

**THE OLD PEOPLE ARE THE SONG, AND WE ARE THEIR ECHO:
RESURGENCE OF WSÁNEĆ LAW AND LEGAL THEORY**

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Abstract

This dissertation attends to pressing questions of strategy and tactics in relation to Indigenous law revitalization in the context of the climate crisis. Grounded in my own W̱SÁNEĆ legal order, I provide an accounting of the context in which the resurgence of W̱SÁNEĆ law is occurring, and clarity regarding what we hope to accomplish with the revitalization of W̱SÁNEĆ (and more broadly, Indigenous) law, both locally and in response to global climate crisis. Doing so prompts questioning of the very foundations of Canadian constitutionalism, and indeed, our most basic ideologies and conceptualizations of our place and relationships within the world. From a position that our theory and methodology of Indigenous law revitalization, and our diagnosis and approaches to the climate crisis must be intricately entwined and mutually reflective, the dissertation sets out to argue that nothing short of a fundamental reimagining of our relationships within the world, and thus the social, legal, political, and economic structures those relational understandings condition, is required. For example, I offer a critique of capitalism not simply as an economic system, but as a way of understanding and organizing our relationships and place within the world.

Approaching such encompassing questions requires the creation of conversations across fields such as Indigenous law, critical Indigenous studies, and political ecology. Since the work of Indigenous law revitalization must avoid pan-Indigenous abstractions, I begin by examining the nature of my own W̱SÁNEĆ legal order, on its own terms, including the ways in which it reflects and generates out of the values, lands, waters, and worldviews of the W̱SÁNEĆ people. Beyond that I demonstrate how the revitalization of W̱SÁNEĆ law, and the tools and actions that might be used to further that objective, are entangled within the relational dynamics of settler colonialism. Further complicating matters is the reality that W̱SÁNEĆ law, and the responsibilities and obligations it entails, including to the land and more-than-human world, are also immersed in the dynamics and diffuse harms (spatial and temporal) of global climate crisis.

I explore the connections between Indigenous law revitalization, settler colonialism, and climate crisis most directly through two chapters centered around the themes of property, dispossession, and jurisdiction. One chapter focuses primarily on land, examining specific and ongoing processes of land dispossession within W̱SÁNEĆ territory, turning then to a critical examination of the Tsawout First Nation's efforts for #LandBack through a BC Supreme Court

claim and the challenges presented in efforts to uphold W̱SÁNEĆ legal responsibilities to those lands. The following chapter shifts attention to the marine environment, specific processes of jurisdictional dispossession of W̱SÁNEĆ ocean territory, and a critical examination of tools such as National Marine Conservation Area Reserves and Indigenous Protected and Conserved Areas, including the potential openings and jurisdictional barriers that present themselves in attempting to implement and uphold W̱SÁNEĆ laws and responsibilities to the ocean and other beings who call it home. Together these chapters also highlight aspects of the tension and balance between pursuing various resurgence and reconciliation-leaning approaches, particularly their potential advantages and disadvantages given the context of climate crisis and in light of my critiques of capitalism.

Guided by W̱SÁNEĆ law and the responsibilities and obligations it entails, how might we navigate ongoing dynamics of settler colonialism and climate crisis? While some form of “decolonized” relationship with Canada seems necessary but insufficient within the context of a global climate crisis, what would actually be required to meaningfully respond and reimagine healthy relationships between all beings? Will forms of state-delegated authority, such as co-management agreements, or forms of “green capitalism”, such as market measures or carbon offsets for Indigenous-led conservation, ever suffice to address our longstanding, and yet continually unfolding, predicaments of settler colonialism and climate crisis? As I argue for a more foundational re-imagining of our relationships and place within the world, my analysis also reveals that we are not left groundless in this re-imagining as we can draw upon the wisdom and practices housed within our respective Indigenous traditions.

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Glossary of SENĆOTEN Terms

ÁLEN – “home or house”

ÁLENĀNEÇ – “homelands”

ĆEĆIKEN – “mink”

ĆELÁĀNEN (or SĆELÁĀNEN) – “ancestry or birthright”

ĆENQOLEW – “the moon during which the dog salmon return to the Earth”

ĆENTEKI – “the sockeye moon”

ÇEÇEÁT SELI – “a life of dignity”

DAKE,ĪĆ – “salal bush”

ENEÇ – “place of, or land of”

EN SW SELÁWE – “the one you are poor for; I am your pitiful one”

ESE – “I, me; it is I; I did, I am”

HÍSWĶE – “thank you”

ĪNES – “grandchild”

JĀ,E – “brother-in-law or sister-in-law when their spouse has died”

KÁTELĆ – “oceanspray or ironwood bush”

KELĻELMEĆEN – “Orca, killer whale, blackfish”

KĻO,EL ENEÇ – “place of Camas”

ĶO – “water”

LAHAL – “bone game”

MESEN – “gall bladder”

NEHIYMET – “ancestral, family name, birthright name”

OLEXET – “to teach and pass on the ways of gathering; the ways of survival”

QEN,DOLES – “smooth round stone”

QOLEW – “chum salmon (or dog salmon)”

SĆANEW – “the working; salmon; Salmon People”

SÇENÁ,Ł - “an adopted child”

SDIU,I,EL – “prayer”

S,ELWÁÁN – “elder, advisor, or oldest person in the family”

SENĆOTEN – “meaning my mouth; the Saanich language”

SHELIS – “the hole at the end of a reef-net; coming from SHELI, meaning soul of life spirit”

SIÁM – “to be respected, or high class”

SKÁLS – “beliefs / laws”

SĶELÁLNEW - “the bad people put away; large fir tree”

SĶELE,EĆEN – “cedar or fern dance society”

SLEQAI – “dunegrass”

SMIET – “deer”

SOŁ – “road, trail, path, or way”

S,OXHELI – “sacred teachings of life”

SPÁ,ET – “black bear”

SQOL,WES – “a parent or sibling of one’s son-in-law or daughter-in-law”

SWÁLET – “reef-net location; reef-net fishery; reef-net; reef-net gear”

SXE,ÁNEW - “bullfrog; large frog”

SXÍXI – “mask dance society; participant in the mask dance society”

SXOLE – “a reef net”

SYELMEWĆES – “hand rattle society”

ŚÍYEĹ - “older sibling”

ŚWIST – “where we paddle to, to sustain our way of life”

ŚWOMETs TTE SELSELI ĆSI ŚĆENNE – (“ancestral beds of the lives within the sea”)

TEKI – “sockeye salmon”

TENEKSEN – “mallard, or earth-nose”

TEXTÁN – “one’s inheritance; sacred society or societal birthright one belongs to”

TESIP – “licorice fern”

TETACES – “islands, or Relatives of the Deep”

W - “breath of the people”

WEXES – “small frogs, peeper; March (the Moon of the Frog)”

WILNEW – “person (and Indigenous or First Nations person)”

WSÁNEĆ – “the emerging people”

XAXE ENEĆ – “sacred place”

XÁLS – Creator or The Transformer

XPĀ – “western red cedar”

Glossary of SENĆOTEN Place Names

- ĆUÁN – “each end; in reference to mountains on each end of island” (Saltspring Island)
- E,HO – “did you hear; burial ground” (Bridge Trail Park between North and South Pender)
- ĶELJI,EWEĻ – “norther tip of ĻEL,TOS” (North tip of James Island)
- ĻÁU,WELNEW – “place of healing or place of refuge” (Mount Newton)
- ĻEL,TOS – “splashed on the face” (James Island)
- MÁ,LEXEL – “Malahat Reserve” (Mill Bay)
- PKOLS – “white rock” (Mount Douglas)
- QENELEĻ – “looking into the groin” (Mount Finlayson)
- S,ĆUÁN – “one on each end” (Mount Tuam)
- S,DÁYES – “wind drying; referring to drying salmon” (Pender Island)
- SELEKTEL – “the splitting stream” (Goldstream River)
- SISØENEM – “sitting out for the pleasure of the weather” (Halibut Island)
- SNIDØEL – “place of the blue grouse” (Tod Inlet)
- SMOĶEĆ – “bluff” (point Roberts)
- STOLØEL – “place way out” (San Juan Island)
- STÁUTW – “houses raised up; Tsawout Reserve” (Saanichton Bay)
- SXIXTE – Pelkey family reef-net site (Bedwell Harbour)
- SXOXÍEM – “still waters” (Willis Point)
- TEKTEKSEN – “long nose” (East Point on Saturna Island)
- TEUXÁLEĆ – “giant; refers to a story at this place” (James Island sandbar)
- TIXEN – “sandspit” (Cordova Spit)
- WE,ĆE,ĆE or WĆEĆEĆE – “creek at Tod Inlet; imitates sound” (Tod Creek)

W̱EN,NÁ,NEĆ – “facing W̱SÁNEĆ” (Fulford Harbour)

W̱JOŁEŁP – “place of maple leaves; Tsartlip Reserve” (Brentwood Bay)

X̱EL,ISEN – “lost middle” (Canal between North and South Pender)

YOS – “caution” (Mount Jeffery)

Acknowledgements

I owe thanks to many people, and I feel that those should be offered in person. It may take some time, but I hope we can all meet up soon.

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To all of those I have mentioned here, and to all of those who have been a part of this journey in big or small ways, thank you so very much for being there. I am honoured that you took the time and energy to be a part of this with me.

HÍSWKE HÁLE

Dedication

For my son, Luca. The moments in which I see the world through your eyes, are the moments that I treasure the most. Thank you for being such a good teacher. All my Love!

PART I

Chapter One

From Where I Speak

HÍSWKE NEÇE XAXE TITEL SIÁM. HÍSWKE MEQ ÇEN SÇA ÁLE E TIÁ TENEW. HÍSWKE MEQ TFE SILE Ç,SE LÁ,E TFE NOS SPWELLO. TXINET TOLW ÁLE E TIÁ TENEW. TINET TOLW I, ÇENÁNET TOLW I,TELÁT E TFE ÍY, SOŁ. IYES ŁTE MEQ ÇENs SÇA. MEQ ÇENs LÁ,TEN E TFE TENEW I, TFE Á,LEÑENEÇ ŁTE. MEQ TFE XAXE TITEL SNÁNET ŁTE: ŁÁU,WEL,NEW, SPÁ,ET, SNAKE, PKOL,S, WSÁNEĆ I, WSÁ,SENEĆ I, W,MÍETEN I,YOS. U, MEQ LELÁNEN SW HÁLE. MEQ U, NEÇILYE SI,I,ÁÁM. I,Á,MEKT NE SDIU,I,EL LÁ,E TFE XAXE E TIÁ ÁNEÇ. QENT TFE NE SČALEČE, QENT MEQ TFE NE ŠWELOKE. MEQ OL TFE NE NENNENE I, TFE NE STOLEs I, MEQ TFE STETI,ÇEN, I TFE NE SŁA,EL I, TFE NE SNÁTWEN I, SNENÁ,EN. HÍSWKE SIÁM E TFE S,JESENEÇ I, MEQ TFE TELETOFELNEW, I, ŠETEN ČOLEK I, TFE ŠISEĆ I, MEQ DENO,EN TFE KO, I TFE TŁÁLSE. ČEK TFE ŠÇEN,NE I, TFE SDÁÇEN I MEQ TFE TELETÁÇES. LELÁNEN SW NEÇILYE SI,I,ÁÁM. MEQ I,ÇELEN, I, QELENSEN I, TFE JESKEN. TW SŁEWÁL SW TFE SČÁÇEL MEQ U ŁNINEŁ. ČA,NEUEL, I ČA ÇENTOL I, ŠTENIST TOLW E TFE ÍY, SOŁ E TIÁ ÁNEÇ. HELIT SW XAXE TITEL SIÁM EN SÇA TFEN SHUĆISTENs I, TFEN SOXHELI. MEQ TFE NE ŠČALEČE (STOLÇEL, 2004).

Thank you high respected one, sacred spirit. Thank you for everything you have made on the Earth. Thank you for grandmother and grandfather four winds. Take pity on us the ones you left on this Earth. Take pity on us and help us take a good path on Earth. We are happy for everything you made on Earth and our homeland. All of our sacred mountains: Mt. Newton, Bear Hill, Mt. Tolmie, Mt. Douglas, the whole of Saanich and the little Saanich Mountain. All of you listen, all of your respected spirits. Listen to me respected hono(u)rable ones. Bring my prayer to the Great Spirit today. Look after my relatives. Look after my brothers, sisters, my children, my partner, all my nieces and nephews. My in-laws and my brother and sister in-laws and thank you respected one for the entire showing of things. All of the animals walking in the hills in the forest, salt water, ocean, and the lakes and all islands. Listen all of my respected ones all the ones flying, Bald eagle, Golden Eagle. Let there be peace amongst us today. Work together with one another. And move us forward on a good path today. Let your sacred teachings and environment laws live. All my relations.

STOLÇEL, 2004¹

1. Structure

Having opened with a SDIU,I,EL (prayer), WSÁNEĆ protocol dictates that next you understand who I am and where I come from. To do so is to understand that I speak from a web of relationships that shape the words I share and the contributions I offer. In expectation of standard

¹ STOLÇEL, 2004, quoted in Renee Sampson, *WÍÁLKEN NE SKÁL: SÇESTELISITE's SENÇOTEN Auto-ethnography*, (M.Ed. Thesis, University of Victoria, 2014) [unpublished] [Sampson, *Auto-ethnography*] at 7.

academic conventions whereby I immediately introduce the central problem or inquiry of my work, followed by a sketch of the arguments to follow, some readers may find this apparent lack of structure somewhat disorienting. I ask you to bear with me because what I offer is not unstructured, but rather, is an introduction to a different structure. Since this structure may be new to you, I take the time not only to offer a SDIU,I,EE and to introduce myself and where I come from, but also to explain in some detail why that matters and how it is part of W̱SÁNEĆ law. Such a structure honours one of the central contributions of this work, which is to begin understanding the nature of W̱SÁNEĆ law on its own terms, as well as what is at stake in its revitalization.

My contributions in regard to understanding the W̱SÁNEĆ legal order fall squarely within the field of Indigenous law. Yet, the potential disorientation my adherence to this alternative structure might induce also foreshadows a broader contribution I make, which is that both the meaningful revitalization of Indigenous law and the necessary actions and orientations required in mitigating climate crisis require not only an openness to questioning foundational structures of Canadian law and constitutionalism, but indeed, even our most basic understandings of our relationships and place within the world. Beginning with a SDIU,I,EE and the structure that follows therefore not only honours a willingness to think, act, and feel our way to a deeper understanding of W̱SÁNEĆ law, but also offers and orientation toward healthier relationships and the more-than-human world that seems necessary in the context of climate crisis.

2. SDIU,I,EE (Prayer)

In W̱SÁNEĆ the work of governance is opened with a SDIU,I,EE. A SDIU,I,EE sets the tone for the work that is to be undertaken, and seeks guidance from both the Creator and our ancestors. It gives thanks “for all the things XÁLS the creator has given us on this Earth in this life.”² It opens our minds and starts our work with a pure heart. Beginning in this good way is essential to the outcome of the work being undertaken. A value we are taught as W̱SÁNEĆ W̱ILNEW (W̱SÁNEĆ people) is that the thoughts, intentions, and feelings we bring to our work not only affects, but also stays with and becomes a part of the product of the work itself. A positive outcome to any work therefore requires coming to it with a good heart and mind.

2. *Ibid.* at 8.

My Auntie Belinda Claxton shared these teachings with me while we harvested cedar together at ŁÁU, WELNEW, our sacred mountain. In reading the work of SXEDTELISYE, Renee Sampson, I am reminded that a dissertation is also work that should be opened with a SDIU, I, EŁ.³ This dissertation is not merely *about* WŚÁNEĆ law, but is an embodiment, and my own process of better understanding WŚÁNEĆ law in my effort to promote its revitalization. I hope for positive outcomes through this work. So, it is with hope, an open mind, and a good heart, that I come to undertake this research and writing.

To expand upon the notion of prayer given above, I wish to introduce SDIU, I, EŁ as a legal concept in WŚÁNEĆ law. Hadley Friedland defines a legal concept as “a legal categorization that triggered (or triggers) collective reasoning processes and felt obligations within broader Indigenous legal traditions.”⁴ Within WŚÁNEĆ law there is an obligation to open acts of governance with a prayer. The person(s) giving the prayer is (are) usually a hired speaker(s) - certainly the case at larger and more formal events - or someone who has been asked by an organizer of the event to provide a prayer. The SDIU, I, EŁ is usually given by an elder, spiritual leader, or recognized speaker. As described above, the SDIU, I, EŁ sets the tone and asks for guidance in the work to be undertaken. It functions with the intent to create a collective respect or atmosphere between those engaged in the process, and to guide the structure and manner of engagement between participants.

It is important that the SDIU, I, EŁ happen at the outset of the gathering, before the work of governance begins. I have made this misstep before, during the first day of the WŚÁNEĆ law field course I taught through the University of Victoria, Faculty of Law. I knew to begin with a SDIU, I, EŁ, and had invited a speaker, Scott Sam, to give a prayer and to drum a welcome song for the group of students beginning the class with me. I stood to introduce myself and to invite a prayer, but in the moment, I began to speak of the course, what it was about, and how excited I was to be a part of it. After my (albeit short) talk, I introduced and called upon Scott Sam. I realized my mistake, and was also gently reminded by my cousin, Lorne Underwood, that I had kept our invited speaker waiting as I failed to open the space to begin with a prayer. In correcting my misstep I made an apology to Scott Sam, and later pointed out and acknowledged my mistake to the class.

³ *Ibid.*

⁴ Hadley Louise Friedland, *The Wetigo Legal Principles: Cree and Anishinabek Responses to Violence and Victimization* (Toronto: UTP, 2018) [Friedland, *The Wetigo*] at 38.

As a legal concept, beginning with a prayer is an act that foregrounds relationships with the Creator, and connects the work being done with the spiritual realm. It “triggers collective reasoning processes and felt obligations” with the Creator.⁵ As Anishinabeg scholar, Aimée Craft, describes in regard to Anishinabe law, “The Anishinabe define their obligations and responsibilities in terms of relationships [and] the first of these relationships is between the Anishinabe and the Creator.”⁶ Followed by relationship with the Creator is that with Mother Earth, and then with air, winds, animals, plants, and the like.⁷ “These relationships exist between all things at all times.”⁸ As Craft continues, she notes that “relationships thus define the *roles* of each living thing in this creation. In turn, the obligations and responsibilities come from our role in creation.”⁹ In speaking directly to the negotiation of Treaty One, Craft argues that, through adherence to Anishinabe protocols and ceremony, the Anishinabe and Crown representatives came to treaty agreements with “the Creator as a third party, [meaning that] the Anishinabe view the treaty relationship as sacred.”¹⁰ While W̥SÁNEĆ law differs from Anishinabe law, it is useful to consider how spirituality and the legal concept of SDIU,I,EŁ frames the work of governance that follows it.

Opening with a SDIU,I,EŁ is a legal practice that is foundational to all other operations of governance. In Canada we are accustomed to hearing national anthems to begin proceedings, or in courtrooms to witnessing oaths and solemn affirmations as part of the work of law. Typically, these are thought of as procedural, as opposed to substantive, elements of the law. Within W̥SÁNEĆ law, however, the spiritual dimension and content of the SDIU,I,EŁ traverses the boundary between legal process and substance. Certainly, opening with a SDIU,I,EŁ is seen, and spoken of, as a *protocol* within W̥SÁNEĆ governance. The English Oxford Dictionary defines protocol as the “official procedure or system of rules governing affairs of state or diplomatic occasions.”¹¹ Yet, beginning with a SDIU,I,EŁ is meant to structure and bear directly upon the substantive work of governance to follow. Again, turning to Craft and her work with Treaty One, she writes that “the mutual reliance of the treaty parties on Anishinabe protocols, or

5. *Ibid.*

6. Aimée Craft, *Breathing Life Into the Stone Fort Treaty: An Anishinabe Understanding of Treaty One*, (Saskatoon: Purich Publishing, 2013) [Craft, *Stone Fort Treaty*] at 70.

7. *Ibid.*

8. *Ibid.*

9. *Ibid.* at 71.

10. *Ibid.* at 81.

11. Oxford University Press, *Lexico Online Dictionary*, 2019 s.v. “protocol”.

procedural laws, invoked substantive normative expectations on the part of the Anishinabe.”¹² In W̱SÁNEĆ law, beginning with a SDIU,I,EL, while potentially viewed as protocol, or procedural law, also invokes substantive normative expectations regarding how those present will interact with one another, the intentions they bring to the work being done, and ultimately, the quality and content of the work completed.

In Canadian law, a procedural oath to God, when undertaken in times of more prominent religious adherence, perhaps had similar intentions in that the procedure of giving an oath was meant to ensure truthful information was given, and thus to have direct bearing upon the substantive outcome and application of substantive law. In a largely secular society, the procedural element of swearing an oath or solemn affirmation loses much of its significance. As will be seen in the case of W̱SÁNEĆ law, the framework through which W̱SÁNEĆ law remains intelligible is in connection with W̱SÁNEĆ beliefs, worldviews, and values. As such, beginning with a prayer is not seen as purely procedural. In fact, as my late grandfather, Earl Claxton Sr., taught, we do “everything with a prayer”¹³ - whether it is walk in the forest amongst our relatives, or take a fish for food. Ultimately, a SDIU,I,EL is a W̱SÁNEĆ legal concept that triggers a variety of “collective reasoning processes and felt obligations.”¹⁴

2.1. The Role of Belief (or Cosmology)

Prior to moving on it is worth foreshadowing the ways in which W̱SÁNEĆ cosmology informs our understanding of W̱SÁNEĆ law. The W̱SÁNEĆ legal order is deeply connected with W̱SÁNEĆ culture and beliefs. The connection between law and culture is true of all legal traditions.¹⁵ Law is always embedded within a broader cultural context,¹⁶ which suggests not only that you cannot separate the two, but that believing you can risks distorting our understandings of both law and culture.¹⁷ As such, my understanding is that one cannot bracket

12. Craft, *Stone Fort Treaty* at 71.

13. Earl Claxton Sr. & Ray Sam, *Everything with a Prayer: S̱CI NONET (The Song of Our Beliefs)*, (Saanich: Tsawout First Nation) [Draft in authors personal possession].

14. Friedland, *The Wetigo* at 38.

15. Lawrence Rosen, *Law As Culture: An Invitation* (Princeton: Princeton University Press, 2006) [Rosen, *Law as Culture*].

16. Rosen expands on this point: “But context is crucial: When we hear a court speak of the “conscience of the community,” “the reasonable man,” or “the clear meaning of the statute,” when we watch judges grapple with parenthood as a natural or functional phenomenon, or listen to counsel debate whether surrogate motherhood or a frozen embryo should be thought of in terms of “ownership,” we know that the meaning of these concepts will come not just from the experience of legal officials or some inner propulsion of the law but from those broader assumptions, reinforced across numerous domains, that characterize the culture of which law is a part.” *Ibid.* at 6-7.

17. *Ibid.* at xii. He writes: “Indeed, it is to suggest that law is so deeply embedded in the particularities of each culture that carving it out as a separate domain and only later making note of its cultural connections distorts the nature of both law and culture.

cosmology or worldview when seeking to understand WSÁNEĆ law. In fact, as I was taught, in the SENĆOTEN language¹⁸ we can interpret the word SKÁLS as meaning both beliefs and laws.

My positioning on this point has implications. Hadley Friedland and Val Napoleon have done significant work in enhancing the accessibility of Indigenous law through their legal synthesis methodology.¹⁹ In her work, *The Wetiko Legal Principles: Cree and Anishinabek Responses to Violence and Victimization*, Friedland opts to “bracket the bigger cosmological questions in the interests of accessibility to the legal principles” surrounding the Wetiko, and their application in Cree law to child victimization.²⁰ The nature and subject matter of her inquiry allow her to more easily undertake this bracketing of cosmological understanding. Yet, her choice to bracket cosmology goes beyond undertaking her specific research project and references an important point about the accessibility of Indigenous law, to both Indigenous and settler peoples seeking to understand these legal principles. She writes, “many Indigenous people today are not growing up, entirely, or at all, within the cosmology that [some] argu[e] is a crucial component to properly understanding the *wetiko* concept.”²¹ Of course, the same point can be made regarding the even smaller number of Indigenous peoples growing up with, or obtaining, a western legal education, on which the legal synthesis methodology hinges. Nonetheless, the important and larger point Friedland is making reflects the need to make Indigenous legal principles workable, and therefore applicable, within communities. To that extent, Friedland “do[es] not mean to minimize the importance of understanding the broader cosmology of a legal tradition,”²² and specifically recognizes “why it is so important to build a Cree legal pedagogy.”²³

The central impetus of my work is to better understand the WSÁNEĆ legal order²⁴ and how it works, “on its own terms.”²⁵ For that, it is not possible to bracket cosmology. I recognize

18 SENĆOTEN is the language of the WSÁNEĆ people.

19. Val Napoleon & Hadley Friedland, “An Inside Job: Engaging with Indigenous Legal Traditions Through Stories” (2016) 61:4 McGill LJ 725 [Napoleon & Friedland, “An Inside Job”] for more on this methodology.

20. Friedland, *The Wetiko* at 48.

21. *Ibid* at note 152 on p. 47.

22. *Ibid.* at 48.

23. *Ibid.* at note 152 on p. 47.

24. Andrée Boisselle uses the term “legal order” to reference a self-identifying polity exercising jurisdiction over a territory in a manner recognized by other neighbouring groups. As such, various distinct legal order co-exist within a broader Coast Salish “legal tradition”. Andrée Boisselle, *Law's Hidden Canvas: Teasing Out the Threads of Coast Salish Legal Sensibility* (PhD Dissertation, University of Victoria, Faculty of Law, 2017) [unpublished] at 35 [Boisselle, *Law's Hidden Canvas*]. I therefore use the term Coast Salish legal tradition to describe a number of distinct Indigenous legal orders that are anthropologically and linguistically related. In a later chapter I will also discuss how the term Coast Salish also might risk glossing over important particularities and place-based nature of these legal orders.

25 The orientation of striving to understand a legal order “on its own terms” is exemplified in the research and reflection of Andrée Boisselle on the Sto:lo Legal order. *Ibid.* at 17.

that my insistence on some level of cosmological understanding can create challenges in fostering accessibility, and for our ability to make normative proclamations regarding specific applications of W̱SÁNEĆ law. It is not that we cannot get there, but that more work is required upfront. A critical first step, in my understanding, is to understand the worldview – that is, the relational ontology – from which W̱SÁNEĆ law is generated and rooted within. I will return to this theme in later chapters, arguing that relationality, properly understood, precludes essentialism – a possible concern raised in response to my general positioning on cosmology.

I agree with Friedland about the importance of re-building, in this case, W̱SÁNEĆ legal pedagogy. Many people do not grow up as immersed in W̱SÁNEĆ law and beliefs as once did. It is for that reason we speak about the *revitalization*, or the *resurgence*, of W̱SÁNEĆ law. My personal experience on this journey of W̱SÁNEĆ law revitalization has always led me first, and continually back to, understanding the fundamental connection between our laws and beliefs. All the elders and knowledge holders who have taken the time and patience to speak with me about W̱SÁNEĆ law have emphasized this connection. I honour and respect their wisdom and teachings, and I too continue to emphasize the connection between laws and beliefs - our SKÁLS - while on my path for a deeper understanding of W̱SÁNEĆ law.

In SENĆOTEN, the word SOŁ means road, trail, path, or way. Our W̱SÁNEĆ creation stories show us the way in our revitalization of W̱SÁNEĆ law and governance. The path of revitalization must be walked by many people. Or perhaps better stated, many people must walk a path toward this revitalization. Having understood, and hopefully *felt*, the legal concept of SDIU,I,EE, I invite you, the reader, to continue on this path with me, with a pure mind and open heart. After all, you too are an important part of this work.

HÍSWŶKE SIÁM (thank you, respected one).

3. ESE (Me)

As mentioned, in accordance with W̱SÁNEĆ protocol, and Indigenous methodologies, it is important I also begin by introducing myself. Only then can you understand how the words I share and the contributions I offer are shaped by who I am, and where I come from.

My name is Robert Clifford. My NEHIYMET, the ancestral name I carry, is YELKÁTTŦE. I am W̱SÁNEĆ and a member of the STÁUTW̱ village (Tsawout First Nation). My mother is YELKÁTIYE, Rebecca Clifford. My father is Ray Clifford. My sister is TŦOLIYE, Rachelle Clifford. The ancestral name I carry, YELKÁTTŦE, comes to me from my

late maternal grandfather, Earl Claxton Sr. My late grandfather was from STÁUTW. He was the son of YELKÁTTE, Johnny Claxton, and XETXOTELWET, Elsie Claxton (nee Pelkey), both from STÁUTW. It is through my great-grandmother, Elsie, that my family and I are related to our cousins, the Pelkey family. My maternal grandmother is Joanne Claxton. She is Squamish and came to STÁUTW when she was 16 years old, after leaving residential school. My late paternal grandfather was Joseph Clifford, and my late paternal grandmother was Delphine Clifford, both of whom have ancestry that links back to the United Kingdom. Both of my paternal grandparents died when my dad was a teenager, and I never had the chance to meet them. I also have many cousins and relatives that I don't have the chance to mention here. I married Susannah Clifford (nee Hollebone). We have a now five-year-old son, Luca Clifford, and live at STÁUTW.

In WŚÁNEĆ we speak by first introducing ourselves, our family, and where we come from, positioning ourselves in a web of relationships. Our ancestral names do the same. In WŚÁNEĆ, names have great significance and our NEHIYMET, or oldest ancestral name, connects us to our familial lines. Our NEHIYMET also connects us to our TEXTÁN, our societies and societal rights. “Each family has names that belong to them. It is part of your SĆELÁNEN, your family's history.”²⁶ I now carry the name YELKÁTTE, but that name has deep roots and was carried by others before me. “A name means very little without the history connected to [it].”²⁷ To receive that name has been a great honor, and responsibility. I have been taught that the TTE, at the end of YELKÁTTE, links together several names within our broader family and relates to an ancestor of ours who came across a particular good fortune, and with that good fortune a responsibility. I was also taught, however, that the particulars of that story are not meant to be shared with others outside of our family. When I refer to carrying the name YELKÁTTE, I am referencing and honouring my ancestors, and positioning myself alongside them. Carrying that name obligates me to care for it and to pass it along, with the history and responsibilities that come with it, when the time comes.²⁸

As a boy I was named with a blanketing ceremony and SXÍXI dancers in the longhouse at STÁUTW (Tsawout). Through our NEHIYMET, our family is connected to the SXÍXI (mask

26 Helen Jack, “NĪL EN SĆELÁNEN” in Tye Swallow, ed., *ÁLENEĆ: Learning From Homeland* (Saanich: The Saanich Adult Education Centre and The Saanich Indian School Board, 2008) 29 [Jack, “NĪL EN SĆELÁNEN”] at 29.

27 *Ibid.* at 30.

28 See *Ibid.* for more.

dance) society. I was honoured to stand and be blanketed next to my cousin SXEDQELÁNEW, Micah Claxton, while he received his name as well. Witnesses were called and a feast was held to validate the naming. At the time, several names could potentially have been passed to me. My mother recalls conversations she had with my late grandfather to determine which name I would be given. The process of choosing a name involved not just familial relationships, but a consideration of who I was as a person and a sense of what type of person I would become, including the role I might assume within the W̱SÁNEĆ community. As Andrée Boisselle writes in her study of the Stó:lō legal order, and broader Coast Salish legal tradition, names “signal what one has been seen to have done and become, and what one is being set up to accomplish and live up to.”²⁹ Names therefore extend “beyond the norms structuring belonging conceived as a birthright...into the expectations surrounding the actual exercise of political agency.”³⁰

To be clear, the name YELKÁTFE has shaped the direction of my life and work, and it shapes this research project. To understand how that is, you need to know a bit more about my grandparents, and particularly about my grandfather. Having that understanding fleshes out the specific subjective obligations associated with my name, which then makes way for a discussion of kinship and names as a legal concept in W̱SÁNEĆ law.

3.1. How My Name Shapes Me and Shapes this Work

My late grandfather - the late YELKÁTFE - was from STÁUTW and was raised within the SENĆOTEN language and the W̱SÁNEĆ culture.³¹ Over the course of his life he accomplished a great deal in helping to save the SENĆOTEN language. In W̱SÁNEĆ the number of fluent SENĆOTEN speakers dwindled and an urgency to keep the language alive arose. The work of late Dave Elliott Sr., my grandfather, John and Linda Elliott, late Philip Paul, and others, provided an impetus in SENĆOTEN language revitalization. Philip Paul envisioned, and helped bring about, the creation of the LÁU, WELNEW Tribal School, and my grandfather and John Elliott worked together to create books and curriculum tools for teaching and documenting the language. Much of that work was possible because of Dave Elliott Sr. and his creation of the

²⁹ Boisselle, *Law's Hidden Canvas* at 266.

³⁰ *Ibid.*

³¹ My great-grandmother, Elsie Claxton, for example, knew a great deal about plants and medicines, working closely with Nancy Turner at the University of Victoria on ethnobotany work. See Nancy J. Turner & Richard J. Hebda, *Saanich Ethnobotany: Culturally Important Plants of the W̱SÁNEĆ People* (Victoria: Royal BC Museum Publishing, 2012) [Turner & Hebda, *Saanich Ethnobotany*].

SENĆOTEN alphabet, having sensed the inadequacy of the international phonetic alphabet for the W̱SÁNEĆ people and the sounds of the SENĆOTEN language. Today, the ŁÁU, WELNEW Tribal School has a SENĆOTEN immersion program that empowers W̱SÁNEĆ youth through embedding them in W̱SÁNEĆ culture and language.

My late grandfather earned an honorary Doctor of Laws from the University of Victoria in recognition of his work with SENĆOTEN. It was an honour for me to be there with him on that day as Nancy Turner presented his honorary degree, and as he spoke to the crowd about W̱SÁNEĆ place names. Although my grandfather accomplished much in terms of language revitalization, his children and grandchildren did not become fluent speakers. He often spoke SENĆOTEN around us, but we were not taught the language or in a position where we were exposed to it enough to pick it up on our own. At times I wish I paid closer attention or been more active in my learning, and at other times I contemplate the discomfort my grandfather may have felt teaching us a language that he saw so many people prejudiced against for speaking during his lifetime. My grandfather avoided residential school, though obtained only a grade three formal education as a result. He was an incredibly smart man and could seemingly build anything with his hands. I learned a lot from being around him, and while out fishing together. My grandmother did not manage to avoid residential school and didn't have the chance to maintain her Indigenous language, *Skwxwú7mesh sníchim* (the Squamish language). She too has been a central role model in my life, teaching me to always be true to myself and to trust in the strength of family.

I cannot speak SENĆOTEN, and I have at times felt that an important part of me was (I don't want to say missing, but) in need of having the strength of our language re-connected within me. Part of my work has involved an effort to begin learning some SENĆOTEN. Many people continue to work tirelessly on revitalizing the SENĆOTEN language, and I raise my hands to all of you. I have had the opportunity to sit with and learn from, in particular, J, SINTEN (John Elliott), PENÁĆ (David Underwood), ØOSINIYE (Linda Elliott), SELILIYA (Belinda Claxton), and the late SELÁMTEN (Lou Claxton) while they did language work at the school. I have also had the chance to walk with and to learn from Kevin Paul during this time. The time they have taken to sit with me, and the language and teachings they have shared, have been invaluable to my learning.

My point is to emphasize how the name, YELKÁTTE, and the work of my grandfather while carrying that name before me, shapes me. It shapes the work that I do, and it shapes the way in which I go about that work. As I moved through an undergraduate degree at the University of Victoria, I envisioned a career where I could be of service to the W̱SÁNEĆ and other Indigenous Nations. Law school and Aboriginal law seemed the best path to do that. Yet, law school and becoming a practicing lawyer took a toll, and practicing law no longer seemed to match my goals and values. My grandfather envisioned a W̱SÁNEĆ community that drew strength from our culture and language, and a Canadian government and society that respected W̱SÁNEĆ laws and values. His work with the SENĆOTEN language empowered the W̱SÁNEĆ community and created opportunities not previously possible. He was respected in the community for the work that he did.

In carrying my grandfather's name, I have an obligation to maintain, and if I can, to increase the honour associated with that name. I *carry* the name YELKÁTTE, I do not *own it*. The name could be taken from me if I were to disrespect it, or carry myself in an inappropriate way.³² Beyond that, I have felt an obligation to continue and to build upon my grandfather's vision for W̱SÁNEĆ and Canada, though in my own way. It was this felt obligation and passion that brought me to graduate work and the revitalization of Indigenous law. In other words, I feel I am doing what I am meant to do, and in many ways, what I am obligated to do.

The name, YELKÁTTE, and what I know of W̱SÁNEĆ law and beliefs, even shapes the way in which I theorize and understand W̱SÁNEĆ law and its revitalization.³³ My vision of the future is shaped by those who came before me – by our ĊELÁNEN (our ancestry or birthright). Our ĊELÁNEN includes our SENĆOTEN language, our S,OXHELI (sacred teachings of life), and our SKÁLS (beliefs/laws). It matters to me that we continue to draw strength from our creation stories, from our SKÁLS, and that our ways of relating to others (human and more-than-human) reflect and generate out of our laws, teachings, and beliefs. At the same time, our laws have always recognized that relationships are fluid and contextual. How we choose to use and enact W̱SÁNEĆ law in different contexts remains living and dynamic. It also impacts how we understand and learn from these creation stories, which I will discuss at length in the next chapter.

³² Jack, "NĪL EN SĆELÁNEN" at 30 also speaks to this point.

³³ I develop this point in greater detail in the section below on 'family law' within the W̱SÁNEĆ legal order.

I have described the obligations I feel to do this work, and the impact that has in how I go about doing it. A discussion of these specific subjective obligations now make way for a more general discussion of kinship and names as a legal concept within W̱SÁNEĆ law. That discussion further emphasizes the position from which I speak, which is not for all Indigenous people, all W̱SÁNEĆ people, or even for my whole family. I am not the head of my family, and I am the first to acknowledge that I have a great deal to learn.

3.2. NEHIYMET and Naming as a Legal Concept

Receiving and carrying a name is a legal process in W̱SÁNEĆ law. I explained how carrying my name creates certain felt obligations. Naming is therefore a legal concept, which in the previous section, we defined as “a legal categorization that triggered (or triggers) collective reasoning processes and felt obligations within broader Indigenous legal traditions.”³⁴ Beyond that, there are legal processes surrounding the granting and obligations of carrying a name. Regarding the broader Coast Salish legal tradition, Andrée Boisselle, writing on the Sto:lo legal order,³⁵ and Sarah Morales, from the Hul’qumi’num legal order,³⁶ have already discussed the importance of names and kinship patterns within each of these respective legal orders. From an anthropological perspective, others have also written about kinship, naming practices, and societal structures, including Diamond Jenness,³⁷ Wayne Suttles,³⁸ Bruce Miller,³⁹ Brian Thom,⁴⁰ Chris Arnett,⁴¹ and others. I will contribute to these discussions only briefly.

In W̱SÁNEĆ, as with many other Coast Salish nations, the main socio-political unit is the family. As Diamond Jenness writes, “The main political unit was therefore not the village, but

³⁴ Friedland, *The Wetigo* at 38.

³⁵ Boisselle, *Law’s Hidden Canvas*.

³⁶ Sarah Noël Morales, *Snw̓’uyulh: Fostering an Understanding of Hul’qumnum Legal Tradition* (PhD Dissertation, University of Victoria, Faculty of Law, 2014) [unpublished].

³⁷ The most accessible work by Jenness has been republished by Barnett Richling. Barnett Richling, ed., *The W̱SÁNEĆ and Their Neighbours: Diamond Jenness on the Coast Salish of Vancouver Island, 1935*, (Oakville: Rock Mills Press, 2016) [Richling, *The W̱SÁNEĆ*].

³⁸ Wayne Suttles, *Coast Salish Essays* (Vancouver: Talon Books, 1987).

³⁹ Bruce Granville Miller, ed., *Be of Good Mind: Essays on the Coast Salish* (Vancouver: UBC Press, 2007); and Bruce Granville Miller & Darby C. Stapp, eds., *The Contemporary Coast Salish: Essays by Bruce Granville Miller* (Richland: Northwest Anthropology LLC, 2016).

⁴⁰ Brian David Thom, *Coast Salish Sense of Place: Dwelling, Meaning, Power, Property and Territory in the Coast Salish World* (PhD Dissertation, McGill University, Department of Anthropology, 2005) [unpublished]; Brian Thom, “The Paradox of Boundaries in Coast Salish Territories” (2009) 16:2 *Cultural Geographies* 170; and Brian Thom, “Entanglements in Coast Salish Ancestral Territories” in Françoise Dussart & Sylvie Poirier, eds., *Entangled Territorialities: Negotiating Indigenous Lands in Australia and Canada* (Toronto: UTP, 2017) ch 7.

⁴¹ Chris Arnett, ed., *Two-Houses Half-Buried in Sand: Oral Traditions of the Hul’q’umi’num Coast Salish of Kuper Island and Vancouver Island* by Beryle Mildred Cryer (Vancouver: Talon Books, 2007); and Chris Arnett, *The Terror of the Coast: Land Alienation and Colonial War on Vancouver Island and the Gulf Islands, 1849-1863* (Vancouver: Talon Books, 1999) [Arnett, *Terror of the Coast*].

the big house occupied by a number of kinsfolk - an enlarged or genealogical “family” to which the Saanich applied the term *hunit’sé’lakum*, and we, in speaking of the similar European nobility, the term “House”.⁴² Each W̱SÁNEĆ family has access to fishing sites, hunting grounds, harvesting locations, and a collection of ancestral names, songs, stories, prayers, and medicines, through these kinship relations.⁴³ It is also possible to inherit a profession through familial lines, whether that relates to spiritual powers, healing powers, or certain harvesting practices.⁴⁴ Ancestral rights to certain practices does not necessarily mean other families or individuals do not know those songs or stories, but that they do not have permission to share them in public or depict them in art.⁴⁵

Particular family units and associated relationships to certain locations and practices are well known and respected. When my grandfather was young he was out fishing with his father at SXIXTE (the Pelkey family reef-net location at Bedwell Harbour), one of our family reef-net locations. They were not catching fish and my grandfather noticed that a family fishing at a nearby SWÁLET (reef-net site) was catching many fish. He asked his father why they couldn’t move to fishing over there. His father replied simply – “no, we can’t do that. That is their fishing location. This is ours. We can’t just go over there and fish in their spot.”⁴⁶ Not all W̱SÁNEĆ territory is governed in this way, and many locations are communally used.⁴⁷ Colonialism and the imposition of settler jurisdictional authority has also impacted this form of governance. Nonetheless, it is our NEHIYMET that connects us to these sites, granting not only the right to harvest at those locations, but also the responsibility to steward those places for future generations.⁴⁸

Access to familial names, like harvesting sites, are also known and respected. “Each house had its stock of names or titles that it handed down from one generation to another and guarded as jealously as the nobles of Europe guarded their titles.”⁴⁹ Granting a name requires

42 Richling, *The W̱SÁNEĆ* at 40.

43 *Ibid.* for more on this point.

44 Diamond Jenness notes how sea lion or whale hunters in W̱SÁNEĆ inherited that profession, and the songs that went with it. *Ibid.*

45 *Ibid.* at 14.

46 Teaching of Belinda Claxton (12 September 2018) SXIXTE (Bedwell Harbour, Pender Island).

47 Richling, *The W̱SÁNEĆ* at 41 for more.

48 The connection between rights and responsibilities is evident in many Indigenous legal orders. For a great short documentary that emphasizes this point through the Mi’kmaq legal principle of *Netukulimk*, as well as provides commentary on how the Canadian legal system, including the Supreme Court of Canada decision *R. v. Marshall* [1999] 3 SCR 456, impacts upon the exercise and practice of that legal principle, see McMillan, J., Prosper, K., Davis, A., & Stigman, M. (Producers). Stigman, M. & Prosper, K. (CoDirector). (2013) *Seeking Netukulimk*. [Documentary Video]. 22min.

49 *Ibid.* at 42.

adherence to proper legal process. One must seek permission through the NEHIYMET. Each family has a S,ELWÁÁN (and elder or advisor), typically the oldest person or otherwise head of the family. Given approval, the actual granting of the name takes place through a naming ceremony, which also serves as public confirmation of the naming. For example, my naming involved hosting a feast at the longhouse, calling witnesses, a blanketing ceremony, SXÍXI dancers, and more.

As mentioned, our NEHIYMET connects us to our TEXTÁN, societies or societal rights. One of these societies is the SXÍXI, or mask dance. The right to dance SXÍXI and inherit a mask portraying a particular being from the animal kingdom, as well as the songs that go with that, is a privilege inherited through a NEHIYMET.⁵⁰ There are other societies one may belong to as well, including SKELE,ÉCEN (the cedar or fern dance) and SYELMEWĆES (hand rattle society). Participating in and witnessing some TEXTÁN is reserved for those who have undergone initiation. Beyond that, much about these societies, in general, is less openly shared, with many of the processes of these societies remaining internal to those initiated. While one may have an inherited right to a certain society through their NEHIYMET, initiation into that society still requires a process that might include winter bathing ceremony,⁵¹ fasting, and so on.

