental Analytical Framework (2015) were created by Hadley Friedland.

General Principles are foundational or animating, and may inform all other principles.

Education, Enforcement, Natural & Spiritual Consequences uphold and reinforce principles.

Legal Principles and Processes, such as *protocols*, *practices*, *procedures* and *decision makers* all serve to help people decide how to **balance relationships**, **responsibilities** and **rights** with, of and to *land and environment*, *other territorial groups* and *community* in a principled and legitimate way.

ILRU Environmental Framework:

The framework contains several categories, each one focusing on a particular aspect of Secwépemc law regarding land and natural resources:

1. **General Underlying Principles:** What underlying or recurrent themes emerge in the stories and interviews that are important to understanding more specific points of law?

2. **Legal Processes:**

a. **Territorial Protocols and Practices:** How do people demonstrate respect for each other's territories?

b. **Harvesting Protocols and Practices:** How do people demonstrate respect for the natural resources they are harvesting?

c. **Procedural Steps for Making and Maintaining Agreements or Resolving Conflicts:** What steps do people take to resolve conflicts or establish and maintain agreements for appropriate access and stewardship of natural resources between families or groups?

d. **Authoritative Decision Makers:** Who has the final say? Where and over what resources?

3. **Relationships, Responsibilities and Rights:**

a. **Land:**

- **Relationship with the Land:** What are the relationships between people and the land? Animals? Plants? Water?

- **Responsibilities to the Land:** What are people's responsibilities to the land? Animals? Plants? Water? Are there certain individuals, families or clans who have particular responsibilities to care for certain territory or resources?
- **Rights of the Land:** How should people be able to expect others to treat the land? Animals? Plants? Water?

b. Other Territorial Groups:

- **Relationships with Other Territorial Groups:** What are the relationships with other groups with overlapping/adjoining territories?
- **Responsibilities to Other Territorial Groups:** What are the responsibilities to other groups with overlapping/adjoining territories? How should people act when they need to access resources within another group's territory?
- **Rights of Other Territorial Groups:** How should other groups with overlapping/adjoining territories expect people to act in their territories? How should people expect to be treated when they need to access resources within another group's territory?

c. Community:

- **Relationships Within the Community:** What are the significant relationships related to natural resources within this group? Leaders? Vulnerable/Those in need?
- **Responsibilities to Others in the Community:** What are the responsibilities related to natural resources to others within the community? Leaders? Vulnerable/Those in need?
- **Rights of People in the Community:** What should individuals be able to expect regarding access to needed resources? Are there certain individuals, families or clans who should expect to access or control access to certain territory or resources?

4. Consequences, Enforcement and Teaching:

a. Consequences: What are the natural and spiritual consequences of accessing and sharing resources in a respectful and sustainable way, or of not doing so?

b. Enforcement: What are the consequences that people have designed and implemented to ensure others are following the legal principles related to accessing and sharing natural resources?

c. Teaching: What are effective ways in which people learn, or teach others about the legal principles related to accessing and sharing natural resources?