Returning to SXÍXI, mask dancers were traditionally expensive to hire due to their prestige. Typically, SXÍXI were therefore hired by those of higher rank in the society,⁵² and principally for occasions such as potlatch, weddings, or funerals. While my naming ceremony used SXÍXI, other naming ceremonies (or any ceremony for that matter) may differ between families. Such difference between family groups might, in part, be a product of intermarriage,⁵³ though it is also characteristic of the legal order itself. As Diamond Jenness observed, “Almost any departure from established custom might become the privilege of a House, heritable by later generations, and by them alone, provided the public had ratified it; and the public had ratified it when, during some potlatch, it heard the statement of claim without demur and accepted the gifts that followed the statement. All such privilege or rights, however, hinged upon proof of lineal

⁵⁰ See *ibid.* at 127 for more.

⁵¹ I discuss bathing ceremony in greater detail in a later chapter.

⁵² My grandfather told me about the prestige of SXÍXI dancers when I was a boy. Also see Richling, *The WSÁNEĆ* at 128.

⁵³ Diamond Jenness writes, “society was organized on a family, not on a tribal basis, and since each family intermarried both within and without its group, the customs and dialects spoken, even in individual villages, were not always uniform, but reflected the marriage ties with other communities. For example, there could be two families in the same village which, though more or less closely related, practiced slightly different rites for ushering their sons into manhood.” Richling, *The WSÁNEĆ* at 1.

descent, and the most obvious indication of such descent was the possession of an ancestral title.”⁵⁴

Given the language of “ratification” in granting ancestral names, it obviously follows that disputes over names sometimes occur. A name, for instance, might be given without proper approval from the NEHIYMET. If already granted through a naming ceremony, a response may be that the individual is permitted to carrying that name for their lifetime, but not to continue passing it along their family line. Since one does not own a name, but carries it, another response may be to strip a person of a name, and thereby the rights and responsibilities that come with it, under certain circumstances. While particular examples might help clarify these processes and circumstances, they may also serve to foster tensions within or between families, and as such, in this instance I prefer to follow a practice that Audra Simpson calls “ethnographic refusal”.⁵⁵

The centrality of families and kinship means these relationships are practiced and reinforced throughout various acts of W̱SÁNEĆ governance. Community gatherings undertaking works of governance usually involve a number of attendees standing to speak. In doing so, they usually begin by introducing themselves (though sometimes it is presumed that everyone there knows who they are) and by describing family relationship or connections with the person or issues being talked about, or to a person who stood to speak before them. It may be that they emphasize who their family is, how their family is related to another family, or point to important friendships or work done between members of different families. Such statements not only make clear to the audience the position that individual speaks from, but also works to shore up and commit to communal memory the relationships and events connecting certain families. In doing so, relationships are maintained and the governance structure is reinforced. It is not to say things always proceed smoothly, or people always agree, but that the process and structure of social and political governance is maintained.

Ultimately, giving, receiving, and carrying a name is a political act of governance in W̱SÁNEĆ law, and one that is continually reinforced throughout various acts of W̱SÁNEĆ governance. Since each name comes with a history, when our ancestral names are used during ceremony or when calling witnesses, for example, to ratify works of governance, our

⁵⁴ *Ibid.* at 40.

⁵⁵ “Ethnographic refusal” involves being guided by the question of “what you need to know and what I refuse to write.” At the heart of this orientation is protecting the community. Audra Simpson, *Mohawk Interruptus: Political Life Across the Borders of Settler States* (Durham: Duke University Press, 2014) [A. Simpson, *Mohawk Interruptus*] at 105.

NEHIYMET is strengthened. In calling a witness we are calling upon not just the person carrying that name now to remember the work being done in the event of future conflict, but we are also calling upon all their ancestors who carried the name before them, and those who will carry it after them.⁵⁶

3.3. The Work of the Family

Families and family structures differ, and it would be inappropriate to delve into any internal family governance and politics. Yet, a clearer picture of the structure of family governance, as I understand and have experienced it, is relevant.

A family has at least one S,ELWÁÁN (an elder or advisor), typically the eldest in the family or someone who carries much of the knowledge held by the family. With the passing of my (great) uncle Lou Claxton, my (great) auntie, Belinda Claxton, is likely a S,ELWÁÁN of our family now. A S,ELWÁÁN is a head of the family, so to speak, though they are not authoritarian. As the head of the family, a S,ELWÁÁN might call a meeting, or be asked by a fellow family member to call a meeting, on a particular issue. Depending on context, various members of the family might attend. In the course of the meeting issues are raised and discussed, with space for individuals to speak and give their opinion, if they want to or are asked to. An allocation of steps and actions might follow, even if done under the name of the S,ELWÁÁN. While a S,ELWÁÁN is an important part of family governance, it does not mean other voices must be excluded. As I have grown and expanded my skills and knowledge, so too has my role in family discussions, as has the extent to which I am formerly asked to participate in politics at the community level.

Within WŚÁNEĆ law and governance, fair deference is given to families and their internal governance processes. Families typically have space to work out matters relating to their own family governance internally and without interference. Once that process is complete, a public position can be put forward on behalf of the family. Understanding this dynamic of WŚÁNEĆ law is important, though it is also worth noting that no system of governance is perfect and such a structure requires checks for problematic power dynamics. I have learned a great deal from Mavis Underwood, former Tsawout Council Member and long-time child safety

⁵⁶ Teaching of PENÁĆ (David Underwood) (date unknown) EÁU,WELNEW Tribal School.

advocate and worker, how this might unfold within child and family care and where there might be a need to confront the notion of family governance.⁵⁷

As with any issue, child safety within the community is a place where we can scrutinize the difference between what people say, and what people do. W̱SÁNEĆ transformation stories, such as that connected to East Point on Saturna Island, emphasize that children are a sacred gift to be cherished and protected. Yet, violence can occur within family units. Gender imbalances and abuses of power need to be properly guarded against. In that sense, complete deference or reluctance to intervene in internal family governance processes can be inappropriate in some contexts. Intergenerational harms stemming from residential schools and the removal of Indigenous children from their homes to be placed instead into the child welfare system has damaged family units. Those children were abused - physically, sexually, mentally, and spiritually. Many of those children lost culture and language, and worse, did not have the opportunity to experience a healthy and functional family unit. How then can those individuals pick up and provide a healthy family unit for their children? Sometimes it is a challenge, and sometimes they cannot. As Friedland puts it, we are forced into the challenging situation where we must ask ourselves “How do we protect those we love from those we love?”⁵⁸

In a hypothetical context such as that presented generally above, an authoritarian structure of family governance could present dangers and a context where the social and political unit of W̱SÁNEĆ governance, the family, is challenged, strained, and needs to be confronted. How we confront that dynamic is itself challenging. Immediate protection for vulnerable children must be a priority. Yet, police and the Ministry of Child and Family Development have themselves caused much harm to Indigenous communities, with systemic issues and racism often perpetuating the removal of children from their communities. “Any long-term fix requires attention to the larger political issues of lost land, entrenched generational poverty, systemic racism, and racist violence within the dominant society. However, there is also power within communities to think and act in the meantime.”⁵⁹ Hadley Friedland grapples with these real and difficult questions in seeking to revitalize the Cree legal order and wetigo legal principles

⁵⁷ Teaching of Mavis Underwood (25 September 2018) LÁU, WELNEW Tribal School.

⁵⁸ Friedland, *The Wetiko*.

⁵⁹ *Ibid.* at 15.

relating to child safety, and I highly recommend Friedland's work for those interested in learning more about these issues.

For our immediate purposes, family law is central to W̱SÁNEĆ law, but like any legal order, we need to guard against dysfunction, patriarchy and toxicity, or any other dynamic that challenges the work of governance. We also need to keep an eye on the relationships and power dynamics between families. In short, there always needs to be space to speak of and ask the difficult questions within our communities, regardless of things such as deference to family governance structures.

3.4. Indigenous Methodologies

Prior to moving on I wish to emphasize that I have located myself in this work through an exercise of W̱SÁNEĆ law and protocol, but that this process of self-location also aligns more broadly with Indigenous methodologies. In line with those protocols and methodologies, I have shown a fair amount of openness and willingness to share from my end. However, that openness is not limitless. Mohawk scholar, Audra Simpson, in discussing her concept of ethnographic refusal, emphasizes that “sovereignty matters, as a methodological issue in and of itself, because it speaks from jurisdictional authority: the right to speak and, in this case, to not speak.”⁶⁰ It matters because:

...these studies are knowledge formations that not only “correspond” to a reality and theorize it, and perform analysis for others to think with and to learn from; they also enact certain possibilities for the people they purport to represent, as well as for those who read and engage with these representations as students, as the curious, as subjects, as those who might or might not govern.⁶¹

The extent of my sharing has invited you, the reader, into engagement with myself, with W̱SÁNEĆ law, and with the W̱SÁNEĆ community. Only when “the goals and aspirations” of the community “inform the methods and the shape of our theorizing and analysis” is the political sovereignty of the Indigenous community upheld, and the research meaningful and tangible for the community itself.⁶² Further, “nested within any methodology is both a knowledge belief

60 A. Simpson, *Mohawk Interruptus* at 104.

61 *Ibid.* at 104.

62 *Ibid.* at 98. Maori scholar, Linda Tuhiwai Smith, also offers a strong critique of research that fails to meaningfully incorporate Indigenous aspirations. She writes, “at a common sense level research was talked about both in terms of its absolute worthlessness to us, the Indigenous world, and its absolute usefulness to those who wiled it as an instrument. It told us things already known, suggested things that would not work, and made careers for people who already had jobs.” Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples (Second Edition)* (London: Zed Books, 2012) at 3.

system (encompassing ontology and epistemology) and the actual methods” of gathering and accessing information.⁶³ Our engagement and presence within community is an important part of this methodology.⁶⁴ As an individual, and a researcher, I bring my own interests and preoccupations to this work. I cannot, nor do I intend to, remove those interests or preoccupations.⁶⁵ What is necessary is an attempt to bring those interests and preoccupations to existing issues that are immediately relevant to the W̱SÁNEĆ community. Having learned a little about me and my family, we must now learn a little bit more about W̱SÁNEĆ.

4. W̱SÁNEĆ: I Belong to this Place

In SENĆOTEN, W̱ means ‘the breath of the people’, and W̱SÁNEĆ are the “emerging people”. The heart of our territory is the Saanich Peninsula, north of what is now Victoria, British Columbia, Canada.⁶⁶ We became W̱SÁNEĆ at ŁÁU, WELNEW̱.

In the beginning XÁLS taught the Saanich People how to take care of this land. For many years, the Saanich remembered XÁLS words. They were happy and had plenty of food. But as many years passed, some people broke XÁLS words and forgot his teachings. XÁLS became unhappy and told the people that there would be a flood over the land. They were to prepare. They prepared a long rope of cedar bark. They gathered food and possessions. The tide water began to rise. The people packed their belongings into their canoes. Some people did not heed XÁLS teachings. They were not prepared and were washed away. Their canoes were destroyed. The water rose higher and higher. The people paddled to the highest mountain nearby. The tress were still above the water. They tied themselves to an arbutus tree on top of the mountain. Soon the tops of the trees were covered with water. They were afraid and prayed to survive the great flood. They asked XÁLS to take pity on them. After many days, a raven came and landed on the bow of the canoe. He was carrying a stick and was talking to the people. The raven had brought the good news. Suddenly a mountain began to emerge in the distance. One of the men said “NI QENNET TFE W̱SÁNEĆ” (“Look at what is emerging”), as he pointed to the mountain emerging in the distance. Before they left the mountain, they gathered around the huge coil of cedar rope and gave thanks.

63 Margaret Kovach, *Indigenous Methodologies: Characteristics, Conversations, and Contexts* (Toronto: UPT, 2009) [Kovach, *Indigenous Methodologies*] at 25. Cree scholar, Shawn Wilson, writes, “Indigenous people have come to realize that beyond control over the topic chosen for study, the research methodology needs to incorporate their cosmology, worldview, epistemology and ethical beliefs.” Shawn Wilson, *Research Is Ceremony: Indigenous Research Methods* (Halifax: Fernwood Publishing, 2008) [Wilson, *Research is Ceremony*] at 15.

64 Margret Kovach, in relation to the research she undertook for her book on Indigenous methodologies, writes that “I believe that where we are, and the daily influences of our lives, shape how we think and write. ... I would not have been able to put Nēhiyaw epistemology at the core of my methodology in the same manner, for our Indigenous methodologies are bound to place.” Kovach, *Indigenous Methodologies* at 52.

65 Margret Kovach writes, situating oneself in our research is about “being congruent with a knowledge system that tells us that we can only interpret the world from a place of our experience.” Kovach, *Indigenous Methodologies* at 110.

66 Janet Poth, ed., *Saltwater People: as told by Dave Elliott Sr.* (Saanich: School District 63, 1990) [Poth, *Saltwater People*] at 13.

They said from now on this mountain will be called ŁÁU, WELNEW (Place of refuge, escape, healing). They further said we will be called the WSÁNEĆ (The emerging people). XÁLS heard their prayers. XÁLS said he would not punish the people by flood again.⁶⁷

The word WSÁNEĆ therefore carries significant and layered meaning. As PENÁĆ (David Underwood) describes in his auto-ethnography, “The word WSÁNEĆ informs my identity, my connection to place, as well as our collective indigenous worldview and epistemology.”⁶⁸ As I hope to make clear, the word WSÁNEĆ therefore also shapes this research.

Regarding place, the name WSÁNEĆ “connects directly to our homeland” - to ŁÁU, WELNEW (“place of refuge”).⁶⁹ The name grounds us within a web of relationships in our ÁLENENEĆ (“homelands”). The story of the flood, for instance, is a reminder of our relationships with the animals (represented by the Raven), the plants (represented by the arbutus tree and cedar rope), the Earth or land (represented by the mountain), and with the Creator (represented by the emergence of the WSÁNEĆ through the flood).⁷⁰ ŁÁU, WELNEW mountain is a sacred place, and in respect of the arbutus tree that reached out its branch and provided a lifeline to the WSÁNEĆ when we needed it, we don’t cut or burn arbutus trees. In return, the arbutus tree, as a reminder, and in honour of that relationship, sheds its bark once per year, which we use as a medicine in our teas. XPÁ (“cedar”) is a similarly sacred tree, used in carvings and ceremonies.

As WSÁNEĆ, we belong to this place - it does not belong to us.⁷¹ Our ÁLENENEĆ (“homelands”) are a gift to us from the Creator, allowing us to sustain our lives. While ŁÁU, WELNEW and the Saanich Peninsula may be the heart of WSÁNEĆ territory, we are also a “Saltwater People”.⁷² Much of WSÁNEĆ territory is over the ocean, and across the islands. Our late elder, Dave Elliott Sr., described our people and our territory in this way:

67 Earl Claxton & John Elliott, *ŁÁU, WELNEW* (Brentwood Bay: Saanich School Board and Saanich School District #63, 1993) [Claxton & Elliott, *ŁÁU, WELNEW*].

68 PENÁĆ (G. David Underwood), *SXENIEN YEW CNEs I, TWE SENĆOFEN? – How is it that I have come to speak SENĆOFEN?: My Reflections on Learning and Speaking SENĆOFEN* (M. Ed. Thesis, University of Victoria, 2017) [unpublished] [PENÁĆ, *How is it that I have come to speak SENĆOFEN?*] at 6.

69 *Ibid.* at 6-7.

70 Kevin Paul, *The Care-Takers: The Re-emergence of the Saanich Indian Map* (Sidney: Institute of Ocean Sciences, Department of Fisheries and Oceans, 1995) [Paul, *The Care-Takers*] at 3.

71 Tye Swallow, “What is Knowledge of Most Worth to WSÁNEĆ People?” in Tye Swallow, ed., *ÁLENENEĆ: Learning From Homeland* (Saanich: The Saanich Adult Education Centre and The Saanich Indian School Board, 2008) 12 at 15.

72 Poth, *Saltwater People* at 15.

We, the Saanich People, were salt water people. By that we mean the sea was very important to our way of life. Before the Europeans came, we had homes throughout the San Juan Islands and on the east and north coasts of the Saanich Peninsula.

We can call the Saanich Peninsula our headquarters because this is where we built permanent winter homes. This is where we stayed in large villages.

Our land went east through the [Gulf and] San Juan Islands and northeast across Georgia Strait to Boundary Bay.

Our territory included the Saanich Inlet and deep into the forest lands on its west side. On the Saanich Peninsula itself, our land went south as far as Mount Douglas. You could imagine a line going right across from Mount Douglas to Mount Finlayson and Goldstream.

In the summer our families travelled all through our territory to fish and gather food. When we travelled we made temporary homes near places where we were fishing and gathering food.

...

The lands and seas we called our territory were the lands and seas that we traditionally used. We gave names to all the places that we knew. Every bay, every stream, every village, every island, every mountain, every lake had a name in our language.⁷³

In SENĆOTEN, our word for islands is TETACÉS, which means ‘Relatives of the Deep’. During the time of creation, XÁLS created the islands by throwing a number of WŚÁNEĆ ancestors out into the ocean and transforming them into the islands that are there today. We have a few small WŚÁNEĆ reserves on the Gulf Islands today, though much of those islands are now in private ownership, and some are on the United States side of the international border.

Moving up the Saanich Peninsula, toward what is now Victoria, BC, our territory extends to Mount Douglas. In SENĆOTEN, we call that place PKOLS. Again, during the time of creation, the Creator stood on the shore casting sacred rocks across our territory, creating the mountains now there. PKOLS, in particular, serves as a soft border between the WŚÁNEĆ and the Lekwungen Peoples, creating a meeting place where both Nations acknowledge each other’s

⁷³ *Ibid.* at 15-16.

respectful presence. In an act of resurgence, we worked to reclaim and rename Mount Douglas back to PKOLS in 2013.

Extending west, toward Mount Finlayson and Goldstream River, is another boundary of our territory, which includes in and along the Saanich Inlet. The SENĆOTEN name for Mount Finlayson is QENELEL (“looking into the groin”), and for Goldstream, SELEKTEL (“the splitting stream”). At this location we have a ceremonial bathing site, and QOLEW (chum salmon) spawning during ĊENQOLEW (the moon during which the dog salmon return to the Earth).⁷⁴ There is also a small shared reserve lands at Goldstream park today.

As alluded to, WŚÁNEĆ territory is now dissected by the international border between Canada and the United States. The Gulf and San Juan Islands have been an important part of our way of life. As Elliott Sr. explains, “If you look at the land, the kind of country it is, you can see what kind of people we would have to be. We didn’t have all that much land. It was broken up into Islands, into water. We had to be sea-going people: Fishermen, Sailors, Navigators, Canoe builders.”⁷⁵ The imposition of the international border is therefore a significant burden on WŚÁNEĆ territory, and our access to it. At the same time, we have not forgotten those connections.

In SENĆOTEN, we have place names for all parts of our territory. As Elliott explained, “The land and seas we called our territory were the lands and seas that we traditionally used. We gave names to all the places that we knew. Every bay, every stream, every village, every island, every mountain, every lake had a name in our language.”⁷⁶ These place names span our territory, but also carry many of our teachings and laws that connect to those places. As such, our teachings and laws flow from and through our homelands, and shape our responsibilities.⁷⁷ I will return to place and place-based ontology, and how that shapes our understanding of WŚÁNEĆ law, in a later chapter. For now, we can think of WŚÁNEĆ creation stories as a journey across WŚÁNEĆ territory and through WŚÁNEĆ cosmology and worldview. These stories are tied

74 Robert YELĶATTE Clifford, “WŚÁNEĆ Legal Theory and the Fuel Spill at SELEKTEL (Goldstream River)” (2016) 61:4 McGill LJ 755 [Clifford, “WŚÁNEĆ Legal Theory”].

75 Poth, *Saltwater People* at 17.

76 *Ibid.* at 16.

77 The word ÁLENEŃEĆ (“homeland”) carries a connotation of learning from homeland. Tye Swallow explains that “ÁLEN can be translated to ‘home’, as in a home, or house we live in. For example, a SENĆOTEN ÁLEŃ is a home for the language. ENEĆ can be understood as ‘place of’ or ‘land of.’ For example XAXE ENEĆ means sacred place, KĶO,EL ENEĆ can mean place of Camas. ÁLENEŃEĆ is homeland in SENĆOTEN and, as I have come to understand, is learning from homeland.” Tye Swallow, “ÁLENEŃEĆ- Learning From Homeland” in Tye Swallow, ed., *ÁLENEŃEĆ - Learning From Homeland* (Saanich: The Saanich Adult Education Centre and The Saanich Indian School Board, 2008) 6 at 6.

inextricably to place and to beings that are located, or move spatially in and through, W̱SÁNEĆ territory (trees, deer, islands, wind, etc.). It is in this way that we (literally) situate W̱SÁNEĆ laws.

Today, many other names and stories have been imposed by settler populations over these places. Much of W̱SÁNEĆ territory is in fee simple ownership, and many W̱SÁNEĆ people live on small reserves. On these reserves there is a lack of space for housing. As for the marine territory, tankers travel through daily, there is heavy boat traffic, commercial fishing, whale watching activities, and innumerable terrestrial and marine tenures. A near constant red tide warning means the harvesting and consumption of shellfish is limited. Fish stocks have been severely depleted.⁷⁸ The ocean, in general, is strained by a multitude of forces and actions. Many of the islands are now in private ownership, heavily settled, or claimed as provincial or national parks. In short, despite holding on to our understandings of territory and being W̱SÁNEĆ, we feel the impact of ongoing settler colonialism and claims to governance.

With these changes have also come changes to W̱SÁNEĆ societal structure. For example, wearing an ancestral name was traditionally limited to those of the noble class, due in large part to the cost of “ratifying” the granting of a name through proper protocol, particularly in the case of prestigious names.⁷⁹ The introduction of wage economy has altered the ability to finance the number and size of potlaches needed to acquire names, and thus social status. Today, most anyone can acquire a name, though having a right to that ancestral name through one’s NEHIYMET is still required. Consequently, while the word SIÁM (or *siem*) use to refer specifically to a ‘high class’, or a Chief, it now more commonly represents a sign of respect.⁸⁰ While W̱SÁNEĆ society is less rigidly stratified than it once was, prestige is still associated with

78 Again, fisheries depletion and fisheries privatization that constricts treaty promises and inherent rights is not unique to W̱SÁNEĆ. For more on this point in the context of Mi’kmaq struggles for self-determination and treaty promises, see Martha Stiegman, *In the Same Boat? Exploring Treaty Rights, Resource Privatization, Community Resistance, and Mi’kmaq / non-Native Solidarity in Bear River First Nation, through Video-based Participatory Research* (PhD Thesis, Concordia University, Special Individualized Program, 2011).

79 “Those who had acquired ancestral names at potlaches were addressed by the honorific title *siem*, whereas those who lacked such names because they could not afford the expense of potlaches ranked as “undistinguished people,” or “commoners” (*sas musteemuch*). Theoretically, not only did all Houses enjoy perfect equality, but so, too, did all *siem*, or nobles, in each House, since they claimed common ancestry and attached little or no importance to primogeniture. No village and no House, therefore, recognized any one officially as its chief. Nevertheless, nobles did differ from one another in prestige and influence, partly through their personal characteristics and achievements, and partly through the varying prestige attached to their titles, which depended to some extent on the prestige of previous incumbents. Generally, therefore, one noble exerted so much influence in his House that he became its leader (*salweans*) in fact, if not in theory; and if his House was numerically the strongest in the village, he was recognized as the principal man in the community. Less often, two or three men competed for the leadership. Richling, *The W̱SÁNEĆ* at 41-42 [internal footnotes omitted].

80 Timothy Montler, *SENĆOTEN: A Dictionary of the Saanich Language* (Seattle: University of Washington Press, 2018) s.v. “SIÁM” at 488.

how well these ceremonies are executed and how much is given out during them. Some level of social stratification along these traditional lines therefore still results.

Chief and Council elected under the *Indian Act* are now the principal governing body in W̱SÁNEĆ, the result of an imposed structure that sought to dismantle and supplant Indigenous governance structures and decision-making authority and which represents a more centralized structure than families or “Houses”. I will reflect on what implications this has in Indigenous law revitalization in the following chapter. For now, I note that individuals, and therefore families, do still gain “prestige and influence” through their own “personal characteristics and achievements,” as well as through the “varying prestige attached to their titles or names.”⁸¹ For example, those who get asked to speak at events, or to share stories or knowledge, do tend to build influence, and thus to be increasingly asked to speak and to give their perspectives. It is also true that many people view knowledge as a gift shared with them, and thus have a sense of responsibility to share that knowledge with others.⁸² In such a context, increased influence and prestige is not rooted in a search for power, but through the adherence to principles of reciprocity. It is when power is exercised over others in oppressive ways that it becomes problematic.

Families that become “numerically the strongest”⁸³ also remains relevant today in terms of gaining access to elected leadership within the colonial Band Council system. Such a possibility is exacerbated by ongoing dynamics of settler colonialism where Indigenous communities are forced to struggle amongst themselves for limited resources. Ultimately, this can create a social stratification, albeit different from that which was historically the case. Despite these potential challenges, an ethic of respect, for all beings (human and more-than-human), is a theme that will run throughout our analysis of W̱SÁNEĆ law - even when things aren’t always going perfectly.

5. An Orientation

Having devoted considerable space to introducing a few foundational concepts and structures of W̱SÁNEĆ law and culture, I want to now step back and introduce my more general orientation in this project, followed by a description of what is to follow. Indigenous societies have their

⁸¹ Richling, *The W̱SÁNEĆ* at 43.

⁸² My late grandfather, Earl Claxton Sr., used to say that “all this information I have does not belong to me, it belongs to everyone.”

⁸³ Richling, *The W̱SÁNEĆ* at 43.

own laws and legal traditions, which they have used to live within their homelands for thousands of years. I have given some sense of how W̱SÁNEĆ laws reflect and generate out of the values, philosophies, lands, and worldviews of our people. This dissertation is about the revitalization of those Indigenous legal traditions, specifically the W̱SÁNEĆ legal order. In that vein, I seek to better understand and begin to relate the nature of W̱SÁNEĆ law, on its own terms.

For my people, our W̱SÁNEĆ ĊELÁNEN (our ancestry or birthright), which includes our SENĆOTEN language, our S,OXHELI (sacred teachings of life) and our SKÁLS (beliefs/laws), is foundational to our governance structure. W̱SÁNEĆ culture, attitudes towards land, and our SENĆOTEN language, are therefore at the heart of W̱SÁNEĆ law. Much of this is contained in our creation stories, which are often tied to specific places and SENĆOTEN place names. We have creation stories for the islands, lands, water, animals, plants, and other beings in W̱SÁNEĆ territory, all of whom we view as our relatives. It is through W̱SÁNEĆ law that we honour and maintain these relationships. As such, W̱SÁNEĆ law remains a valid, living, and important source of authority and wisdom for answering pressing questions, regulating relationships, addressing harms, and resolving disputes throughout W̱SÁNEĆ territory.

While commitment to Indigenous law revitalization continues to grow, we often remain unclear about what the revitalization of Indigenous law entails, and vague regarding the context and goals of that revitalization. As such, a guiding question with which this dissertation grapples is - the revitalization of W̱SÁNEĆ (and Indigenous) law, to what end? In other words, I set out to provide a sober accounting of the context in which the resurgence of W̱SÁNEĆ law is occurring, and clarity regarding what we hope to accomplish with the revitalization of W̱SÁNEĆ (and more broadly, Indigenous) law, both locally and in response to climate crisis. Additionally, what do those objectives and contexts mean for how we approach questions of method and theory in Indigenous law revitalization?

For many, Indigenous law revitalization is seen as a necessary component of reconciliation.⁸⁴ Yet, the term reconciliation has also tended to be used absent any foundational

⁸⁴ See Truth and Reconciliation Commission of Canada, *The Final Report of the Truth and Reconciliation Commission of Canada*, vols. 1-6 (MQUP, 2015) [TRC, *Final Report*]; Truth and Reconciliation Commission of Canada, *Honoring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: Truth and Reconciliation Commission of Canada, 2015) [TRC, *Summary of Final Report*]; Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2012) [TRC, *Calls to Action*]. For an interesting work on the role of Indigenous law revitalization as a component of reconciliation see Jacinta Arianna Ruru, *Settling Indigenous Place: Reconciling Legal Fictions in Governing Canada and Aotearoa New Zealand's National Parks* (PhD Dissertation, University of Vitoria, Faculty of Law, 2012) [Ruru, *Settling Indigenous Place*]. Not only is this work interesting for our purposes in that it takes up the project of Indigenous law revitalization as a component of reconciliation, but it is relevant due to many contextual similarities as well. As will be seen, my work also discusses parks (terrestrial and marine) regarding Indigenous law revitalization. Additionally, I will also raise connections between Canada and Aotearoa in

change to the structures of the colonial relationship itself. For the revitalization of Indigenous law, such a tendency may result in a presumption that Indigenous law will be fit (forced) into (limited by) the framework of the colonial legal system, and the worldviews and conceptual understandings that uphold it. Reconciliation, conceived of in those terms, does little to change, and actually reinforces, the colonial relationship. I will argue that such approaches to reconciliation, particularly given climate crisis, are problematic and should be rejected. The revitalization of Indigenous law, in my view, does hold promise for moving us toward healthier relationships, however, we must remain mindful of the ways in which our approach to, and conceptualization of, Indigenous law and its revitalization works to push against and/or reinforce existing dynamics.

Indigenous resurgence theorists, often posed in contrast to reconciliation theorists, a distinction I will return to later in this work, tend to emphasize the need to transcend colonialism through a regeneration of Indigenous ways of being, and thus through action directed outside of, or beyond, the realm of the state. The concerns raised by these scholars is that the institutional realm of the Canadian state functions to reinforce power structures, institutions, and conceptual frameworks that perpetuate colonialism, and work to negatively shape Indigenous identity.⁸⁵ I would add that these also function to perpetuate climate crisis. Since I ultimately problematize many of the foundational structures of Canadian constitutionalism, and the basic ideologies and conceptualizations of our place and relationships within the world that underlie those foundational structures, it will be seen that I tend to see more promise in these types of interventions.

Beyond our political ideals regarding Indigenous-Settler relations in what is now Canada, I find it necessary to approach these debates with a perspective of global climate crisis in mind as well.⁸⁶ It is as clear as ever that the climate crisis stands as the most pressing and important issue

later chapters in terms of treaties, specifically the Douglas Treaties, and in discussing the use of the potential legal tool of recognizing legal personhood in the environment and potential connections with environmental conservation initiatives, a topic on which Jacinta Ruru is also a leading scholar. See for example, Jacinta Ruru, "Recognizing Legal Personality of Nature as a Reconciliation Strategy for Connective Sustainable Governance" in Sumudu A. Atapattu, Carmen G. Gonzalez & Sara L. Seck, eds., *The Cambridge Handbook of Environmental Justice and Sustainable Development* (Cambridge: Cambridge University Press, 2021) [Ruru, "Legal Personality of Nature"].

⁸⁵ See, for example, Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014) [Coulthard, *Red Skin, White Masks*].

⁸⁶ Here there is some overlap between scholars typically placed in the reconciliation and resurgence camps. For example, Glen Coulthard, argues that for Indigenous nations to live, capitalism must die. Coulthard, *Red Skin, White Masks* at 170-173. Capitalism, as we will see, has intimate links with climate crisis. Stated differently, but with the same message, John Borrows has pointed out that Canadian and Indigenous peoples and legal orders will have a hard time reconciling if we don't first reconcile ourselves with the Earth. John Borrows, Address (The Role of the Sacred in Indigenous Law and Reconciliation, Alex Gooldeen Hall, Victoria, 8 March 2018) [unpublished]. See also, John Borrows, "Earth

facing all of us (human and more-than-human), yet, again, there is far less unanimity in terms of understanding and responding to these challenges. A significant premise of this dissertation is that these two intractable and seemingly distinct issues are not disparate. I argue instead that both our theory and methodology of Indigenous law revitalization, and our diagnosis and approaches to climate crisis, can, and should be, intricately entwined and mutually reflective. As such, this dissertation attempts to bring a critical lens to things such as the ‘Anthropocene’ narrative, colonialism, capitalism and sovereignty, the binary between Nature/Society, and the agency and/or rights of the more-than-human world. In doing so I create conversations across fields such as Indigenous law, critical Indigenous studies, and political ecology.

I draw upon these different fields of scholarship and action in order to clearly contextualize Indigenous law revitalization efforts as occurring within the ongoing relational dynamics of settler colonialism and climate crisis. While I introduce W̱SÁNEĆ law as flowing from a place-based ontology, I go on to examine how the structural and relational dynamics of settler colonialism pose significant challenges to revitalizing W̱SÁNEĆ law on its own terms, but also, how climate crisis simultaneously immerses the operation of W̱SÁNEĆ law within global harms and dynamics that impact W̱SÁNEĆ law and complicate how we think of its revitalization.

My commitment to restructuring the colonial relationship while mitigating climate crisis means I have a significant focus on the morality of W̱SÁNEĆ law, so to speak. That is, my work focuses on the values and principles by which W̱SÁNEĆ law is guided and which thereby shape the nature of W̱SÁNEĆ law. I do, however, seek to “articulate and theorize” W̱SÁNEĆ law “in a way that is both practical and useful” to the W̱SÁNEĆ people, which is most evident in the case studies I have chosen.⁸⁷

6. What Follows: Chapter Briefs

Part I of this dissertation, which consists of three chapters, is an introduction to W̱SÁNEĆ law through various methods. In Chapter One I began with a SDIU,IEĒ, situated myself according the W̱SÁNEĆ protocol and Indigenous methodologies, and grounded this project of W̱SÁNEĆ

Bound: Indigenous Resurgence and Environmental Reconciliation” in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: UPT, 2018) ch 2 [Borrows, “Earth Bound”].

⁸⁷ Val Napoleon, *Ayook: Gitksan Legal Order, Law and Legal Theory* (PhD Dissertation, University of Victoria, Faculty of Law, 2009) [unpublished] [Napoleon, “Ayook”] at 3.

law revitalization within W̱SÁNEĆ territory and the W̱SÁNEĆ community. In doing so, I have also outlined my theoretical and methodological orientation to this project in broad brush strokes. In Chapter Two I will approach the nature and revitalization of W̱SÁNEĆ law through the lens of story. In engaging with W̱SÁNEĆ law through stories I will touch on pedagogy and learning from stories, place and place-based ontology, and the decentralized nature of W̱SÁNEĆ law and engaging with story. Since law and the revitalization of W̱SÁNEĆ law is an embodied process, in Chapter Three I will focus on land-based pedagogy and my teaching of a W̱SÁNEĆ law field course.

Part II of this dissertation steps back to situate the project of W̱SÁNEĆ law revitalization within the broader context of climate crisis. In Chapter Four I introduce the problem of global climate crisis and the extent of change required in order to mitigate against its harshest effects. I also work to diagnose and analyze a number of drivers of climate crisis, and introduce ways of understanding and critiquing capitalism and sovereignty. I foreshadow the revitalization of Indigenous law as a path towards healthier relationships with the Earth and in mitigating against climate crisis, should we take that as our objective.

In Part III of this dissertation I introduce two case studies as a way to examine the nature of W̱SÁNEĆ law, the challenges faced in its revitalization given contemporary and systemic colonial power structures and ideologies, and I attempt to tie together what this also means for global climate crisis. In Chapter Five I approach these themes through the dispossession of W̱SÁNEĆ land-base, with a specific focus on ŁEL,TOS (James Island) and current W̱SÁNEĆ efforts for #LandBack through a BC Supreme Court claim. Chapter Six mirrors Chapter Five, but shifts to look at dispossession of W̱SÁNEĆ marine territory and an analysis of contemporary struggles for increased jurisdictional authority and decision-making powers within the Salish Sea, including through the creation of a National Marine Conservation Area Reserve and/or an Indigenous Protected and Conserved Area.

Part IV provides a conclusion to my dissertation. In Chapter Seven I step back to offer insights and arguments regarding what specific theoretical and methodological implications there are in terms of taking seriously the intimate link between our approaches to Indigenous law revitalization and our diagnosis and approaches to climate crisis mitigation. Chapter Eight is my concluding chapter and briefly offers a direction for future work along these lines. Specifically, I introduce the idea of looking to the 13 W̱SÁNEĆ Moons as inspiration for imagining an

Indigenous, anti-colonial and anti-capitalist economy in a rapidly warming world. Much of this dissertation focuses on introducing W̱SÁNEĆ law, outlining the context in which its revitalization is occurring, specifically the dynamics of settler colonialism and climate crisis, and arguing the need for foundational and far reaching changes that draw upon Indigenous law, epistemologies, and worldviews. Admittedly, then, the project that remains, and which is the hardest and most complex, is *what this looks like* and *how we will get there*. I offer an orientation and preliminary insights in that regard, but much remains for future work.

Chapter Two

Learning from Stories: Embodiment and Responsible Engagement⁸⁸



Figure 1: "WEXES - Moon of the Frog", Claxton & Elliott, *The Saanich Year* at 6.

1. Responsible Engagement

When one speaks of *WSÁNEĆ* law, one cannot help but also be speaking of *WSÁNEĆ* identity. The two are always bound up.⁸⁹ In *WSÁNEĆ* we speak of *ĆELÁNEN*, our ancestry or birthright. *ĆELÁNEN* includes our *SENĆOTEN* language, our *S,OXHELI* (sacred teachings of life) and our *SKÁLS* (beliefs/laws). Much of this is captured within *WSÁNEĆ* creation stories, which are often tied specifically to *SENĆOTEN* place names. *WSÁNEĆ* creation stories are therefore a journey across *WSÁNEĆ* territory and worldviews, and are central to *WSÁNEĆ* law. *WSÁNEĆ* law existed prior to the construction of Canada, and continues to apply. It cannot be put aside.

⁸⁸ An earlier version of this chapter appeared in Robert YELLKÁTFE Clifford, "WSÁNEĆ ("The Emerging People"): Stories and the Re-emergence of WSÁNEĆ Law" in Karen Drake & Brenda L. Gunn, *Renewing Relationships: Indigenous Peoples and Canada* (Saskatoon: Native Law Centre, 2019).

⁸⁹ See Aaron Mills, "Rooted Constitutionalism: Growing Political Community" in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: UTP Press, 2018) [Mills, "Rooted Constitutionalism"] for an excellent reflection on identity and law in the revitalization of Indigenous legal traditions, and Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847 [Mills, "Lifeworlds"] for an analysis of the connection between law, constitutionalism, and lifeworlds, and the ways in which this matters for revitalizing Indigenous legal orders and for legal education.

In this chapter, I focus on further fleshing out the nature of W̱SÁNEĆ law and begin to explore and model a way of engaging responsibly with W̱SÁNEĆ stories and law. What mode of reasoning do I bring to engagement with these stories? How do I become a responsible participant in W̱SÁNEĆ law? Through these questions, I begin to illustrate some of the key markers of the tradition, as I understand them.⁹⁰ My process for navigating these questions involves drawing upon the SENĆOTEN language. I will contend that the SENĆOTEN language necessitates a mode of reasoning with W̱SÁNEĆ stories that requires embodied engagement in the relationships to which the stories speak. I argue, through reference to SENĆOTEN place names and naming system, that this includes a relationship with place, in which place is not an object, but an actor. Taking into account the SENĆOTEN mode of reasoning and place-based ontology, I also argue that when W̱SÁNEĆ law works through stories it functions primarily to engage and empower actors within the tradition to internalize W̱SÁNEĆ laws and norms within an acceptable range of understandings. In other words, that W̱SÁNEĆ law is, in many ways, decentralized. Generally speaking, this theorization of W̱SÁNEĆ stories and the nature of W̱SÁNEĆ law also fits within my larger claim that climate crisis necessitates a foundational re-imagining of our relationships and place within the world, and that Indigenous legal traditions can help guide us in that re-imagining.

In taking W̱SÁNEĆ stories seriously, they cannot be seen as relics of the past. At the same time, while W̱SÁNEĆ laws remain living and dynamic they are shaped by our ĊELÁNEN. It is our ĊELÁNEN that holds together W̱SÁNEĆ law over time. The interplay between past and present that I am speaking of is captured by the brilliant words of Philip Kevin Paul, and the images they bring to mind – “the old people are the song, and we are their echo.”⁹¹ These words hold a great deal of explanatory power as a theoretical metaphor for my growing understanding of W̱SÁNEĆ law and its re-emergence. An echo is *always shaped by* the original voice or song, even while reverberating back – shaped too by the *context* in which it resounds, such as the form of the landscape.

90 Law is always a societal and community exercise and nothing here is meant to preclude that process. This chapter describes my own approach and development of thoughts. Others may agree, disagree, or emphasize a different understanding of these stories and their context; that is part of the process. Indigenous methodologies also tend to emphasize that we always do research from our own position. Kovach, *Indigenous Methodologies* at 110 writes that such an approach is congruent with “a knowledge system that tells us we can only interpret the world from the place of our experience.”

91 These are the brilliant words of Philip Kevin Paul, W̱SÁNEĆ knowledge holder. Teaching of Kevin Paul (5 July 2016) Victoria, British Columbia. The notion of song and echo contains much metaphoric value and I have also chosen it as the title of my PhD dissertation. I have elsewhere also used the metaphor of roots and branches to capture this same interplay. See Robert YELKATTE Clifford, “Listening to Law” (2016) 33:1 Windsor YB Access Just 47 [Clifford, “Listening to Law”] and Clifford, “W̱SÁNEĆ Legal Theory”. For a well-developed metaphor that uses trees in speaking to Anishinaabe constitutionalism, see Mills, “Rooted Constitutionalism” and Mills, “Lifeworlds”.

My interpretation of the interplay between past and present should not be misconstrued as originalist or essentialist.⁹² I do not claim that the song and the echo are strict binaries. My claim is also certainly not that the echo is a constant diminishing of the original song. Rather, the song and the echo are an interplay – a constant and contextual balance and negotiation of reverberations as the song and echoes enfold with one another. Much of what is occurring in daily life is how we manage those reverberations. While I know of no theorist who negates change, many interpretations of modernity seem to privilege change in a way that does not adequately capture the significance of the song in this process.⁹³ It seems to me that there is something disorienting about focusing only on the echoes.⁹⁴ I emphasize a rootedness throughout my work because emphasis on hybridity and cultural fluidity seems to lack the explanatory power to adequately reflect my sense of W̱SÁNEĆ law and identity,⁹⁵ that is, the way in which W̱SÁNEĆ laws are shaped by our CÉLÁNEN. That is the framework in which W̱SÁNEĆ law is intelligible, as I understand it.

Throughout this chapter I foreground a particular W̱SÁNEĆ creation story in each section as a way of illustrating and reflecting upon key markers of the tradition.⁹⁶ My method, however, is not one of narrowing any given story to a particular *ratio*, as might be done in certain methodologies in understanding Indigenous law through a common law mode of reasoning,⁹⁷ but of opening meaningful connections across stories and to the best of my ability with SENĆOTEN language and W̱SÁNEĆ sense of place, which is always relational.⁹⁸ My aim through meaningfully engaging with stories in this way is to begin to embody the song and echo – that is, navigate the specific way in which the W̱SÁNEĆ tradition negotiates the relationship between

92 I have elsewhere taken issue with the way in which claims of originalism and essentialism are leveled against Indigenous law. See Clifford, “Listening to Law”.

93 Glen Coulthard engages with anti-essentialist claims and Indigenous identity in Coulthard, *Red Skin, White Masks* at ch 3.

94 Johnny Mack uses the Nuuchahnulth word *hoquotist* (a disoriented person, or one whose canoe is overturned) as a metaphor to describe a similar observation regarding the current state of (dis)connection he sees with Nuuchahnulth storied foundations. See Johnny Mack, “Hoquotist: Reorienting Through Storied Practice” in Hester Lessard, Rebecca Johnson & Jeremy Webber, eds, *Storied Communities: Narratives of Contact and Arrival in Constituting Political Community* (Vancouver: UBC Press, 2011) 287 [Mack, “Hoquotist”].

95 I concede that I may simply lack the exposure to a scholar(s) writing about hybridity that would convince me otherwise. See Clifford, “W̱SÁNEĆ Legal Theory” and Clifford, “Listening to Law”.

96 I focus on a set of stories that are available to me. I do not hold this particular collection of stories out as the definitive collection or versions of stories, but as an available starting point. I have considered many more stories than presented here. The stories I have chosen to explicitly rely upon exemplify particular themes that arose during my consideration of this chapter more broadly.

97 For example, Val Napoleon and Hadley Friedland have used a case brief methodology derived from the common law in their work: See Napoleon & Friedland, “An Inside Job”. In doing so they increase the accessibility of Indigenous law and have brought greater attention to the role of stories in Indigenous law. The purpose of my specific inquiry is to better understand the W̱SÁNEĆ mode of reasoning encoded in these stories. I do not necessarily claim one cannot eventually achieve this through a case brief method, but that has not been my approach here.

98 I note that I am not a SENĆOTEN speaker, and that English is my first language.

change and continuity over time (i.e., what makes it its own unique tradition).⁹⁹ Of course, engagement must always be contextualized.

2. Re-emergence and Its Context

*SXE,ÁNEW, the frog, is the keeper of the Sacred Season of Survival. Each spring SXE,ÁNEW wakes up when the Earth warms. The warm weather announces to the people to get ready for the Sacred Season of Survival; it announces that winter is finished and it is time to end winter gatherings and prepare for the sacred season. This time of year is a time to OLEXET (to teach and pass on the ways of gathering; the ways of survival). These ways of gathering and survival are what teach the Saanich people to respect the land and living things, our relatives. XÁLS, the Creator, spoke in SENĆOFEN when he taught the people this good way to live, and when he gave his sacred teachings of life to the Saanich People.*¹⁰⁰

Stories are told in context. The re-emergence of W̱SÁNEĆ law must too be contextualized. In Chapter Four I will provide a far more in-depth contextualization of W̱SÁNEĆ law revitalization within settler colonialism and climate crisis. For now, I note that in taking these stories seriously we will begin to form an understanding of a place based ontology that views the land and more-than-human beings in W̱SÁNEĆ territory as our relatives. Such an understanding is central to W̱SÁNEĆ law. However, striving to give meaningful weight and application to this orientation in W̱SÁNEĆ law revitalization brings to attention two broader contextual points – the operation of colonial power and the fact of global climate crisis. In my approach to W̱SÁNEĆ law I consider each of these contexts related and impossible to ignore. Thinking in terms of place-based ontology is necessarily complicated by global forces of climate crisis, and global actors that drive climate crisis. That is, the former is necessarily embedded within and impacted by the latter. It complicates how we might think and enact W̱SÁNEĆ law given its place-based ontology. While most of this chapter aims to describe a W̱SÁNEĆ place-based ontology in more detail, I am mindful upfront of the way in which place (regardless of where) is embedded within these dynamics. As such, my insistence on taking these stories seriously not only allows us to better understand W̱SÁNEĆ law on its own terms, but provides a foundation from which we can start to consider meaningful change to the colonial relationship and an alternative “way of being”

⁹⁹ I acknowledge the input of my supervisor, Andrée Boisselle, in helping me clarify my thinking on this point. See also Boisselle, *Law's Hidden Canvas*.

¹⁰⁰ This story comes to me from W̱SÁNEĆ elders and knowledge holders, specifically my late grandfather YELKÁTFE (Earl Claxton Sr.), STOLČEL (John Elliott), and Philip Kevin Paul. I read this particular story on papers handed to me by my grandfather before he passed. Teachings of Earl Claxton Sr., John Elliott, and Kevin Paul (date unknown) Saanichton, British Columbia. I have kept each element of the story as I read it, but I carry it forward here in my own voice and in my own learning. In doing so I have made myself part of the story (I discuss this further in later sections of the paper), something I am coming to see as important to W̱SÁNEĆ law.

in the midst of climate crisis. These two points are worth briefly touching on prior to looking at W̱SÁNEĆ stories in more detail.

The negative impact of colonial power on Indigenous peoples is well documented, as is the role of the state's legal apparatus in this regard.¹⁰¹ The revitalization of Indigenous laws and governance structures is a potential path forward.¹⁰² However, colonial processes have not only impacted the healthy functioning of Indigenous legal traditions, but also function to limit the ways in which we might imagine the possibilities, application, and revitalization of those traditions.¹⁰³ Canada has simply remained unwilling to call into question its most foundational assumptions or political and economic commitments.¹⁰⁴ The Canadian state still presumes superiority over Indigenous nations by denying or restricting Indigenous legal and political authority over their lands,¹⁰⁵ as well as through constantly subsuming Indigenous laws and interests to those of the state, including economic development and resource extraction.¹⁰⁶ Indigenous territories in general remain constantly threatened by pipelines, LNG terminals, tankers, mines, and hydro-electric dams, just to name a few. Reconciliation will fail so long as background structures of Canadian law and the state are always taken for granted. The 'Reconciliation is Dead' movement that gained traction during the RCMP raids of the Unist'ot'en blockades set up within Wet'suwet'en territory in resistance to the Coastal GasLink pipeline project is a fitting example.¹⁰⁷

What is clear is that the revitalization of W̱SÁNEĆ law faces an uphill battle. At the heart of this struggle we might also see differences in cosmology and ontology as continuing to create deep tensions between Indigenous and settler societies and legal traditions, and as therefore

101 There are many works that approach this issue from various perspectives. For a critique of Aboriginal case law and some of the reasoning and assumptions behind it, see John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22:1 Am Indian L Rev 37; Lawrence Barsh & James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42:4 McGill LJ 993. For more on the notion of sovereignty and its web of meaning and assumptions, see Gordon Christie, "Indigeneity and Sovereignty in Canada's Far North: The Arctic and Inuit Sovereignty" (2011) 110:2 South Atlantic Q 329 [Christie, "Indigeneity and Sovereignty"]. For a critical analysis of the Aboriginal law paradigm, see Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations' Independence* (Halifax: Fernwood, 1999). For a stronger critique of Aboriginal law as a continuation of imperialism, see Coulthard, *Red Skin, White Masks* and Taiaiake Alfred, *Wasáse: Indigenous Pathways of Action and Freedom* (Toronto: UTP, 2009) [Alfred, *Wasáse*].

102 The Truth and Reconciliation Commission of Canada, which has recently identified Indigenous law as important to reconciliation, illustrates a wider adherence to this premise. See TRC, *Final Report*; TRC, *Summary of Final Report*; and TRC, *Calls to Action*.

103 I have found a number of works influential in this regard. See Coulthard, *Red Skin, White Masks* and Christie, "Indigeneity and Sovereignty".

104 Gordon Christie, "Reconciliation in the Face of Crown Intransigence on Indigenous Sovereignty" in Brendan L. Gunn and Karen Drake, *Renewing Relationships: Indigenous Peoples and Canada* (Saskatoon: Native Law Centre, 2019) ch 2 [Christie, "Crown Intransigence"] does an excellent job of laying out this tendency.

105 *Ibid.*

106 In British Columbia, for example, the NDP Government's somewhat recent approval of the Site C hydroelectric dam on the Peace River near Fort St. John will flood thousands of hectares of the Peace River Valley. The West Moberly and Prophet River First Nations are both signatories to Treaty 8 and are two Nations that have strongly opposed the project and the irreparable damage it will do to their lands and treaty rights.

107 See the Unist'ot'en website at <https://unistoten.camp/> for more context and background information on this dispute.

central to understanding the revitalization of W̱SÁNEĆ law.¹⁰⁸ Taking W̱SÁNEĆ stories seriously allows us to begin understanding the broader framework in which W̱SÁNEĆ law is constituted, thereby approaching the tradition responsibly and on its own terms. Taking time to understand W̱SÁNEĆ law on its own terms is a foundational step in creating grounds on which to potentially build toward meaningful change. Beginning with a brief description of the framework of W̱SÁNEĆ law also allows us to begin grappling with the way in which global climate crisis challenges our way of being in this world.

Fittingly, it is spring as I write these words and the story of SXE,ÁNEW comes to mind in helping orient my understanding of W̱SÁNEĆ law within these complex issues. In the W̱SÁNEĆ calendar SXE,ÁNEW announces the Sacred Season and the onset of WEXES – the Moon of the Frog.¹⁰⁹ Each spring the frog sings its song as the Sacred Season of Survival arrives. No one year is the same as another, yet something remains constant – the frog still wakes each spring and will teach us, if we listen.¹¹⁰ In this way, the story of SXE,ÁNEW reflects the interaction of song and echo, a rootedness and fluidity, each year and over time.

During this Moon the frog acts as both a witness and messenger for the W̱SÁNEĆ people.¹¹¹ It signals a move to the outdoors, and that the Earth is warming up with the arrival of spring in W̱SÁNEĆ territory.¹¹² In fact, each year the Earth is warming up much more than ever before, and the trend is likely to continue.¹¹³ This realization *should* teach us something and we *should* act differently given that knowledge. In this regard, the story also importantly points to the significance of experiential learning and embodied engagement with these stories and teachings – “these ways of gathering and survival *are what teach* the Saanich people to respect the land and living things, our relatives.”¹¹⁴ Since we are speaking about the *revitalization* of

108 Resistances to resource extraction and development projects that have negative impacts on Indigenous lands exemplify this tension between societies and legal traditions. John Borrows uses the term civil (dis)obedience to reflect that resistance against one legal tradition may simultaneously be obedience to Indigenous laws: see John Borrows, *Freedom & Indigenous Constitutionalism* (Toronto: UTP, 2016) [Borrows, *Freedom*] at ch 2.

109 The W̱SÁNEĆ calendar is divided into thirteen different moons, each relating to the weather and different economic and cultural activities that occur during that time: see Earl Claxton & John Elliott, *The Saanich Year* (Brentwood Bay: Saanich School Board and Saanich School District #63, 1993) [Claxton & Elliott, *Saanich Year*].

110 See Clifford, “Listening to Law” for a narrative reflection on listening to law.

111 Claxton & Elliott, *Saanich Year* at 5. There is more to explore here as well. In the W̱SÁNEĆ legal tradition witnesses are called during important times or events and are tasked with keeping and sharing when called upon the importance of the work that was undertaken. The frog is the “keeper” and acts as a witness and messenger for the Sacred Season. In this context, witnessing may be seen as creating relationships and responsibilities across the human and non-human world.

112 *Ibid.* at 5.

113 I mean this as a general comment based on news reports while writing this chapter in 2016, which was the hottest on record. 2017 is currently the second hottest on record behind 2016, despite the absence of El Niño: see Damian Carrington, “Record Breaking Climate Change Pushes World Into ‘Uncharted Territory’”, *The Guardian* (21 March 2017), online: <theguardian.com/environment/2017/mar/21/record-breaking-climate-change-world-uncharted-territory>.

114 Teachings of Earl Claxton Sr., John Elliott, and Kevin Paul (date unknown) Saanichton, British Columbia [emphasis added].

WSÁNEĆ law, we necessarily negotiate our engagement with these stories and laws each day in accordance with our own abilities and current understandings, but in doing so, what is important is not only the stories themselves, but also *how we use them*.

Any legal tradition consists of more than a body of rules.¹¹⁵ Engagement with WSÁNEĆ stories must therefore involve a search to understand and embody something more complex and elusive than the explicit content of the stories themselves, though that is important too.¹¹⁶ What I mean is that WSÁNEĆ stories and law, like any tradition, are embedded within a larger constitutive framework that animates and gives them meaning; a framework that both empowers and constrains their scope and vision.¹¹⁷ In WSÁNEĆ law a principal component of that framework is an emphasis on encompassing interdependent relationships across a range of actors, both human and more-than-human. I have begun to describe this as an “ontological understanding of land that assigns to land much more ‘agency’ and ‘being’ than typical of the non-Indigenous worldviews that inform Canadian law.”¹¹⁸ Through this being and agency the more-than-human world is also a central actor in the legal tradition.¹¹⁹ A mode of being in relation with the more-than-human world therefore becomes central to WSÁNEĆ law.

In WSÁNEĆ our creation stories are about the animals and land once being human and having their own spirit. These creation stories are tied inextricably to given places and their SENĆOTEN place names, giving specificity to this broader theme of relation with the more-

115 Jeremy Webber argues that in protecting Indigenous legal orders we should not aim to protect a predetermined body of norms, but practices of normative deliberation and decision making: see Jeremy Webber, “Legal Pluralism and Human Agency” (2006) 44:1 Osgoode Hall LJ 167 [Webber, “Legal Pluralism”].

116 Julie Cruikshank, *Do Glaciers Listen? Local Knowledge, Colonial Encounters, & Social Imagination* (Vancouver: UBC Press, 2005) at 66 writes: “Storytelling may be a universal human activity, but understanding what one hears requires close attention to local metaphor and local narrative conventions. When speaking in story-like constructions, Yukon elders tend to make generous assumptions about their listeners’ or readers’ understandings of such precepts....It is, of course, precisely the absence of such knowledge that often makes cross-cultural communications so fraught”).

117 We may generally refer to this as constitutionalism. The work of Aaron Mills is helpful on this point: see Mills, “Rooted Constitutionalism” and Mills, “Lifeworlds”. I have also found the work of Christine Black helpful: see CF Black, *The Land is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (New York: Routledge, 2011) [Black, *The Land is the Source*]. Black argues that cosmological narratives provide a framework through which we “can come to terms with the manner in which the laws of that society and the individual’s behaviour are understood” (*ibid* at 24). That is, we can better understand the “principles, ideals, values and philosophies that inform the legal tradition” (*ibid* at 15). I also understand that law and culture are always intertwined in myriad ways: Rosen, *Law as Culture* (providing an excellent discussion on the connection between law and culture more generally).

118 Clifford, “WSÁNEĆ Legal Theory” at 767. In that article I tried to begin demonstrating this point in specific relation to a fuel spill at Goldstream River in WSÁNEĆ territory.

119 Aimée Craft eloquently describes this point in relation to water in describing her methodological approach to Anishinabe law. She writes: “Whereas, in other systems of law, water is treated as a subject or object, often to be owned and used, in ANI nibi (water) is treated as an actor in a relationship. The research and gatherings were premised on the teaching that water has a spirit, that it is living and that we must conduct ourselves in relationship with it. However, the conversation could not be limited to water itself, given that water is in constant interaction with other beings (including each of us, our bodies and our spirits). In fact, water sustains all life”: Aimée Craft, “Giving and Receiving Life from Anishinaabe nibi inaaakonigewin (Our Water Law) Research” in Jocelyn Thorpe, Stephanie Rutherford & L Anders Sandberg, eds, *Methodological Challenges in Nature-Culture and Environmental History Research* (New York: Routledge, 2017) [Craft, “Giving and Receiving Life”]. See also Aimée Craft, “Ki’inaakonigewan: Reclaiming Space for Indigenous Laws”, paper prepared for the Canadian Administration of Justice Conference, Aboriginal Peoples and Law: “We Are All Here to Stay”, 14–17 October 2015 [Craft, “Reclaiming Space”].

than-human world through situating it in place. What is occurring is not anthropocentrism, but an understanding that other elements of creation are our “relatives”, to whom we have responsibilities.¹²⁰ Honouring the responsibility to care for our relatives throughout W̱SÁNEĆ territory is an enactment of W̱SÁNEĆ law. If this is the framework for understanding W̱SÁNEĆ law on its own terms, then the context I have been building to in this section is how do we honour this responsibility within the constraints of colonial power and global climate crisis?

The clash between the constitutive framework of W̱SÁNEĆ law and that of Canadian law (and its political and economic commitments) has been noted. Further complicating matters is the fact that we are embedded within a globalized world in an advanced state of climate crisis.¹²¹ While W̱SÁNEĆ law can (and always has) provided an alternative way of being within this reality, the nature of global climate crisis does complicate the way in which we think of the place-based ontology of W̱SÁNEĆ law, and how we might work to protect W̱SÁNEĆ territory through W̱SÁNEĆ law. While we may witness local manifestations of climate crisis,¹²² the diffuse and cumulative effects of pollution cannot be confined to the actions and practices of only one nation or actor.¹²³ These harms would, for instance, include the acidification of oceans and warming temperatures, to name only two. As such, the forces that impact W̱SÁNEĆ’s ontological connections with land – and thus the enactment of W̱SÁNEĆ law – are not confined only to Canada, but are impacted by the fact that at a global level the limits of earth’s systems are strained by human action.

Some have termed this reality the Anthropocene.¹²⁴ I will provide a more detailed critique of this term in a later chapter. For now I note that, as opposed to an undifferentiated “anthropos” recently “awakening” to the reality of climate crisis,¹²⁵ it has been conscious choices by powerful

120 The W̱SÁNEĆ creation story of islands is explicit in this regard, which is discussed in greater detail later in this chapter. In that story, as the Creator transformed W̱SÁNEĆ ancestors into the islands in W̱SÁNEĆ territory he gave the teaching of reciprocal relationships in which the islands would care for the W̱SÁNEĆ people, and the W̱SÁNEĆ people would care for the islands: see Clifford, “W̱SÁNEĆ Legal Theory” and Clifford “Listening to Law” for more on this story.

121 Timothy Morton, *Hyperobjects: Philosophy and Ecology after the End of the World* (Minneapolis: University of Minnesota Press, 2013) [Morton, *Hyperobjects*] has used the term “hyperobjects” to describe things such as climate change. While I do not adhere to his object oriented ontology, his description of the ways in which hyperobjects are “viscous” in the sense that we are inside of them and they are stuck to us and all that we do, is helpful. For example, as I turn the key to my car I am necessarily embedded within the hyperobject of global warming: *ibid.* at 28.

122 The term “hyperobject” used by Timothy Morton is also useful in relating how climate change is so “massively distributed in time and space relative to humans” that it exists beyond our realm of perception (*ibid.* at 1). Therefore, what we experience is necessarily a “local manifestation of some vast entity that I am unable to directly see” (*ibid.* at 47–48).

123 See Jean-Luc Nancy, *After Fukushima: The Equivalence of Catastrophes* (New York: Fordham University Press, 2015) at 4 (arguing that catastrophes, such as that at Fukushima, can never be viewed as isolated incidents, nor viewed as “natural” in the era of globalization and technology. Any disaster necessarily impacts a web of “technical, social, economic, political intricacies that keep us from regarding it as simply a misadventure or a misfortune whose consequences can be more or less easily circumscribed”).

124 The term Anthropocene was made popular by Paul Crutzen and refers to a geological epoch marked significantly by human impact on Earth’s systems. Paul J. Crutzen, “Geology of Mankind” (2002) 415 *Nature* 23 [Crutzen, “Geology of Mankind”].

125 The name *Anthropocene* is a combination of *anthropo* from *anthropos* which means “human” and *cene* from *kainos* which meaning “new” or “recent”.

actors and institutions throughout recent human history that propel us into this troubling predicament.¹²⁶ The ontological divide between Nature and Society that has plagued western thought is arguably one significant or enabling factor underlying the Anthropocene.¹²⁷

The story of SXE,ÁNEW indicates that spring is a time to teach, and thus to learn. While my principal objective in this chapter is to relate an understanding of W̱SÁNEĆ law on its own terms, including the ontological framework that makes it intelligible, I have tried to also introduce the idea that this necessarily matters at the level of “reconciliation”¹²⁸ and at a global level of existence (both human and more-than-human). Any approach to W̱SÁNEĆ law that removes it from this larger framework and context troubles me. In fact, if our societies and legal traditions (all and every one of them in the world) cannot meaningfully address global climate crisis within their own normative frameworks, then I am afraid they are failing.¹²⁹ I do not presume to dictate what the normative framework of other traditions should be specifically, though I feel free to critique them when they manifest in local and global harms.

I also noted that the story of SXE,ÁNEW taught me that what is important is not only the stories themselves, but also *how we use them*. Generally speaking, they can be used as a foundation for building healthier relationships and an alternative way of being in the midst of climate crisis. Importantly, the story of SXE,ÁNEW also stressed the significance of experiential learning and embodied engagement with W̱SÁNEĆ stories and laws. This task takes commitment, and I will return to it in the next chapter in introducing the W̱SÁNEĆ field course I teach. For now, it is insightful how quickly into my first reading of some of these W̱SÁNEĆ stories that I began to approach my current knowledge limit. Part of that was simply the amount of time available to immerse myself in a set of stories, many of which were new to me at the time. The issue is not one of memorizing the stories, but of internalizing the implicit elements of those stories. The other component is that W̱SÁNEĆ stories always require a mode of reasoning

126 Bonneuil, Christophe & Fressoz, Jean-Baptiste, *The Shock of the Anthropocene: The Earth, History and Us*, trans. by David Fernbach (London: Verso, 2016) [Bonneuil & Fressoz, *Shock of the Anthropocene*] at 70. Bonneuil and Fressoz have usefully analyzed the term and state of the Anthropocene, moving the analysis from one in which a generalized “human species” has “unwittingly” impacted Earth’s systems at a global level, and only recently come to awaken to this reality, to an analysis which provides a critical history of how we have actually reached this point of “environmental crisis”. In short, they argue that the choices that brought us to the point of the Anthropocene were political and with awareness of the consequences. There are connections with colonial expansion in that the influx of resources allowed European powers to continue to expand at unsustainable rates.

127 See *ibid.* for more.

128 Meaningful reconciliation cannot be narrowly construed nor remain discrete. Recognition, when conceived of as accommodation within existing structures and ideologies, does little to address the type of change I think is necessary to adequately address colonial power structures and global climate crisis.

129 I take a strong stance on this point but the situation of global climate change seems to require a strong chance.

and engaging with these stories that requires us to move beyond the story itself. The remainder of this chapter begins to examine the ways in which this can happen.¹³⁰

3. Written Stories and Pedagogy

A story about The Four Winds reminds me that the content of WŚÁNEĆ stories is important, but the mode of reasoning with these stories compels me to move beyond the story itself and to become a participant engaged directly in the relationships which the stories speak to.

There were two young sisters who were jealous and envious of one another. The younger sister (SOTEĆ) was a nice looking girl and the older sister (ŚCES) was jealous of her looks. SOTEĆ was also ambitious and hard working, which also made her sister jealous. One day SOTEĆ was making an Indian blanket. She was almost finished and hung her blanket outside to beat the fungus out of it. Her sister, ŚCES, made fun of her work. SOTEĆ tried to ignore her, but her sister kept laughing at her and her work. SOTEĆ eventually allowed herself to be affected by her sister's words and become more and more angry. She beat her blanket faster and harder until it broke apart. The pieces of the blanket flew into the air.

Eventually the older sister, ŚCES, found a husband (SKANET) and this time her younger sister was jealous and envious. ŚCES and SKANET had a little boy (STIWET). The younger sister, SOTEĆ, wished she had been the mother of the child and planned to steal the baby and keep it for her own.

XÁLS could see what was happening to this family and he appeared to them. He said that to have a family is a precious gift¹³¹ that must be cared for and taken care of. It is wrong to be envious and jealous; to be mean and unkind; and to allow another person to make you angry and then to become part of that anger. XÁLS told the sisters that their weaknesses would always be remembered. He turned SOTEĆ into the north wind and said, "You will come as a cold wind to wash away the weakness on the land, and the living things." XÁLS said, "When SOTEĆ blows, the snow will come." The two sisters have always disagreed with each other. When SOTEĆ arrives in WŚÁNEĆ her teeth hang from the roofs as icicles. When ŚCES sees this her sister brings her warmth to WŚÁNEĆ and the icicles fall. The old people say that the sisters are playing a LAHAL game; when SOTEĆ's teeth are on the roofs she wins the sticks. When ŚCES blows, the icicles fall and she wins the sticks. Even today the two sister's disagreement can be seen and heard.

The rest of the WŚÁNEĆ family also became the winds. SKANET was an older man who was a kind and good person. SKANET and ŚCES had a son named STIWET who grew up to be a handsome and kind young man. SKANET taught STIWET all the good qualities of life and to be a kind and trustworthy person.

ŚCES saw what a handsome man her son had grown up to be. ŚCES began to like her own son in a way that she shouldn't have. Since she had the ability to change her appearance,

¹³⁰ The broad themes that follow each deserve far greater attention than I can give here, but can serve as building blocks for my own learning and for subsequent discussions. Each section is therefore more about thought building as opposed to giving concrete answers about the WŚÁNEĆ legal order.

¹³¹ The first WŚÁNEĆ man, SŁEMEW, was given the gift of a family by the Creator after having been diligent in following the teachings and laws given to him by the Creator. This story is referred to again later in the paper. I emphasize it here to indicate how stories often fit together in informative ways.

she changed herself into a young lady. STIWET was walking along the shore when he met the young lady. He didn't know the young lady was his mother and he started to become fond of her. STIWET told his father about the young lady. SKANET suspected something about the young lady but didn't want to believe it. When STIWET told his father about wanting to stay with the young lady he met, his father questioned him about her. He told STIWET about his mother's ability and about his suspicion. He cautioned his son. SKANET asked his son whether the young lady had a scar on her thigh. STIWET didn't know but followed his father's advice to look. The next time he met the young lady he looked and found the scar his father spoke of. STIWET returned and told his father about the scar. SKANET became very sad and tears began to fall from his eyes. His son didn't know why his father was crying. STIWET asked, "Father what is it, why are you crying?" SKANET told his son that "I know now that the beautiful young lady you have been seeing is your own mother who has been deceiving you".

Again, XÁLS could see what was happening and appeared to the family. He spoke to SCÉS and said, "Your handsome son is a gift to you. What you have done to your son and husband is wrong. You must respect and love your children in a way that is good. You must respect your mate."

XÁLS pointed to each of the family and sent them in the four directions to become the winds. SKANET became the Southeast wind; SCÉS became the Southwest wind; STIWET became the Northwest wind; and SOTEC became the Northeast wind. These are the main winds that blow in WSAÑEC. When the Southeast wind blows it always brings the rain. It is said that these are the tears of the kind old man SKANET. The wind that is very unpredictable, can be very fierce, unkind, and arrive without warning, is SCÉS, the Southwest wind. The very character of this bad woman is the character of the Southwest wind. When the Northwest wind blows, there is always a turn to better as the weather clears. This is the character of the kind, handsome young man who was so trusting. The two sisters SCÉS and SOTEC are still jealous and envious of one another because SCÉS made fun of SOTEC's Indian blanket. SOTEC became so angry she hit her blanket until it fell apart. The parts of her blanket that she beat into small bits is the snow that comes when the North wind blows and brings the cold winter months.¹³²

Stories and their role in Indigenous knowledge systems has been an important topic of Indigenous studies literature.¹³³ In arguing for the resurgence of Indigenous legal traditions,¹³⁴ there has been a similar emphasis on the role of stories in this process of revitalization¹³⁵ and decolonization.¹³⁶ In my early research I too focused on a set of transcribed as well as published

132 This is an interpretation of the story of The Four Winds as I have heard it. Teachings of Earl Claxton Sr., John Elliott, and Kevin Paul (date unknown) Saanichton, British Columbia. There is a great deal going on in this story. The story is gendered and a great deal more attention to that fact and the implications it has needs to be explored in more detail.

133 See Jo-ann Archibald (Q'um Q'um Xiiem), *Indigenous Storywork: Educating the Heart, Mind, Body, and Spirit* (Vancouver: UBC Press, 2008); Jill Doerfler, Niigaanwewidam James Sinclair & Heidi Kiiwetinewinewisiik Stark, *Centering Anishinaabeg Studies: Understanding the World through Stories* (Winnipeg: University of Manitoba Press, 2013).

134 John Borrows has been a leading figure in this regard. See generally John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002); John Borrows, *Canada's Indigenous Constitution* (Toronto: UTP, 2010) [Borrows, *Indigenous Constitution*]; John Borrows (Kegedonce), *Drawing Out Law: A Spirit's Guide* (Toronto: UTP, 2010); John Borrows, *Law's Indigenous Ethics* (Toronto: UTP, 2019); and Borrows, *Freedom*.

135 Val Napoleon and Hadley Friedland have given particular emphasis to stories in their work: see e.g. Napoleon & Friedland, "An Inside Job".

136 See Leanne Betasamsake Simpson, *Islands of Decolonial Love* (Winnipeg: Arbeiter Ring, 2013).

stories available to me to better understand the WSÁNEĆ legal order.¹³⁷ Aside from the centrality of stories in the WSÁNEĆ tradition, there are practical reasons for this choice as well.¹³⁸ My late grandfather handed me many of the written stories I have available to me. The transcriptions were part of an effort to record those stories so that the knowledge and values they contain would not be lost. The stories contain the voices of many different people, including my late grandfather and late great-grandmother. I learned a great deal from both my grandfather and great-grandmother growing up, but the reality is they are no longer here and I was not raised as immersed in the knowledge and legal tradition I am now looking to better understand as they were.¹³⁹ The notion of resurgence itself reflects this scenario (the idea of something once vibrant undergoing a contemporary re-emergence).¹⁴⁰ In this light, the importance of recording these stories cannot be overstated; it is a large part of what allows me to learn from them here. The Old People who carried these stories have done their part; the question I now have is what is (or should be) my role and relationship in understanding and caring for these stories? Again, the relationship between the song and the echo is at play.

Part of understanding these stories requires building knowledge of the SENĆOTEN language and the mode of reasoning it provides. Philip Kevin Paul emphasizes that the SENĆOTEN language creates participants, that is, requires the speaker to become directly involved in a relationship with that which is being spoken about in order to understand the full meaning of the SENĆOTEN word being used.¹⁴¹ In exemplifying his point, Paul uses the word mallard, which in English describes, or at most brings to mind an image of, a particular type of duck. In SENĆOTEN the word for mallard is TENEKSEN, meaning “earth-nose”. While this word also brings to mind an image of the bird, it additionally represents a habitat of the duck. He explains that at certain times of the year ducks walk in fields of grain or hay with their bills to the ground, eating grain. When they are feeding on grain is the best time to hunt them, because that is when they are best to eat.¹⁴² It is also the season in which we use sacred duck feathers in our ceremonies.

137 Some of the stories I have relied on in this paper I have previously heard in other contexts. I have, of course, also made connections with knowledge, experience, and conversations I have had beyond those stories.

138 For an excellent discussion of theoretical reasons for turning to Indigenous storied foundations, see Mack, “Hoquotist”.

139 There are others in WSÁNEĆ who carry knowledge and stories and who I can and do learn from. However, the closeness I had with my grandfather and great-grandmother means these stories are an important and meaningful place for me to turn.

140 The violence of colonialism has meant that Indigenous knowledge and legal systems are not as vibrant or widely practiced as they once were.

141 Paul, *The Care-Takers* at 4. Paul also contrasts this with the English language, which he describes as creating observers, as opposed to participants.

142 *Ibid.* at 4.

In short, knowledge in the W̱SÁNEĆ tradition is not compartmentalized, but holistic. That is, in the W̱SÁNEĆ tradition knowledge requires experiential learning and participation, meaning full knowledge of one thing most often requires knowledge of another;¹⁴³ this is the mode of reasoning I believe Paul is pointing to in his observations about TENEKSEN. This mode of reasoning is focused on relationships between interdependent beings. Harkening back to the story of SXE,ÁNEW, this mode of reasoning is a recognition and reflection of the notion that we are in direct relation with all of creation – the land and animals are our relatives. The same mode of reasoning, I argue, applies to W̱SÁNEĆ law through W̱SÁNEĆ stories and pedagogy, which includes written stories. It is worth expanding on this point, and how I arrived at this thought.

In my legal studies, our approach to the common law was mostly compartmentalized from the outset; one learns tort, contract, constitutional, property, criminal law and the like separately, and with little reference across those categories. Law school also taught me a mode of reasoning predominantly focused on searching a case for a *ratio* (or rule), and then applying that *ratio* (usually in some innovative way) to a particular fact scenario. Equally important may be distinguishing the application of a specific *ratio* or principle based usually on a particular set of facts. However, this did not seem to fit with my growing understanding of W̱SÁNEĆ law.¹⁴⁴ For example, it is certainly possible to take the explicit content of the story of The Four Winds and draw direct rules about family relationships. The insights about proper family relations, including inappropriate relations between parent and offspring, remain consistent with contemporary society and would likely find little contestation. The gendered nature of the story should also be examined in greater detail, along with the implications that has in the legal tradition. However,

143 In Clifford, “Listening to Law” at 49, I stated: “And it is never just one story. That makes it hard. To explain one thing, you usually need to explain another first. But where does that get us? Are we always forced to try and explain something else? Could you even explain it all if you tried? Theoretically, perhaps; but daily life doesn’t often unfold at that level of awareness. So where would we be? Stuck? No, that won’t work either. You pick a point that seems to fit and you jump in. You do your best.” In doing so I meant to point to a more holistic approach to W̱SÁNEĆ knowledge, law, story, and pedagogy, while also capturing the reality that the *revitalization* of W̱SÁNEĆ law requires jumping in at some point, even without all the knowledge and connections currently in place.

144 We are in relationships with all of creation, and relationships are fluid and contextual as opposed to governed by strict rules: see Marie Battiste & James (Sa’ke’j) Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Saskatoon: Purich Publishing, 2000) at 77–78 (writing that stories are not about transmitting “explicit rules,” but rather, are “anecdotes” focused on the “processes of knowing”); James (Sákéj) Youngblood Henderson, “Postcolonial Indigenous Legal Consciousness” 1 *Indigenous LJ* 2002 1 at 45 (characterizing Indigenous law as an ecological order in which everything is interrelated, holistic, and works to sustain harmony and balance through shared relationships with nature. Indigenous law is therefore based on the implicate order of the surrounding ecology. Because ecology and all life forms and forces are constantly in flux, Indigenous law works to constantly adapt to that flux). I have also found the work of Raymond Austin to be helpful. Austin describes three core values or legal concepts for the Navajo tradition: hózhq (glossed as peace, harmony, and balance), k’é (glossed as kinship unity through positive values), and k’ei (glossed as descent, clanship, and kinship), which he describes as conditions generated through the operation of Navajo law, as opposed to a basic legal principle to be directly applied: see Raymond Austin, *Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Government* (Minneapolis: University of Minnesota Press, 2009) [Austin, *Navajo Courts*].

stories can have layered meaning, and if we embrace the mode of reasoning carried in the SENĆOTEN language, is that all that the story of The Four Winds is meant to convey?

The revitalization of W̱SÁNEĆ law should not be about looking for a separate system of rules, but rather for processes of normative deliberation.¹⁴⁵ I have therefore not read W̱SÁNEĆ stories with a common law mode of reasoning in mind.¹⁴⁶ I have not looked for a *ratio* or for explicit rules within stories. I don't think W̱SÁNEĆ stories are meant to (at least predominantly) encode rules within individual stories in the same way. Rather, my inquiry has been to try and build implicit and meaningful connections across stories and thus to identify and better understand the W̱SÁNEĆ mode of reasoning encoded within them. There are several implications in taking up this mode of reasoning with stories.

Just as one cannot understand the full meaning of the word TENEKSEN without becoming a participant and drawing connections with other aspects of knowledge, so too can one not fully understand a story without doing the same. Stories may be a good place to start, but you can never fully grasp a principle or a legal tradition by looking only to one story, or even a particular set of stories. The W̱SÁNEĆ mode of reasoning means that stories always link together with other stories, with the SENĆOTEN language, and with other aspects of knowledge and worldview. The more work we do in building these connections beyond the words of the story, the better we begin to understand the mode of reasoning required in W̱SÁNEĆ law. Building these connections is not simply about learning the stories (though that is a helpful guide) but requires deeper engagement and embodied learning.

As W̱SÁNEĆ stories are meant to create participants, the learner must therefore become directly involved in a relationship with that which the story is speaking about in order to grasp the full meaning. In fact, the stories themselves, even when written, are already a manifestation of this type of learning and pedagogy. The Old People who carried these stories before were participants in this same way, and thus equally embodied both the song and the echo. What I mean is that, the stories the Old People carried, and that we turn to here, are a snapshot of a particular time and telling; they were a product of the knowledge and experience already developed over time by those who came before them. What this mode of reasoning tells me is that in each instance these stories have always reached beyond the words of any single telling or

¹⁴⁵ See Webber, "Legal Pluralism".

¹⁴⁶ See Napoleon & Friedland, "An Inside Job".

version of the story, and learning from them therefore requires a different type of engagement. W̱SÁNEĆ knowledge is not abstracted from relationships, but rather, is premised on those relationships. The time, place, storyteller and the learner all shape the story and the context in which it is told and carried.

Embodying these stories and teachings is a significant part of being a participant and learning from them. We should not see these stories as detached from daily life, as though they are only remnants of the past. When we see that these stories relate to something beyond them, and always have, then they become more dynamic and powerful. The story of The Four Winds is more explicit in this regard, and can be best exemplified by relating some of my own experience with this story.

The story of The Four Winds carries knowledge about the relationship W̱SÁNEĆ have with the winds in W̱SÁNEĆ territory, which is expressed through the character of each family member in the story. I have experienced these winds, and their connection with other stories, in several different ways. For instance, I have elsewhere written about the SENĆOŦEN concept of TETÁĆES (island)—meaning “Relatives of the Deep”. The word TETÁĆES reflects the W̱SÁNEĆ creation story for islands, in which during the time of creation the Creator made the islands by throwing a number of W̱SÁNEĆ ancestors into the ocean.¹⁴⁷ I have found the concept useful to express a relationality I see within W̱SÁNEĆ stories and law. In that story, I refer specifically to one of these islands – ŁEL,TOS (James Island), meaning “splashed on the face.” ŁEL,TOS is named such because the southeast side of the island is worn by the wind and the tide. I have stood on the shores at Tsawout in a very strong southeast wind (SKANET) as it rained and as heavy waves funneled through the channel, and wore away at ŁEL,TOS. Similarly, as I renovated the house my great-grandfather built on the shores of Saanichton Bay at Tsawout, I felt the biting teeth and chill of the north wind. On many days the wind blew from different directions, but it is on days the north winds blow that the chill becomes particularly pronounced. I could literally feel the temperature drop from the presence of SOTEĆ. In this way, these stories tell us of life within W̱SÁNEĆ territory and carry knowledge that is central for navigating the ocean and weather. They tell us of moral values, but they are also rooted in place and ontology that teaches us how to understand and live in relation with the land and beings in

¹⁴⁷ In doing so the story explains that the Creator told the W̱SÁNEĆ to look after their “Relatives of the Deep” and for the “Relatives of the Deep” to look after the W̱SÁNEĆ. This created a reciprocal obligation that reflects W̱SÁNEĆ law.

WSÁNEĆ territory, including the wind. It may even be said that these stories and laws are *of* the land.

The re-emergence of WSÁNEĆ law is not only about the knowledge and teachings within the stories themselves, but also about embodying the mode of reasoning they speak to.¹⁴⁸ Many of the stories flow from this type of engagement, and from the relationships with the land that form the content of the story. This brings us to another broad theme of WSÁNEĆ stories and WSÁNEĆ law – in most cases they are connected to “place.”¹⁴⁹

4. “Place” and WSÁNEĆ Law

The story of ŁÁU, WELNEW reminds me of the importance of place and SENĆOTEN place names. WSÁNEĆ stories are tied to place, but place is not an object, but an actor with which we are in relation.¹⁵⁰ Even the act of naming in the SENĆOTEN language is relational, often reflecting a feeling or experience of place. Better understanding WSÁNEĆ concept of place helps build our understanding of WSÁNEĆ law and our mode of reasoning with WSÁNEĆ stories. We can also begin to see how this rootedness in place will be complicated by the context of climate crisis.

In the beginning XÁLS taught the Saanich People how to take care of this land. For many years, the Saanich remembered XÁLS’s words. They were happy and had plenty of food. But as many years passed, some people broke XÁLS words and forgot his teachings. XÁLS became unhappy and told the people that there would be a flood over the land. They were to prepare. They prepared a long rope of cedar bark. They gathered food and possessions. The tide water began to rise. The people packed their belongings into their canoes. Some people did not heed XÁLS teachings. They were not prepared and were washed away. Their canoes were destroyed.¹⁵¹ The water rose higher and higher. The people paddled to the highest mountain nearby. The tress were still above the water. They tied themselves to an arbutus tree on top of the mountain. Soon the tops of the trees were covered with water. They were afraid and prayed to survive the great flood. They asked XÁLS to take pity on them. After many days, a raven came and landed on the bow of the canoe. He was carrying a stick and was talking to the people. The raven had brought the good news. Suddenly a mountain began to emerge in the distance. One of the men said “NI QENNET TFE WSÁNEĆ” (“Look at what is emerging”), as he pointed to the mountain emerging in the distance. Before they left the mountain, they gathered around the huge coil of cedar rope and gave thanks. They said from now on this mountain will be called ŁÁU, WELNEW

148 See Mack, “Hoquotist” at 305 (speaking to the importance of actively engaging our stories and cultural practices in the processes of revitalization).

149 There are different categories of stories and different reasons for telling a story. “Place” and place names are very important in WSÁNEĆ stories, teachings, laws, and in the SENĆOTEN language. My purpose in the following section is to emphasize the importance of place, not to deny or detract from other important elements and considerations.

150 See also Craft, “Giving and Receiving Life” and Craft, “Reclaiming Space”.

151 This reminds me of Mack’s use of the word *hoquotist* in analyzing the impact of colonialism on the Nuu- chah-nulth people: see Mack, “Hoquotist”.

*(Place of refuge, escape, healing). They further said we will be called the WSÁNEĆ (The emerging people). XÁLS heard their prayers. XÁLS said he would not punish the people by flood again.*¹⁵²

I have argued that differences in ontology create deep tensions between Indigenous and settler societies and legal traditions. In this section I will begin to explore aspects of a place based ontology that I argue informs WSÁNEĆ law.

WSÁNEĆ stories provide narratives for the elements of creation, and are thus a journey across WSÁNEĆ territory, as well as through WSÁNEĆ cosmology and worldview.¹⁵³ It will be seen that WSÁNEĆ stories provide a rootedness in place. However, it is also interesting to note that the WSÁNEĆ are the “emerging people”. It is possible to see emerging as signifying something that is always in a state of becoming, even while situated in place. This observation would also reflect my earlier comments about the interaction between the song and echo in WSÁNEĆ tradition.

Knowledge in the WSÁNEĆ tradition is not abstracted from, but rather premised on, relationships. One way in which this manifests is through the connection between stories and law to place. Many WSÁNEĆ stories have a strong spatial component in that they are connected to place, physically identifiable points, or to the creation of beings (trees, deer, islands, wind, etc.) which are located or move spatially in and through WSÁNEĆ territory. Similarly, most SENĆOTEN place names contain, through literal translation, and the creation stories they carry with them, important teachings and laws. For instance, as described above, ŁÁU,WELNEW translates as “place of refuge” and connects to a central WSÁNEĆ creation story. Philip Kevin Paul interprets several important symbols throughout this story as reminding the WSÁNEĆ about their relationships with the animals (represented by the Raven); the plants (represented by the arbutus tree, as well as the cedar rope); the earth or land (represented by the mountain); and with the Creator (represented through the emergence of the WSÁNEĆ and the flood).¹⁵⁴ It is also, more specifically, what makes ŁÁU,WELNEW a spiritually important place for the WSÁNEĆ.

¹⁵² Claxton & Elliott, ŁÁU,WELNEW.

¹⁵³ I have elsewhere argued for the intimate connection between cosmology, or worldview, and WSÁNEĆ law: see Clifford, “WSÁNEĆ Legal Theory”.

¹⁵⁴ Paul, *The Care-Takers* at 3.

Paul goes on to indicate that the SENĆOTEN language creates participants, a concept I found useful to introduce in the preceding section. Paul's principal point was that SENĆOTEN requires the speaker to become directly involved in a relationship with that which is being spoken about in order to grasp the full meaning of the SENĆOTEN word being used. This point was exemplified through the word TENEKSEN. I argued that the same mode of reasoning applies to stories. A similar observation holds here in regard to "place" and "place-names" as well. Paul writes that "[e]ach place name requires explanation. The interpretations range from depictions of the sound that a stream makes hitting the shore; to descriptions of hunting grounds; to explanations of water circulation; even to lessons in life."¹⁵⁵ The place names cannot be fully understood without experiential knowledge of that place.

A number of the place names that now overlay WSÁNEĆ territory are labeled after "significant" people, as determined by settler society. An excellent example is the island in WSÁNEĆ territory called ŁEL,TOS. As discussed above, the name represents the fact that the southeast side of the island is worn by the wind and the tide. The name ŁEL,TOS therefore connects with, at minimum, the story of The Four Winds and the creation story of TETÁĆES (islands, or "Relatives of the Deep"). The islands within WSÁNEĆ territory were once WSÁNEĆ ancestors. During the time of creation XÁLS threw a number of WSÁNEĆ people out into the ocean making the islands that are there today. The names of the islands reflect their characteristics and the manner in which they landed. ŁEL,TOS is quite literally "splashed on the face". The creation story of TETÁĆES also goes on to provide a law of reciprocal relationships in which the WSÁNEĆ and their Relatives of the Deep each care for one another as interdependent beings.

In English, however, we now refer to ŁEL,TOS as James Island, named after Sir James Douglas, Governor of Vancouver Island, who concluded a number of treaties in the area.¹⁵⁶ The process of naming land or places after significant people, in the western, or settler, tradition, seems to reflect the tendency to set humans apart from nature, and perhaps even to impose human, and more specifically the individual, over nature and place.¹⁵⁷ Conversely, to name

¹⁵⁵ *Ibid* at 4.

¹⁵⁶ I will discuss ŁEL,TOS in detail in Chapter Five. For more on James Island, from a different perspective, see Bea Bond, *Looking Back on James Island* (Sidney: Porthole Press, 1991) [Bond, *James Island*].

¹⁵⁷ I note that sometimes names come from an anglicized version of the original Indigenous name. Such an example is Saanich, which comes from WSÁNEĆ. This process of naming might be seen as an attempt to mimic the Indigenous name, as opposed to a direct policy to impose a foreign name. However, while such an approach does differ from directly imposing a name of a significant person on the landscape, it can still function as a colonial tool in that sometimes these names are placed in another territory. For example,

places in a way that reflects the very being of land and the W̱SÁNEĆ relationship to, and experiential knowledge of, that particular area of land or element of nature, reflects a very different way of orienting ourselves to that place. I will return to a discussion of this Nature/Society binary and what role it has in settler colonialism and climate crisis in far greater detail in later chapters. For now, it is important to grasp that this ontological difference is relevant in that our laws reflect and generate out of this mode of reasoning.¹⁵⁸

Despite this orientation to place in the W̱SÁNEĆ tradition, the act of naming in itself cannot avoid some element of anthropocentrism. However, one of my teachers has emphasized that it is possible to avoid the presumptiveness of naming.¹⁵⁹ Part of avoiding this presumptiveness involves understanding that different people have different names for place; it is not presuming that your name, story, or relationship to a place is the only one. In relation to the notion of “territory,”¹⁶⁰ I have heard that this lack of presumptiveness was particularly relevant near “soft borders” where neighbors were permitted to each relate to place in their own respectful way. I have heard Philip Kevin Paul and John Elliott speak of PKOLS, now commonly known as Mount Douglas in Victoria, British Columbia, as one such area where neighboring societies would often meet with an attitude of “soft borders,” as opposed to ownership. This attitude involves respecting different names and stories for place within families, and across neighboring Indigenous societies. It also involves respecting place in and of itself.

Just as there may be an element of presumptiveness to naming, so too can it be discourteous to name a place when that act of naming is an attempt to objectify and possess that place. In the SENĆOTEN language naming is less about capturing a place, as in claiming or objectifying it. Rather, naming is relational and often describes a feeling or experience of place. What is being named is less about the place itself, than it is the relationship to that place. When seen in this light, naming is less about objectifying a place as it is about “attaching” ourselves to

I live near a small park named Iroquois park near Sidney, British Columbia, which is squarely within W̱SÁNEĆ territory. The Iroquois, or Haudenosaunee, people’s territory is located in and around what is now Quebec, Ontario, and New York areas.

158 See Austin, *Navajo Courts* for more on seeing Navajo principles as conditions generated through law, as opposed to basic legal principles to be applied.

159 Philip Kevin Paul emphasized this point in a Linguistics 379: Language and Land class I attended at the University of Victoria in the summer of 2016. Teaching of Kevin Paul 95 July 2016) Victoria, British Columbia.

160 I have chosen the word territory here because I was uncomfortable with the word “property” and “jurisdiction” which each carry notions of ownership or power over an area of land. For more regarding tensions with the notion of jurisdiction, see Clifford, “W̱SÁNEĆ Legal Theory”.

that place in respectful ways. Such an approach does not necessarily limit other names or experiences being added to a place in their own respectful way. It is more like an assemblage.¹⁶¹

An example of this system of naming in the SENĆOTEN language is the word for Sockeye salmon, which is TEKI; its prayer name is EN ŚW SELÁWE, which means “I’m your pitiful one.” The prayer name is more about capturing a feeling toward the salmon and the WSÁNEĆ people’s dependence on sockeye to live. In the WSÁNEĆ calendar ĆENTEKI is the Sockeye Moon. Our oral history tells us that the WSÁNEĆ were once very poor but the Salmon People took pity on us.¹⁶² It was also the Salmon People who gave to us our traditional method of fishing, the reef net (SXOLE).¹⁶³ During this Moon we have special ceremonies to honour the Salmon People and our reef net fishery.¹⁶⁴ The name for Sockeye is a reflection of this relationship between the WSÁNEĆ and Sockeye.¹⁶⁵

In the processes of revitalizing WSÁNEĆ law it is important to grasp this ontology and the ways in which it manifests through place names. Control over the act and process of naming has been a significant tool of colonialism.¹⁶⁶ In this context, naming has been used as a tool in an attempt to erase Indigenous presence,¹⁶⁷ as well as Indigenous knowledge and place-based ontologies, and thus claims to governing authority.¹⁶⁸ Consequently, reclaiming traditional Indigenous place names has also been a tool of resistance and an active decolonization strategy for Indigenous peoples. Within WSÁNEĆ territory there has been an effort to rename Mount Douglas (again, named after Sir James Douglas) to its original name of PKOLS.¹⁶⁹ These names are important to the re-emergence of WSÁNEĆ law beyond symbolism for several reasons. Law

161 There is some reference here to Deleuze and Guattari. See generally Gilles Deleuze & Felix Guattari, *Anti-Oedipus: Capitalism and Schizophrenia* (Minnesota: University of Minnesota Press, 2008); Gilles Deleuze & Felix Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* (Minneapolis: University of Minnesota Press, 1987). I do not pretend to fully understand their work, or claim any type of synchronicity between them and Indigenous theory. Rather, it is another way of drawing a comparison for those interested in that field that may be helpful.

162 Claxton & Elliott, *Saanich Year*.

163 Earl Claxton & John Elliott, *Reef Net Technology of the Saltwater People* (Brentwood Bay, BC: Saanich Indian School Board, 1994) [Claxton & Elliott, *Reef Net Technology*]. See also Nicholas Xumthoult Claxton, “ISTÁ ŚĆIÁNEW, ISTÁ SXOLE ‘To Fish as Formerly’: The Douglas Treaties and the WSÁNEĆ Reef-Net Fisheries” in Leanne Simpson, ed., *Lighting the Eighth Fire: The Liberation, Resurgence, and Protection of Indigenous Nations* (Winnipeg: Arbeiter Ring, 2008) [Claxton, “The Douglas Treaties”]; Nicholas Xumthoult Claxton, *To Fish as Formerly: A Resurgent Journey Back to the Saanich Reef Net Fishery* (PhD Thesis, University of Victoria, Department of Curriculum and Instruction, 2015) [unpublished] [Claxton, *To Fish as Formerly*].

164 Claxton & Elliott, *Saanich Year*.

165 My thoughts in this paragraph are again influenced from the class I took with Philip Kevin Paul. Teachings of Kevin Paul (5 July 2016) Victoria, British Columbia.

166 See Jean O’Brien, *Firsting and Lasting: Writing Indians Out of Existence in New England* (Minneapolis: University of Minnesota Press, 2010) (providing one example of analyzing this process).

167 *Ibid.*

168 Rueben Rose-Redwood, “‘Reclaim, Rename, Reoccupy’: Decolonizing Place and the Reclaiming of PKOLS” (2016) 15:1 ACME 187 [Rose-Redwood, “Reclaiming PKOLS”].

169 *Ibid.*

and culture are always connected¹⁷⁰ and the place based ontology I have been describing is central to understanding W̱SÁNEĆ law. Our stories are connected to place, and to events that are marked into the land. Thus, our teachings and laws are in and of the land. At the risk of being too brief, this is much different than western law, which is today marked considerably by liberalism, which in its original form was the birth of an *idea* that placed liberty and equality in the realm of the individual. As an idea, liberalism is not restricted to or informed by place, but rather, is specifically meant to appear or apply as a “universal” idea – a societal good to be expected and spread across vastly different territories.¹⁷¹

An important aspect of understanding W̱SÁNEĆ law is learning these place names, being in relationship to these places, and the deeper meaning contained in the SENĆOTEN language, all of which connects directly to creation stories that are tied to these places and place names. Our teachings and laws are embedded in these contexts and lands.¹⁷²

4.1. Jurisdictional Boundaries

Having introduced the foundations of W̱SÁNEĆ place-based ontology, it is worth pausing to consider the implications this has for the nature of the type of jurisdictional boundaries I am characterizing in speaking of W̱SÁNEĆ law in this way. I will have much more to say about jurisdiction in later chapters, though here my narrow aim is to give more clarity to the scope or extent of jurisdictional authority I am referencing, and thus to the bounds of the legal order. I have up until this point referred to *W̱SÁNEĆ* law, as opposed to a broader Coast Salish or Salish tradition that the W̱SÁNEĆ might be said to belong to. My intent in this section is to reflect upon this choice through drawing further connections with the place-based ontology I have been describing.

While comparisons and insights can be drawn across Indigenous traditions,¹⁷³ a rejection of a “pan-Indigenous” law is straightforward given the diversity of Indigenous societies across

170 For two examples within Indigenous legal theory that illustrate the connections between law and culture, see Craft, “Giving and Receiving Life” and Black, *The Land is the Source*. Also see Rosen, *Law as Culture* more generally.

171 My comments here are necessarily limited. I am simply attempting to draw a general comparison as opposed to definitively defining what liberalism means to any given person. Liberalism has a notoriously slippery definition. For a comparison of rooted and liberal constitutive frameworks, see Mills, “Rooted Constitutionalism”.

172 Sarah Morales, in speaking of the Hul’qumi’num tradition, makes a similar point about how laws are embedded in the land and how place is where we can connect to and learn from our ancestors: see Sarah Morales, “STL’UL NUP: Legal Landscapes of the Hul’qumi’num Mustimuhw” (2016) 33 Windsor YB Access to Just 103 [Morales, “Legal Landscapes”].

173 The general context of colonialism (though colonialism never applies evenly across Indigenous societies) means Indigenous societies face similar struggles. The Indigenous traditions I am familiar with also tend to see themselves as patterned into a complex web of interdependent relationships with other beings, thereby making dialogue across traditions simpler.

what is now Canada.¹⁷⁴ Making narrower distinctions between the jurisdictional authorities of these various Indigenous traditions can be more complex. There are conceptual and power structures that may play a role in emphasizing either a more narrow or broad scope than I have proposed. For instance, the imposition of the *Indian Act* has led to the dismantling of Indigenous societies into smaller units, or “Indian Bands.”¹⁷⁵ In the case of W̱SÁNEĆ, we are now composed of four different Indian Bands: Tsawout, Tsartlip, Tseycum, and Pauquachin.¹⁷⁶ The continued existence of the *Indian Act*, and the power it exerts to divide and therefore undermine Indigenous governance structures, means that there may be real pressure and incentive to view Indigenous law as operating within the framework of *Indian Act* jurisdiction.

Conversely, some may critique *Indian Act* jurisdiction as mirroring a colonial logic and in seeking to escape this scenario prefer to emphasize a broader Salish or Coast Salish legal tradition as a more appropriate jurisdictional scale. It is certainly possible to draw similarities across the numerous societies of which the Salish or Coast Salish group is composed – and so there should be given that Indigenous societies never existed in isolation from their neighbours. There is (and always has been) mobility, kinship and relations, and interaction across societies, giving weight to the importance of a broader emphasis on a Salish or Coast Salish legal tradition, within certain contexts.

Various “nested jurisdictions” operate within Canada’s federalist structure. For instance, in Canadian law we see distinctions between federal, provincial, municipal, and even international law and jurisdiction, depending on the context. My point is not to draw a direct comparison to a division of powers,¹⁷⁷ but to indicate that law often operates at different jurisdictional levels based on context. However, if we take W̱SÁNEĆ stories seriously (as I suggest we should) we thereby foreground a place-based ontology that necessarily shapes our understanding of jurisdiction and how we see law operating. First off, in general these stories span W̱SÁNEĆ territory, moving beyond any given *Indian Act* Band. Further, while I am more narrowly a member of the Tsawout community (which is relevant) I identify principally as W̱SÁNEĆ. My experience is that this is largely true for many people in W̱SÁNEĆ.¹⁷⁸ As I

¹⁷⁴ Borrows, *Indigenous Constitution*.

¹⁷⁵ *Indian Act*, RSC 1985, c 1-5.

¹⁷⁶ I was taught that the Malahat are also W̱SÁNEĆ people, though they have connections elsewhere now as well.

¹⁷⁷ See Jeff Cornthassel & Richard C. Witmer II, *Forced Federalism: Contemporary Challenges to Indigenous Nationhood* (Norman: University of Oklahoma Press, 2008) for a discussion of federalism and its impact on Indigenous self-determination.

¹⁷⁸ I am always hesitant to speak for others, though my personal experience indicates that many people seem to consider themselves W̱SÁNEĆ.

claimed at the outset, W̱SÁNEĆ law and identity are bound up. The re-emergence of W̱SÁNEĆ law presents an opportunity to (re)envision an alternative that moves beyond the confines of the *Indian Act*.

The broader scale of a Salish or Coast Salish legal tradition seems to face similar challenges once we foreground the place-based nature of W̱SÁNEĆ stories. It is worth repeating that there have been wars, raids, peace, trade, inter-marriage, and more between Salish and Coast Salish societies. Within that context, without being able to pin it down at this point,¹⁷⁹ there may be something that holds together this larger group as a distinct tradition.¹⁸⁰ However, I view this interaction as representing more of an “international” relationship between distinct nations and traditions, as opposed to a unity of one tradition. With that said, part of what also seems to be setting the bounds around the larger Salish or Coast Salish tradition or identity is an anthropological or linguistic classification. My understanding is that the term Salish comes from the language of the Bitterroot Salish in Montana, and their language, Salish. The term was later extended to include all similar languages. While language similarities are very important, which I hope I have expressed, classifying and grouping Indigenous peoples in this manner overlooks the fact that within that construct are distinct cultural and political societies of people with their own legal and political authority.¹⁸¹ The fact that we see ourselves as W̱SÁNEĆ matters.

While I sympathize with resisting the logic of the *Indian Act* that seeks to break down Indigenous societies into smaller groups, by emphasizing a broader Salish or Coast Salish tradition we may not be achieving exactly what we think. Arguably, this approach could simply mirror the abstract nation building projects of nation states, which brings together larger groups of people through emphasizing (or constructing) shared similarities across vastly different places and physical locations. For instance, a Salish group from Montana in no way shares the same longstanding and intimate relationships that as W̱SÁNEĆ we have with our sacred mountain, ŁÁU, WELNEW. It was at ŁÁU, WELNEW that we became W̱SÁNEĆ, “the emerging people.” This point is particularly significant given place-based ontology is central to what makes W̱SÁNEĆ law intelligible. Within this framework, it may be helpful to not too quickly draw

179 I simply do not have an in-depth knowledge of all Salish and Coast Salish societies and legal traditions that would allow me to speak fully on this point.

180 There is a great deal of internal diversity within the loose category of Coast Salish.

181 To extend my distinction above about distinguishing between federal, provincial, municipal, and international law within Canada, we can here also consider the diversity of, for instance, French language speakers in Quebec versus the maritime provinces versus franco-Manitobans.

groups together under one single legal tradition, one single story, one single path, or one single vision.¹⁸²

Place-based ontology and land-based pedagogy are not unique to W̱SÁNEĆ.¹⁸³ XÁLS too is found in many Coast Salish traditions.¹⁸⁴ Therefore, it is conceivable that we might be able to create a set of general principles that describe a manner of relating to land and place that could apply to all, or most, Salish or Coast Salish groups. That is, although the specific places and relationships to those places would differ across each group, a similar principle or method of relating to land, and the ways in which the groups' laws flow from that relationship, could very well be consistent. Such an approach can be very helpful. At the same time, from my experience, those looking to better understand and apply Indigenous law often seek greater specificity. How do we achieve that specificity? Raymond Austin has described the core values or legal concepts of Navajo law as being conditions generated through the operation of Navajo law, as opposed to a basic legal principle to be directly applied.¹⁸⁵ My emphasis then is that those broader principles, which we might be able to point to, gain specificity only through application in specific place and context. It is in this way that we also give meaningful weight to place as an actor with both being and agency.

W̱SÁNEĆ law is not operating in abstract space or place; it is rooted in W̱SÁNEĆ homelands. As Philip Kevin Paul notes, "...Saanich beliefs cannot be taken out or away from us if only because XÁLS and the old people have left a map for us in the Saanich Language and the traditional place names, so we can return to the very heart of our strength."¹⁸⁶ With that said, both place and relationship to place is not something that is fixed. Rather, it is about respecting relationships and interdependencies across a range of actors, and never about a relationship

182 To be clear, I am not arguing for W̱SÁNEĆ to stand alone and deny the relations it has with others; quite the opposite. We can, and must, work together even as we are distinct; to my mind, that is what it means to be in relation. Moving the register of law and decision making to a local level does not negate that there are always relations and needs to interact across those planes—especially when faced with global concerns such as climate crisis. Arguably, it may be that moving concerns to the local level is more effective in ensuring that those most directly connected to an area and place have decision-making authority as opposed to those far removed from that place. This seems to often happen with resource development where Indigenous groups are forced to pay the local price for resource extraction largely benefiting those far removed from that place. I also note that scholars outside Indigenous issues have also argued for more local governments for those wishing to make that connection: see e.g. Warren Magnusson, *Local Self-Government and the Right to the City* (Montreal: McGill-Queen's University Press, 2015).

183 For more discussion on land-based pedagogy see e.g. Morales, "Legal Landscapes"; John Borrows, "Outsider Education: Indigenous Law and Land-Based Learning" (2016) 33 Windsor YB Access to Just 1; Leanne Betasamosake Simpson, "Land as Pedagogy: Nishnaabeg Intelligence and Rebellious Transformation" (2014) 3:3 Decolonization 1 [L. Simpson, "Land as Pedagogy"]; Matthew Wildcat et al, "Learning From the Land: Indigenous Land Based Pedagogy and Decolonization" (2014) 3:3 Decolonization I.

184 Amongst the island Hul'qumi, num the Creator is known as Xeels, for example.

185 Austin, *Navajo Courts*.

186 This passage from Philip Kevin Paul was incorporated in the papers I received from my late grandfather. Teaching of Earl Claxton Sr., John Elliott, and Kevin Paul (date unknown) Saanichton, British Columbia.

between two fixed points. Within this ontology land itself is given greater “being” and “agency” and thus is not simply a “thing” with which to be in relation to.¹⁸⁷

In expanding on this point, place is necessarily non-linear.¹⁸⁸ For instance, every place is subject to a cycle of seasons. The WSÁNEĆ calendar is organized around thirteen different moons that relate to this cycle of seasons.¹⁸⁹ It is also clear that place itself changes over time. For instance, ŁEL,TOS, or James Island, has experienced vast and varied changes over the last one-hundred plus years.¹⁹⁰ I will describe many of these changes in a later chapter. For now, we can note that these changes have forcefully altered the relationship the WSÁNEĆ have been able to maintain with ŁEL,TOS over that time. This displacement from place has resulted largely in an inability to uphold our system of law and to fulfill our obligations to care for ŁEL,TOS. However, far from rendering the stories of ŁEL,TOS, TETÁĆES, and others associated stories with that place meaningless, those stories and the responsibility to care for those islands remain just as powerful and all the more pressing given the harms and violations of WSÁNEĆ laws that have occurred.

Relationships remain, despite never manifesting in exactly the same way. WSÁNEĆ law speaks to the need to have healthy and reciprocal relationships, while leaving open a range of possibilities for those responsibilities to be met within given circumstances.¹⁹¹ Understanding the specifics of what is required in a given relationship and a given instance requires a close connection with place. Since stories and WSÁNEĆ law are speaking in large part to encompassing relationships while leaving open an acceptable range of potential applications to meet that standard, my final inquiry in this chapter is focused around how stories are able to accomplish this. Much of this storywork is done through an internalization process, that is, developing the discipline to live with reciprocity within the web of interdependent relationships the stories speak to. This understanding and commitment to live in reciprocity with all that is around us is also something I later argue is needed more broadly in the context of climate crisis.

187 Craft, “Giving and Receiving Life” and Craft, “Reclaiming space”.

188 Vine Deloria Jr has distinguished between spatial thinking and temporal thinking, which tends to be more linear: Vine Deloria Jr, *God is Red: A Native View of Religion*, 30th Anniversary ed (Golden, Colorado: Fulcrum Publishing, 2003) [Deloria Jr., *God is Red*].

189 Claxton & Elliott, *Saanich Year*.

190 ŁEL,TOS has been a private hunting reserve, dynamite munitions site, the home of a world-class golf resort, a private “eco-paradise” for the wealthy and elite, and more.

191 Recall the work of Austin who described Navajo legal principles as conditions generated through law, as opposed to basic legal principles to be directly applied: Austin, *Navajo Courts*.

5. Decentralized Storywork

I know several stories about SMIEF (deer). Two of these stories remind me that when WSÁNEĆ law works through stories it functions primarily to engage and empower actors within the tradition to internalize WSÁNEĆ laws and norms within an acceptable range:¹⁹²

The first story is set in the time of creation:

SMIEF was one of the first WSÁNEĆ men. This was at a time when the Creator, XÁLS, was still walking the earth. One day SMIEF was on the shore at WEN,NÁ,NEĆ (Saltspring Island) making mussel shell knives and arrows. A man came ashore while he was doing this and asked SMIEF what he was making. It was CÉĆIKEN (Mink). SMIEF told him he was making knives and arrows so that he could kill XÁLS when he arrived. SMIEF knew that XÁLS was making the animals by transforming people. He was afraid of XÁLS and didn't want to be turned into an animal. It was because of this attitude, and because of his intention to harm someone, that XÁLS came and turned SMIEF into a deer.

As SMIEF was changed into a deer he became angry and felt bad for himself. He started to walk away full with these feelings. At that time XÁLS called him back and said he wasn't finished with him yet. XÁLS said that he had not given SMIEF a MESEN (Gall bladder) yet. SMIEF again started to walk away in anger. XÁLS was upset with SMIEF's expression of anger towards him. Because of this XÁLS took the two arrows SMIEF had made and placed them in SMIEF's back legs, giving him bent legs. XÁLS then took the two mussel shell knives and placed them on either side of SMIEF's head. He said that these would now be SMIEF's ears and that they would be very sensitive. XÁLS told SMIEF to go hide in the hills and that he would be hunted by the WSÁNEĆ for food and clothing. XÁLS told him that his skin would warm and protect the people, his hoofs will be used and his human spirit would care for the future generations of WSÁNEĆ. SMIEF ran into the hills and still protects the streams and hillsides. He is still listening so he can protect himself from the hunters.¹⁹³

The second story, or teaching, is about hunting deer:¹⁹⁴

When XÁLS still walked the Earth he made the animals, birds, plants, forest, and all of their spirits. The knowledge of the origin of all of creation, the mountains, rock boulders, and the trees caused the WSÁNEĆ people to have a deep respect for walking in the forest, the home of their relatives. Preparation prior to a hunt was a way of life and an important part of their respectful ways. To walk in these sacred places and to have the intention to take the life of an animal or plant is a sacred act. The plants and the animals are addressed by their relative name, and

¹⁹² Umeek (E Richard Atleo), *Principles of Tsawalk: An Indigenous Approach to Global Crisis* (Vancouver: UBC Press, 2011) [Umeek, *Principles of Tsawalk*] provides an excellent discussion on many of the same points covered in this section, but from a Nuuchah-nulth tradition. Atleo speaks to creation stories as theory, that is a vision of reality (physical and non-physical) and how we might function successfully within that reality. Creation stories are thus a constellation of teachings which promote harmonious relationships across all life forms. The process of human development or maturation was achieved through the vision quest. The experiences of this vision quest were individual, but the practice was universal amongst traditional Nuuchah-nulth: *ibid* at 53. Therefore, each individual, "within the bounds of accepted cultural beliefs, can make his or her own decisions": *ibid* at 117. "It is for this reason that an origin story, such as the one about Son of Raven, when taken from either an individual or a community perspective, is, in principle, the same story even though it may be interpreted differently by each person": *ibid*.

¹⁹³ Teaching of Earl Claxton Sr., John Elliott, and Kevin Paul (date unknown) Saanichton, British Columbia.

¹⁹⁴ There are other stories about hunting deer at particular locations, which also connect with specific place names.

shown respect when a life is taken. To walk in sacred places in search of a relative for survival is like a prayer. It is a WSÁNEĆ belief that every act is a kind of prayer.

When the Creator made the deer he said that the deer should not be mentioned by its SENĆOTEN name, SMIEF, previous to or during the hunt. The deer should be addressed as INES (grandchild) instead. SMIEF was once a WSÁNEĆ person's grandchild who would not listen. Referring to deer as INES in this way is part of how XÁLS intended the WSÁNEĆ people to care for the deer. XÁLS reminded SMIEF that he would feed and clothe the WSÁNEĆ people. However, if one remembers why XÁLS turned SMIEF into a deer then they might think about SMIEF's intention to kill or injure XÁLS while hunting. It is wrong to intend or cause harm to anyone.

XÁLS blessed the deer with a strong mind and the ability to survive in the forest and hills. If one walks in the forest unprepared, it is a WSÁNEĆ belief that the deer can affect the mind of a hunter and cause those who are unprepared to see what the deer wants him to see. The powerful mind of the deer can cause the hunter to see the deer's human form. The deer can also cause the unprepared hunter to become lost.

The hunter should never take for granted the life of the deer, XÁLS creation. These are the beliefs of the WSÁNEĆ people. It is for these reasons that the WSÁNEĆ show their deepest respect and use the name INES while hunting.¹⁹⁵

Each of these stories is about deer, but both are embedded in different contexts and are told on different occasions. Context is important to all relationships and the differences between these stories reflect the notion that deer is not simply a “thing,” but a being with which we are in relation. A similar occurrence can be identified in the SENĆOTEN language and its reference to water.¹⁹⁶ The word for water in SENĆOTEN is KO. However, when water is a part of ceremony, it is referred to as SĚMEW (Grandfather Rain).¹⁹⁷ This reference is to the creation story of SĚMEW, the first WSÁNEĆ ancestor who came to the Earth in the form of rain. SĚMEW helped form the rivers, streams, and ocean in WSÁNEĆ territory, and thereby brings life to the land. The WSÁNEĆ honour SĚMEW through the ceremony of bathing that is done in the waters of WSÁNEĆ territory. Again, relationship to water is not static because water is not a “thing.”¹⁹⁸

Once one starts to emphasize relationships in this way then there is necessarily fluidity as well. Stories speak to large issues in a more indirect manner, and as a result each person will

195 Teaching of Earl Claxton Sr., John Elliott, and Kevin Paul (date unknown) Saanichton, British Columbia.

196 A similar occurrence happens in other Indigenous languages as well. Rupert Ross describes this in Rupert Ross, *Indigenous Healing: Exploring Traditional Paths* (Toronto: Penguin Canada, 2014) at ch 1. He uses the example of a bowl, which in one context may be used to hold sweetgrass for ceremony, and another to hold cigarette butts. The bowl is not a “thing”, but depends on context and its relation to what is happening and how it is being used.

197 See Clifford, “WSÁNEĆ Legal Theory ” (providing a more in depth discussion of Grandfather Rain).

198 See Craft, “Giving and Receiving Life” (providing a similar discussion of water in Anishinaabe tradition).

draw from stories differently.¹⁹⁹ Stories may also be related somewhat differently at different times, depending on context and what one wishes to emphasize to the audience within the story.²⁰⁰ In these ways the learner/listener becomes central to the tradition.²⁰¹ Within this pedagogy, teachings and laws are carried largely within the listener/learner, as opposed to becoming externalized or abstracted from this relationship.²⁰² Stories are dynamic in that teachers/storytellers and listeners/learners are never situated in precisely the same way.

Delineating a definitive way to live in healthy relation with other beings across a range of contexts (beyond reciprocity and having respect for those relationships) is not possible, and I think stories recognize that. My growing understanding is that W̱SÁNEĆ law has, as the foundational condition it seeks to generate through its operation, a respect for these interdependent relationships. In achieving this aim it functions primarily to engage and empower actors within the tradition to internalize these norms which become “defined by a range of behaviour that is mutually agreeable and reciprocal within a society.”²⁰³

Many W̱SÁNEĆ stories do appear to have an element of punishment about them. XÁLS walks the Earth transforming people into animals and stone, thereby making an example out of them – sometimes a good example and sometimes a bad example.²⁰⁴ In the first story about SMIEF he appears to be punished for his intention to kill or harm the Creator. In this case, the punishment is not coming from a decision maker in the community who is “policing” behaviour – though W̱SÁNEĆ law does have mechanisms for when behaviour strays.²⁰⁵ Rather, the force doing the “punishment” is spiritual (the Creator). Or, perhaps, the story may also reflect the presumption that there are simply direct consequences that manifest when we live in a state of unhealthy relationships. For example, our arrival into the ‘Anthropocene’ and global climate crisis are certainly a direct consequence of living in unhealthy relationships with the world

199 Paul, *The Care-Takers*.

200 See Napoleon & Friedland, “An Inside Job” (indicating that stories may be related differently at different times); Umeek, *Principles of Tsawalk* at 147 (writing: “If the fundamental characteristics of reality are perceived to be dynamic and ever-changing, as in accord with [vision quest] experiences, then it becomes problematic to keep records that are static....This dynamic reality was managed by Nuuchahnulth peoples through a method of storytelling that allowed for changes of detail from one telling to another (in the same way that reality presents itself as ever-changing)”).

201 See Paul, *The Care-Takers* (indicating that in an oral tradition the listener becomes the only vessel in which the teaching is carried); Napoleon & Friedland, “An Inside Job” (indicating the centrality of the learner in Indigenous law).

202 There may still be use of carvings, songs, totems, and other devices to carry meaning and relate the importance of particular events.

203 Umeek, *Principles of Tsawalk* at 93. Umeek goes on to discuss this range of behaviour in more detail and the ways in which this range of behaviour might come to be found mutually agreeable within Nuuchahnulth society.

204 CÍIYA, the ambitious woman who was turned into the stellar jay because of her discipline to work hard, is an example of someone being transformed to make a good example out of them.

205 Generally, this may include ceremony, the longhouse, or other methods for addressing a given dispute or problem.

around us. In this regard, it is interesting that SMİET has a fear of physically becoming an animal, which we might view as a resistance to the notion that humans are no more or less important than other more-than-human beings. In this light, the story speaks directly to ontology. In any case, the principal role of an agent within WŚÁNEĆ law is then to understand and develop the self-discipline to live in a respectful manner with the rest of creation.²⁰⁶ The notion of self-discipline is explicit in many WŚÁNEĆ stories and is, as I understand it, one of the central purposes of bathing ceremonies, for instance.²⁰⁷

To be clear, there are elements of WŚÁNEĆ law that relate to specific decision-making protocols when disputes arise. However, in the category of stories I have turned to, little of that comes through, and I do not understand that to be all that WŚÁNEĆ law is about. In no way do I dismiss the importance of specific decision-making processes. Rather, my point is that underlying specific decision-making protocols is an understanding of what those protocols reflect or are meant to accomplish.

It is easy to think of law simply as a social power applied to individual behaviours. What may come to mind regarding Canadian law are courts, police, regulations, administrative bodies, and the like. However, there is always an internalization of norms as a component of all law. Canadian citizens don't carry around a copy of the *Criminal Code* (or are even intimately familiar with its specifics in many cases) yet for the most part remain "law abiding" citizens who know generally what can and cannot be done. I am not drawing direct analogies with Canadian law, but simply indicating that relying on internalization does not mean law is not operating.²⁰⁸ My reason for emphasizing this point is that story, as a principal component of pedagogy in WŚÁNEĆ law, seems to necessitate this type of internalization. The implication is that the re-emergence of WŚÁNEĆ law must be about more than dispute resolution processes and include actors being immersed in these stories, and bringing these stories into daily life. Within WŚÁNEĆ law, if we are in need of a teaching, given the way we are living our lives, we may often be told a story. It is law – it shapes our actions – but it does so in a way that does not

206 Vine Deloria Jr identifies that the "task of tribal religion, if it can be said to have a task" is this type of self-discipline: see Deloria Jr., *God is Red* at 87. The theme of developing self-discipline is also expressly mentioned in several WŚÁNEĆ stories.

207 See Umeek, *Principles of Tsawalk* (stressing the development of humility and self-discipline within the Nuuchah-nulth tradition, first through bathing then through vision quest).

208 Reference may be made to Michel Foucault and his observations on the operation of power.

strictly define them. We are always an agent in the process of understanding and living law. In other words, we embody the contextual interplay between the song and the echo.

Given the centrality of agency in learning from stories, things cannot collapse into one authoritative interpretation or telling of a story. The context in which stories are told is always relevant as there is a framework of reciprocity between the interpretive lens of the listener and the agency of the storyteller. For instance, families carry different stories, individuals understand the meaning of certain stories differently, and so on. As such, I am finding myself interested in exactly how it is possible to carry forward a multiplicity of stories, voices, and authority within W̱SÁNEĆ law.²⁰⁹ In fact, any given story is already a collection of various voices and wisdoms. A story is told by one person to another, carried along by that person, transmitted on to another, and so on. Stories shape us. However, stories are also shaped by context, by relationships, by understandings, and by everything that gives them life. It is in that sense that a story is already composed of many voices. We always insert ourselves in stories as an agent when we learn them. We can carry them no other way. We have our own relationships to a given story. It is unique to us, but shaped by everything that has come before. It will continue to be shaped by all that comes after. It is relational. It is, in short, the song and the echo (and contains the resonance of all the echoes that came since). I think then that stories can be carried forward and deliberated over within W̱SÁNEĆ law without being centralized into one authoritative interpretation.²¹⁰ Perhaps in this regard connections can be made with calling multiple witnesses at feasts (and from various families), each of whom is tasked with remembering the work that has been undertaken and the importance and relevance of a given event. We are always carrying forward many voices and teachers, and this is a practice of decentralized power, authority, and normative deliberation.

6. Conclusion

I would like to finish with a story about SPÁ,EF the Bear:

The bear too was a human being before becoming an animal. His name was SPÁ,EF. XÁLS made him to be an animal of the forest. He gave SPÁ,EF a strong body covered with fur, as well as strong teeth and claws to find his food. His warm fur and strong body was a gift to him. SPÁ,EF fished the streams and ate berries.

209 For those interested, perhaps useful connections can be made with the work of Mikhail Bakhtin and his insights on polyvocal (or multivoiced) narrative. I require more time to think through this possible connection. See also Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance* (New York: Routledge, 2015) for an example of an author taking up the concepts of intertextuality, dialogism, and chronotope from Bakhtin in considering the spatio-temporal workings of law.

210 I emphasize that the dynamic use of stories within W̱SÁNEĆ law does not give anyone license to take these stories and use them in any context and in any way they wish beyond the social processes of normative deliberation within the W̱SÁNEĆ tradition.

One day SPÁ,EF was travelling to the hills in MÁ,LEXEL (Mill Bay). He reached SXOXÍEM (Willis Point) and walked to the shore. He looked across the inlet and sat on the shore thinking to himself that he would like to swim across to the other side if it wasn't so far. If the water wasn't so cold he could probably make it across no problem. So SPÁ,EF sat on the shore thinking of more reasons why he shouldn't, and couldn't, swim across the inlet. SPÁ,EF didn't know that XÁLS could hear his thoughts.

XÁLS appeared to SPÁ,EF. He said, "SPÁ,EF, I have given you many gifts. You have a strong body, and a thick fur coat to protect you from the cold. It is only your cowardly manner that prevents you from swimming to the other side. It is wrong to be cowardly and to not use your gifts. You should never hesitate to do something you have to do." XÁLS moved his hand over SPÁ,EF on the shore near SXOXÍEM and changed him into a huge boulder. Today you can still see the huge boulder at that place near SXOXÍEM, which is named SPÁ,EF.²¹¹

Thinking through what the meaningful revitalization of WSÁNEĆ law entails is a challenging task, particularly given a colonial power dynamic and the troubling reality of global climate crisis, but one we should not (and cannot) shy away from. Personally, I have a great deal still to learn in this process, but I hope to contribute the gifts I can and to continue to learn from the gifts of others. I do not believe there is one correct path forward, but for me these stories are gifts that I seek to meaningfully embrace as best I can. Since a legal tradition is not just a series of rules, but a distinct mode of normative reasoning,²¹² expecting WSÁNEĆ law to operate within the same framework as Canadian law does not respect the vision and gift these stories provide – a vision for all living together (human and more-than-human). On that note, despite an emphasis on collapsing the ontological divide between human and more-than-human, none of this means humans do not have a unique role to play.²¹³ As we will see in Chapter Four, it also does not mean all humans have the same level of accountability and responsibility in regard to climate crisis. The relationships envisioned always require that we share our gifts of creation. In fact, WSÁNEĆ law seems to be about a constant process of striving to enact these relationships as best we can; that is the framework within which it is intelligible.

211 Teaching of Earl Claxton Sr., John Elliott, and Kevin Paul (date unknown) Saanichton, British Columbia.

212 See Webber, "Legal Pluralism".

213 That humans have an important role to play may now be amplified by the fact that humans have already impacted Earth's systems to such a significant extent that we must bear a great deal of the responsibility in mitigating and correcting that wrong—none of which is to say we should continue to think ourselves so superior.

Chapter Three

Learning From Place: A W̱SÁNEĆ Law Field Course



Figure 2: "W̱SÁNEĆ Field Course at the top of PKOLS" Photo, 2018.

1. Introduction

When I was a boy my grandfather showed me how to make a gaff for fishing QOLOW at SELEKTEL. He didn't describe the process to me. He took the materials we had gathered and he said "watch, here is how you do it." He only showed me once. My uncle used a similar way of teaching when he took me to SELEKTEL to fish for the first time. He took the gaff my grandfather and I had built, he went to the river, and he caught a salmon. He showed me an approach to fishing in shallow waters, and one for deeper waters. He handed me the gaff, and it was my turn to practice. I remember each of these moments vividly because I was immersed and engaged in the act of learning. Over the past two decades or so, I have been learning more each time I go to fish, or make a new gaff. At the time I thought I was just learning about fishing QOLOW, but now I see I was learning about much more as well, including W̱SÁNEĆ pedagogy.

In February of 2017 John Borrows and I began conceiving of a semester-long intensive field course in W̱SÁNEĆ law, offered through the University of Victoria, Faculty of Law, and in partnership with the W̱SÁNEĆ School Board.²¹⁴ My hope, and understanding of student experiences in the course to date, is that this course offers impactful moments of teaching and learning W̱SÁNEĆ law and culture. The land-based and experiential learning in this course also picks up and builds upon my understanding and theorization of W̱SÁNEĆ stories, including their place-based nature and the way in which W̱SÁNEĆ stories are ultimately meant to create participants. Students begin to build new relationships with these places while engaging W̱SÁNEĆ law on its own terms, and gaining a sense of how W̱SÁNEĆ law reflects and generates out of the lands, waters and worldviews of the W̱SÁNEĆ people. As noted, relationships with place are never static, nor is the composition or experiences of any given group of students in the course the same. Therefore, through the course I am also constantly learning and engaging as a participant in W̱SÁNEĆ law, while continuing to deepen my own relationships with the places we visit in W̱SÁNEĆ territory.

My pedagogical method in the course is non-hierarchical as I often de-centre my own voice by inviting numerous, and differently situated, guests and W̱SÁNEĆ voices into our learning, while also being attentive to how each place we visit offers us different teachings and engages us in different ways through its own agency. Student projects, as will be discussed, are also generated by and grounded in the W̱SÁNEĆ community. As such, reciprocity and relationality are our guiding principles. The purpose of this chapter is to build upon our understanding of W̱SÁNEĆ law, particularly experiential and place-based pedagogy, through outlining the W̱SÁNEĆ law field course in greater detail. As I have foreshadowed the need to fundamentally re-imagine our relationships and place within the world given the context of climate crisis, my description of some of the place-based learning we do in the course also provides some insight on how W̱SÁNEĆ envision our relationships with these places, and some of the structural challenges that harm or constrain those relationships. While it would be most ideal for you, the reader, to engage with W̱SÁNEĆ law in this way on the land, and thus directly shape your own subjectivity, the type of ethnographic account that follows will have to do.

²¹⁴ I have since taught this course through the Peter A. Allard School of Law, University of British Columbia, with half the J.D students also attending from the University of Victoria, Faculty of Law.

2. Beginning in a Good Way and Teaching as Ceremony²¹⁵

A primary objective of mine in creating this course was to build a partnership with the W̱SÁNEĆ Nation, and to design and conceptualize the course in consultation with the W̱SÁNEĆ community.²¹⁶ As I noted in Chapter One, “sovereignty matters, as a methodological issue in and of itself, because it speaks from jurisdictional authority: the right to speak and, in this case, to not speak.”²¹⁷ What type of content would be appropriate to have in a course of this nature? How could community projects be reciprocal, offering valuable learning experiences for students but create relevant and beneficial results for the community? What, specifically, would some of those community projects be? Student projects change from year-to-year, though also build over time. These types of questions require continual engagement with the community.

Community representatives helped guide the content and structure the course through several meetings early in the process of developing the course.²¹⁸ Such an approach upholds Indigenous self-determination and involves communities as participants in research, as opposed to objects of study. As participants there is an opportunity for communities to shape not just the topic or content of research and education, but also to ensure that *how that content is taught and formed* reflects the community’s worldviews and expectations.²¹⁹ Land-based pedagogy and embodied engagement with these teachings has from the start been an important part of the W̱SÁNEĆ field course.²²⁰ While I was trusted to develop the course in a good way, it was still incumbent on me to engage various leaders of our communities and to ensure broader support and guidance for the course.

As one may expect, a significant amount of thought and planning is required in developing and implementing a course of this nature, including organizing guest speakers, travel and accommodation, and student projects. Important to also remember, however, is the teaching I

215 Shawn Wilson (Wilson, *Research is Ceremony*) writes about research as ceremony, and I expand upon that notion here.

216 In terms of course structure (a period of intensive land-based learning, followed by student project placements, concluding with presentations and peer-to-peer learning to finish the course) we did take influence from the model used at Osgoode Hall Law School in their intensive program in Aboriginal Lands, Resources and Governments. I would like to thank and acknowledge Andrée Boisselle for her insight and experience with the Osgoode Hall intensive program model, as well as John Lutz for sharing his development of a field school with the Sto:lo Nation through the University of Victoria. I also thank and acknowledge Julian Norris and David Lertzman at the University of Calgary, who shared example course syllabi. Finally, thank you to John Borrows for sharing his vast experience in this area and for inviting me to his home community at Nayaashiinigiing to be a part of his Anishinabe law camp.

217 A. Simpson, *Mohwak Interruptus* at 104.

218 Specifically, I consulted with the Board of the ŁÁU,WELNEW Tribal School, which consists of elected members from each of the four W̱SÁNEĆ communities along with administrators of the Tribal School.

219 Wilson, *Research is Ceremony*.

220 L. Simpson, “Land as Pedagogy”.

raised at the outset of this dissertation – that the thoughts, feelings, and intentions we bring to our work impacts, and ultimately becomes part of, the work itself. As such, there is a requirement to approach important work of this nature in a good way. While I was excited to create a course on W̱SÁNEĆ law, it so happened the opportunity to do so coincided with a period in my personal life that presented various challenges, including anxiety and depression. The context of that struggle, and my efforts to help myself reach a better place, brought me to recognize that this course could not come from only a place of thought. It should come also from a place of healthy body, spirit, and emotion. That is, teaching the course required more of me than simply thinking through W̱SÁNEĆ law. I had to once again feel and embody the relationships I was going to teach about.

I implemented many approaches to help bring myself to a better place,²²¹ one of which was our ceremonial practice of bathing, which through immersion in cold water works to heal our bodies, train our minds in a meditative sense, and to make a spiritual connection. This process of embodiment was important as learning Indigenous law involves engaging our whole being. Without embodiment, knowledge is abstract and partial. Abstract knowledge also does not necessarily correlate with behavioral or material change in our bodies, minds, and day-to-day life in the way that embodied knowledge does.²²² We can “know” many things without *feeling* or *acting* differently.²²³ Actions and habits do not flow in some straightforward sense from rational thought.²²⁴ In fact, any time we feel uncertain, stressed, or overwhelmed, for instance, our pre-frontal cortex (the area of the brain dealing with reasoning processes) goes offline and older areas of our brain take over.²²⁵ However, meditation, for example, given dedicated *practice*, changes our brains and thereby has material implications that shape our relationships with that around us.²²⁶ In Chapter Seven I will return to these points, arguing that the embodied *practice* of W̱SÁNEĆ law in the manner I describe could lead to similar material change.

221 If you are reading this and overwhelmed by anxiety or depression, know that you are not alone and it is okay to need and ask for help. Seeking out a counsellor and taking medication was also an important part of my feeling better again.

222 The neuroscience on meditation practice is interesting in relation to this point. John Kabat-Zinn, *Full Catastrophe Living: Using the Wisdom of Your Body and Mind to Face Stress, Pain, and Illness* (New York: Bantam Books, 2013) describes meditative practice as a “bigger than conceptual” learning and knowledge. When we practice meditation it physically transforms our brains and creates space for understanding and reacting to events and relationships in different ways (Judson Brewer, *Unwinding Anxiety: New Science Shows How to Break the Cycles of Worry and Fear to Heal Your Mind* (New York: Avery, 2021) [Brewer, *Unwinding Anxiety*].

223 As a simple example, it is widely known that smoking causes cancer and other health related issues, yet, people continue to smoke. Nicotine is, of course, addicting, though similar patterns hold true with eating, exercising, and more.

224 See Wendy Wood, *Good Habits, Bad Habits: The Science of Making Positive Changes that Stick* (New York: Farrar, Straus and Giroux, 2019) [Wood, *Good Habits*].

225 Brewer, *Unwinding Anxiety*.

226 *Ibid.*

W̱SÁNEĆ law is, in many ways, about how we understand and choose to live in relation to others around us (human and more-than-human), and doing so requires intentionality and embodied awareness. I made a similar argument in regard to learning from W̱SÁNEĆ stories. But, how do we open to all that is around us without also focusing on a healthy self? How do we properly and fully *care* for others if we cannot do so for ourselves? Can we meaningfully connect and listen to others, and other beings, if we find ourselves constantly entangled in our own issues and thought processes? I believe that opening in this way is healing, and healing in this way also allows us to be more open. In this light, focusing on oneself is not selfish, but rather, can be seen as bringing humility to ourselves and opening to the relationships and interconnectedness all around us, and on which we depend. While becoming a parent, in particular, was a crash course in humility for me, I have much personal work left to do. If we are honest, caring for our entire being is more difficult than we imagine. Nonetheless, I believe it to be an important part of a course like this. Law school can tend to be an unhealthy place, given the stress and workload. As an *experiential learning* course within the law school, I hope to not only teach about W̱SÁNEĆ law but also to cultivate an experience that fosters the type of learning, engagement, and sense of care I hope to accomplish.

3. Land-Based Learning

In this section I will focus on the land-based learning component of the course, and some of the teachings about W̱SÁNEĆ law that flow from that. I can only touch briefly upon our experiences at various places, though together I hope they provide a better sense of the field school experience. Each land-based outing fills an entire day, with various elders and knowledge holders accompanying us on each trip. Each guest brings unique knowledge and perspectives relating to particular places or subjects, allowing us to bring a plurality of voices and experiences into our learning. It also allows us to at times hear the same stories and laws, but from different vantage points. Each day the ŁÁU, WELNEW Tribal School on the Tsartlip First Nation reserve was our homebase.

3.1. ŁÁU, WELNEW Tribal School



Figure 3: “ŁÁU,WELNEW Tribal School Entrance” Photo, 2021.

Each morning we gathered outside the Cultural Building at the ŁÁU,WELNEW Tribal School to wait for our class to begin. The SENĆOTEN immersion students at the school would be finishing up their morning protocol in the building, drumming and singing in the SENĆOTEN language. We listened and watched as the children moved toward their respective classes while continuing to drum and sing. This drumming and singing is a process of starting each day with a prayer, and honouring the web of interconnectedness we live in (human and more-than-human). It is a daily practice of grounding oneself in relationality; a practice that shapes subjectivities and that is needed much more broadly within the context of climate crisis and the systemic exploitation of so many beings. We couldn't help but be energized and inspired. It is a privilege to witness the hard work of previous generations to create this school and save the SENĆOTEN language in fruition, and to see the future shining bright. The immersion students also reminded us of the importance of language in the work we were doing, and kept our spirits and intentions focused. In short, we began each day in a good way.

I can't overstate the importance of having our class in community. The experience would not have been the same in a university setting. Apart from witnessing the children each morning, the Cultural Building is also designed to resemble and feel like a longhouse. We assembled desks to sit in a circle each day we were there, though chose instead to be outside when the weather was nice. Whether we were at the school for the day, or headed out on a land-based outing, the Cultural Building and tribal school was our starting point.



Figure 4: “WSÁNEĆ Field Course in the field at ŁÁU,WELNEW Tribal School” Photo, 2018.

The ŁÁU,WELNEW Tribal School opened in 1989 and serves the WSÁNEĆ communities. The school is named ŁÁU,WELNEW after our sacred mountain, meaning ‘place of refuge’ or ‘place of healing.’ The mountain received this name as the sacred place where the WSÁNEĆ people survived the great flood. In adopting this name the school draws upon that central creation story, and “today it is a place that offers respite and wisdom. The school is a haven, a place for Saanich children to know their history and to find a clear vision of their future.”²²⁷

²²⁷ WSÁNEĆ School Board website, <https://wsanecschoolboard.ca/>.

3.2. Bathing at TIXEN



Figure 5: “WSÁNEĆ Field Course Bathing at TIXEN” Photo, 2018.

The field course immerses students in learning WSÁNEĆ law, both literally and metaphorically, as they would discover. Students immerse their bodies into cold ocean waters the morning of our first full day of class, signaling to them that our learning is embodied and experiential. The process opens students to experiences and stories that are new to them. All law is cultural,²²⁸ but beginning with bathing allows students to *feel* a deeper connection with water, and thus to better understand the connection between law, belief, and the sacredness of water in WSÁNEĆ law. In SENĆOTEN the word for water is ĆO. However, when bathing in ceremony we instead use the word SĚMEW to honour Grandfather Rain. As a class, we sat on the shore as I shared the story of SĚMEW (Grandfather Rain) and invited students into the water to feel that connection.

²²⁸ Rosen, *Law as Culture*.

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

XÁLS said to SĚMEW “You will cleanse yourself in the lakes and streams.” He listened to XÁLS and purified himself in the way he was told. XÁLS gave SĚMEW a gift, a wife and family. SĚMEW taught his family to be clean of mind, body and spirit, the way XÁLS had taught him. The WŚÁNEĆ should never forget SĚMEW. If he had not followed XÁLS’ teachings, he wouldn’t have been given the gift of his wife and family. Without a wife and family for the first man, there may never have been WŚÁNEĆ people. Honour SĚMEW by always honouring XÁLS’ teachings and XÁLS’ wish for the WŚÁNEĆ people.²²⁹

The story of SĚMEW and the practice of bathing introduced key legal principles relating to water, and opened our minds, bodies, and spirits to water in a meaningful way. It is not a stretch for anyone to say that water is our first ancestor. Without water, there is no life. Beyond that, we also get a sense of the being and agency of water, as SĚMEW helped form the world. The agency and effect water has on our bodies can also very much be felt. Overall, the orientation being related is that water is sacred. Additionally, if water is sacred and meant to purify and cleanse us through bathing ceremony, then actions that pollute, or function to harm Grandfather Rain, detract from that purity and sacredness, contrary to XÁLS teachings. Such an orientation has clear implications that inform and structure our critiques of capitalism, extractivism, and other exploitative logics. I will return to these critiques in later chapters, but flag here the relationships between learning WŚÁNEĆ law and our diagnosis and response to climate crisis that I have been emphasizing.

Traditionally, WŚÁNEĆ children bathe each morning to discipline themselves,²³⁰ and bathing remains an important ceremony, particularly in winter dance where new dancers initiated into the longhouse will bathe in cold winter waters before sunrise. While the practice and teachings of bathing remain strong in WŚÁNEĆ culture and spirituality, there is room, in my perspective, to also invite critical questions where necessary.²³¹ For example, all law is gendered and the story of SĚMEW invites questions as to why we speak of our first ancestor as a

229 Teaching of Earl Claxton Sr., John Elliott, and Kevin Paul (date unknown) Saanichton, British Columbia.

230 Richling, *The WŚÁNEĆ*.

231 Val Napoleon, “Aboriginal Discourse: Gender, Identity, and Community” in Benjamin J. Richardson, Shin Imai & Kent McNeil, eds., *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Oxford University Press, 2009) ch. 9.

W̱SÁNEĆ *man* who came to the Earth and was *gifted* a wife and family?²³² Not all our stories are about W̱SÁNEĆ men, but examining how our stories are gendered can bring insight into broader power dynamics within the community. It can be tricky to introduce and navigate such critiques, particularly for students not from the community or culture, but a failure to examine hard questions risks perpetuating any harms or power imbalances that potentially exist. It is important to open this type of space.

3.3. ŁÁU,WELNEW



Figure 6: “W̱SÁNEĆ Field Course at the top of ŁÁU,WELNEW” Photo, 2018.

It was at ŁÁU,WELNEW where we became the W̱SÁNEĆ people. It was therefore important that one of our first land-based trips be to our sacred mountain. My Auntie, Belinda Claxton, accompanied us on this trip and shared knowledge about plants and medicines that she learned from my great-grandmother, Elsie Claxton. A central teaching students picked up on and carried through the course was the importance of prayer and intention when harvesting (and which I touched upon at the outset of my dissertation through the legal concept of SDIU,I,EL). On this trip we introduced the concept of prayer in learning about harvesting cedar bark. Prior to harvesting we are taught to turn toward the east and pray, in our own way, to XÁLS and XPĀ (the cedar we are about to harvest).

232 I note that there are multiple ways to tell or relate a story, and I often alter the story to speak in neutral terms of our first ancestor and their family.



Figure 7: “Harvesting Cedar Bark at LÁU, WELNEW” Photo, 2018.

Light hearts and good thoughts and intentions are a necessary part of this work. To emphasize this point my Auntie Belinda shared a story about harvesting plant medicine. A relative had asked her to help find a particular plant. As they searched together, Belinda pointed out the plant, but our relative still could not see it. After some time, our relative eventually determined that it was no use and they should go home. Our relative understood that the plant knew she had bad intentions and it would not show itself to her – her grandson had a new girlfriend and she wanted the plant to make a medicine to help break them up.²³³

Plants have agency and individuals must bring a healthy mind to the work being done. Students carried this lesson to the harvesting they did later in the course, thereby shaping the relationships and standards by which they interacted with plants and trees. While it was too late

²³³ Teachings of Belinda Claxton (7 September 2018) LÁU, WELNEW Mountain (Mt. Newton).

in the year for us to harvest cedar bark, we did use previously harvested cedar to do cedar weaving and to learn the patience and skill that requires.



Figure 8: "W̱SÁNEĆ Field Course Weaving Cedar at ŁÁU, WELNEW Tribal School" Photo, 2018

Our inability to harvest cedar bark at that time of year was a chance to emphasize how W̱SÁNEĆ practices coincide with the rhythms of the seasons. Harvesting cedar bark only occurs during a short window in spring when moisture levels in the bark allow us to peel it away, and without harming the tree. In fact, W̱SÁNEĆ rely on many indicator species and observation of the seasons to structure our various laws and governance practices. KÁTEŁĆ (Oceanspray), for example, is one of those indicator species. Full bloom of KÁTEŁĆ indicates the peak of the Sockeye Salmon run through W̱SÁNEĆ territory, signaling the start of the fishery, and triggering a variety of laws and governance practices. Upon catching the first fish, the First Salmon Ceremony is held. The First Salmon Ceremony last for four days, where no fishing is done, and respect is paid to the spirit of the Salmon People and much of the salmon run passes through W̱SÁNEĆ to continue on their journey.



Figure 9: "Oceanspray Blooming" Stock image.

While these types of observations structure and teach us about W̱SÁNEĆ law, they also teach us about global warming and climate crisis. My Auntie Belinda has recognized how warming temperatures associated with climate crisis have disrupted the synchronicity between the blooming of KÁTEŁĆ and the peak of the Sockeye Salmon run.²³⁴ I will return to this discussion, as well as introduce my analysis of climate crisis in the next chapter. I note here, however, how ecological knowledge can inform climate crisis discussions, and how climate crisis has an increasing impact on not only beings in the world, but also on cultural practices and systems of law.

3.4. SNIDČEŁ

SNIDČEŁ (place of the blue grouse) is now known to many as Tod Inlet, in Gowlland Tod Provincial Park. The blue grouse was also an indicator species. Kevin Paul explains that blue grouse were seen as lazy birds because they never ventured too far from their homes. As a result, the lands where they lived had to be fruitful, and the presence of blue grouse indicated a healthy and fruitful environment.²³⁵ Blue grouse are now long gone from SNIDČEŁ, and so too is the once healthy environment. The remnants of the colonial history that created much of this particular harm, however, remains visible.

²³⁴ *Ibid.*

²³⁵ Teaching of Kevin Paul (10 September 2018) SNIDČEŁ (Tod Inlet).



Figure 10: “Cement remnants at SNIDÇEŁ” Photo, 2018.

SNIDÇEŁ was the first WSÁNEĆ village site, where SŁEMEW came to the earth in the form of rain. The village site was later burned by Haida raiders, causing the people living there to move to two other WSÁNEĆ village sites - WJOŁEŁP (Tsartlip) and STÁUTW (Tsawout). SNIDÇEŁ remains an important place for WSÁNEĆ. However, in 1904 SNIDÇEŁ also became the operating site of the Vancouver Portland Cement Company, founded by Robert Butchart. Four years later, in 1908, the limestone at SNIDÇEŁ had run out and an empty quarry remained. Robert Butchart’s wife, Jenny Butchart, took the opportunity to expand her ever increasing garden into the quarry in an effort to “beautify” the excavated area. Today, Butchart Gardens attracts over one million visitors each year.

Several observations about colonialism and extractivism are apparent at SNIDÇEŁ. The once thriving first village site of WSÁNEĆ is gone. While still a beautiful place, as you walk the path along the creek down to the inlet you still see the remnants of the old cement factory. At the inlet itself you often see thousands of jelly fish, which thrive in marine ecosystems under duress

– for example, low in oxygen, acidic, and high temperature.²³⁶ Little else currently lives in the inlet. Underground, the accumulation of dust and cement from previous factory operations make digging difficult. The soil is contaminated, including from leach from the Hartland Landfill nearby. The creek that once flowed into the inlet is now significantly diverted for water to Butchart Gardens. I don't mean to portray SNIDÇEŁ in a negative light, but to relate some of the harms experienced by that place.

Ironically, literally on the other side of the fence, Butchart Gardens is world-renowned for its beauty. It is beautiful, but also distinctly colonial. As a show garden it is composed largely of imported plants that have been “cherry-picked” from around the world, and which most often cannot survive without being moved to a greenhouse for the winter and replanted in the spring. The beauty the flowers offer overlay the harm and destruction wrought by the cement factory, mask the location of the first W̱SÁNEĆ village site, and occupy the space where native plants might otherwise flourish.

At the same time, peeking through this colonial cover is the voice and life of W̱SÁNEĆ law. Specifically, a group of young W̱SÁNEĆ women working through PEPÁḴEN HÁUTW̱ Native Plant Nursery and Garden²³⁷ at the ŁÁU, WELNEW̱ Tribal School have partnered with SeaChange Marine Conservation Society²³⁸ to do restoration work at SNIDÇEŁ. Invasive plant species are being removed and native plants are being grown and planted. SENĆOFEN place-names are also being remembered and reimplemented. Part of this re-naming includes a sign at the start of the trail explaining the name SNIDÇEŁ. This place-based restoration, which as a class we also participated in, is not only an exercise of W̱SÁNEĆ law, but also a local and grounded example of forging healthier relationships with place and ecosystems, and thus, a component of climate justice.

The landscape itself continues to call us to this work. The creek that runs along the trail to the inlet offers a reminder of its name. In SENĆOFEN that creek is known as WE,ĆE,ĆE (or WĆEĆEĆE). The name imitates the sound the water from the creek makes as it hits the shore and flows into the inlet. Kevin Paul speaks of the sound this creek makes as it hits the water as an invitation.²³⁹ As the stream hits the water it invites other life to come feed there. A healthy

236 Lisa-ann Gershwin, *Stung! On Jellyfish Blooms and the Future of the Ocean* (Chicago: University of Chicago Press, 2013).

237 For more see PEPÁḴEN HÁUTW̱ Native Plant Nursery and Garden website at <http://pepakenhautw.com/about/>.

238 For more see SeaChange Marine Conservation Society website at <https://seachangesociety.com/>.

239 Teaching of Kevin Paul (10 September 2018) SNIDÇEŁ (Tod Inlet).

creek carries sediment, nutrients, and fresh water into the ocean, inviting fish and birds that often flock to those types of locations. While that invitation is currently largely disrupted (the flow of the creek tempered and the ground and inlet contaminated), there is still the faint voice of the creek making the invitation. Perhaps, with the help of those working to restore this place, that call will continue to grow louder.

3.5. TETÁĆES

As a Saltwater People, an important component of WŚÁNEĆ territory are the islands and ocean waters within our homelands. It was therefore essential that our field course brought us on a 3-night camping trip to spend time with our Relatives of the Deep (the Southern Gulf Islands), beginning at S,DÁYES (Pender Island).

3.5.1. S,DÁYES

On S,DÁYES we camped for two nights on the reserve lands at Bedwell Harbour on South Pender Island, across from SXIXTE (the Pelkey family SWÁLET, or reef-net fishing site). Several students decided to take up our previous teachings relating to bathing, and to go into the water each morning to start our day. The students continued to *practice* embodying WŚÁNEĆ law and foregrounding relationships with water.



Figure 1: "WŚÁNEĆ Field Course Camping at SXIXTE on Pender Island" Photo, 2018.

My cousin, Nick Claxton, joined us at this location to speak about his work in revitalizing the reef-net fishery.²⁴⁰ As I have discussed, through our NEHIYMET families carry rights and stewardship responsibilities to certain places. Like W̱SÁNEĆ territory more broadly, families do not own these locations, but rather, belong to them.²⁴¹ My great-grandmother, Elsie Claxton, was from the Pelkey family, meaning my family carries rights to fish at SXIXTE (the Pelkey family SWÁLET, or reef-net site). After many decades of our reef-net fishery being deemed illegal by the Canadian government, my cousin spearheaded a reef-net fishery at this location in 2014. It was a powerful moment of resurgence.²⁴²

Aside from our inherent rights, the W̱SÁNEĆ are also signatories to the Douglas Treaties, which promised to protect our “right to fish as formerly.” The “right to fish as formerly” protects (or should protect) not just the *method* of fishery, but the laws and governance structures surrounding that fishery.²⁴³ Our NEHIYMET is part of that governance structure, and so too are the broader principles flowing from our relationship with the Salmon People. Our oral history teaches us that the reef-net fishery was gifted to us from the Salmon People. This gift came about when a W̱SÁNEĆ family was out travelling the islands with their daughter. She would sit alone on the shore each evening, where a handsome young man came to visit her, and with whom she fell in love and wished to be married to. Before giving their consent, the girl's family required the young man to first stay in the community for some time. While doing so the young man saw that the W̱SÁNEĆ were suffering because salmon to eat were scarce. The young man said he could help, and made the people a SXOLE (reef net) out of willow bark. He taught them how to make the net and how to fish with it. With this gift the W̱SÁNEĆ once again thrived. When the young man announced it was time he and his wife returned to his home, the couple paddled off, not in the direction of any village, but out to deep water where they disappeared. The W̱SÁNEĆ knew then that the young man had been one of the Salmon People in human form.²⁴⁴

The reef-net, when in use, resembles a womb and is said to symbolize a woman who is capable of giving and supporting life. Salmon are life supporting for the W̱SÁNEĆ, and at the end of the net there is an escapement hole, called the SHELIS. Our belief is that each school of

240 Claxton, *To Fish as Formerly*.

241 Claxton & Elliott, *Ref Net Technology* at 13.

242 Uvic Community Mapping Collaboratory, “To Fish as Formerly: W̱SÁNEĆ Nation Brings Reef Net Fishing Back After 100 Years” YouTube video at <https://www.youtube.com/watch?v=vTQk1IR9ibc>.

243 Claxton, “The Douglas Treaty”.

244 Claxton & Elliott, *Ref Net Technology*.

While at S,DÁYES we also visited E,HO, (“did you hear?”) and XEL,ISEN (“lost middle”), both located at the point where an isthmus once connected North and South Pender Island. My Auntie, Belinda Claxton, shared memories of her time there as a child harvesting clams, seaweed, hunting deer, and staying in a small shack that was eventually bulldozed when they were ordered to leave.



Figure 3: "WSÁNEĆ Field Course at E,HO" Photo, 2018.

An important part of our discussion revolved around the ancestral remains that were badly disturbed at that location by the opening of the canal between North and South Pender, as well as latter excavations. Simon Fraser University held 200 sets of ancestral remains from this location, which WSÁNEĆ worked to have repatriated and brought back to E,HO in 2017. Belinda was one of our elders present as our ancestors were ceremonially returned to rest. The place-name, E,HO, translates as “did you hear?” The name reflects the place as a burial location and the power and ability of ancestors past to manifest in the world today.

Poet's Cove Resort, located next to SXIXTE, where we camped, experienced this power. At that location a number of WSÁNEĆ remains were also excavated during the construction of the swimming pool. Employees of Poet's Cove began to complain of supernatural happenings, and eventually WSÁNEĆ medicine people were called over to brush off the building and people, and to help rebury the remains close by. My grandfather and great-grandmother marked the entrance to the burial location with signage, attempting to bring some knowledge of our history and presence at these locations, as well as to explain elements of our NEHIYMET. The sign describes the name SXEDQELÁNEW, which my cousin now carries, and the connection to that location.

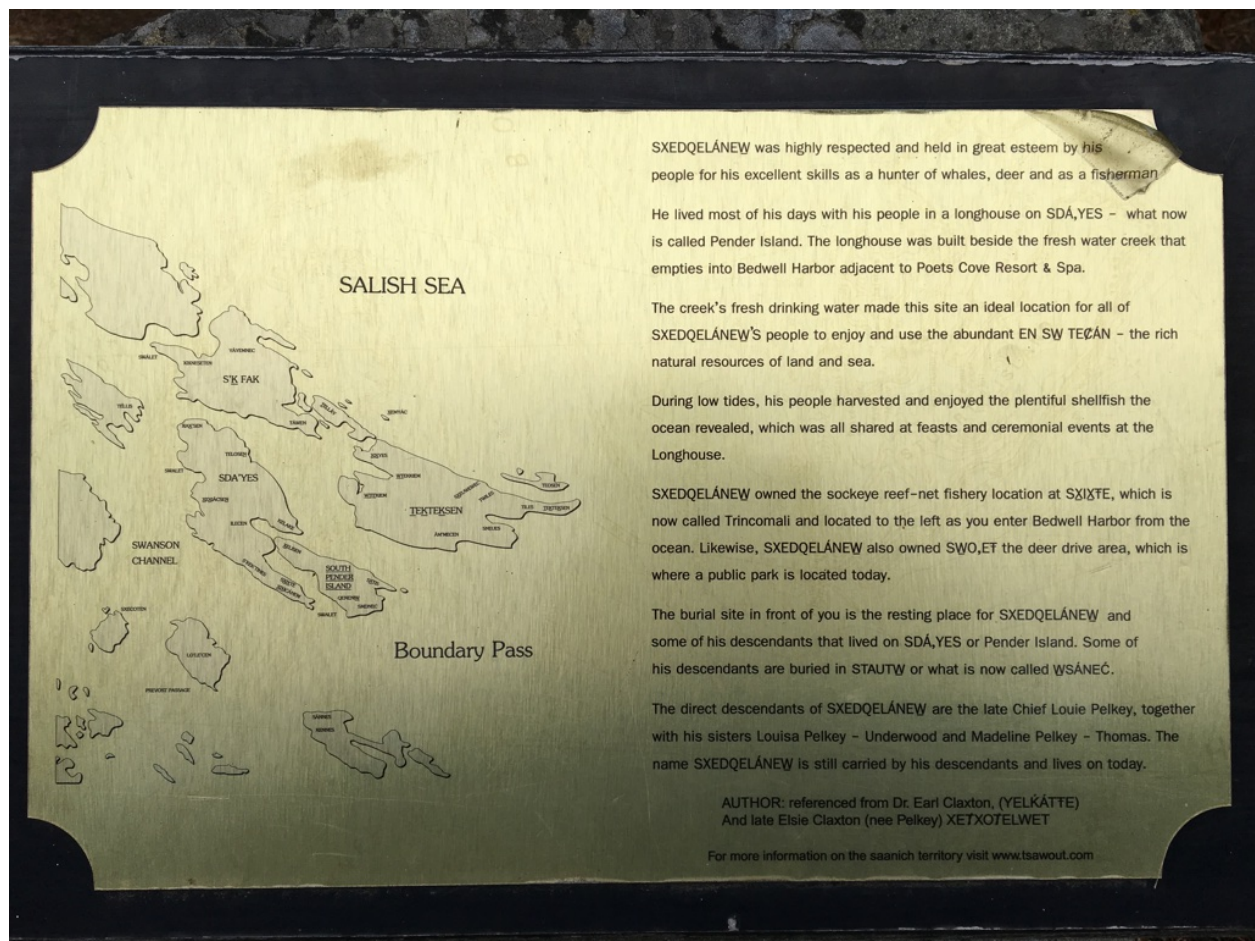


Figure 4: "Sign Installed at Poet's Cove on Pender Island" Photo, 2018.

These are but two examples of many burial locations throughout WSÁNEĆ that have been disturbed by a multitude of activities. Despite these harms and the imposition of other frameworks and relationships, such as a private property regime, with these places, WSÁNEĆ

people we continue to exercise our laws and responsibility to care for our ancestors as best we can. I will return to a far more in-depth study of the tensions between private property and WŚÁNEĆ responsibilities of care in Chapter Five on LEL,TOS. My study of the dispossession of LEL,TOS also examines the role of property within capitalism.

3.5.2. Boat Tour and TE_KTE_KSEN

In moving our camping location from S,DÁYES to WEN,NÁ,NEĆ (Saltspring Island), we took a boat tour for the day. Even with a motorized boat and the better part of a day, the amount of WŚÁNEĆ territory we could see by water was still limited. In itself, this reality emphasized that while we do not have a particularly large landmass, the ocean and islands throughout our territory are ample and provided a way of life for us. This way of life is grounded in reciprocity, a point our creation story of TE_TÁĆES, in which XÁLS created the islands from WŚÁNEĆ ancestors thrown into the ocean, and from which flows mutual responsibilities of care (between the WŚÁNEĆ and TE_TÁĆES), emphasizes.



Figure 5: "WŚÁNEĆ Field Course on Boat Tour" Photo, 2018.

The main island we visited during our boat trip was TE_KTE_KSEN (Saturna Island). TE_KTE_KSEN, which means “long nose”, is actually the name for East Point on Saturna Island, though we now commonly use the name to also refer to the island as a whole. East Point is again the location of one of our transformation stories, where six young girls were changed into stone. The story relates how the girls were asked to do chores, but instead, basked in the sun on the beach, where XÁLS came and transformed them into boulders. Many WŚÁNEĆ stories

emphasize a certain self-discipline required to do what needs to be done, which can be seen as being aimed at creating a particular type of citizen that is engaged and responsible for their actions.

3.5.3. WEN,NÁ,NEĆ

The final stop during our camping trip was to ĆUÁN (Saltspring Island), where we were joined by my uncle, Earl Claxton Jr. ĆUÁN means “each end” and refers to the mountains (Mount Tuam and Mount Maxwell) at each end of the island. We camped on the reserve lands near Fullford Harbour – a place we know as WEN,NÁ,NEĆ, or “facing towards Saanich”.²⁴⁷ Many of us continued to go into the water to start our day by bathing.



Figure 6: "W̱SÁNEĆ Field Course Camping at W̱EN,NÁ,NEĆ on Saltspring Island" Photo, 2018.

²⁴⁷ translation through Saltwater People....I should add this for each translation I use so people know where it came from (especially since people translate differently).

In the afternoon we traveled to S,ĆUÁN, meaning “one on each end”, which specifically refers to Mount Tuam. We met Robert Hershey, Professor Emeritus, Indigenous Law & Policy Program, University of Arizona,²⁴⁸ at his property, which he considers himself a steward of, atop Mount Tuam. From here we overlooked the Saanich Inlet and Malahat (straight ahead in the photo below), with Cowichan territory to the right and W̱SÁNEĆ territory toward the left. From here, the proximity between the two territories and adjacent legal orders is far more evident than perceived in relation to the long highway around the inlet. Since W̱SÁNEĆ are Douglas Treaty signatories and Cowichan Tribes are engaged in the BC Treaty Process, our vantage points allowed discussion around not only the notion of “overlap”, but also to contrast historic and modern treaties, the relationships between those processes, and how those mechanisms collapse inter-societal relationships and interactions between neighbouring Indigenous legal orders. These are complicated discussions in Indigenous law revitalization. However, borders, as often now bound up with concepts of territorial sovereignty, is also a complex issue within the context of climate crisis. I will return to this discussion, but it should be clear by now that global climate crisis does not recognize socially created boundaries.

The peak of the Malahat is called YOS, which means “caution”, and is home of the Thunder Beings. It is a sacred, powerful, but also potentially dangerous place to be. Even pointing at YOS (which I accidentally did when speaking) is disrespectful. From here we also spoke of SPÁ,EF, the bear who wanted to swim across the inlet from SXOXÍEM to Malahat. The story of SPÁ,EF is about using our gifts and different situatedness to strive toward our goals and a better future. For me, this was powerfully illustrated in words my uncle shared on behalf of my grandmother, Joanne Claxton.

²⁴⁸ Robert Hershey worked extensively in the Tribal Court system, including with the Navajo, Pascua Yaqui, Hopi, White Mountain Apache, and Tohono O’odham Tribes.



Figure 7: "W̱SÁNEĆ Field Course on the top of Mt. Tuam" Photo, 2018.

My uncle shares a message from my grandmother about residential schools with all students he interacts with. My grandmother, when she was a young girl, along with her brothers and sister, was taken away overnight by boat to the Seschelt residential school. When they arrived they were met by nuns and priests, who separated the boys and the girls, and told my grandmother never speak with her brothers. They didn't use her name, but called her number 38, and her younger sister number 35. She wasn't allowed in the classroom and was instead made to cook, clean, sew, and other chores. She was also placed on a special diet, not allowed to eat or drink any of the dairy she collected. On her sixteenth birthday she aged out of the residential school and was told to leave. She weighed 89 pounds. She went straight to the police to tell them what was happening at the school, and she was told to leave or be arrested. She left for California and taught herself to read and write. To this day she doesn't like to sign her name because she has shame around her writing abilities. After returning from California she married my grandfather and later helped start the Saanich Indian School Board (now the W̱SÁNEĆ School Board) because she feels that control of our own education is a path forward for First Nations people. She became a social worker and committed herself to protecting and advocating for Indigenous children growing up in care.

My grandmother does not often talk about these stories but she went to court to tell her story about residential schools and now asks my uncle to share her story with the students he speaks with. With that story she sends the students a message – she says, “please, *please*, don’t be bullies! Live peacefully amongst each other and try to learn as much as you possibly can.”²⁴⁹ It is a powerful message of hope and love. My grandmother never stopped looking after her siblings, even when it resulted in her own punishment. She fiercely defends and loves her family and she has been a remarkable teacher and influence in my life. She models so much of what can be accomplished and overcome when we draw on the strength of those things that matter most.



Figure 8: "My Grandma, Joanne Claxton" Photo, 2022.

3.6. PKOLS

As we continued on with our land-based learning we travelled to PKOLS (Mount Douglas), where we were joined by Eric Pelkey. Eric shared about the history and signing of the Douglas Treaty, which occurred at the top of PKOLS in 1852. I will have more to say about this Treaty, its differing interpretations, as well as its impacts, in a later chapter. These differences in

249 Teaching of Earl Claxton Jr. (14 September 2018) ŠĆUÁN (Mount Tuam).

interpretation relate primarily to very different understandings of land, and thus our jurisdictional relationships with those lands. Such differences have important implications for Indigenous-Settler relations and climate crisis. Colonial understandings of land, and the property regimes built upon them, not only function to dispossess Indigenous peoples, but to open those lands to the penetration of capitalism. Therefore a great deal hinges on how we understand land, and how we understand what was agreed to at this place in 1852.



Figure 19: "WSÁNEĆ Field Course at PKOLS" Photo, 2018.

From the top of PKOLS there is a 360-degree view of WSÁNEĆ territory and its boundaries. During the time of creation, XÁLS, the Creator, was on the beach at the STÁUTW village while creating the markers around WSÁNEĆ territory. In doing so, XÁLS took white rocks from the beach (PKOLS means “white rock”) and threw them in various direction, with mountains growing from the land where each rock landed. The PKOLS that we visited on this day (Mount Douglas) created the boundary between the WSÁNEĆ and the Lekwungen people. Another rock landed at Saltspring Island, which is roughly the border between the WSÁNEĆ and the Hul’qumi’num people (though we don’t use the word PKOLS for that place). Another rock landed where the city of White Rock is today, on Semiahmoo Bay, where our relatives the Semiahmoo First Nation live. That mountain grew but is said to have sunk into the mud of the bay. A large white boulder sits at that location to this day, and the current city maintains the name of White Rock. The last of these PKOLS landed in Elwah on the Olympic Peninsula.



Figure 9: "View from the top of PKOLS" Photo, 2018.

I know PKOLS as a meeting place and a “soft border” between the W̱SÁNEĆ and Lekwungen people. Neither claims exclusive ownership and each respect the various relationships with PKOLS. The “soft border” at PKOLS has been historically recognized and respected by our groups and families, and continues to be so. It is an example of how neighbouring Indigenous legal orders can rely on their own traditions to negotiate boundaries without falling into the divide and conquer trap characteristic of many territorial “overlap” negotiations.

PKOLS continues to strike me as an important meeting place. The University of Victoria, at the foot of PKOLS, is a place where many people come from around the world to meet and share ideas, which at times fosters respectful relationships, and other times less so. Our class on W̱SÁNEĆ law brought students together from various backgrounds and locations, including scholars visiting from Mexico, the United States, Sweden, and South Africa, to meet, share ideas, and form relationships. In that sense, PKOLS continues to bringing different people and cultures together. The sign erected at the top of PKOLS in an effort to reassert and rename the mountain offers a proclamation about the connection W̱SÁNEĆ have with PKOLS, and an invitation to better understand that ongoing relationship.

3.7. TIXEN

One of our later land-based outings brought us to TIXEN (Cordova Spit at the Tsawout reserve) for a traditional pit cook and salmon on a stick. A pit cook involves cooking (often large amounts of) food buried under the sand. The students were eager to take on the significant labour and preparation a pit cook requires. As a group we split and gathered fir firewood (fir is a hot burning wood).



Figure 10: "WSÁNEĆ Field Course Chopping Firewood on the Tsawout Reserve" Photo, 2018.

We also needed to harvest greenery, including sword fern, salmon berry and thimble berry branches, and salal. We began around my grandmother's home, by her invitation, and by first offering a prayer and good intentions. Initially the students were hesitant, feeling they were depleting her yard. She explained that the plants would come back stronger once you harvest from them and that using them wasn't a negative thing, but rather, was important. The same is true of clam gardens and the need to turn over clam beds for them to remain healthy. Such a teaching differs from a perspective of Nature as being somehow separate from us, and as Nature maintaining its integrity only insofar as it remains untouched – such is often the state goal of parks. The Nature/Society binary is an important point in terms of attempts to justify processes of settler colonialism, as well as is, I will argue, at the root of climate crisis. As such, I will return to this discussion in far more depth in following chapters. Of course, we also remembered to take only what we needed while harvesting. In short, we emphasized reciprocity.

Robin Kimmerer elegantly emphasizes her understanding of reciprocity when she asks, "What do you suppose would happen *if* people believed this crazy notion that the earth loved them back?"²⁵⁰ Regarding plants she observes that "We are linked in a co-evolutionary circle. The sweeter the peach, the more frequent we disperse its seeds, nurture its young, and protect them from harm. For plants and people act as selective forces on each other's evolution - the thriving of one in the best interests of the other. This, to me, sounds a bit like love."²⁵¹ In

250 Robin Wall Kimmerer, *Braiding Sweetgrass: Indigenous Wisdom, Scientific Knowledge, and the Teachings of Plants* (Minneapolis: Milkweed Editions, 2013) [Kimmerer, *Braiding Sweetgrass*] at 124

251 *Ibid.*

harvesting plants there is a taking, but with reciprocity there is more than that.²⁵² From this understanding Kimmerer also offers a critique of food consumer economy, where food is “taken forcibly from the earth” and where it is now “hard to recognize food that is mummified in plastic, bought and sold, as a gift anymore. Everybody knows you can’t buy love.”²⁵³ Conversely, “In a garden, food arises from partnership. If I don’t pick rocks and pull weeds, I’m not fulfilling my end of the bargain.”²⁵⁴ I would assert that these principles of reciprocity apply equally to an ocean, a forest, and more. We are faced with the question, “How, in our modern world, can we find our way to understand the earth as a gift again, to make our relations with the world sacred again? I know we cannot all become hunter-gatherer — the living world could not bear our weight — but even in a market economy, can we behave “as if” the living world were a gift?”²⁵⁵ The questions Kimmerer raises here have huge implications not just for Indigenous law revitalization, but for climate crisis. Contemporary food systems and all that upholds them in terms of creation, transportation, and consumption of food, including fossil fuels, chemical fertilizers, livestock emissions, deforestation, and much more, all have a massive impact on climate crisis. While our starting point was modest, as a class we worked to embody these principles of reciprocity and to begin thinking of food systems differently.



Figure 11: "WSÁNEĆ Field Course at TIXEN Preparing for a Pit Cook" Photos, 2018.

252 Kimmerer describes The Three Sisters garden (corn, beans, and pumpkins or squash). She describes how traditionally these three seeds are planted in the same garden at the same time. Each grows, develops, and matures in their own manner and at their own pace - first the corn, then the beans, then the pumpkins or squash. Together they thrive. Kimmerer observes, “It is tempting to imagine that these three are deliberate in working together, and perhaps they are. But the beauty of the partnership is that each plant does what it does in order to increase its own growth. But as it happens, when the individuals flourish, so does the whole.” *Ibid.* at 134. In harvesting there is a taking, but with reciprocity, including through gratefulness, there is more than that.

253 *Ibid.* at 126.

254 *Ibid.*

255 *Ibid.* at 31.

In addition to greenery, students also collected around 200 QEN,DOLES - particular round black stones – needed for a pit cook. In making a pit cook you dig a hole in the sand, line the bottom with the rocks, and build a fire on top to make them red hot. After several hours of heating the rocks you remove the coals with shovels (or you can heat the rocks outside of the pit and move the rocks into the bottom of the pit). Quickly, you add the salmon berry and thimble berry branches, then the salal, and finally the sword ferns, after which you place berlap sacks, which have been soaked in water and filled with vegetables, on top of the greenery, followed by another layer of sword fern, salal, and then salmon berry and thimble berry on top. While this has been happening someone has held a long pole in the centre of the pit to maintain an opening to the hot rocks below. The pole is removed and fresh water is poured directly on the stones, creating steam. Again, very quickly, a blanket is placed over the entire pit and then filled with sand to lock in all the steam and heat. Depending on what you are cooking, the food cooks for several hours.



Figure 12: "WSÁNEĆ Field Course at TIXEN Making a Fire for a Pit Cook" Photo, 2018.



Figure 13: "WSÁNEĆ Field Course Completing a Pit Cook at TIXEN" Photo, 2018.

As the vegetables cooked we began a new fire with the existing coals and began cooking the salmon. The students prepared the **TEK̓I** (Sockeye Salmon) and placed them on ironwood sticks (the branches of ocean spray are sometimes called ironwood because it is a hard wood that becomes even more so as it is cured by the fire). John Bradley Williams and my uncle, Earl Claxton Jr., guided us through these processes and shared teachings and stories.



Figure 14: "*W̓SÁNEĆ Field Course Preparing and Cooking Salmon at TIX̓EN*" Photo, 2018.

Directly behind where the fish was cooking in the photo above is Saanichton Bay, the shores of the Tsawout village. My uncle spoke of previous plans to dredge the bay and develop a marina, which the Tsawout First Nation opposed. My uncle recalled when early one morning, in the snow and freezing weather, the dredger moved in to start dredging the bay. The lawyer for Tsawout, Louise Mandell, advised that someone should get out there and start taking pictures. My uncle jumped on a boat with his camera. He recalls the late Philip Paul being on another boat, jamming his paddle into the bucket of the dredger attempting to stop it. The bucket caught the lip of the boat and lifted it up to a 45 degree angle. As Philip Paul held tight and the boat splashed back down, my uncle says he knew he had to do something.

The felt obligation my uncle describes links back, he explains, to his initiation as a **SX̓ÍXI** dancer. As you recall, through our **NEHIYMET** we are connected to various **TEXTÁN** (societies and to our societal rights), which for my family is the **SX̓ÍXI**. My uncle was initiated into **SX̓ÍXI** through the longhouse where my grandfather told him that **SX̓ÍXI** were also traditionally the warriors who fought to protect the village. My uncle told us how on that day he feels he became a **SX̓ÍXI** warrior. Feeling obligated to act, he had the boat driver pull closer to the dredger and he jumped out of the boat onto the bucket of the dredger. He says the dredger operator looked at

him, shook his head, and turned off the machine. Tsawout later won an interim, followed by a permanent, injunction to prevent development of the marina.²⁵⁶

My uncle's actions were an exercise of his societal rights through our *TEXTÁN*, but also his societal *responsibilities* as a *SXÍXI* warrior. He was upholding *WSÁNEĆ* law, while simultaneously taking the first, and in this case necessary, action to prevent capitalism (the repurposing of Saanichton Bay as a marina in order to obtain profit) penetrating the Tsawout village. He continues to uphold these responsibilities through speaking against increased tanker traffic associated with the Kinder Morgan pipeline expansion, for example. After hearing important and powerful stories such as these, we ended the day by sharing food and returning the salmon bones to the water - a *WSÁNEĆ* teaching in which the return of salmon bones (if all returned) to the ocean would ensure regeneration into another salmon.²⁵⁷



Figure 15: "Vegetable and Potatoes from Pit Cook at *TIXEN*" Photo, 2018.

256 *Claxton v. Saanichton Bay Marina Ltd.* (1989), 36 B.C.L.R. (2d) 79 (BCCA).

257 Teaching of Belinda Claxton (12 September 2018) *SXÍXTE* (Bedwell Harbour Pender Island) and Richling, *The WSÁNEĆ* at 20.

3.8. Mary Lake

Our visit to the Mary Lake Nature Sanctuary (MLNS) is an example of alliances that might offer a step in helping foster the revitalization of W̱SÁNEĆ laws. The Nature Sanctuary is a 67-acre protected forest and riparian area, protecting different species and ecosystems, including rare flora and fauna.²⁵⁸ The Greater Victoria Greenbelt Society (GVGS) purchased the property in 2016 and desires to “bringing together the values based priorities of [the GVGS and Tsartlip First Nation] to create a declaration of partnership.”²⁵⁹ As explained to me, MLNS hopes to bring “together W̱SÁNEĆ Indigenous knowledge with the ecological sciences for First Nations and settler children.”²⁶⁰ Tom Sampson, a Tsartlip First Nation elder, has been particularly involved in the partnership. A main goal of this partnership is “to protect the area from development and provide opportunities for the Tsartlip Nation for sacred ceremonies, teachings by the elders and language keepers” and other similar forms of cultural resurgence.²⁶¹ In that regard, it is envisioned as both “the work of reconciliation” and “working together to protect Mother Earth.” With continued work and dedication it represents a potential site of resurgence and regeneration, both culturally and multi-culturally, as well as legally and ecologically.



Figure 16: "Mary Lake Nature Sanctuary" Photo, 2018.

258 For more see the Mary Lake Nature Sanctuary website at <http://www.marylakeconnections.ca/about/>.

259 Email from Koi Neah to Robert Clifford (23 September 2018). More recently the partnership has focused on the W̱SÁNEĆ Nation more broadly as well.

260 *Ibid.*

261 Email from Laura Melley to John Borrows and Koi Neah cc'd (13 August 2018) and forwarded to me by John Borrows as part of the class planning and further communication (15 August 2018).

During our class Tom Sampson joined us for a guided walk of the area and shared many teachings and stories. One that particularly struck me involved him pointing out two trees that can be seen living together, and connected at the roots. One of these trees is a Cedar, and the other a Fir. In SENĆOTEN, the cedar tree is called XP̱A. XP̱A is a sacred tree named after the Creator, XÁLS. The fir tree is called SKELÁLNEW (“the bad people put away”). SKELÁLNEW connects to the following creation story.

XÁLS came to Saanich where there were some giants that were stealing from the people and abducting people. He saw that the giants were unkind and brought much harm to the Saanich people. XÁLS told the giants to stop what they were doing. XÁLS said “it is not right to be mean and unkind to one another and it is wrong to steal.” He warned the giants that if they didn’t change their ways he would return. XÁLS continued on his travels. When XÁLS returned he saw that the giants had not heeded his warning. As the giants realised the power of XÁLS they began to run into the hills and far away. XÁLS spoke to the giants and even the giants that were far away could hear his voice. When XÁLS told the giants to stop they all stopped where they were. They couldn’t move. XÁLS told the giants that they would remain where they were. XÁLS said they would stand with their feet in the ground forever. XÁLS said that from now on the giants would be there for the people to bring warmth to the homes of the people. He said that they would also be used to carry people from place to place. He told the Saanich people that they should always remember that the trees were once human beings. He told the Saanich people that they should always treat respectfully the SKELÁLNEW (bad people put away). Only when there was great need should a live tree be taken. XÁLS gave a sacred tree to the Saanich People, named XP̱A (the cedar tree). XP̱A would clothe and protect the Saanich People. XÁLS said the XP̱A would house the people and protect them in their travels. The SKELÁLNEW is the home for the birds and animals in the forest.²⁶²



Figure 17: "Cedar and Fir Tree at Mary Lake Nature Sanctuary" Photo, 2018.

262 Teaching of Earl Claxton Sr., John Elliott, and Kevin Paul (date unknown) Saanichton, British Columbia.

From this understanding of XPA and SKELÁLNEW, Tom Sampson showed us the two trees pictured above, emphasizing that “the good and the bad can live together. There are examples here in the forest that can help you with that.”²⁶³ For me, I interpreted his message as one of hope and with layered meaning. I often despair about the state of our world, but our laws tell us - *show us* - it is not impossible to all live together, and to mutually thrive. At the same time, we can clearly see that the two trees in the picture are the same size. One is not dominating the other. Further, together, and on equal terms, each is rooted into the same earth, and it is in that way that they survive.²⁶⁴ What Tom Sampson emphasizes most in relating this story is a subjective shift in our orientation, as a whole, that “feels the power of the land” and where “our consciousness needs to take in the land” and “we walk more gently.”²⁶⁵ Such a message fits well with that I offer in relation to climate crisis.

3.9. SELEKTEL and QENELEL



Figure 29: “WSÁNEĆ Field Course at the top of QENELEL” Photo, 2018.

I have written elsewhere about the stories of QOLEW (the chum salmon that spawn here), SELEKTEL (the river that gives them life), and QENELEL (the mountain that overlooks the river).²⁶⁶ Sharing these stories and reflecting on the impact of a fuel spill at this salmon spawning and ceremonial bathing location was a significant part of our day. However, an important act of reciprocity also began to take form on this trip.

During our trip I informed the students that we would return later in the year, during CENQOLEW (the moon of the dog salmon) to fish. Knowing this, and that the smokehouse I previously used at my Auntie Belinda’s house across the street was no longer in operation, the students decided to build me a new smokehouse in gratitude of their time in the course. Together

²⁶³ Teaching of Tom Sampson (24 Sept 24th 2018) Mary Lake.

²⁶⁴ See Mills, “Rooted Constitutionalism” for an excellent discussion of this larger principle.

²⁶⁵ Teaching of Tom Sampson referenced at <http://www.marylakeconnections.ca/voices-support/>.

²⁶⁶ Clifford, “WSÁNEĆ Legal Theory”.

they raised the funds and bought the materials, also coming together to help construct it (regardless of experience level). After a few preparations, most students spent an entire day helping to build the smokehouse. We could not complete it in one day, but my brother-in-law and I finished it up afterward. It was a touching gesture by the students and one that says a lot about reciprocity.



Figure 18: Smokehouse Gifted by WSÁNEĆ Field Course Students" Photo, 2018.

Salmon die after the act of spawning. With the giving of their own life, they bring forth new life, not only through the salmon that will hatch but also from the nutrients their decaying bodies return to the earth. When I go to fish, I begin by bending down and washing myself in the river, giving thanks to the QOLEW, the river, and more. The lives of the salmon I am about to take give sustenance and allow for the maintenance of my own life, and that of my family's. In offering this gratitude I recall our teachings that the Salmon People, SCÁNEW, are our ancestors.

XÁLS arrived to a place where there were some people. They were hard working people who helped one another and were good to one another. They were living the way he had told them to live on this land. They were a family: ŠÍYEL (older sibling), SCENÁ,Ł (an adopted child), SQOL, WES (a parent or sibling of one's son-in-law or daughter-in-law), EN SW SELÁWE (the one you are poor for, the honoured one) and JÁ,Ł (brother-in-law or sister-in-law when their spouse has died). Because the family were such good hardworking people, XÁLS wanted them to always be remembered. He told the people "I will call you SCÁNEW - the working people". XÁLS was pleased with them because they did not war with anyone and they lived in a peaceful way. XÁLS said "you will be able to travel far out to sea and return after your travels to the land." He said "you will always be respected and you will feed the people." The SCÁNEW do travel together and they live peacefully. XÁLS preserved the family and their ways because he wanted all the people to remember that it is good to be ambitious and to live in peace with one another. XÁLS declared FEKI (sockeye salmon) the leader of SCÁNEW. He said the spirit of SCÁNEW would become a sacred cleansing and would protect the society and beliefs of the people.²⁶⁷

Having returned to SELEKTEL and caught a number of fish, the students also returned to my house to help clean and prepare the fish for smoking. Many learned how to cut fish, while others volunteered to help with my sister's baby shower preparations. I salted and hung the fish in the smokehouse that evening and watched the fire for the next few days as they smoked.



Figure 19: "Smoked QOLEW" Photo, 2018.

²⁶⁷ Teaching of Earl Claxton Sr., John Elliott, and Kevin Paul (date unknown) Saanichton, British Columbia.

Once the fish were finished smoking, I portioned them up. Once everything was prepared, I gave salmon to my grandma, uncle, parents, sister, and others. I also made sure that each student in the class received fish as well – my own form of reciprocity in thanking each of them for contributing to the smokehouse. This type of coming together has always been a part of W̱SÁNEĆ law and culture.

4. Student Placements

I have devoted the majority of this chapter to describing portions of the land-based learning and pedagogy I used in teaching the W̱SÁNEĆ law field course. For the students this learning continued, and was put into action, during the community project portion of the course. In groups of two or three, and working under the guidance of a community supervisor, students undertook a variety of projects over an 8-week period. While community projects vary from year-to-year, each project adheres to a collaborative community-based legal education model, the reciprocal nature of which creates productive learning experiences for students while also helping to meet the often pressing demands placed upon communities in protecting their interests and meeting their objectives. In that sense, while students are learning and implementing W̱SÁNEĆ law, they are also drawing upon the skills and knowledge developed in law school.

Specific and timely projects are developed in consultation with W̱SÁNEĆ leadership and community members, resulting in around seven different projects per year. While the course has its own identifiable learning objectives, it is not our place to impose a certain set of projects on the community. We approach these projects in the spirit of being of service to the community, and from that orientation opportunities for learning will follow. I do not have the space to discuss each of these projects in any detail. To offer a glimpse of what these projects have consisted of over the two times the course has run, students have done place-restoration and reclamation work,²⁶⁸ W̱SÁNEĆ reef-net fishery and hunting revitalization work,²⁶⁹ developed a Grade 11 introduction to law curriculum for the ŁÁU, WELNEW Tribal School,²⁷⁰ created an introduction to W̱SÁNEĆ law published book,²⁷¹ contributed to NĪŁ TU, O Child and Family Services child

268 HĪSW̱KE to Diana Borges, Sebastian Cooper, and Xilonen Hanson Pastran for your work at SNIḎCEL.

269 HĪSW̱KE to Corbin Greening and Sarah Jackson.

270 HĪSW̱KE to Tessa Fryer and Helena Tlen.

271 HĪSW̱KE to Kelly Twa and Chya Mogerman.

wellbeing projects,²⁷² began creating a W̱SÁNEĆ woman's land trust,²⁷³ W̱SÁNEĆ art revitalization project,²⁷⁴ worked on beginning a W̱SÁNEĆ Southern Resident Killer Whale Guardian program,²⁷⁵ partnered with environmental non-profit groups for co-management and #LandBack work,²⁷⁶ and assisted with longer-term governance work including a court claim for James Island,²⁷⁷ a proposed National Marine Conservation Area Reserve / Indigenous Protected and Conserved Area along with potential co-management of the Gulf Islands National Park Reserve,²⁷⁸ as well as advocating for W̱SÁNEĆ law at the municipal level.²⁷⁹

While the obvious themes of language, place, culture, stories and W̱SÁNEĆ law and history run throughout all the projects, each present their own challenges and importance to the community. Most projects have not only elements of W̱SÁNEĆ law revitalization, but also represent community-led initiatives to uphold care for land, water, and other beings within W̱SÁNEĆ territory, and thus can be seen as ecological and climate justice initiatives as well. Regardless of the project, a course such as this only works with students who are engaged and dedicated. Each and every student in the course has done a tremendous job, forging pathways, forming lasting relationships (between themselves, community members, and places), and opening avenues for future work and possibilities. I raise my hands and say HÍSW̱KE SIÁM to each of them.

Having explored the nature of W̱SÁNEĆ law throughout Part I of this dissertation, including through a process of self-location, an examination of W̱SÁNEĆ stories and our mode of reasoning with those stories, and finally, through a detailed look at experiential learning and place-based pedagogy in the context of the W̱SÁNEĆ law field course, we can now step back and consider the larger context in which this revitalization of W̱SÁNEĆ law is occurring. Part II of this dissertation therefore shifts to an analysis of climate crisis and a critical analysis of its primary drivers, including capitalism.

272 HÍSW̱KE to Kim Francisco and Veronica Martisius.

273 HÍSW̱KE to Abi Moore and Eira Glover.

274 HÍSW̱KE to Adil Ahmed.

275 HÍSW̱KE to David Balzer, Dario Balca and Russell Chiong.

276 HÍSW̱KE to Dave Gill and Jack Jones for your work at W̱MÍYEFEN and HÍSW̱KE Naz Lakani and Matt Arsenault for your work at SISCENEM.

277 HÍSW̱KE to Meena Ansari and Sarah Robinson.

278 HÍSW̱KE to Katrina Annett, Sean Rupka and Leah Hughes.

279 HÍSW̱KE to Harmony Huffman and Camille Fortin.

PART II

Entanglements of the ‘Anthropocene’: The Global Context for W̱SÁNEĆ Law Revitalization



Figure 20: *The 13 Moons*. Artist, Briony Penn, copyright Tsawout First Nation. Image copied from <https://wsanec.com/sjelcasen-the-moon-of-putting-your-paddle-away-in-the-bush-november-and-december/>.

1. Introduction

The name WSÁNEĆ “connects directly to our homeland” – to ŁÁU, WELNEW (“place of refuge”) at the time of the great flood, and to our sacred teachings.²⁸⁰ The name grounds us within a web of reciprocal relationships within our ÁLENANEC (“homelands”), which we uphold through enactments of WSÁNEĆ law. At the same time, to live in a place is now also to be entangled within the global dynamics of climate crisis. As such, to speak of revitalizing Indigenous laws in particular places also requires recognition that place, and law, does not exist in isolation. The ways in which our lives are entangled in these global dynamics are at times visible, and at others they are not. In this chapter, I will provide a framework for thinking about climate crisis and its primary drivers. In doing so I hope to render more visible how the two intractable and seemingly distinct issues of climate crisis and Indigenous law revitalization are not disparate. This supports my argument that our theories and methodologies of Indigenous law

280 PENÁČ, *How is it that I have come to speak SENČOFEN?* at 6-7.

revitalization, and our diagnosis and approaches to climate crisis, can, and should be, intricately entwined and mutually reflective. I will provide more thoughts on how this specifically shapes our approach to Indigenous legal theory and methodology in Chapter Seven. For now, the context of climate crisis, followed by more specific critiques of its drivers, highlights the extent of the project of Indigenous law revitalization, as I see it, as well as pushes us to engage with scholarship typically outside that of Indigenous law revitalization. Importantly, an emphasis on climate crisis also illustrates just what is at stake in all of this.

Climate crisis is the most important and pressing issue facing all of us (human and more-than-human), and it is as clear as ever that it no longer makes sense (it never did) to consider the ‘social’ (i.e., law, economics, etc.) in isolation from the ‘environmental’ (i.e., “Nature”). Indigenous knowledge and scientific data have observed how species and ecosystems are already being rapidly and severely impacted by climate crisis in myriad ways. Advanced states of climate crisis will continue to intensify existing social and environmental challenges, and through that intensification “transform global political economy and alter our world’s most basic political arrangements.”²⁸¹ Some have termed this the ‘Anthropocene’, a proposed geological epoch where human activity impacts planetary climate and ecosystems. Yet, that term obscures as much as it reveals in that it depoliticizes the history of climate crisis and glosses over the power dynamics that continue to fuel global warming. This critique has led some to propose different nomenclature, such as the ‘Capitalocene’.²⁸²

We clearly need to stop burning fossil fuels, but at the root of climate crisis are other important considerations as well, such as capitalism, its relationship to nature, and its inherent need for compound growth. While capitalism has its own logic, that logic is also buttressed by the power of the nation-state in upholding conditions that allow capital to function. Capitalism, of course, also interacts with colonialism and the ongoing dispossession of Indigenous lands in central ways. Indigenous resurgence scholars, beyond any explicit connection with climate crisis,

281 Geoff Mann & Joel Wainwright, *Climate Leviathan: A Political Theory of Our Planetary Future* (London: Verso, 2018) [Mann & Wainwright, *Climate Leviathan*] at x.

282 Jason W. Moore, “The Rise of Cheap Nature” in Jason W. Moore, ed., *Anthropocene or Capitalocene? Nature, History, and the Crisis of Capitalism* (Oakland: PM Press, 2016) ch 3 [Moore, “Cheap Nature”] at 81 argues – “The Capitalocene argument says three things that the Anthropocene perspective does not – and cannot. First, it insists that the history of capitalism is a relation of capital, power, and nature as an organic whole. It is world-ecological. It is a multispecies affair. Capitalism is neither a purely economic nor social system, but “a historically situated complex metabolism and assemblages.” Second, the history of capitalism cannot be reduced to the burning of fossil fuels, in England or anywhere else. It is a history of relations of power and re/production premised on the cash nexus. Those relations enfold coal and other energy sources from the sixteenth century; they allowed for successive waves of global conquest and the worldwide appropriations of Cheap Nature. Third, the Capitalocene argument challenges the Eurocentric – and frankly false – view of capitalism as emerging in England during the eighteenth century.”

tend to also offer critiques of capitalism and sovereignty, or the nation-state.²⁸³ There are reasons we see tensions arise in almost all cases where deep and meaningful engagement with Indigenous law bumps up against economic interests and the jurisdictional and sovereign intransigence of the state.²⁸⁴

All of this is to say that climate crisis can push us to conceive of radical alternatives and different ways of being, and there has been a sense that the governance structures and ways of being of Indigenous peoples can represent important and positive alternatives in this regard. However, that is only the case if we take that as the objective and context of the resurgence of Indigenous law. We must be open to the ways Indigenous law can question, transform, and even reject foundational principles of Canadian (and global) law and society, where that is necessary. The scope of these issues is vast, and I cannot do full justice to any one of these immense issues. My more modest objective is to provide *a sober accounting of the context in which the resurgence of W̱SÁNEĆ law is occurring, and clarity in regard to what we hope to accomplish with the revitalization of W̱SÁNEĆ (and more broadly, Indigenous) law*. In other words, it is a clear picture of where we are now and what our best path forward is in achieving a just life and dignity for Indigenous, settler, and more-than-human beings.

2. Global Climate Crisis and Climate Science

W̱SÁNEĆ knowledge has observed the effects of climate crisis and can offer guidance in its mitigation. At the same time, climate crisis entangles specific relationships W̱SÁNEĆ have with their homelands within a global web of broader relations. While we may witness local manifestations of climate crisis, the diffuse and cumulative effects of pollution cannot be confined to the actions and practices of only one nation or actor. These cumulative effects, for instance, would include the acidification of oceans and the rise in global temperature, to name only two. As such, the forces that impact W̱SÁNEĆ's connections with land, human, and more-than-human relatives – and thus the enactment of W̱SÁNEĆ law – are not confined only to W̱SÁNEĆ territory, nor even Canada, but are impacted by the fact that Earth's systems are

283 See e.g. Coulthard, *Red Skin, White Masks* and Alfred, Taiaiake, "Sovereignty" in Joanne Barker, ed., *Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination* (Lincoln: University of Nebraska, 2005) 33 [Alfred, "Sovereignty"].

284 Christie, "Crown Intransigence".

strained by human action at a global level. Within that context concepts such as “reconciliation” must take new meaning.

2.1. Climate Crisis as “Hyperobject”

In an effort to describe the global, as well as the spatially and temporally diffuse, nature of climate crisis, Timothy Morton uses the term “hyperobjects.”²⁸⁵ What is helpful in Morton’s description is that hyperobjects are “viscous” – we are inside of them and they are stuck to us and all that we do, in one form or another.²⁸⁶ Similarly, hyperobjects, such as climate crisis, are so “massively distributed in time and space relative to humans” that they exist largely beyond our realm of perception.²⁸⁷ In that sense, hyperobjects are *nonlocal* - what we experience is necessarily a “local manifestation of some vast entity that I am unable to directly see.”²⁸⁸ At most, we see only “pieces of hyperobjects at a time.”²⁸⁹ To go further, we are not looking at a hyperobject from the outside. Rather than being “poised on the edge of the abyss, contemplating its vastness” we are instead “like Wile E. Coyote in midair [having] discovered that we are already falling inside the abyss, which is not pure empty space, but instead the fiery interior of a hyperobject.”²⁹⁰ For Morton, the consequence of this realization is the “end of the world” - not in the sense of “unless we act now”, but in the sense that our concept of *world* is no longer imaginable.²⁹¹ Or, as Geoff Mann and Joel Wainwright argue, climate crisis already is altering, and will undoubtedly fundamentally “transform global political economy and alter our world’s most basic political arrangements.”²⁹² How we chose to react to this transformation remains an open question.²⁹³

2.2. The Scientific Method and Climate Science

Indigenous knowledge and the scientific method are often presented as two distinct and entirely different bodies of knowledge and epistemologies. Science has also had a troubling role in

²⁸⁵ Morton, *Hyperobjects*.

²⁸⁶ *Ibid.* at 28.

²⁸⁷ *Ibid.* at 1.

²⁸⁸ *Ibid.* at 47-48.

²⁸⁹ *Ibid.* at 70.

²⁹⁰ *Ibid.* at 160.

²⁹¹ *Ibid.* at 6.

²⁹² Mann & Wainwright, *Climate Leviathan* at x.

²⁹³ For Morton, what we have is the chance for “intimacy” (Morton, *Hyperobjects* at 139), to “forge new alliances” and “create more democratic modes of coexistence between relationships between humans and with nonhumans” (*Ibid.* at 121).

colonialism and imperialism.²⁹⁴ To be sure, the scientific method is not neutral nor objective, but carries epistemological, ontological, and other cultural assumptions at its core.²⁹⁵ On top of that, the challenges we face with climate crisis are essentially political, and science will not be a panacea.²⁹⁶ Yet, a dismissal of climate science in critical thought is also dangerous in at least two ways. First, if climate crisis is a “hyperobject”, and thus largely beyond our direct perceptions, then to “reject techno-science altogether is to reject [a particular] means of knowing about [climate crisis].”²⁹⁷ In that climate science relies on a “techno-scientific apparatus so extensive that it is now an entire planetary infrastructure”, the scientific method can help us traverse the gap where the spatial and temporal breadth of climate crisis is beyond individual and localized perceptions.²⁹⁸ In short, climate science helps us diagnose climate crisis, and to emphasize the extent of change required to mitigate it. The second danger of dismissing climate science is a political point. By “undermining confidence in the methods of climate science and the consensus reached on climate change”²⁹⁹ we risk “play[ing] into the hands of climate denial.”³⁰⁰ The result is that we must “think tactically about where and when the critique of science is prudent.”³⁰¹

As regards climate crisis, our goal may be to “recast objectivity claims of the sciences...without dismissing the scientific endeavor.”³⁰² We do not all need to become climate scientists, beyond a general consensus on the reality of climate crisis and the extent of change needed in crafting a meaningful response to those realities.³⁰³ The “political problems we face cannot be fixed simply by delivering science to the masses.”³⁰⁴ There is also danger in granting

294 Laurelyn Whitt, *Science, Colonialism, and Indigenous Peoples: The Cultural Politics of Law and Knowledge* (Cambridge: Cambridge University Press, 2014) [Whitt, *Science, Colonialism*].

295 Perhaps most concerning is the epistemological assumption that to know something requires deconstruction - the isolating and breaking down of things into their constituent parts. With that deconstruction comes a fetish to search for, understand, organize, and ultimately control and overcome, everything in the world down to the molecular. The extent to which those epistemological assumptions are bound up, at least to some extent, with the problem is an open question.

296 Scientists are not heroes who have opened our eyes to the effects of human action - a narrative that the term the Anthropocene feeds (Bonneuil & Fressoz, *The Shock of The Anthropocene* at 79).

297 McKenzie Wark, *Molecular Red: Theory For The Anthropocene* (London: Verso, 2015) [Wark, *Molecular Red*] at 180. The original passage references techno-science as “the means of knowing about” climate crisis. However, this is an overstatement given that we can know of climate crisis in other ways, and as such I have adjusted my use of the passage. With that said, Wark’s claim does reference back to Morton’s argument that hyperobjects are temporally and spatially beyond human perceptions.

298 *Ibid.*

299 *Ibid.* at 179.

300 *Ibid.* at 180.

301 *Ibid.* at 179.

302 *Ibid.* at 134. While Wark does help me to not uncritically dismiss science, he does appear to still privilege worldviews, epistemologies, and power relations, despite his methodological position to do otherwise. What Wark does claim about this approach is that, “It retains a double discomfort, asking critical questions in a scientific zone, and speaking knowledgeably about actual science in a humanities zone” (*ibid.* 134).

303 Mann & Wainwright, *Climate Leviathan* at 7.

304 *Ibid.*

only “experts” a political voice in crafting a response.³⁰⁵ Ultimately, we can look to “affirm science without expecting too much of it politically.”³⁰⁶

2.3. The State of Climate Crisis

The science on climate crisis is unanimous in terms of its existence and general urgency.

Today, all around the world, the menace we worried about is no longer merely potential, but has rapidly materialized. Record-breaking temperatures on every continent. Rates of extinction so high that the only relevant comparisons are to planetary cataclysms far beyond human memory. Species and ecosystems scrambling to change their geographical range and - where they cannot move quickly, as with coral reefs - perishing altogether. Rising seas, forests ablaze, glaciers disappearing, superstorms. The underlying cause is well known. The increasing proportion of certain trace gases in the Earth’s atmosphere (in round numbers, carbon dioxide [CO₂] has risen from 250 to 400 parts per million, methane [CH₄] from 700 to 1700 parts per billion) means a larger portion of the sun’s energy remains in the Earth’s seas, land masses, and atmosphere, changing the movement of heat energy through the world’s climactic system.³⁰⁷

In 1990 the Intergovernmental Panel on Climate Change (IPCC)³⁰⁸ issued its first report on climate crisis and its trajectories, with members of the United Nations agreeing to combat anthropogenic climate crisis and cut greenhouse gas emissions in signing the United Nations Framework Convention on Climate Change (UNFCCC).³⁰⁹ “Yet in 2012, global CO₂ emissions were 58 percent higher than in 1990.”³¹⁰ This increase in emissions is part of a familiar trend. “The graph of the quantity of CO₂ in the atmosphere [over the last] 200,000 years looks relatively flat until the early nineteenth century” when we see a dramatic exponential growth in CO₂ levels.³¹¹ The trend continues, unchecked, and at higher speeds. “In the 1990s, the annual increase in global CO₂ emissions stood at an average 1 percent; since 2000, the figure has been 3.1 percent - a tripled growth rate, exceeding the worst-case scenarios developed by the IPCC and expressing a trend that still does not show any signs of reversal.”³¹²

305 Albert Einstein, *Why Socialism?* (New York: Monthly Review Press, 1951) 4.

306 Mann & Wainwright, *Climate Leviathan* at 59.

307 *Ibid.* at ix.

308 The IPCC now has five reports, the most recent being the IPCC, 2014: *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II, and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, R.K. Pachauri and L.A. Meyers (eds.)]. IPCC, Geneva, Switzerland, 151 pp. At the time of writing the Sixth Assessment Report is underway, with an anticipated release in 2022.

309 Andreas Malm, *Fossil Capital: The Rise of Steam Power and the Roots of Global Warming* (London: Verso, 2016) [Malm, *Fossil Capital*] at 2-3.

310 *Ibid.* at 3.

311 *Ibid.* at 5.

312 *Ibid.* at 3.

Earlier projections and political agreements identified the threshold level of “a rise of 2C in relation to the pre-industrial level” as necessary to avoid the most catastrophic impacts of climate crisis.³¹³ Of course, as Naomi Klein emphasizes, the choice of a 2C threshold is just as much a political one, and one “that has more to do with minimizing economic disruption than with protecting the greatest number of people.”³¹⁴ She goes on: “when the 2 degrees target was made official in Copenhagen, there were impassioned objections from many delegates who said the goal amounted to a “death sentence” for some low-lying island states, as well as for large parts of Sub-Saharan Africa.”³¹⁵ Certainly, it would be a “death sentence” for a vast number of plants, animals, and ecosystems throughout the world as well. As we sit around 1 degree above pre-industrial levels we already increasingly see even more rapid and extreme impacts with rising temperatures than predicted. For example, we have witnessed that the acidification of oceans is up 26 percent in relation to pre-industrial levels,³¹⁶ a rate of species extinction 100 to 1,000 times above the geological norm,³¹⁷ and the polar ice cap has melted so much that “we can expect ice-free ship passage by 2030.”³¹⁸ Yet, emissions do not slow; they expand.

The melting of the polar ice cap is emblematic of our predicament. “Rather than spark a rush to cut off fossil fuels exploitation, this terrible manifestation of our planetary emergency has provoked a new geopolitical struggle - lead by Russia, China, the United States, and Canada - to control the flow of resources from and through the north, especially fossil fuel energy. The leading capitalist states thus address the problems they have created by deepening the same problems.”³¹⁹ As regards the arctic, Gordon Christie has called this the “second-wave of colonization.”³²⁰

Even more troubling is the realization that climate crisis does not happen in a linear fashion. Rather, “small variation in the globe’s average temperature can lead to sudden and disorderly changes.”³²¹ These changes “trigger tipping points beyond which runaway warming would

313 “The first UNFCCC document to mention a limit to global warming of 1.5°C was the Cancun Agreement, adopted at the sixteenth COP (COP16) in 2010” (IPCC: Chapter 1 FAQ at <https://www.ipcc.ch/sr15/faq/faq-chapter-1/>).

314 Naomi Klein, *This Changes Everything: Capitalism vs The Climate* (Toronto: Vintage Canada, 2015) [Klein, *This Changes Everything*] at 12.

315 *Ibid.*

316 Bonneuil & Fressoz, *The Shock of the Anthropocene* at 7.

317 *Ibid.*

318 Mann & Wainwright, *Climate Leviathan* at 8.

319 *Ibid.*

320 Christie, “Indigeneity and Sovereignty”.

321 Bonneuil & Fressoz, *The Shock of the Anthropocene* at 6.

occur.”³²² Put simply, as temperatures rise climate change becomes self-sustaining. Glaciers melt and vast amounts of carbon dioxide stored within them is release. Forests burn and carbon emissions spike. On it goes.

Setting the threshold of a 2 degrees rise in global temperature above pre-industrial levels is, on its own, dangerous enough. Even more troubling is the fact that the target of “2 degrees now looks like a utopian dream,” never mind the more recent emphasis on a 1.5 degree Celsius threshold.³²³ Some say that the 2C target “will be very hard not to breach given the current lack of international political will,”³²⁴ while others go so far as to say there is no way to prevent the breach of that target.³²⁵ Even the Paris Agreement itself, the most recent UN agreement to combat climate crisis, acknowledges that the steps for carbon mitigation strategies it proposes (even if they are all met, I would add) are not enough.³²⁶

Climate crisis is clearly both urgent and important, requiring *united action*, and *much sooner* than later. The nature of climate crisis has propelled me to further engagement with climate science, as well as with branches of scholarship and critique beyond those of Indigenous law revitalization. I turn to some of the literature on climate crisis and political ecology - not because it is more authoritative or important, or beyond critique – but because it creates new possibilities. Climate crisis complicates how we might think and enact WSÁNEĆ law and legal theory, and its emphasis on place-based ontology. In that spirit I now turn to some of the critical scholarship on climate crisis and its drivers.

3. The ‘Anthropocene’

The state of climate crisis we now find ourselves in has been termed by some as the ‘Anthropocene’, a term made popular by Paul Cruzen as descriptive of a geological epoch marked significantly by human impact on Earth’s systems.³²⁷ Etymologically, the term *Anthropocene* is a combination of *anthropo*, from *anthropos*, which means “human”, and *cene*,

322 Klein, *This Changes Everything* at 14.

323 *Ibid.* at 13.

324 Bonneuil & Fressoz, *The Shock of the Anthropocene* at 6.

325 Mann & Wainwright, *Climate Leviathan*.

326 *Paris Agreement* (13 December 2015), in UNFCCC, COP, Report No. 21, Addendum, U.N. Doc. FCCC/CP/2015/10/Add.1 (29 January 2016) at para. 17. The paragraph reads: “[The Conference of the Parties] notes with concern that the estimated aggregate greenhouse gas emission levels in 2025 and 2030 resulting from the intended nationally determined contributions do not fall within least-cost 2C scenarios but rather lead to a projected level of 55 gigatonnes in 2030, and also notes that much greater emission reduction efforts will be required than those associated with the intended nationally determined contributions in order to hold the increase in the global average temperature to below 2C above pre-industrial standards...”

327 Cruzen, “Geology of Mankind” and Paul J. Cruzen & Eugene F. Stoermer, “The “Anthropocene”” (2000) 41 *Global Change Newsletter* 18.

from *kainos*, meaning “new” or “recent”.³²⁸ Yet, the scholarship I find most persuasive in this area is critical of the idea of an undifferentiated ‘anthropos’ recently ‘awakening’ to the reality of climate crisis. Rather, scholars making these critiques point instead to conscious choices by powerful actors and institutions throughout recent human history, which have, and continue to, propel us toward climate catastrophe.³²⁹ In other words, there is a refusal to “depoliticize the long history of the Anthropocene.”³³⁰

The term ‘Anthropocene’ carries with it a narrative that marks “a new era of natural history in which human actions are the decisive force ecologically and geologically,”³³¹ though it also renders many things invisible.³³² It is unhelpful and inaccurate to conceptualize a universal *anthropos* as having brought on this epoch, nor as there being a universal experience of it.³³³ The impacts of climate crisis are geographically unequal and fall most heavily on the marginalized and poor.³³⁴ If the ‘Anthropocene’ is the end of the world (or worlds) – in the sense Morton referred to it – then Black³³⁵ and Indigenous peoples³³⁶ around the globe have experienced its effect for centuries.³³⁷ In so far as the ‘Anthropocene’ connotes that “we are all in this together,” marginalized groups or nations, who have suffered the most and benefited the least while living with climate crisis, have reason to be sceptical. While there is little incentive to erase the ledger “of past wealth-producing emissions”, and holding to account heavy emitters and nations (who are often also those with power and capacity to create potential change) is key, it is paradoxical when this position also justifies resistance to climate action by developing countries or groups.³³⁸

Our focused diagnosis, and thus responses to climate crisis, improve as we examine matters more closely. Christophe Bonneuil & Jean-Baptiste Fressoz provide an important critical history of the ‘Anthropocene’ in their book, *The Shock of the Anthropocene: The Earth, History*

328 Bonneuil & Fressoz, *The Shock of the Anthropocene*.

329 See, for instance, Bonneuil & Fressoz, *The Shock of the Anthropocene*, and Mann & Wainwright, *Climate Leviathan*.

330 Bonneuil & Fressoz, *The Shock of the Anthropocene* at xiii.

331 Mann & Wainwright, *Climate Leviathan* at x.

332 *Ibid* at 47.

333 *Ibid*.

334 For instance, the very existence of the Republic of Maldives of South Asia is threatened by rising sea levels.

335 See Kathryn Yusoff, *A Billion Black Anthropocenes or None* (Minneapolis: University of Minnesota Press, 2018) [Yusoff, *Black Anthropocenes*] for a critique of the politics of the Anthropocene through feminist black theory.

336 Kyle Whyte, “Indigenous Science (fiction) for the Anthropocene: Ancestral Dystopias and Fantasies of Climate Change Crises” (2018) 1(1-2) Environmental Planning E: Nature and Space 224 [Whyte, “Indigenous Science (fiction) for the Anthropocene”].

337 “For instance, if the Anthropocene is defined as a planetary and historical regime shaped in irreversible ways by “humanity” or “man”, then Indigenous peoples in the Americas have been surviving the damnation of the Anthropocene for more than 500 years” (Mann & Wainwright, *Climate Leviathan* at 188-89).

338 Mann & Wainwright, *Climate Leviathan* at 75.

and *Us*, illustrating a method aimed at determining how we actually reached this point of environmental crisis.³³⁹ The narrative of “awakening” to the ramifications of human driven climate crisis is “historically wrong.”³⁴⁰ Rather, Bonneuil and Fressoz argue that “the period between 1770 and 1830 was marked on the contrary by a very acute awareness of the interactions between nature and society” at a global level,³⁴¹ as was the case during “the Great Acceleration of the mid twentieth century.”³⁴² Our focus then shifts more specifically to the processes and the “actors, institutions and decisions that have produced these effects” of climate crisis.³⁴³

The unfolding of the ‘Anthropocene’ did not occur without struggle and resistance, even if asymmetries of power and social inequalities within those historical processes rendered those struggles as peripheral. Much harm could have been avoided had those with the power and capacity to take measures done so.³⁴⁴ Instead, the “wealthy minority of the world’s people” continued with choices and activities that resulted in the emission of a “vast proportion of historical greenhouse gases.”³⁴⁵ To emphasize this point, consider that “ninety corporations are responsible for 63 percent of the cumulative emissions of carbon dioxide and methane between 1850 and today.”³⁴⁶ Or that “approximately 7 percent of the world is responsible for half of all carbon emissions today, and half of the world is responsible for only approximately 7 percent.”³⁴⁷

Not only was it a small portion of the population responsible for most emissions, those in power also worked to deflect alternative pathways away from fossil fuel consumption and its

339 Bonneuil & Fressoz, *The Shock of the Anthropocene*.

340 *Ibid.* at 76.

341 *Ibid.* Bonneuil and Fressoz open with two distinct perspectives illustrating this early understanding of the impacts of human action. The first being Saint-Simon in 1852: “The object of industry is the exploitation of the globe, that is to say, the appropriation of its products for the needs of man; and by accomplishing this task, it modifies the global and transforms it, gradually changing the conditions of its existence. Man hence participates, unwittingly as it were, in the successive manifestations of the divinity, and thus continues the work of creation. From this point of view, Industry becomes religion” (*Doctrine de Saint-Simon*, vol. 2, Paris, Aux Bureaux de l’Organisateur, 1830, 219 quoted in Bonneuil and Fressoz at xii.). Bonneuil and Fressoz also provide the following from Eugène Huzar, who in 1857 wrote: “In one or two hundred years, criss-crossed by railways and steamships, covered with factories and workshops, the world will emit billions of cubic meters of carbonic acid and carbon oxide, and, since the forests will have been destroyed, these hundreds of billions of carbonic acid and carbon oxide may indeed disturb the harmony of the world (Eugène Huzar, *L’Arbre de la science*, Paris: Dentu, 1857, 106, quoted in Bonneuil and Fressoz at xii).

342 *Ibid.* at 77. Bonneuil and Fressoz label the ‘Great Acceleration’ as the period after 1945 and the Second World War, which indicates an exponential growth in 24 different socio-economic and Earth Systems trends. See *ibid.* at 10-11 for visual representations of these trends.

343 *Ibid.* at 70.

344 Mann & Wainwright, *Climate Leviathan* at ix.

345 *Ibid.*

346 Bonneuil and Fressoz, *The Shock of the Anthropocene* at 68 (quoting Richard Heede, ‘Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854-2010’, (2014) 122:1-2 *Climate Change* 229).

347 Mann & Wainwright, *Climate Leviathan* at 73.

associated emissions, including a much earlier invention of electric cars. Andreas Malm, in *Fossil Capital: The Rise of Steam Power and the Roots of Global Warming*, provides an example of this. He writes:

Cars, to begin with, run on fossil energy, a legacy of photosynthesis originating hundreds of millions of years ago. The vehicles were not invented just now; they spread in the twentieth century. The choice to travel in them rather than in trams or buses or on bicycles is conditioned by a vast infrastructure of oil terminals, petroleum refineries, asphalt plants, road networks, gasoline stations - not to speak of the film industry, the lobbying groups, the billboards - which did not fall from the sky in this moment but was built up *over time*, eventually amassing such weight and inertia that other modes of transportation are now excluded, or at least prevented from rising to predominance. This is what some refer to as ‘carbon lock-in’: a cementation of fossil fuel-based technologies, deflecting alternatives and obstructing policies of climate change mitigation: a poisoned fruit of history.³⁴⁸

Inequality “entrenches the capacity of the wealthy - who benefit disproportionately from economic growth - to prevent the conversion of our carbon-intensive economy into a more sustainable alternative.”³⁴⁹ Those with the power and capacity to redistribute wealth, power, and the end of fossil fuels are often also the ones who benefit most from those structures and practices.³⁵⁰ As such, affluent nations and the capitalist class tend to shirk historical and moral accountability because it would threaten their current position of privilege and power, something which also helps insulate them from the most harmful effects of climate crisis. Inequality, historically and currently, therefore undermines collective action in a variety of ways. So, as opposed to faulting a universal *anthropos*, we would be well served to dissect the ways financial, political, and social inequalities have played a central role in propelling us toward environmental crisis. Mitigating climate crisis therefore requires confronting the power structures, systems, and ideologies that have driven this change and produced inequalities (between humans and between humans and the more-than-human world).

Little has produced more inequality than capitalism. In fact, as we will see in the following sections, inequality is central to its logic. While various scholars have proposed different

³⁴⁸ Malm, *Fossil Capital* at 7.

³⁴⁹ *Ibid.* at 101.

³⁵⁰ Mann & Wainwright, *Climate Leviathan* at 73-75.

nomenclature to the ‘Anthropocene’,³⁵¹ the term ‘Capitalocene’ has accuracy.³⁵² The choice of narrative is significant because “it has its effects on the type of ‘solutions’ that are proposed” in attempts to mitigate climate catastrophe.³⁵³ In following the analytical path of the ‘Capitalocene’ one accepts that “any substantial attempt to come to grips with climate crisis *must* contend with capitalism.”³⁵⁴ Yet, capitalism and the nation-state, despite different origins, are not so easy to disentangle. For that, and other reasons, I also agree with Mann and Wainwright that “only a theory capable of radically examining capitalism *and* sovereignty holds any hope of orienting us today.”³⁵⁵ Along those lines, Mann and Wainwright identify “two broad but distinct trajectories that might” lead on a just path to mitigating climate catastrophe - 1) the “anticapitalist Left, sprung from Marxist roots” and 2) the “knowledge and life ways of [Indigenous] peoples who have long historical experience with ways of being that are not overdetermined by capital and the sovereign state.”³⁵⁶ This project identified by Mann and Wainwright, and to which my work offers a contribution, requires finding ways in which these two trajectories might support and give momentum to each other.³⁵⁷

4. Capitalism

Capitalism and climate crisis are intimately linked as we see an exponential rise in carbon emissions alongside the global reach of capitalist relations in the late 1700’s.³⁵⁸ Adopting the ‘Capitalocene’ narrative allows us to look at a relational set of dynamics that creates deep inequality within nations and across the globe, exploits nature to the privilege of an elite group of humans, and fuels the engine of colonialism and capitalism through continued subjection of

351 Bonneuil and Fressoz have proposed seven potential narratives other than the Anthropocene as a way to capture social and power dynamics, and the role they have played in climate change. Bonneuil & Fressoz, *The Shock of the Anthropocene* propose the following terms: 1) Themocene: Apolitical History of COs; 2) Thanatocene: Power and Ecocide; 3) Phagocene: Consuming the Planet; 4) Phronocene: Grammars of Environmental Reflexivity; 5) Agnotocene: Externalizing Nature, Economixing the World; 6) Capitalocene: A Combined History of Earth and World-Systems; and 7) Polemocene: Resisting the Deterioration of the Earth Since 1750. Other scholars have proposed similar alternatives. See for example Donna J. Haraway, *Staying with the Trouble: Making Kin in the Chthulucene* (Durham: Duke University Press, 2016) [Haraway, *Staying with the Trouble*]; and Jason W. Moore., ed., *Anthropocene or Capitalocene? Nature, History, and the Crisis of Capitalism* (Oakland: PM Press, 2016) [Moore, *Anthropocene or Capitalocene?*]. While Andreas Malm appears less concerned with new nomenclature, he does offer a critique of the Anthropocene narrative (Andreas Malm & Alf Hornborg, “The geology of mankind? A critique of the Anthropocene narrative” (2014) 1:1 *The Anthropocene Review* 62) and provides an in-depth look at the ways in which culture, power and the logic of capital have led to climate change.

352 See specifically Jason W. Moore, *Capitalism in the Web of Life: Ecology and the Accumulation of Capital* (London: Verso, 2015) [Moore, *Capitalism in the Web of Life*] and Moore, *Anthropocene or Capitalocene?*.

353 Bonneuil & Fressoz, *The Shock of the Anthropocene* at 71.

354 Mann & Wainwright, *Climate Leviathan* at 99.

355 *Ibid.* at 15.

356 *Ibid.* at 189.

357 *Ibid.* at 189-90.

358 Andreas Malm, *Fossil Capital*.

lands and ‘resources’ within Indigenous territories to the logic of capital and accumulation. As such, it is not surprising that Dené resurgence scholar, Glen Coulthard, has proclaimed that “for Indigenous nations to live, capitalism must die.”³⁵⁹ In this regard, Coulthard stands on similar ground as scholars on the Left who say that “any substantial attempt to come to grips with climate change *must* contend with capitalism.”³⁶⁰

Near the outset of his influential book, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition*, Coulthard sets about bringing together “two diverse fields of critical inquiry” - “Indigenous studies and Marxist political economy.”³⁶¹ While these two fields do not always have an easy fit, Coulthard stresses that “for Indigenous peoples to reject or ignore the insights of Marx would be a mistake.”³⁶² In that my inquiry has a particular focus on climate crisis, I would also include Marxist political ecologists. Marxist thought provides us with some of the strongest and most in-depth critiques of capitalism and its social relations, both between humans and between humans and our more-than-human relatives. Since capitalism is engrained in much of the global imaginary, it is worth devoting a fair amount of attention to a framework of understanding capitalism, its origins and internal contradictions, and why those necessarily create inequality and environmental devastation.

4.1. The Origin of Capitalism

To understand the origins of capitalism is to recognize that “capitalism is not a natural and inevitable consequence of human nature, nor simply an extension of age-old practices of trade and commerce. Rather, it is a late and localized product of very specific historical conditions, which required great transformations in social relations and in the relationship between humans and nature.”³⁶³ The result is “a system in which goods and services, down to the most basic necessities of life, are produced for profitable exchange, where even human labour-power is a commodity for sale in the market, and where all economic actors are dependent on the market”³⁶⁴

359 Coulthard, *Red Skin, White Masks* at 173.

360 Mann & Wainwright, *Climate Leviathan* at 99.

361 Coulthard, *Red Skin, White Masks* at 8. Mann & Wainwright, *Climate Leviathan* at 189 make a similar call for the “anticapitalist Left, sprung from Marxist roots” and Indigenous peoples to come together to support and give energy to one another.

362 Coulthard, *Red Skin, White Masks* at 8. Coulthard presents three problematic areas of Marx’s thesis on primitive accumulation in need of transformation. See *Ibid.* at 8-15 for more.

363 Ellen Meiksins Wood, *The Origin of Capitalism: A Longer View* (London: Verso, 2017) [E.M. Wood, *The Origin of Capitalism*] from the back cover synopsis.

364 *Ibid.* at 2

and are compelled by the “market *imperatives*”³⁶⁵ of competition, profit-maximization, and the systemic requirement to increase labour productivity. Capitalism, then, “is not a thing, but a social formation organized around commodity production and consumption, driven by the constant imperative to expand the accumulation of surplus by realizing positive returns on investment.”³⁶⁶ As we will see later, capitalism can thus also be seen as “a way of organizing nature.”³⁶⁷

In terms of its origin, capitalism arose in England, in the countryside, under specific historical conditions. Other European countries, despite some having extensive wealth, trade networks, and economies, *were not capitalist*, at least not until “they came within the orbit of an already existing capitalist system and the competitive pressures it was able to impose on its political, military, or commercial rivals.”³⁶⁸ Various accounts of capitalism exist, although Ellen Meiksins Wood in her account of the origins of capitalism argues that almost all of them fall short in that they tend to fall back on assumptions housed within “the commercialization model” of classical political economy and its connections with “Enlightenment conceptions of progress.”³⁶⁹ Within each of these accounts there is some notion of a natural human inclination toward capitalism,³⁷⁰ with historical accounts of various elements of “proto-capitalism”³⁷¹ basically waiting to emerge given particular circumstances, such as a certain level of primitive accumulation³⁷² or the removal of barriers inhibiting the transition to capitalism,³⁷³ such as feudalism, or some other form of social, cultural, or religious barrier.³⁷⁴ In each of these “question-begging explanations” the transition to capitalism is “already prefigured” given its existence in earlier forms.³⁷⁵ That is, in addition to certain assumptions about human nature, where given the chance individuals will “always avail themselves of the opportunity to maximize

365 Ibid. at 50.

366 Mann & Wainwright, *Climate Leviathan* at 100.

367 Moore, *Capitalism in the Web of Life*.

368 E.M. Wood, *The Origin of Capitalism* at 73. Wood discusses the Dutch, French and Florence as examples.

369 Ibid. at 11. A central purpose of this book is to push back against these traditional types of arguments.

370 Adam Smith frames this as a natural inclination to “truck, barter and trade”.

371 E.M. Wood, *The Origin of Capitalism* at 32.

372 In classical political economy primitive accumulation references the reaching of a certain level of accumulation, or financial surplus, which can then be reinvested for profit (i.e., capital). This accumulation is primitive in the sense that it happens prior to the ability to reinvest surplus for profit. As we will see, Marx spoke of primitive accumulation in a different sense than that of classic political economy.

373 E.M. Wood discusses these in relation to the work of Max Weber and Fernand Braudel, for example.

374 See E.M. Wood, *The Origin of Capitalism* at Chapter 1: The Commercialization Model and Its Legacy for a more in-depth discussion.

375 Ibid. at 4.

profit through acts of exchange,”³⁷⁶ the transition to “capitalism represents not so much a qualitative break from earlier forms as a massive quantitative increase: an expansion of markets and the growing commercialization of economic life.”³⁷⁷

Foundationally, the above form of explanation of the origin of capitalism, aside from its flawed logic, presents two problems. First, “if capitalism is the natural culmination of history, then surmounting it is unimaginable.”³⁷⁸ Second, stressing “the *continuity* between non-capitalist and capitalist societies [is] to deny or disguise the *specificity* of capitalism.”³⁷⁹ Two scholars, Karl Polanyi and Karl Marx, are helpful starting points in emphasizing the specificity of capitalism.

4.1.1. Polanyi and Marx

Karl Polanyi pointed to the critical transformation that distinguished a market society from all previous societies.³⁸⁰ In doing so, Polanyi challenged Adam Smith’s notion of ‘economic man’, insisting that “the motive of individual profit associated with market exchange was never till the modern age the dominant principle of economic life.”³⁸¹ Rather, “In all earlier societies, ‘economic’ relations and practices were ‘embedded’ or submerged in non-economic – kinship, communal, religious, and political – relationships.”³⁸² “Only in modern ‘market society’, according to Polanyi, is there a distinct ‘economic’ motive, distinct economic institutions and relations separated from non-economic relations.”³⁸³ Society itself is therefore subject to the market in that even land and labour, as “fictitious commodities”, are subject to the market.³⁸⁴ Ultimately, “a market *economy* can exist only in a ‘market *society*’, that is, a society where, instead of an economy embedded in social relations, social relations are embedded in the

376 *Ibid.* at 5-6

377 *Ibid.* at 12.

378 *Ibid.* at 8.

379 *Ibid.* at 5.

380 Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston: Beacon Press, 2001 edition) [Polanyi, *The Great Transformation*].

381 E.M. Wood, *The Origin of Capitalism* at 21

382 *Ibid.* at 21.

383 *Ibid.* at 23.

384 Polanyi, *The Great Transformation*.

economy.”³⁸⁵ Where Wood disagrees is not with the extent of transformation indicated by Polanyi, but rather, the sequence of events.³⁸⁶

Karl Marx was, of course, also a predominant figure in critiquing classic political economy and its notions of primitive accumulation, instead emphasizing the social nature of these relationships.³⁸⁷ In his critique of “the so-called primitive accumulation”, Marx insisted “that wealth by itself is not ‘capital’, and that capital was a specific social relation.”³⁸⁸ Accumulation on its own, regardless of the source, is not enough. “What transformed wealth into *capital* was a transformation of social property relations.”³⁸⁹ Capitalism, then, has a historical specificity.³⁹⁰ “The specific precondition of capitalism is a transformation of social property relations that generates capitalist ‘laws of motion’: the *imperatives* of competition and profit-maximization, a *compulsion* to reinvest surpluses, and a systematic and relentless *need* to improve labour-productivity and develop the forces of production.”³⁹¹

4.1.2. Agrarian and Industrial Capitalism

It is often assumed that “capitalism emerges when the fetters of feudalism are removed.”³⁹² In that sense, capitalism is seen principally as an *opportunity* as opposed to an *imperative*. “In capitalist ideology the market implies not compulsion but freedom.”³⁹³ Yet, “the distinctive and dominant characteristic of the capitalist market is not opportunity or choice but, on the contrary, compulsion.”³⁹⁴ Market dependence is imposed on all individuals, both the capitalist class and those “deprived of what they need for their subsistence” and as such are left with only “the capacity to perform labour.”³⁹⁵ “This unique system of market-imperatives of competition,

385 E.M. Wood, *The Origin of Capitalism* at 23.

386 For example, E.M. Wood sees a technological determinism in Polanyi where the industrial revolution leads to social change. E.M. Wood, rather, points to historical conditions and a change in social property relations the preceeded the Industrial Revolution. See *ibid.* at 24. E.M. Wood also writes: “In other words, in contrast to Polanyi’s suggestion that ‘market society’ was a response to certain technological developments in a commercial society, the conclusion we can draw from the history of agrarian capitalism is that a capitalist dynamic rooted in a new form of social property relations preceded industrialization, both chronologically and causally” (*ibid.* at 143).

387 See Karl Marx, *Capital: Volume 1: A Critique of Political Economy* (London: Penguin Classics, 1992).

388 E.M. Wood, *The Origin of Capitalism* at 36.

389 *Ibid.* at 36.

390 *Ibid.* at 37.

391 *Ibid.* 36-37.

392 *Ibid.* at 41.

393 *Ibid.* at 6.

394 *Ibid.* at 7.

395 *Ibid.*

accumulation, profit-maximization, and increasing labour-productivity – regulate not only all economic transactions but social relations in general.”³⁹⁶

In this account, notions of Enlightenment progress are not at the centre in explaining the origins of capitalism. You can have economic and culturally flourishing societies, with global trade networks, *without* having capitalism. You cannot trace the specific origin of capitalism back to any notion of superiority.³⁹⁷ Rather, capitalism arose in the English countryside, first with *agrarian* capitalism,³⁹⁸ which through creating a “non-agricultural labour force and a potential mass market for the most basic necessities and cheap consumer goods,” which s in turn established conditions that allowed for “the development of *industrial* capitalism.”³⁹⁹ Market imperatives, therefore, predate “the mass proletarianization of the workforce.”⁴⁰⁰ “What created the drive to intensify exploitation was not the emergence of steam or the factory system but rather the need inherent in capitalist property relations to increase productivity and profit.”⁴⁰¹

Previous societies created “profit in circulation rather than production,”⁴⁰² or as with feudal lords, extracted surplus through “extra-economic means.” “These earlier modes were not driven by the same requirement to improve the productivity of labour, because surplus appropriation by dominant classes depended not on increasing the productivity of the direct producers but on strengthening the appropriator’s coercive power to squeeze more surplus labour out of the producers.”⁴⁰³ What then led to these capitalist imperatives regarding production? With the beginning of a political centralization of the English state, landowners had less “extra-economic” means to appropriate surplus and began to rely more on the extent to which their tenants (i.e., farmers) were successful in agricultural production. Landowners thereby sought tenants that were more competitive producers, increasingly imposing competitive or “economic rents – rents fixed not by some legal or customary standard but by market conditions. There was, in effect, a

396 *Ibid.*.

397 Around the globe a variety of cultures and commercial centres “have often produced rich material and cultural infrastructure, far in advance of developments in the European backwater that first gave rise to capitalism. No reasonable person would deny that, in Asia, Africa, and the Americas, there were ‘high’ civilizations, which in some cases developed commercial practices, as well as technological advances of various kinds, that far surpassed those of medieval England. But the emergence of capitalism is difficult to explain precisely because it bears no relation to prior superiority or more advanced development I commercial sophistication, science and technology, or ‘primitive accumulation’ in the classical sense of material wealth” (*Ibid.* at 75).

398 If we do not call it *agrarian capitalism*, the social property relations were a “precondition” of capitalism, and were unlike any seen elsewhere in history (*Ibid.* at 131).

399 *Ibid.* 57-58.

400 *Ibid.* at 65.

401 *Ibid.* at 67.

402 *Ibid.* at 79.

403 *Ibid.* at 56.

market in leases.” In order for tenants to have access to land for production, they had to outproduce, or out compete, other prospective tenants. More successful producers gained access to more land, and less successful tenants became dispossessed of land and left only with the capacity to perform labour. All parties, “landlord, capitalist tenant, and wage labourer” were therefore subject to market imperatives where each relied on competitive pressure of the market to sustain and reproduce themselves.

Ultimately, there was systemic “pressures to improve labour-productivity,”⁴⁰⁴ as well as the creation of “a large population not engaged in agricultural production, but also an increasing propertyless mass that would constitute both a large wage-labour force and a domestic market for cheap consumer goods – a type of market with no historical precedent.”⁴⁰⁵ “More distinctive was the growth of the numbers *compelled* to buy – not the superfluities of life but the most basic commodities and the implements of daily subsistence and self-reproduction.”⁴⁰⁶ Along with these market forces came new conceptions of property.

4.1.3. Locke and Capitalist Property

When land and labour, and as Wood emphasizes, also food – in other words, the basic necessities of life – become subject to market imperatives, Karl Polanyi called these “fictitious commodities”. We can focus briefly on emerging conceptions of property, which involved a preoccupation with notions of “improvement” and that buttressed English agricultural practices and the emergence of capitalism. “The word ‘improve’ itself, in its original meaning, did not mean just ‘make better’ in a general sense but literally meant to do something for monetary profit, especially to cultivate land for profit.”⁴⁰⁷ Improvement therefore meant “new forms and conceptions of property” and it “certainly meant the elimination of old customs and practices that interfered with the most productive use of land.”⁴⁰⁸ In England peasants had various customary uses of land, however, these “traditional conceptions of property had to be replaced by new, capitalist conceptions of property – not only as ‘private’ but as *exclusive*.”⁴⁰⁹ Waves of enclosure in England “meant not simply a physical fencing of land but the extinction of common and

404 *Ibid.* at 103.

405 *Ibid.* at 103.

406 *Ibid.* at 138.

407 *Ibid.* at 106.

408 *Ibid.* at 107.

409 *Ibid.* at 108.

customary use rights on which many people depended for their livelihood.”⁴¹⁰ The propertyless class grew and suffered greatly, resulting in the English Civil War, though, ultimately, these enclosures were also backed by acts of Parliament. As we can see, capitalism requires “politically organized and legally defined stability, regularity, and predictability in its social arrangements” and relies on the state and various “political and legal supports” to maintain favourable conditions.⁴¹¹ This remains a key point and central function of the settler state and legal system today.

Perhaps the most famous systematic theorization of property during this period was by John Locke. We will return to the theorizations of Locke in a later chapter, as his conceptions of property, in addition to buttressing “rising agrarian capitalism” and “domestic property relations in England”, also functioned “for the justification of colonial expropriation.”⁴¹² For Locke, all land begins as a commons, and it is through an individual mixing their labour that removes land from its natural state and changes it to private property. “Locke’s whole argument on property turns on the notions of ‘improvement’.”⁴¹³ The Earth is to be “made productive and profitable”, and as such “private property, which emanates from labour, trumps common possession.”⁴¹⁴ The labour need not be one’s own, but could also be “the labour of someone else whom he employs.”⁴¹⁵ The value of land, therefore, is calculated based on “not simply *use* value but *exchange* value.”⁴¹⁶ What this meant for colonialism was that, although Indigenous populations may have had occupation and even some *use* value in land, they did not improve the land in a way that enhanced *exchange* value, and as such, the colonial view was that the land “effectively constitutes waste.”⁴¹⁷ This conception of “improvement” was not only based on economic principles, but “took on a moral and religious meaning” as well.⁴¹⁸ Again, in regards to colonialism, Locke’s theorization of property not only justified colonial expropriation, it also framed the process as necessary and as creating overall benefit.⁴¹⁹

410 *Ibid.* at 108.

411 *Ibid.* at 178-179.

412 *Ibid.* at 110 and 112.

413 *Ibid.* at 110.

414 *Ibid.* at 110.

415 *Ibid.* at 111.

416 *Ibid.* at 111.

417 *Ibid.* at 158.

418 *Ibid.* at 165.

419 *Ibid.* at 165.

“All the major powers in the sixteenth- and seventeenth-century Europe were deeply engaged in colonial ventures, conquest, plunder, and imperial oppression.”⁴²⁰ However, “the new dynamics of a growing capitalist system produced a new form of colonization and new kind of imperial drive.”⁴²¹ “Locke wrote this in the late seventeenth century at a time when agrarian capitalism had already put down deep roots in English society”, and “his theory of property encompasses the project of ‘improvement’ both in England and in its colonies.”⁴²² In short, colonialism and capitalism have intimate links.

4.1.4. Industrial Capitalism and the State

Agrarian capitalism is at least a precondition to industrial capitalism. “Without a productive agricultural sector that could sustain a large non-agricultural workforce, the world’s first industrial capitalism would have been unlikely to emerge. Without England’s agrarian capitalism, there would have been no dispossessed mass obligated to sell its labour-power for wage. Without that dispossessed non-agrarian workforce, there would have been no mass consumer market for cheap everyday goods – such as food and textiles – that drove the process of industrialization in England. It is worth emphasizing that this large market derived its special character not only from its unusual size but also from its limitations, the relative poverty of consumers demanding cheap goods for everyday use.”⁴²³ As we know, capitalism then spread from England throughout Europe and the globe, imposing “capitalist imperatives on other countries with different social property relations.”⁴²⁴

The nation-state also played a role in this process, with capitalism and the nation state having both “developed in tandem.”⁴²⁵ As English landlords became “increasingly dependant on purely ‘economic’ forms of exploitation” the “state maintained order and enforced the whole system of property.”⁴²⁶ Capitalism expanded “not by erasing national boundaries but by reproducing its national organization, creating an increasing number of national economies and nation states.”⁴²⁷ Global capital relies on “nation states to maintain local conditions favourable to accumulation as

⁴²⁰ *Ibid.* at 146.

⁴²¹ *Ibid.* at 152

⁴²² *Ibid.* at 158.

⁴²³ *Ibid.* at 142.

⁴²⁴ *Ibid.* at 149

⁴²⁵ *Ibid.* at 169.

⁴²⁶ *Ibid.* 172-173.

⁴²⁷ *Ibid.* at 176.

well as to help navigate the global economy.”⁴²⁸ “The economic imperatives of capitalism are always in need of support by extra-economic powers of regulation and coercion, to create and sustain the conditions of accumulation and maintain the system of capitalist property.”⁴²⁹

4.1.5. Inequality

Profit is the driving force and only objective of capitalism. In capitalism there is, in fact, a systemic compulsion for profit. Without profit and growth, capitalism cannot live. As David Harvey frames it, “a zero-growth capitalist economy is a logical and exclusionary contradiction. It simply cannot exist. This is why zero growth defines a condition of crisis for capital. If prolonged, zero growth of the sort that prevailed in much of the world in the 1930s spells the death knell of capitalism.”⁴³⁰ What is occurring is not simply a desire for profit, but a “systemic tendency towards self-sustaining growth.”⁴³¹ We can chart this tendency beginning with a long history of “zero or slow growth” in the per capital GDP toward an abrupt movement upwards that represents “the relentless growth of unprecedented magnitude characteristic of capitalism.”⁴³² If private consumption, driven by ‘use-value’, is satiable, then capitalist relations, driven by ‘exchange-value’, are insatiable.⁴³³ As capital endlessly drives for accumulation, inequality is the inevitable result.

Thomas Piketty has noted that high inequality within capitalist countries is not a market-failure, but rather, an inherent part of the capitalist system.⁴³⁴ Extreme inequality results in capitalist societies because there is a general tendency for the rate of returns on capital to exceed the rate of economic growth.⁴³⁵ Under those conditions, “it is all but inevitable that inheritance (of fortunes accumulated in the past) predominates over saving (wealth accumulated in the present).”⁴³⁶ As Picketty observes, “once a fortune is established, the capital grows according to a dynamic of its own, and it can continue to grow at a rapid pace for decades simply because of

⁴²⁸ *Ibid.* at 177.

⁴²⁹ *Ibid.* at 178.

⁴³⁰ Harvey, David, *Seventeen Contradictions and the End of Capitalism* (Oxford: Oxford University Press, 2014) [Harvey, *Seventeen Contradictions*] at 232.

⁴³¹ Malm, *Fossil Capital* at 286.

⁴³² Malm, *Fossil Capital* at 286.

⁴³³ *Ibid.* at 287.

⁴³⁴ Thomas Piketty, *Capital in the Twenty-First Century*, trans. by Arthur Goldhammer (Cambridge: Belknap Press, 2014) [Picketty, *Capital in the Twenty-First*].

⁴³⁵ *Ibid.*

⁴³⁶ *Ibid.* at 378.

its size.”⁴³⁷ In short, “money tends to reproduce itself.”⁴³⁸ As a result, wealth and resources are consolidated in the hands of a small number of human elites.⁴³⁹ Picketty goes on to warn that “if the twenty-first century turns out to be a time of low (demographic and economic) growth and high return on capital (in a context of heightened international competition for capital resources) then inheritance will take on increased importance and inequality will be exacerbated.”⁴⁴⁰

Inequality is one of many concerns and contradictions presented by capitalist relations, and we can now turn to and address three of the most dangerous of those contradictions in more detail.

4.2. The Contradictions of Capitalism

Since Marx and Engels, critiques of capitalism have often focused on its internal contradictions, some of which are arguably fatal.⁴⁴¹ Capitalism, however, has also shown to be very flexible and capable of overcoming perceived limits in reproducing itself. For one, “capitalism has always managed to extend the outer limits through “spatial fixes,” expanding the geography of the system to cover nations and people formerly outside of its range.”⁴⁴² Additionally, an array of “technological fixes” have also helped avoid the catastrophic collapse predicted by Marx.⁴⁴³ What is far less clear is whether capitalism, in the ‘Anthropocene’, can continue to avoid its most troubling contradictions. While some find promise in a form of ‘Green Capitalism’, others insist that capitalism has reached a more epochal limit. In this section we will look at three specific and most dangerous contradictions within capitalism, as identified by David Harvey: 1) endless compound growth; 2) capital’s relation to nature, and; 3) the revolt of human nature: universal

437 *Ibid.* at 440. Picketty gives the following examples: “Take a particularly clear example at the very top of the globe wealth hierarchy. Between 1990 and 2010, the fortune of Bill Gates...increased from \$4 billion to \$50 billion. At the same time, the fortune of Liliane Bettencourt - the heiress of L’Oréal, the world leader in cosmetics, founded by her father Eugène Schueller...- increased from \$2 billion to \$25 billion.... Both fortunes thus grew at an annual rate of more than 13 percent from 1990 to 2010, equivalent to a real return on capital of 10 or 11 percent after correcting for inflation. In other words, Liliane Bettencourt, who never worked a day in her life, saw her fortune grow exactly as fast as that of Bill Gates, the high-tech pioneer, whose wealth has incidentally continued to grow just as rapidly since he stopped working.”

438 *Ibid.* Part of this is that an “individual with this level of wealth can easily live magnificently on an amount equivalent to only a few tenths of percent of his capital each year, and he can therefore reinvest nearly all of his income. This is a basic but important economic mechanism, with dramatic consequences for the long-term dynamics of accumulation and distribution of wealth.”

439 I purposefully mention human here because, as we will see, capital also centrally relies on appropriation of the non-human world.

440 Picketty, *Capital in the Twenty-First* at 378.

441 See Harvey, *Seventeen Contradictions*.

442 Harvey, *Seventeen Contradictions* at abstract on back cover. For more on the spatial aspects of capitalism, see David Harvey, *Spaces of Global Capitalism: A Theory of Uneven Geographical Development* (London: Verso, 2019).

443 Picketty, *Capital in the Twenty-First*.

alienation.⁴⁴⁴ In doing so, we will see that capitalism does in fact seem to face an epochal crisis.⁴⁴⁵

4.2.1. Compound growth

As David Harvey explains, “capital is always about growth and it necessarily grows at a compound rate.”⁴⁴⁶ For those unfamiliar with mathematics, compound or exponential growth may begin with relatively small numbers, but eventually accelerates and then explodes into numbers that “mock all powers of the imagination.”⁴⁴⁷ Harvey’s point is that “most people do not well understand the mathematics of compound interest,” nor “the potential dangers it can pose.”⁴⁴⁸ To bring this specifically back to capital, all capitalists require a positive return on their investment, which Harvey places at “a 3 percent compound rate of growth” in order “to gain a positive rate of return on their capital.”⁴⁴⁹ Continuing to secure “a satisfactory growth rate” means there is a constant need to find “profitable investment opportunities.”⁴⁵⁰ As the proportion of capital rises (we assumed at a 3 percent compound rate of growth) there needs to be a correlated rise in new investment opportunities. The difficulty is that as capital rises at an exponential rate, the ability to find, create, or imagine new investment opportunities seem unimaginable. As Harvey notes, “Imagined physically, the enormous expansions in physical infrastructures, in urbanization, in workforces, in consumption and in production capacities that have occurred since the 1970s until now will have to be dwarfed into insignificance over the coming generation if the compound rate of capital accumulation is to be maintained.”⁴⁵¹

Capitalism has responded to this conundrum in various ways, including by “systematically shorten[ing] the turnover time of consumer goods by producing commodities that do no last...”⁴⁵² Capital has also sought out “new markets and further enclosures of the commons (from land and water to intellectual property rights)” so as to expand investment opportunities.⁴⁵³ For example, “the creation of carbon trading markets and the patenting of genetic material have

444 Harvey, *Seventeen Contradictions* at chapters 15-17.

445 Moore, *Capitalism in the Web of Life*.

446 Harvey, *Seventeen Contradictions* at 222.

447 *Ibid.* at 226.

448 *Ibid.* at 222.

449 *Ibid.*

450 *Ibid.* at 228.

451 *Ibid.* at 228-29.

452 *Ibid.* at 236.

453 *Ibid.* at 235.

given capital the power of entry into many areas of economic, social and political life that were hitherto closed to it.”⁴⁵⁴ However, after “nearly four decades of neoliberal privatization strategies”, Harvey rightfully wonders, “how much [is really] left to enclose and privatise.”⁴⁵⁵ It is true that capital can be accumulated in its monetary form, but “an exponential creation of money is almost certain to end in disaster unless accompanied by other adaptations.”⁴⁵⁶ Ultimately, we are left to wonder if capital’s need for exponential growth can continue without running into serious difficulties, particularly given the impacts that level of growth could have on the environment, which brings us to our next contradiction.

4.2.2. Capital’s Relation to Nature

Capital’s relation to nature is particularly relevant for my purposes, and as such, I will give it the most attention. We have thus far explored capitalism principally as a social form that creates certain market imperatives. However, it seems that capitalism has an equal imperative when it comes to conceptualizing nature in a particular way. Social imperatives of capital push toward exploitative relationships, while ecological imperatives push toward the appropriation of nature.

David Harvey begins by observing that “capital *is* a working and evolving ecological system within which both nature and capital are constantly being produced and reproduced.”⁴⁵⁷ It is, however, Jason Moore who most thoroughly interrogates this proposition. In *Capitalism in the Web of Life: Ecology and the Accumulation of Capital*, Moore argues that “Cartesian Dualism” has structured our political and philosophical imaginaries,⁴⁵⁸ with the Nature/Society binary presenting the most foundational binary at the root of the “colossal violence, inequality, and oppression of the modern world.”⁴⁵⁹

The view of Nature as “external”, that is, as somehow distinct and separate from Society, is a fundamental condition of capital accumulation.⁴⁶⁰ Yet, as Moore argues, and as is more in line with Indigenous sensibilities, there is no binary in which Nature and Society can be truly separated, but rather, there is only the “web of life,” which Moore refers to as *oikeois*.⁴⁶¹

⁴⁵⁴ *Ibid.*

⁴⁵⁵ *Ibid.*

⁴⁵⁶ *Ibid.* at 233. A “crisis of inflation” would be one of the resultant disasters.

⁴⁵⁷ *Ibid.* at 247.

⁴⁵⁸ Moore, *Capitalism in the Web of Life* at 19.

⁴⁵⁹ *Ibid.* at 2.

⁴⁶⁰ *Ibid.*

⁴⁶¹ *Ibid.* at 3. Moore calls this the *oikeois*.

Capitalism, then, does not simply *act upon* nature, but rather, “the mosaic of relations that we call capitalism work *through* nature.”⁴⁶² From that vantage point, capitalism is not merely an economic system with environmental implications, but rather, “*a way of organizing nature*.”⁴⁶³ The “conceit” of capitalism is that it can do with nature (as external) as it wants.⁴⁶⁴ In that way, we might say that “capital creates its own distinctive ecosystem.”⁴⁶⁵

While now fairly common to regard humans as a part of nature, our methods, vocabulary, and conceptual and analytical frameworks rarely break with the Nature/Society dualism.⁴⁶⁶ The dominant narrative of ‘Anthropocene’, already critiqued above, upholds this Cartesian Dualism in that “humans are placed in one category, Nature in another, and the feedback loops between them identified.”⁴⁶⁷ The ‘Anthropocene’ does nothing to challenge power or inequality, between humans and other humans and between humans and the more-than-human world.⁴⁶⁸

One of Moore’s central arguments is that we will never transcend capitalism so long as our imagination is captured by this dualism. In that sense, Moore’s use of *oikeois* is primarily a methodological orientation with an ontological claim.⁴⁶⁹ His notion of “double internality” is a central component of understanding this claim. Double internality references “two simultaneous movements” - “capitalism’s internalization of planetary life and processes, through which new life activity is continually brought into the orbit of capital and capitalist power”, and “the biospheres internalization of capitalism, through which human-initiated projects and processes influence and shape the web of life.”⁴⁷⁰

The ways in which planetary life and processes are internalized into the orbit of capital and capitalist power is worth expanding upon. Capitalism brings planetary life and processes into its orbit as “the capacity to do work” (human and more-than-human), which is transformed into value.⁴⁷¹ Capitalism, therefore, relies not only on exploitation (wage labour, etc.) but also fundamentally on appropriation (free work from nature, women, and etc.) in its endless drive for

462 *Ibid.* at 2. Moore also makes the point that “nature works *through* that more limited zone capitalism” (*ibid.*).

463 *Ibid.*

464 *Ibid.*

465 Harvey, *Seventeen Contradictions* at 251.

466 Moore, *Capitalism in the Web of Life* at 33.

467 *Ibid.* at 25.

468 *Ibid.* at 170

469 *Ibid.* at 8.

470 *Ibid.* at 13.

471 *Ibid.* at 14. Marx also phrased this as the capacity to turn “blood into capital”.

accumulation.⁴⁷² The process of appropriation involves rendering unpaid work invisible. To give an example, consider the vast length of time it took for organic matter to break down and create what we now call (through a capitalist lens) fossil fuels.⁴⁷³

A significant component of capital accumulation has rested on finding and enabling “more expansive appropriations of nature.”⁴⁷⁴ It is in that sense that the “view of Nature as external is a fundamental condition of capital accumulation.”⁴⁷⁵ That is, “Nature is necessarily viewed by capital...as nothing more than a vast store of potential use values - of processes and things - that can be used directly or indirectly (through technologies) in the production and realization of commodity values.”⁴⁷⁶ As such, “natural use values are monetized, capitalised, commercialised and exchanged as commodities. Only then can capital’s economic rationality be imposed upon the world.”⁴⁷⁷

Certainly, capitalism’s emphasis on exponential growth and its externalization of nature has serious implications regarding environmental devastation. Yet, the point is not simply one of capital having an ‘outer limit’ imposed *by* nature. As we look more closely, capitalism has been very adept at pushing past this ‘outer limit’, reconstituting its relationships, and bringing even more within its scope. Two central components of this process have been reliance on “spatial fixes” and “technical fixes.”

4.2.2.1. “Spatial Fixes”

472 *Ibid.* at 26.

473 *Ibid.* at 145. “‘Resources’ can be defined only in relationship to the mode of production which seeks to make use of them and which simultaneously ‘produces’ them through both physical and mental activity of the users. There is, therefore, no such thing as a resource in abstract or a resource which exists as a ‘thing in itself’” (David Harvey, “Population, Resources, and the Ideology of Science” (1974) 50:3 *Economic Geography* 256 at 265.

474 Moore, *Capitalism in the Web of Life* at 144.

475 *Ibid.* at 2. “Although the distinction between humans and the rest of nature has a long history that predates capitalism, the construct of Nature/Society is thoroughly modern” (*Ibid.* at 19). For one of the ways in which the distinction between nature and human predates capitalism, see the portrayal of Nature in the *The Bible*, King James Version, Genesis 1: 26-31 – “And God said, Let us make man in our image, after our likeness: and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping things that creepeth upon the earth. So God created man in his *own* image, in the image of God created he him; male and female created he them. And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth. And God said, Behold I have given you every herb bearing seen, which *is* upon the face of all the earth, and every tree, in which is the fruit of a tree yielding seed; to you it shall be for meat. And to every beast of the earth, and to every fowl of the air, and to every thing that creepeth upon the earth, wherein *there is* life, I *have given* every green herb for meat: and it was so. And God saw every thing that he had made, and, behold, *it was* very good. And the evening and the morning were the sixth day.”

476 Harvey, *Seventeen Contradictions* at 250.

477 *Ibid.*

Capitalism has compelled nature “to work harder and harder - for free, or at a very low cost.”⁴⁷⁸ “The atmosphere, for instance, must be put to work as capital’s unpaid garbage man.”⁴⁷⁹ The need to have Nature work harder, and for free, is at the heart of what Moore calls, capitalism’s Cheap Nature strategy (or the Four Cheaps).⁴⁸⁰ Nature cannot be made cheap until it is made “external.”⁴⁸¹ However, capitalism still faces several difficulties with this strategy. For one, since nature is finite, the “discovery” of new natures that can deliver unpaid work is necessary.⁴⁸² In other words, the extension of capital and its logics into new and uncommodified spaces.⁴⁸³ Ongoing capital accumulation therefore “depends upon finding new frontiers of appropriation.”⁴⁸⁴ However, those frontiers are “not just there, but had to be imagined, conceptualized, and seen.”⁴⁸⁵

A “spatial fix” can be thought of as a scenario where it is possible to extend “the zone of appropriation faster than the zone of exploitation,” and has thus allowed capitalism to overcome some of its “natural limits.”⁴⁸⁶ For our purposes, two pertinent points regarding this type of “fix” are necessary. First, colonialism, and the dispossession and exploitation Indigenous lands and “resources”, was, of course, a massive appropriation of uncommodified or “Cheap Nature.”⁴⁸⁷ Yet, as opposed to simply being *historical* fact, *ongoing* dispossession and exploitation of Indigenous peoples and lands plays a persistent and ongoing role in the “reproduction of colonial and capitalist social relations.”⁴⁸⁸ As Coulthard argues, “capitalism continues to play a vital role in facilitating the ongoing dispossession of Indigenous peoples in Canada,” and it does so within a constellation of other power relations.⁴⁸⁹

478 Moore, *Capitalism in the Web of Life* at 13.

479 *Ibid.* at 101.

480 The Four Cheaps identified in Moore, *Capitalism in the Web of Life* are labour power, food, energy, and raw materials. For a work focused more specifically on Cheap Nature see Raj Patel & Jason W. Moore, *A History of the World in Seven Cheap Things: A Guide to Capitalism, Nature, and the Future of the Planet* (Berkeley: University of California Press, 2018) [Patel & Moore, *Seven Cheap Things*]. For a shorter introduction to Cheap Nature see Moore, “Cheap Nature”.

481 Moore, *Capitalism in the Web of Life* at 297. Moore recognizes that “Yes, the distinction between human and extra-human natures has a long history that stretches back to Greco-Roman antiquity. But never before had Nature as external object become an organizing principle for a civilization” (*ibid.*).

482 *Ibid.* at 62.

483 *Ibid.* at 63.

484 *Ibid.* at 101.

485 *Ibid.* at 190. On this point we will see important connections with Indigenous peoples, Indigenous lands, and the concept of sovereignty more broadly (discussed in a later section).

486 *Ibid.* at 73.

487 See Patel & Moore, *Seven Cheap Things* and Moore, “Cheap Nature” for more.

488 Coulthard, *Red Skin, White Masks* at 9.

489 *Ibid.* at 14. I will return to these arguments in the following sections on sovereignty.

Second, there is a fundamental contradiction in capital's need to have the zone of appropriation extend faster than the zone of exploitation, particularly given capital's need for compound growth and an escalating demand for "profitable investment opportunities."⁴⁹⁰ The reproduction rate of capital accelerates at a rate that contrasts sharply with the reproduction rate of nature (for example, the amount of time it takes for organic materials to transform into "fossil fuels").⁴⁹¹ That point alone signals a tendency for the "ecological surplus" of a given space to decline.⁴⁹² On top of that, however, is also the fact that many capitalist processes result in the accumulation of "negative-value" (such as pollution), eventually leading to a scenario where capital must "pay a greater share of its costs of doing business."⁴⁹³ The conundrum is that somehow capital needs to continually try "to make more out of less."⁴⁹⁴

Not only does it seem that "opportunities for appropriation...relative to the mass of accumulated capital"⁴⁹⁵ are declining, but it also seems clear "it is becoming increasingly difficult to get nature - of any kind- to work harder."⁴⁹⁶ The implication is that the previously relied upon, and unpaid, work of nature becomes "exhausted or collectively uncooperative."⁴⁹⁷ In other words, Nature gets "*maxed out*" – not in the sense that it can no longer deliver work or energy, but that it can only do so "at a volume and cost that no longer sustains accumulation."⁴⁹⁸ Since capital *necessitates* accumulation, aside from expanding into new frontiers, another type of "fix" is also required. Here we find Green Capitalism, and various "technological fixes", that would seem to many as capitalism's only way forward. Again, these "fixes" are not without their concerns.

4.2.2.2. "Technological Fixes"

Since capitalism is embedded within the "web of life", the need to expand spatially *ad infinitum* is not possible - unless, of course, colonization of other planets becomes reality. The fact that this "solution" even presents itself highlights the sad truth that, for some, "it is easier to imagine the

490 Harvey, *Seventeen Contradictions* at 228.

491 Moore, *Capitalism in the Web of Life* at 97.

492 *Ibid.* at Chapter 4.

493 *Ibid.* at 98

494 *Ibid.* at 115.

495 *Ibid.* at 101.

496 *Ibid.* at 13.

497 *Ibid.* at 101. Moore makes clear that exhaustion is a "relational property" (*ibid.* at 124).

498 *Ibid.* at 113.

end of the world than to imagine the end of capitalism.”⁴⁹⁹ Capital’s search for myriad “technological fixes” has been accelerating, and while it is “increasingly difficult to get nature...to work harder”, capital continues to dig deeper.⁵⁰⁰ As Harvey observes:

“Capital cannot help but privatize, commodify, monetize and commercialize all those aspects of nature that it possibly can. Only in this way can it increasingly absorb nature into itself to become a form of capital - an accumulation strategy - all the way down into our DNA. This metabolic relation necessarily expands and deepens in response to capital’s exponential growth. It is forced on to terrains that are more and more problematic. Love forms, genetic materials, biological processes, knowledge of nature and intelligence in how to use its qualities and capacities and powers...are all subsumed within the logic of commercialization. The colonization of our lifeworlds by capital accelerates.”⁵⁰¹

In reshaping itself to these demands, capitalism takes on new adjectives, such as “Green Capitalism” or “disaster capitalism”.⁵⁰² Viewed through the lens of Moore’s “double internality” - the ways in which capital internalizes the biosphere and the biosphere internalizes capital – the intensification of environmental harm and even crisis has, through the logic of capital, presented an opportunity for profit. Green capitalism, then, is “about taking economic advantage of the conditions that the impacts of climate change is producing.”⁵⁰³

Some would argue that “green alternatives” are simply proper function of the market in responding to climate crisis. However, simply assuming the logic of the market seems a troubling way to respond to environmental crisis. In the language of the market, environmental harms are appropriately viewed as “externalities”, and consequently a component of ‘market failure’. As such, the argument goes, if private corporations were required to pay the ‘true costs’ of these environmental harms, the market would simply correct itself.⁵⁰⁴ First off, however, these “costs” are near impossible to calculate in economics, leaving aside the detached and arrogant view of the more-than-human world it adopts. Additionally, the proposition that individuals favouring “green” options will lead to the necessary market corrections, and be enough avoid

499 Fredric Jameson, “Future City”, (2003) II/21 New Left Review 76.

500 Moore, *Capitalism in the Web of Life* at 13.

501 Harvey, *Seventeen Contradictions* at 262.

502 *Ibid.* at 249. And see generally *ibid.* from pp. 246-50 for more discussion on this point.

503 Isabel Altamirano-Jiménez, *Indigenous Encounters With Neoliberalism: Place, Women, and the Environment in Canada and Mexico* (Vancouver: UBC Press, 2013) [Altamirano-Jiménez, *Indigenous Encounters With Neoliberalism*] at 118.

504 This argument has the effect of bringing more and more within the scope and logic of capital. The argument also fails to account for the spatial component of these harms and the ways in which capitalism creates very uneven development, benefits, and harms across the globe. Such process tend to increasingly benefit the rich and harm the poor. As climate change escalates it has also become increasingly that spatial fixes of this nature are less and less possible. See Harvey, *Seventeen Contradictions* at 255 and 258 for more discussion of these points.

climate crises, is weak. Such positioning re-inscribes, and further entrenches, the same neoliberal logic that, quite arguably, magnified the problems raised by capitalism to begin with.⁵⁰⁵ Not only does the argument assume capitalist and neoliberal logic, it also masks power dynamics that operate to disrupt and foreclose alternatives. At least part of “the problem is the hubris and the vested interests of certain factions of capital (and of certain capitalist state governments and apparatuses) that have the power to dispute, disrupt and prevent actions that threaten their profitability, competitive position and economic power.”⁵⁰⁶

It is not that “green” and sustainable technologies are not important. Paul Hawken, for example, has edited a collection that presents vast and sweeping proposals relating to more sustainable practices regarding energy, food, land use, transportation, and more.⁵⁰⁷ These proposals drastically cut greenhouse gas emissions and represent more sustainable practices than currently used. In addition to these positive benefits, the allure to this project, and others like it, is the seeming promise that “we can just do what we already do, but “green”, and we will be richer, more equal, *and* good stewards of Spaceship Earth.”⁵⁰⁸ Green Capitalism, unsurprisingly, does not reject the logic of capital, nor even represent an overall commitment to less consumption, but rather, it is a search for “technological fixes” that allow for “green” alternatives that continue to make profit, while hopefully avoiding catastrophe.⁵⁰⁹ To be clear, profit remains the primary endeavor, and that is why sustainable alternatives only reach the broader market when deemed “economically viable” (i.e., make a profit).

The notion of “drawdown” is, in fact, misleading. Many people consider that simply “cutting back” our carbon emissions is the answer to climate crisis. In fact, we are well past that option.⁵¹⁰ Even in *Drawdown*, Hawken clearly indicates in the foreword that, “we know we can’t avoid cataclysmic impacts of global warming by only focusing on achieving zero net carbon emissions;

505 Klein, *This Changes Everything* seems to imply that a significant part of the issue is not just capitalism, but a type of deregulated, or neoliberal, capitalism. Mann & Wainwright, *Climate Leviathan* at 167-71 take issue with this aspect of Klein’s work, arguing that capitalism creates problems without the addition of neoliberalism. For an analysis of neoliberalism in connection with Indigenous peoples in Canada and Mexico, see Altamirano-Jiménez, *Indigenous Encounters With Neoliberalism*. For a critique of neoliberalism see Wendy Brown, *Undoing the Demos: Neoliberalism’s Stealth Revolution* (New York: Zone Books, 2015). For a book that seeks to trace the history of liberalism more broadly, see Edmund Fawcett, *Liberalism: The Life of an Idea* (Princeton: Princeton University Press, 2014). For a book which attempts to pin-point the roots of liberalism in arguing that the centrality of the individual, and thus the roots of liberalism, can be traced to Christian thinkers in the Middle Ages, see Larry Siedentop, *Inventing the Individual: The Origins of Western Liberalism* (London: Allen Lane, 2014).

506 Harvey, *Seventeen Contradictions* at 256.

507 Paul Hawken, ed., *Drawdown: The Most Comprehensive Plan Ever Proposed to Reverse Global Warming* (New York: Penguin Books, 2017) [Hawken, *Drawdown*].

508 Mann & Wainwright, *Climate Leviathan* at 121.

509 For works interrogating green capitalism see, for example, Heather Rogers, *Green Gone Wrong: Dispatches from the Front Lines of Eco-Capitalism* (London: Verso, 2010); and Daniel Tanuro, *Green Capitalism: Why It Can’t Work* (Halifax: Fernwood Publishing, 2014).

510 Mann & Wainwright, *Climate Leviathan*; Moore, *Capitalism in the Web of Life*; Klein, *This Changes Everything*.

we must also rapidly re-sequester carbon.”⁵¹¹ Additionally, we must remember that since capital’s drive for exponential growth – more investment opportunities and bringing more and more into its orbit – necessitates continued exploitation of nature, albeit in new and more effective ways. Technological innovation, then, can never be a ‘one-off’ solution. “Whatever capitalism may do to enable the efficient use of resources, its own imperatives will always drive it further. Without constantly breaching the limits of conservation, without constantly moving forward the boundaries of waste and destruction, there can be no capital accumulation.”⁵¹²

While Green Capitalism may offer better practices, it also relies wholly on the ability of technology to continually outpace catastrophe while still meeting its need for exponential growth - a risky gamble to say the least. Complicating matters is the observation that thus far most “technological fixes” have also been necessarily linked with “spatial fixes”, raising the question of whether technology alone can deliver large enough appropriations to satisfy the needs of capital.⁵¹³

Finally, it is important to return briefly to the point made by Hawken about the need to re-sequester carbon. On this point, the IPCC also agrees. At this point, any model in which we are able to limit global warming to 1.5°C will require “rapid and far-reaching transitions in energy, land, urban and infrastructure (including transport and buildings), and industrial systems,” *in addition* to reliance on some form of Carbon Dioxide Removal.⁵¹⁴ As such, questions around whether it has actually come to the point where geoengineering, the “deliberate and large-scale intervention in the Earth’s climate system to mitigate the effects of global warming”, is not only a plausible, but perhaps even necessary intervention, are debated.⁵¹⁵ There are certainly ways in which “technologies might be used to further climate justice.”⁵¹⁶ It is not appropriate to simply conflate capitalism and technology.⁵¹⁷ There are also “natural” processes of carbon sequestration

⁵¹¹ Hawken, *Drawdown* at ix.

⁵¹² E.M. Wood, *The Origin of Capitalism* at 198.

⁵¹³ Moore, *Capitalism in the Web of Life* at 276-77.

⁵¹⁴ IPCC, 2018: Summary for Policymakers. In: *Global Warming of 1.5 °C. An IPCC Special Report on the impacts of global warming of 1.5 °C above pre-industrial levels and related global greenhouse gas emissions pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* [Masson-Delmotte, V., P. Shai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfields (eds.)]. In Press at p. 15, C.2. [IPCC 2018, *Global Warming of 1.5 °C*].

⁵¹⁵ See J.P. Sapinski, Holly Jean Buck, & Andreas Malm, *Has it Come to This?: The Promises and Perils of Geoengineering on the Brink* (New Brunswick: Rutgers, 2020).

⁵¹⁶ Holly Jean Buck, *After Geoengineering: Climate Tragedy, Repair, and Restoration* (London: Verso, 2019) [Buck, *After Geoengineering*] at 34.

⁵¹⁷ *Ibid.* at 37.

that deserve great attention, though they will not be enough on their own. The work of Holly Jean Buck is helpful on this point.

Certainly, there are natural blue (seaweed and algae) and green (trees and grasslands) sequestration methods that are important moving forward. We can see these acts of “reforestation and soil carbon sequestration...through the lens of “ecological infrastructure.”⁵¹⁸ Understanding the possibilities of alternative infrastructures is important work. I am not able to fully explore these alternative infrastructures here, though they do form part of my future projects.⁵¹⁹ For our immediate purposes, I want to highlight that, despite the vast promise of these practices, these natural carbon removal processes are not enough on their own in that they do become saturated, many are not permanent, and the scale of these processes necessary to accommodate even current emission levels is vast.⁵²⁰ *Even if* we were to completely “stop emitting...right away” it would be at best “very risky to rely on natural climate solutions alone”, and quite likely that “it will be impossible for these techniques to make up for our current levels of carbon emissions.”⁵²¹

In terms of technological carbon sequestration techniques, there are carbon capture and storage facilities that essentially capture carbon out of the air, which is then to be buried underground. Like the above scenario, the number of carbon capture facilities this technique alone would require around the globe, to capture just our annual carbon emissions, would be vast. However, the potential problem with solutions like these, which will bring us, finally, to our third dangerous contradiction of capitalism, is the danger that these types of technologies can be “co-opted.”⁵²² That is, these more drastic technological solutions, such as carbon capture and storage or solar geoengineering, raise important questions about power and conceptions of sovereignty, which I will return to.

4.2.3. The Revolt of Human Nature: Universal Alienation

⁵¹⁸ *Ibid.* at 43.

⁵¹⁹ I have begun to craft grant applications regarding a project titled: “13 Moons anti-colonial and anti-capitalist economies in a rapidly warming world”. I am also part of a joint SSHRC Partnership grant along with several other scholars who are focusing on this topic.

⁵²⁰ Buck, *After Geoengineering* at 114.

⁵²¹ *Ibid.* at 115.

⁵²² *Ibid.* at 197.

Capitalism has been very flexible in reproducing itself, but at some point, “the issue is not, therefore, that capital cannot survive its own contradictions but that the cost of it so doing becomes unacceptable to the mass of the population.”⁵²³ Harvey calls this universal alienation.

The concepts of “Nature” or “frontier” are “not just there, but had to be imagined.”⁵²⁴ These imaginaries require what Moore calls, a “cultural fix”.⁵²⁵ That is, culturally, they must “serve to normalize otherwise unacceptable appropriations of global natures, human and extra-human.”⁵²⁶ Ideas of gender, nature, and the like, “are not simply outputs of the system but implicated in the intergenerational reproduction of life and labour-power that capital cannot pay for and must appropriate (lest reproduction costs rise and accumulation falter).”⁵²⁷ Ultimately, if capital cannot find new - *and increasingly larger* - frontiers or technological fixes to accommodate its demand for growth, then there becomes a need for “ferocious acts of redistribution.”⁵²⁸ While we might imagine any form of dystopic future, the more central point to highlight is that climate crisis will likely serve to exacerbate existing tensions and power dynamics, risking, what Mann and Wainwright call, a Climate Leviathan. Yet, to explain this type of dystopia we need to consider not only the logic of capital, but also sovereignty.

5. Sovereignty

From an Indigenous perspective, the concept of sovereignty has long been problematic, even as Indigenous groups have attempted to assert their own sovereignty in resistance to that imposed upon them. Yet, climate crisis poses its own challenges to sovereignty as well. The crux of Mann and Wainwright’s book, *Climate Leviathan*, is that global climate crisis will exacerbate existing political tensions and power dynamics, with advanced stages of climate crisis fundamentally altering our most basic political organization, of which sovereignty and capitalism are at the base.⁵²⁹ A full tracking of the concept of sovereignty is not possible here, although I will return to the role sovereignty has in dispossession in a later chapter.⁵³⁰ For now, my purpose is to think

⁵²³ Harvey, *Seventeen Contradictions* at 264.

⁵²⁴ Moore, *Capitalism and the Web of Life* at 190.

⁵²⁵ *Ibid.* at 199.

⁵²⁶ *Ibid.*

⁵²⁷ *Ibid.*

⁵²⁸ *Ibid.* at 151.

⁵²⁹ Mann & Wainwright, *Climate Leviathan*.

⁵³⁰ Also See Joanne Barker, “For Whom Sovereignty Matters” in Joanne Barker, ed., *Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination* (Lincoln: University of Nebraska Press, 2005) 1 [Barker, “For Whom Sovereignty Matters”] for an introduction and tracking of the concept of sovereignty through an Indigenous lens.

about conventional conceptions of sovereignty within international law - a group of territorially based but mutually exclusive nation-states with supreme authority within those territories – in connection with the global nature of climate crisis.⁵³¹

5.1. Global Sovereignty and Climate Crisis

In *Climate Leviathan* Geoff Mann and Joel Wainwright develop a speculative theory to address the political effects of climate crisis.⁵³² As mentioned, their political philosophy of climate crisis rests on the premise that “rapid climate change will transform global political economy and alter our world’s basic political arrangements.”⁵³³ More specifically, the pressures created by climate crisis will intensify existing challenges to the global order and thereby push existing forms of sovereignty to a planetary scale.⁵³⁴ The authors anticipate the potential for four main socio-political formations as a result, each distinguished by their tendency toward capitalist or non-capitalist structures, and planetary or anti-planetary sovereignty.⁵³⁵ Of these potential formations, Mann and Wainwright argue that the most likely formation is Climate Leviathan. That is, rather than the fruition of alternative politics and modes of relating, those who currently control wealth and power are likely to ‘double-down’ on the status quo to protect, insulate, and maintain their positions. As such, Climate Leviathan anticipates an entrenchment around the logic of both capital and sovereignty. The result is a planetary capitalist sovereign (or collection of coordinated powers) that they call, Climate Leviathan.

To better explain the notion of Climate Leviathan, we must briefly return to the topic of capitalism. Climate Leviathan anticipates a form of Green Capitalism that internalizes the effects of climate crisis and allows for “capitalist elites to stabilize their position amidst planetary crisis.”⁵³⁶ Of the more drastic adaptation strategies involved are processes of geoengineering, undertaken through wide-scale carbon capture and storage, as well as solar radiation management. Adaptation strategies of this magnitude have clear implications for conceptions of sovereignty given that “any attempt to modify the world’s albedo will require decisions over the

⁵³¹ Mann & Wainwright, *Climate Leviathan*. This conception of sovereignty has, arguably, been an aspect of what has propelled us into the predicament of climate crisis.

⁵³² Mann & Wainwright, *Climate Leviathan*.

⁵³³ *Ibid.* at x.

⁵³⁴ *Ibid.* at x.

⁵³⁵ *Ibid.* at 29.

⁵³⁶ *Ibid.* at 15.

fate of the Earth's climate and energy, nothing less than life and death.”⁵³⁷ Additionally, “every large-scale geoengineering project will involve a relatively small group of actors experimenting with global systems in the most improbable of missions: to materially reconfigure planet Earth so as to avoid having to rework human political economies.”⁵³⁸

As climate crisis intensifies and pushes conceptions of sovereignty to adapt or crumble, Climate Leviathan anticipates a planetary sovereignty whereby “some sovereign exists who can invoke the exception, declare an emergency, and decide who may emit carbon and who cannot.”⁵³⁹ Not only would the decision to experiment with atmospheric geoengineering on a global scale likely require the decision of a planetary sovereign (or group of powers), “the state or sovereign that initiates [such an atmospheric geoengineering project] would arrogate to itself its own perpetual necessity.”⁵⁴⁰ Although the state of exception being invoked would be proclaimed and carried out “in the name of preserving life on Earth,” it should be clear that these hard decisions will not benefit or harm everyone equally.⁵⁴¹ The nature and ability of sovereign authority - and we should be clear that the ability to proclaim this state of exception will fall on those who already have the power and position to claim it - is to “determine what measures are necessary and what and who must be sacrificed.”⁵⁴² As I introduced the magnitude of climate crisis earlier in this chapter, we noted how the threshold of 2 degree Celsius over pre-industrial levels was already a decision of this type. As climate crisis progresses, those who are sacrificed will be many and those who will be ‘saved’ are few.

Having grasped what is meant by Climate Leviathan, we can now consider the old question of whether a centralized state authority is a social necessity. The global nature of climate crisis intensifies this question. Regarding climate crisis, for some, “the scale of the problem is so great, it seems impossible to confront them without the state.”⁵⁴³ The logic, or assumption, at play in this positioning is that without a centralized state the ‘tragedy of the commons’, where there is no incentive to cooperate or limit one's self-interest, will prevail.⁵⁴⁴ With climate crisis, this logic

⁵³⁷ *Ibid.* 149.

⁵³⁸ *Ibid.*

⁵³⁹ *Ibid.* at 29.

⁵⁴⁰ *Ibid.* at 150.

⁵⁴¹ *Ibid.* at 15.

⁵⁴² *Ibid.*

⁵⁴³ *Ibid.* at 125.

⁵⁴⁴ *Ibid.* at 104. The tragedy of the commons model makes sense when dealing with capitalist citizens. However, given the creation of a different type of citizen, one with an internalized incentive that leans toward stewardship, the same paradox would not apply. I argue that a principal component of W̱SÁNEĆ law is creating citizens that view the non-human world as relatives, and thus creates a tendency toward stewardship and care for common ‘resources’.

scales up to the planetary level - a global tragedy of the commons, complicated by the ways in which inequality (between and within) nation states make shared sacrifice difficult to conceive.⁵⁴⁵ As mentioned in my critique of the ‘Anthropocene’, collective action is difficult when those who have gained the most socio-economic benefits in contributing significantly to climate crisis want to now claim that “we are all in this together”, and marginalized groups or nations that have (and will) suffer the most while contributing the least to climate crisis want an historical accounting.⁵⁴⁶

Ultimately, “With the surface of the globe covered in a chaotic and lumpy arrangement of adjacent but supposedly distinct and non-overlapping parcels, each of which has some capacity to contribute to everyone else’s calamity, it is clear to global elites that no individual or subgroup of contemporary states are up to the task. What is obviously necessary is a means of governance that is not beholden to modern state sovereignty, at the same time that this necessity is denied by some of those very sovereign states.”⁵⁴⁷ Within this self-created paradox, Climate Leviathan becomes the most ‘realistic’ political answer insofar as we accept, based largely on some notion of path dependency, that “sovereign territorial nation-states” and the “(neo)liberal capitalist order” are “understood as virtually unassailable.”⁵⁴⁸ The only option, then, is to ‘double-down’ on those commitments. What follows is “a tacit acceptance of green capitalism and planetary sovereignty as our best or only hope.”⁵⁴⁹ Mann and Wainwright characterize this as the “marked unimaginativeness” of our times. As they claim, we have always known what needs to be done - redistribute power, wealth, and stop burning fossil fuels. As such, the “transformation we need is essentially political”⁵⁵⁰ and, therefore, “our challenge is closer to a crisis of imagination and ideology”⁵⁵¹ than anything else.

Mann and Wainwright, however, do not leave us without some political vision for how we might “transform the prevailing global political economic situation so that we can confront climate change in something like a just fashion.”⁵⁵² The momentum they see for creating some type of unity, coordinating movements, and a rapid reduction of carbon emissions through

⁵⁴⁵ *Ibid.* at 126.

⁵⁴⁶ *Ibid.* at 75.

⁵⁴⁷ *Ibid.* at 125.

⁵⁴⁸ *Ibid.* at 170-71.

⁵⁴⁹ *Ibid.* at 171.

⁵⁵⁰ *Ibid.* at 72.

⁵⁵¹ *Ibid.* at 7.

⁵⁵² *Ibid.* at 166.

collective action, comes from two sources - Marxist and Indigenous perspectives. We have touched on ecological Marxist perspectives throughout this chapter. The remainder of this section will be devoted to introducing the notion of Indigenous alternatives and the complexity that involves.

6. Entanglement of Indigenous Alternatives

My summary of climate crisis, and the preceding critiques of capitalism and sovereignty, is meant to emphasize the point that the escalating state of climate crisis requires “living differently, radically differently, than we do now.”⁵⁵³ A number of scholars,⁵⁵⁴ including Mann and Wainwright, have offered that the “richest resources” we have for living radically differently are found in “the modes of life of many Indigenous and colonized peoples.”⁵⁵⁵ Despite this apparent synergy, there is often a marked failure in much of this scholarship to meaningfully engage with Indigenous thought and philosophy.⁵⁵⁶ I will return to this point in Chapter Seven.

In *Climate Leviathan* Mann and Wainwright find promise in “the knowledge and life ways of peoples who have long historical experience with ways of being that are not overdetermined by capital and the sovereign state.”⁵⁵⁷ While I agree with their position, the authors do gloss over the ways in which Indigenous peoples are, even while they struggle against it, undoubtedly entangled in complex ways with the logic of sovereignty.⁵⁵⁸ As Mann and Wainwright argue that sovereignty constrains our imagination in attempting to find a suitable and just solution to climate crisis, Gordon Christie argues that sovereignty is functioning in a similar way to constrain our imagination regarding the ways in which Indigenous peoples can realize struggles for self-determination.⁵⁵⁹

⁵⁵³ *Ibid.* at 193.

⁵⁵⁴ Haraway, *Staying With The Trouble* does reference Navajo traditions. However, while she speaks to “being-with” others (humans and non-human) as a central theoretical premise of her work, she seemingly fails to spend any time with Navajo communities in her effort to shed light on their practices and philosophies. Similarly, Morton, *Hyperobjects* references the concept of Dreamtime in his work, but without any apparent connection or relationships with the Australian Aboriginal communities and individuals who hold those practices and beliefs. Umek, *Principles of Tsawalk* tries to bridge the connection between western and Indigenous perspectives on climate change in important ways. Kyle Whyte makes similar interventions. See Kyle Whyte, “Critical Investigations of Resilience: A Brief Introduction to Indigenous Environmental Studies & Sciences” (2018) 147:2 *American Academy of Arts & Sciences* 136.

⁵⁵⁵ Mann & Wainwright, *Climate Leviathan* at 194.

⁵⁵⁶ Some of these tensions, particularly as they relate to orienting towards different ontologies, are explored in Zoe Todd, “An Indigenous Feminist’s Take on the Ontological Turn: ‘Ontology’ is Just Another Word for Colonialism” (2016) 29:1 *Journal of Historical Sociology* 4, as well as Sarah Hunt, “Ontologies of Indigeneity: The Politics of Embodying a Concept” (2013) 0:0 *Cultural Geographies* 1.

⁵⁵⁷ Mann & Wainwright, *Climate Leviathan* at 189.

⁵⁵⁸ Mann and Wainwright note that Indigenous peoples “have, of course, been subject to capital and state power” in various ways” (*ibid.*).

⁵⁵⁹ Christie, “Indigeneity and Sovereignty”.

As a foundational concept to western law and democracy, sovereignty sets the ultimate backdrop against which possible action by Indigenous peoples is subjected and primarily conceived.⁵⁶⁰ That is, sovereignty carries with it the ‘legitimate’ and ‘rightful’ grounds, processes, ways of viewing and conceptualizing the issues, and ultimately, the power of decision-making and the actions that follow in relation to its given territory.⁵⁶¹ As such, a significant amount of Indigenous struggles for justice, self-determination, and inherent rights are directed *through* the concept of sovereignty and its myriad apparatuses. Indigenous peoples can achieve tangible benefits through these processes, but the processes themselves are also limiting.⁵⁶²

Mann and Wainwright, in reference to the United Nations Conference of the Parties (COP), their advancement of the United Nations Framework Convention on Climate Change (UNFCCC), and the resultant 2015 Paris Agreement, note that these bodies and processes are “the central nexus of international negotiations [and therefore] an unavoidable passage point for climate politics. Yet this should not prevent us from analyzing what it represents: Climate Leviathan in formation.”⁵⁶³ The same can be said of Canadian courts, politics, negotiated agreements, and the like; they may be largely “an unavoidable passage point” for many Indigenous struggles, but that should not stop us from understanding what they are - colonialism and imperialism in formation, the backdrop of which is the sovereignty paradigm. As with climate crisis and the COP/UNFCCC, colonialism and sovereignty function as the backdrop that constrains possible action.

The language of “*reconciliation* and *resurgence* have become ways of describing the field of activities, relationships, and possible futures between Indigenous and settler people.”⁵⁶⁴ While orientations towards resurgence and/or reconciliation fall along a spectrum, it is fair to say that opinions on whether or not the most effective forms of action take place within or outside of the sovereignty paradigm is a significant point of divergence between these two camps. Since sovereignty involves the supreme authority over a specific territory, the differences between the

⁵⁶⁰ *Ibid.* at 338.

⁵⁶¹ *Ibid.* In applying Christie’s insights I have outlined some of the implications this can have while considering a fuel spill that happened at Goldstream River in W̱SÁNEĆ territory. See “Clifford, “W̱SÁNEĆ Legal Theory”.

⁵⁶² Christie, “Indigeneity and Sovereignty” at 335-37. As an alternative, Christie proposes the concept of Indigeneity to function above and beyond the confines of sovereignty.

⁵⁶³ Mann & Wainwright, *Climate Leviathan* at 35.

⁵⁶⁴ John Borrows & James Tully, “Introduction” in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: UTP Press, 2018) [Borrows & Tully, “Introduction”] at 3.

resurgence and reconciliation camps can also be conceptualized in relation to “how each understand power to organize the fields of possible movement for getting” to a decolonized relationship.⁵⁶⁵

It is, therefore, one thing to say that there are conceptual and lived Indigenous alternatives to colonialism and the crisis of the ‘Anthropocene’, however, it is misguided to anticipate a pan-Indigenous perspective, and important not to underestimate the power that sovereignty exerts on Indigenous ways of being, and the ways in which Indigenous peoples are, even while struggling against it, entangled in complex ways with the logics of sovereignty and capitalism. Understanding how these entanglements function to limit the cultivation of lived alternatives is vital. The insightful work of Paul Nadasdy and his analysis of sovereignty helps explain how the creation of Indigenous self-government agreements in the Yukon has worked to both empower and subjectify Indigenous groups through the cultural assumptions embedded in the concept of sovereignty.

To begin, colonialism is a relational dynamic that is upheld not only by excluding Indigenous peoples from participation in state processes, but also through the processes of inclusion.⁵⁶⁶ Dené scholar, Glen Coulthard, has offered an influential critique in this regard, arguing that the colonial politics of recognition works through both structural and subjective pathways. Structurally, domination occurs through the economic, legal, and political structures of the state. In this way, “the terms of accommodation usually end up being determined by and in the interests of the hegemonic partner.”⁵⁶⁷ Drawing on Fanon, Coulthard adds that the colonial relationship also depends on creating certain types of political subjects through this process of ‘recognition’.⁵⁶⁸ In other words, the subjective aspects of colonization work through drawing Indigenous peoples into (and eventually having Indigenous peoples come to identify with) the

⁵⁶⁵ Mills, “Rooted Constitutionalism” at 137.

⁵⁶⁶ Note that in early relationship, while the Crown was still seeking a foothold, so to speak, in North America, particularly towards the east, the relationship was characterized more by a nation-to-nation relationship that drew upon Indigenous law and culture in its interactions. See Craft, *Stone Fort Treaty* for an excellent discussion on the ways in which this dynamic played out in the context of Treaty One. Also, see generally Bruce Morito, *An Ethics of Mutual Respect: The Covenant Chain and Aboriginal-Crown Relations* (Vancouver: UBC Press, 2012) and John Borrows, “Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government” in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada* (Vancouver: UBC Press, 1998) ch 6.

⁵⁶⁷ Coulthard, *Red Skin, White Masks* at 17. These structural critiques have points of connection with Marxist perspectives.

⁵⁶⁸ Recognition theories vary and it is beyond my scope and ability to give a complete accounting of these differences here. It is generally accepted that recognition has a role in identity creation insofar as human subjectivity is formed intersubjectively through our social relations. Others, including Coulthard, go on to argue that “relations of recognition can have a positive (when mutual or affirmative) or detrimental (when unequal and disparaging) effect on our status as *free and self-determining agents*” (*ibid.* at 17). In this regard, Coulthard draws heavily on the work of Frantz Fanon (see Frantz Fanon, *Black Skin, White Masks*, trans. by Richard Philcox (New York: Grove Press, 1952) and Frantz Fanon, *The Wretched of the Earth*, trans. by Richard Philcox (New York: Grove Press, 1963). Many recognition theorists also draw upon, or orient themselves in relation to, G.W.F. Hegel, *Phenomenology of Spirit*, trans. by A.V. Miller (Oxford: Oxford University Press, 1977).

misrecognition and structural relations perpetuated through the economic, political, and legal discourses of the state. It is in that light that contemporary colonial power works through the *inclusion* and shaping of Indigenous peoples and perspectives by state discourses, as opposed merely to a process of *exclusion*.⁵⁶⁹

In examining Dené struggles for self-determination and the negotiation of land-claims settlements, Coulthard references a subjective shift in that “the land-claims process itself has also served to subtly shape how Indigenous peoples now think and act in relation to the land.”⁵⁷⁰ Specifically, Coulthard describes “a reorientation of Indigenous struggle from one that was once deeply *informed* by the land as a system of reciprocal relations and obligations (grounded normativity), which in turn informed our critique of capitalism..., to a struggle that is now increasingly *for* land, understood now as material resource to be exploited in the capital accumulation process.”⁵⁷¹

While Coulthard foregrounds recognition and capitalism in describing this type of “discursive translation” of Indigenous thought and action, Paul Nadasdy narrows in on sovereignty and an in depth ethnography and analysis of these processes of translation. To begin, sovereignty is not something that you simply possess, or don’t possess. Rather, “states must constantly negotiate their sovereignty.”⁵⁷² That is to say that “a state is recognized as sovereign only if it acts in ways expected of a sovereign state.”⁵⁷³ The implication is that “practices of recognition do not merely serve to acknowledge (or not) states’ prior status as sovereign entities, they actually produce the normative requirements of sovereignty along with the very states that (seek to) conform to them.”⁵⁷⁴

The types of recognition issues Coulthard points to in his work are therefore implicit in sovereignty more broadly. In fact, Nadasdy asserts that “recognition is an essential aspect of

569 Robert Clifford, book review of *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* by Glen Sean Coulthard, (2015) 30:2 C.J.L.S. 229.

570 Coulthard, *Red Skin, White Masks* at 77-78.

571 *Ibid.* at 78. This reorientation is described as a trend because, while it may be part of the colonial project, the colonial project has never been completed. I also note that Coulthard defines “grounded normativity” as “the modalities of Indigenous land-connected practices and longstanding experiential knowledge that inform and structure our ethical engagements with the world and our relationships with human and nonhuman others over time” (*ibid.* at 13). The reorientation of which Coulthard is speaking of has been observed by others as well. A. Simpson, *Mohawk Interruptus*, offers an analysis “of the events and interactions that have forced Kahnawake:non into their historically inverted position on membership” (at 49). While Mohawk membership and identity was once open and inclusive, categories and issues such as ‘race’, ‘sex’, land loss, and sovereign diminution, have now become meaningful factors in shaping Mohawk identity and membership (*ibid.* at ch 2).

572 Nadasdy, Paul, *Sovereignty’s Entailments: First Nation State Formation in the Yukon* (Toronto: UTP, 2017) [Nadasdy, *Sovereignty’s Entailments*] at 13.

573 *Ibid.* at 12.

574 *Ibid.* at 13.

sovereignty.”⁵⁷⁵ “No state has complete control over the terms of its own recognition, and if weaker states wish to be recognized as sovereign, they must conform to the normative requirements of sovereignty as dictated (largely) by more powerful states.”⁵⁷⁶ Importantly, then, and aligning with Coulthard, “the politics of recognition involve much more than the mere recognition of that which already exists; rather, they are constitutive of the recognized self.”⁵⁷⁷ It should, therefore, be clear that this recognition is always political. Outdated and egregious recognition politics deemed Indigenous peoples too “primitive” or “backwards” to qualify as sovereign, thus justifying colonial expansion into the Americas. Today, the accepted way for a Indigenous Nation to prove they are capable of self-government is to show “the ability to establish and run a state-like government.”⁵⁷⁸ The paradox involved here is evident, and we will return to it in a moment. First, we should step back to clarify an implication this broader dynamic of recognition entails.

Drawing on Nadasdy’s work, First Nations in the Yukon have signed land-claim and self-government agreements as a way to obtain significant, although limited, powers to govern their lives. If this recognized form of sovereignty, or authority to self-govern, is something not simply possessed but constantly negotiated within the sovereignty paradigm, in this case “through decades of struggle against colonial policies,”⁵⁷⁹ then these agreements can’t be viewed simply as an imposition that “emanates – in some straightforward top-down fashion – from the Canadian government.”⁵⁸⁰ Rather, the foundation of the agreements themselves are the problem – the need to create “recognizable (to state officials) structures of authority that would enable government-to-government relations” that sovereignty entails.⁵⁸¹

The powers granted to the First Nations through these agreements come in “the currency of territorial sovereignty.”⁵⁸² To use that currency and wield the negotiated powers of governance, the Indigenous group has to be fundamentally state-like, and therefore must “alter their forms of social and political organization in dramatic and often unforeseen ways.”⁵⁸³

⁵⁷⁵ *Ibid.* at 15.

⁵⁷⁶ *Ibid.*

⁵⁷⁷ *Ibid.* at 14.

⁵⁷⁸ *Ibid.* at 300. “Yukon First Nation negotiators thus found themselves in a grimly ironic position: the only way they could convince federal negotiators they were politically mature enough to handle “self-government” was to agree to the establishment of a political system that was not their own” (*ibid.* at 300-301).

⁵⁷⁹ *Ibid.* at 132.

⁵⁸⁰ *Ibid.*

⁵⁸¹ *Ibid.* at 16.

⁵⁸² *Ibid.* at 132.

⁵⁸³ *Ibid.*

Specifically, Nadasdy emphasizes dramatic transformations regarding “human-animal-land relations.”⁵⁸⁴ Ultimately, “sovereignty and its entailments not only come to structure relations between indigenous people and the state, but also relations among indigenous people and between them, the land, and animals.”⁵⁸⁵

We might suggest that the Canadian state offer some other form of currency or negotiated agreement, and perhaps they could to some extent.⁵⁸⁶ However, the “currency of territorial sovereignty” is what the Canadian state has to offer because they too receive that currency vis-à-vis other sovereign states, internationally. Again, sovereignty is something constantly negotiated and a product of acting in ways expected of a sovereign state, and in line with the normative requirements of sovereignty.⁵⁸⁷ The foundational issue, therefore, extends beyond the Canadian state and is of broader scale. In fact, the concept of sovereignty has become so entrenched that “sovereignty has come to serve in contemporary political thought as the theoretical precondition for politics.”⁵⁸⁸ For that reason it is not uncommon to hear invocations of *Indigenous sovereignty*.⁵⁸⁹

While “the language of sovereignty” can be empowering, it “has also been to a large extent obligatory.”⁵⁹⁰ Although the concept of sovereignty, and its associated concepts of territory, citizenship, and nation, “are all flexible and contested, they are not infinitely so; using them inevitably entails making historically and culturally specific assumptions about the nature of society – and about the world.”⁵⁹¹ While utilizing these concepts can be empowering in that it means no longer living “under the colonial dictates of the federal Indian Act [with] virtually no say either in their own governance or in the management of their lands and resources,”⁵⁹² that form of ““empowerment” must *also* be viewed as a form of subjection” in that it “requires formerly disempowered peoples to alter themselves and their society as a prerequisite for the

584 *Ibid.*

585 *Ibid.* at 38.

586 Those who push for greater understanding of Indigenous laws and traditions have this in mind. In negotiations, it is not uncommon to hear officials simply don’t understand how they would speak or relate with many traditional governance structures. It is also worth noting that there is debate regarding whether this can even happen, or if it is even desirable in current contexts.

587 *Ibid.* at 12-13.

588 *Ibid.* at 39

589 *Ibid.* Nadasdy spends the entire book arguing how this is the case. I will touch more on this argument, but I cannot present it in full detail.

590 *Ibid.* at 18.

591 *Ibid.* at 9. Nadasdy also argues that it is wrong to treat these “state-derived concepts as universal” or to find “embryonic” forms of these concepts and thus “projecting them onto non-state societies” in a way that naturalizes those assumptions and their evolutionary necessity, in turn rendering alternative forms “unthinkable” (*ibid.* at 9). Also see Rosen, *Law as Culture* and Christie, “Indigeneity and Sovereignty”.

592 Nadasdy, *Sovereignty’s Entailments* at 5.

exercise of that power.”⁵⁹³ These processes of state-formation do *not* merely recognize pre-existing governance structures and make room for them, but rather, “they are the mechanisms for *creating* the legal and administrative systems that bring those polities into being.”⁵⁹⁴

Nadasdy pays particular attention to the way the sovereignty paradigm narrows politics and sociality to “the realm of the human.”⁵⁹⁵ As he notes, it is “taken for granted that only humans can be political actors.” While “plants, animals, and other elements of “the environment” can be the *objects* of politics, they cannot be its *subjects*.”⁵⁹⁶ Lacking the designation of “citizen”, the more-than-human world is excluded from being political actors.⁵⁹⁷ Such exclusion is not incidental.

“Hobbes himself was clear about the need to exclude animals and inanimate objects from the realm of the political. Not only did he explicitly reject them as potential members of the sovereign community (on the grounds that, lacking language, they do not have the rational capacity to enter into the social contract), he also marked as illegitimate many of the ways of knowing and being in the world (dreams, visions, traditional stories, nonlinear temporal frameworks) that together frame Yukon [and other Indigenous people’s] interactions with the other-than-human persons that inhabit the world.”⁵⁹⁸

In this move, the sovereignty paradigm simultaneously ejects the more-than-human world from the participatory realm of politics, as well as Indigenous groups who hold on to those beliefs and practices. “More precisely, because such beliefs – and the practices based upon them – by definition stand “outside” the relation of sovereignty, indigenous people who claim knowledge based on dreams, whose hunting practices, say, are rooted in a different temporal order, or who view animal people as powerful political actors, necessarily place themselves “outside” the Hobbesian relation of sovereignty.”⁵⁹⁹ The ontological and epistemological groundings of these Indigenous groups situate them as “backward”, “irrational”, or “savage” and,

⁵⁹³ *Ibid.* at 6.

⁵⁹⁴ *Ibid.* at 10.

⁵⁹⁵ *Ibid.* at 43.

⁵⁹⁶ *Ibid.* at 44 [emphasis added].

⁵⁹⁷ *Ibid.* at 138.

⁵⁹⁸ *Ibid.* at 44-45 [original footnotes omitted].

⁵⁹⁹ *Ibid.* at 71.

as a consequence, “not yet ready” for “self-government.”⁶⁰⁰ In that sense, they serve as the “oppositional category against which sovereignty is produced”⁶⁰¹ and maintained.⁶⁰²

7. Anti-capitalists and Countersovereignty?

Indigenous perspectives regarding the possibilities and dangers of both the concept and usefulness of sovereignty vary greatly.⁶⁰³ Taiaiake Alfred offers perhaps the strongest critique of sovereignty,⁶⁰⁴ taking issue not only with sovereignty being a European concept,⁶⁰⁵ but also with sovereignty’s inherent organization of power that he sees as inconsistent with Indigenous values and fostering a postcolonial future.⁶⁰⁶ While the concept and use of the term sovereignty has shifted over time,⁶⁰⁷ it has carried a core meaning of “supreme authority within a territory.”⁶⁰⁸ It is this notion of supreme power and authority over a given territory with which Alfred principally takes issue.

“Sovereignty is historically contingent”⁶⁰⁹ and is “embedded within the specific social relations in which it is invoked and given meaning.”⁶¹⁰ Audra Simpson therefore takes a different, though equally strong, approach to Alfred. Simpson argues for, what she calls, “nested

600 *Ibid.* at 71-72.

601 *Ibid.* at 66.

602 “Because sovereignty is viewed as a product of human nature and because it requires an oppositional and coercive “outside”, representations of indigenous people as animal-like savages cannot be written off as simply the result of racism and ignorance; rather, they are *essential* to the maintenance of sovereignty itself” (*ibid.* at 70).

603 Joanne Barker has edited two books that encompass many of these different perspectives. See Joanne Barker, ed., *Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination* (Lincoln: University of Nebraska, 2005) and Joanne Barker, ed., *Critically Sovereign: Indigenous Gender, Sexuality, and Feminist Studies* (Durham: Duke University Press, 2017).

604 Alfred strongly argues that ““sovereignty” is inappropriate as a political objective for indigenous peoples” (Alfred, “Sovereignty” at 38). He does, however, note that “Indigenous peoples nonetheless struggled to achieve a degree of freedom and power within the intellectual and political environment created out of the colonial domestication project and settler state sovereignty” (*ibid.* at 36).

605 “But few people have questioned how a European term and idea - sovereignty is certainly not Sioux, Salish, or Iroquoian in origin - came to be so embedded and important to cultures that had their own systems of government since the time before *sovereignty* was invented in Europe” (*ibid.* at 39).

606 Alfred writes: “Fewer still have questioned the implications of adopting the European notion of power and governance and using it to structure the postcolonial systems that are being negotiated and implemented within indigenous communities today” (*ibid.* at 39). While Alfred has always remained critical of sovereignty as a concept, his position seems to have shifted somewhat over the span of his scholarly work. For example, in Alfred, “Sovereignty” at 42 he writes: “The challenge for indigenous peoples in building appropriate postcolonial governing systems is to disconnect the notion of sovereignty from its Western, legal roots and to transform it.” In a later work, Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto, Second Edition* (Oxford: Oxford University Press, 2009) he writes: “Keeping in mind what sovereignty means intrinsically, where it comes from, and what it means as a power relationship between government and the people, my idea right now is that it’s useful for us today only as an externalized concept. As you said, relative to Canada and the United States, we can use it to assert ourselves. But, internally, I don’t think it’s the appropriate frame for governance.” In his most recent book, Alfred, *Wasáse*, he is clearly more focused on transcending colonial identities, structures, and rebuilding indigenous identity and culture - something in which sovereignty, it would appear, serves only as a barrier.

607 See Barker, “For Whom Sovereignty Matters”.

608 Daniel Philpott, “Sovereignty”, *The Stanford Encyclopedia of Philosophy* (Summer 2016 Edition), Edward N. Zalta, ed., available at <<https://plato.stanford.edu/archives/sum2016/entries/sovereignty/>>.

609 Barker, “For Whom Sovereignty Matters” at 21.

610 *Ibid.*

sovereignty.”⁶¹¹ She notes that “sovereignty may exist within sovereignty. One does not entirely negate the other, but they necessarily stand in terrific tension and pose serious jurisdictional and normative challenges to each other.”⁶¹² Simpson recognizes that sovereignty does include a “jurisdictional dominion over territory, a notion of singular law, and singular authority,”⁶¹³ but she also recognizes that the colonial project did not completely work, and Indigenous peoples are still here, defending their territory, carrying their laws and governance, and so find themselves within a form of “nested sovereignty.”

The persistence of Indigenous peoples is what Audra Simpson calls the “politics of refusal.”⁶¹⁴ “We could see this as a political strategy that is cognizant of an unequal relationship, understands the terms of bondage, and chooses to stay within them in order to assert a greater principle: nationhood, sovereignty, jurisdiction by those who are deemed to *lack* that power, a power rooted in historical precedent but is conveniently forgotten or legislated away.”⁶¹⁵ For Simpson, sovereignty “is a critical language game in the conditions of settlement - this structural condition of ongoing Indigenous dispossession and disavowal of that dispossession and structure.”⁶¹⁶ As such, it is from a grounding in sovereignty that she asserts her politics of refusal.

While the fact that sovereignty is a European concept is of little concern to me, its origins are more concerning. “Initial efforts to theorize sovereignty went hand-in-hand with broader efforts to delegitimize the political systems of colonized peoples.”⁶¹⁷ In that regard, we would be wise to keep a close eye on the ways in which sovereignty has, and continues to, function to delegitimize or transform Indigenous political systems, and how this then shapes relationships with land and the more-than-human world in harmful ways.

Just as we may try to “Indigenize” sovereignty, we may also try to “green” capitalism. Green Capitalism, however, does not alter the logic of capital nor address the rationality of Nature as abstract and external.⁶¹⁸ Indigenous groups, however, with intimate relationships with

611 A. Simpson, *Mohawk Interruptus* at 11.

612 *Ibid* at 10.

613 *Ibid* at 12.

614 *Ibid*.

615 *Ibid*. at 24.

616 *Ibid*. at 105.

617 Nadasday, *Sovereignty's Entailments* at 3. Also see Barker, “For Whom Sovereignty Matters” at 4. Barker writes, “Nations certainly put sovereignty to work during the colonization of the Americas and the Pacific to justify - by explanation or denial - the dispossession, enslavement, and genocide of indigenous peoples.”

618 “Capitalism, as a project, seeks to create a world in the image of capital, in which all elements of human and extra-human nature are effectively interchangeable” (Moore, *Capitalism in the Web of Life* at 204).

particular territories, refuse to see Nature as abstract. Most Indigenous struggles against capitalism have therefore been place-based. These actions are at once processes of both negation (anti-capitalist) and affirmation (of Indigenous law).⁶¹⁹ These actions “embody an enactment of Indigenous law and the obligations such laws place on Indigenous peoples to uphold the relations of reciprocity that shape our engagements with the human and nonhuman world - the land.”⁶²⁰

The Zapatista movement - “a place-based revolutionary struggle in Chiapas that operates within and against the nation-state form” - identify themselves as “modest anti-capitalists”.⁶²¹ Yet, it cannot be only Indigenous peoples involved in these movements. Naomi Klein has urged an expansion of what she calls, “Blockadia.”⁶²² Blockadia, she writes, is not a place “but rather a roving transnational conflict zone that is cropping up with increasing frequency and intensity wherever extractive projects are attempting to dig and drill.”⁶²³

It should be noted that while these types of movements are important, they also tend to create difficult dynamics within communities. The dynamics of capitalist and colonial relations has rendered Indigenous peoples poor within our own homelands, creating deep divides within our communities. We are made poor, and constantly baited to become complicit in the capitalist project. Economic development to meet fundamental needs can be pitted against the importance of upholding our own laws and beliefs in relation to our homelands. The dynamic is not fair and we are constantly made to sacrifice.⁶²⁴ What most needs to change is not Indigenous peoples, or our reactions to the structures imposed around us, but rather, the structures and ideologies that make those injustices and harms part of daily life.

We need to find ways in which we can have economic relations not rooted in exploitation; that don’t view nature as external; where resources are not extracted for the profit of others, from elsewhere. In creating these alternatives we can look to Indigenous laws, governance, and ways of being. It is not enough to simply insert Indigenous content into an otherwise unacceptable framework. In addition to being *anti-capitalist* we also need a healthy dose of

619 Borrows, *Freedom* at ch. 2 recognizes this point. Borrows also cautions against a decontextualized and universalized approach to direct action, indicating that “direct action can be a double-edged sword for Indigenous peoples” in that it may equally be used by settler people against Native peoples (*ibid.* at 80).

620 Coulthard, *Red Skin, White Masks* at 170.

621 Mann & Wainwright, *Climate Leviathan* at 181.

622 Klein, *This Changes Everything* at Chapter 9.

623 *Ibid.* at 295.

624 Altamirano-Jiménez, *Indigenous Encounters With Neoliberalism* at 175 makes a similar observation in relation to her analysis of the Zapatista in Chiapas. She writes: “The shift away from state-conditioned support for community self-sufficiency has limited the Zapatistas’ ability to provide basic services such as education, health, and economic infrastructures in order to sustain the Zapatistas’ well-being. Thus relying on external networks of solidarity has been a necessary means of compensating for the absence of the state.”

countersovereignty.⁶²⁵ In the ‘Anthropocene’ our “planetary crisis is, among other things, a crisis of the imagination, a crisis of ideology, the result of an inability to conceive of any alternative to walls, guns, and finance as tools to address the problems that loom on the horizon.”⁶²⁶

8. Conclusion

Having been introduced to W̱SÁNEĆ law through a series of methods, specifically to the structure W̱SÁNEĆ law through a process of self-location and reflexivity, the mode of reasoning with W̱SÁNEĆ law through an engagement with stories, and W̱SÁNEĆ and land-based pedagogy through an introduction of the field course, I worked in this section to step back and contemplate the nature of global climate crisis given the fact that any local consideration of W̱SÁNEĆ law is necessarily entangled within and affected by global dynamics. Having set the stage of W̱SÁNEĆ law and global climate crisis, in the following section (Part III) I can now focus more narrowly on two distinct, but related, case studies. The first case study relates to LEL,TOS (James Island), the process of land dispossession, and W̱SÁNEĆ law efforts at #LandBack through a BC Supreme Court claim. The second case study relates to jurisdictional dispossession of ocean territory and a proposed National Marine Conservation Area Reserve / Indigenous Protected and Conserved Area as a potential tool in upholding W̱SÁNEĆ law.

625 Such a claim is consistent with Mann & Wainwright, *Climate Leviathan* at 15 who say that “only a theory capable of radically examining capitalism *and* sovereignty holds any hope of orienting us today.”

626 Mann & Wainwright, *Climate Leviathan* at 197.

PART III

Chapter Five

Property or Relative?

Land, Treaty, and Dispossession: A Look at ŁEL,TOS (James Island)



Figure 21: "ŁEL,TOS from the Air" Photo by Sarah Robinson, 2018.

1. Introduction

One of the most central and enduring claims Indigenous peoples make against the state is that our land has been *stolen*. Not only have Indigenous peoples been physically dispossessed of our territorial land base, we have also been dispossessed of our ability and authority to relate to those lands in accordance with our own Indigenous legal orders. In other words, we have been both physically dispossessed, as well as dispossessed of our jurisdictional authority. Assertions of European sovereignty have been one mechanism of this dispossession, but so too have conceptions and mechanisms of property formation. The dispossession of ŁEL,TOS (James Island) is one example of these processes of dispossession, and an instance in which competing claims to the island has led the Tsawout First Nation to launch a court action for the return of the island to the WŚÁNEĆ people.

In this chapter I will outline aspects of the colonial and racialized conception of property and dispossession.⁶²⁷ However, since dispossession always happens in ‘place’, I will also narrow this examination to look at a particular instance of dispossession in W̱SÁNEĆ territory, specifically that of LEL,TOS (James Island). The mechanisms and logic of property and sovereignty have shaped and allowed certain types of relationships with the island, while simultaneously functioning to foreclose or inhibit other longer standing modes of relating to LEL,TOS. These processes, however, have never been complete. Even while we make a claim (of one type or another) for the *possession* of LEL,TOS, we also have not forgotten to listen to the ways LEL,TOS calls us to certain *responsibilities* and other ways of relating to land. Therefore, in concluding this chapter I will return to an analysis of a relational ontology, including a look at W̱SÁNEĆ law and how it might point us toward relating to land in a different way.

2. Dispossession

LEL,TOS, since her creation, has had an eventful life. Once a W̱SÁNEĆ village site and burial ground, currently a privately owned ‘eco-paradise’ retreat, and much in between, is now also the subject of a BC Supreme Court action in which the Tsawout First Nation, through Aboriginal Title and Treaty claims, is seeking to re-claim the island for the Nation.⁶²⁸ How is it that this process has unfolded, both conceptually and practically? How has settler law been superimposed over W̱SÁNEĆ law, and/or alternatively sought to enfold W̱SÁNEĆ law and jurisdiction *within* itself, and how do these processes present opportunities or function as barriers to the revitalization of W̱SÁNEĆ laws?

To begin, this process applies not only to LEL,TOS. Indigenous peoples have been systematically dispossessed of “the territorial foundations of their societies, which have in turn become the territorial foundations for the creation of new, European-style, settler societies.”⁶²⁹ Indian reserves in Canada comprise only approximately 0.2 percent of the total land base of Canada. This number is even smaller in British Columbia where the colonial land policy differed

627 See Brenna Bhandar, *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership* (Durham: Duke University Press, 2018) [Bhandar, *Colonial Lives of Property*] and Aileen Morten-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty* (Minneapolis: University of Minnesota Press, 2015) [Morten-Robinson, *The White Possessive*] for more in-depth discussion on this point.

628 Tsawout First Nation, Notice of Civil Claim, Supreme Court of British Columbia, Victoria Registry, Court File No. VIC-S-S-180772 (Filed: 24 January 2018) [Tsawout, “Notice of Civil Claim”]. See also Tsawout First Nation, Amended Notice of Civil Claim, Supreme Court of British Columbia, Victoria Registry, Court File No. VIC-S-S-180472 (Filed: 4 July 2018) [Tsawout, Amended Notice of Civil Claim”].

629 Robert Nichols, *Theft is Property! Dispossession and Critical Theory* (Durham: Duke University Press, 2020) [Nichols, *Theft is Property*] at 5.

from the rest of Canada,⁶³⁰ and where reserve size and creation was often intimately linked with access to fisheries.⁶³¹ Regardless, it is clear how one can come to diagnose settler-colonialism principally as “a form of structured dispossession.”⁶³² One can also see how a central Indigenous justice strategy is to demand #LandBack.⁶³³ How can we envision meaningful reconciliation, flourishing Indigenous legal traditions, and healthy socio-economic societies of any sort with an inadequate land base to support them? As my previous chapter discussed capitalism as “a way of organizing nature”,⁶³⁴ it is clear that the claim for #LandBack must also foreground a particular way of relating to land. Our first step, then, in tracking this process of dispossession is to briefly draw upon scholars utilizing a critical lens on dispossession and property formation within settler colonialism, as well as the types of relationships with land those condition.

2.1. Theorizing Property Formation and Dispossession

Robert Nichols’ book, *Theft is Property! Dispossession and Critical Theory*, highlights the paradox Indigenous peoples face in their claims of dispossession and for #LandBack. *Dispossession* is framed in the negative, presupposing some pre-existing form of property or possession. Yet, Indigenous peoples are often making two simultaneous claims, as is much the case with Tsawout’s claim for EEL,TOS. The first is a justice claim centered on theft (that our lands have been stolen). The second is an ontological claim that the land does not actually belong to anyone. One seems to contradict, or undermine, the strength of the other. In theorizing the creation of this apparent paradox, Nichols understands there to be a recursive nature to property formation. In short, he argues that theft *produces* property, as opposed to theft *pre-supposing* property. That is, the *making* and *taking* of property are happening together, at the same time. In other words, a non-proprietary relationship is transformed into a proprietary one, while at the same time systematically divesting Indigenous peoples from that property. Any form of minimal property interest projected on to Indigenous peoples is immediately truncated and minimized.⁶³⁵ Anarchists, such as Rousseau (property is theft), and Marx (separation from land drives

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

631 Doug Harris, *Landing Native Fisheries: Indian Reserves & Fishing Rights in British Columbia, 1849-1925* (Vancouver: UBC Press, 2008) [D. Harris, *Landing Native Fisheries*].

632 Coulthard, *Red Skin, White Masks* at 7.

633 Yellowhead Institute, *Land Back: A Yellowhead Institute Red Paper* (October 2019) [Yellowhead Institute, *Red Paper*].

634 Moore, *Capitalism in the Web of Life*.

635 Nichols, *Theft is Property*.

exploitation and domination) have already given attention to the role of property formation and domination. So too have those writing from the Black Radical Tradition.⁶³⁶ However, as it relates to Indigenous peoples, ownership is not simply creating a social class, but a racialized group.⁶³⁷

Our first step in dissecting this process is to briefly understand the concept of ownership, what its origins are, and how it continues to structure the relationships we are considering. Such a commitment requires a brief foray into theorizations of property and sovereignty, and their deeply colonial roots, which structure land ownership as we understand it. From there we can see some of the conceptual and material expectations these theorizations create, and how they continue to manifest today. We must, therefore, also be entirely clear that colonialism is not a past event, but rather, a process and relational power dynamic that remains foundational to the colonial settler-state that is Canada. From these understandings we are better equipped to consider what alternative models for land ownership, or relationships with land, might look like, and more importantly, whether those alternatives escape the colonial foundations of the model we are seeking to reimagine.

Escaping these colonial foundations is not a given, nor necessarily straightforward. Aboriginal law (including broader political agreements to which Aboriginal law forms the backdrop) has done well to be (or at least appear to be) “progressive” over the last few decades, while still retaining the foundational and problematic roots of colonialism.⁶³⁸ This is relevant in considering Tsawout’s Aboriginal and Treaty claim for ownership of LEL, TOS, as well as the potential of co-management agreements in WSÁNEĆ territory (to be discussed in the next chapter). The risk here is that we might simply duplicate the same colonial foundations. Finally, while this chapter examines climate crisis in less explicit detail than the last, it is *critically* important to remember that the colonial and racialized assumptions and process of property formation are as relevant to our diagnosis of climate crisis as they are to our understandings of dispossession.⁶³⁹

636 Nichols engages in a discussion of anarchist, Marxist, and the Black Radical Tradition in his work on dispossession (*ibid.*). See also Ronaldo Walcott, *On Property: Policing, Prisons, and the Call for Abolition* (Windsor: Biblioasis, 2021) and Morton-Robinson, *The White Possessive*.

637 See Nichols, *Theft is Property* for a much more in-depth analysis of this paradox and process of property formation. Also, see Bhandar, *Colonial Lives of Property* for a much more in-depth analysis of the racialized nature of property formation.

638 The recent work of Gordon Christie is informative here. See Gordon Christie, *Canadian Law and Indigenous Self-Determination: A Naturalist Analysis* (Toronto: UTP, 2019) [Christie, *Canadian Law and Indigenous Self-Determination*]. Glen Coulthard, *Red Skin, White Masks* also offers a strong and influential critique of the liberal politics of recognition, something which Aboriginal law is a part of.

639 James Tully “Reconciliation Here on Earth” in Michael Asch, John Borrows & James Tully, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: UTP, 2018) [Tully, “Reconciliation Here on Earth”] explores the intimate connection between reconciliation between Indigenous and non-Indigenous peoples, and between humans and the Earth.

2.1.1. Two Pillars of Dispossession: Sovereignty and Property

Canada, as the sovereign nation-state many currently imagine and experience it as, is *not possible* without the *dispossession* of Indigenous peoples of their lands, laws, and self-determining governance structures.⁶⁴⁰ In fact, Canada is founded entirely on this fact.⁶⁴¹ Sovereignty claims, and the mechanisms and concepts of property, have been two pillars the colonial project has used to first imagine and then set about achieving, legitimizing, and then continually reinforcing this dispossession. These efforts have created certain expectations and entitlements to superiority over Indigenous peoples, and certainty over ownership of Indigenous lands; something that Eva Mackey calls “settled expectations.”⁶⁴²

Both sovereignty and property are racialized concepts that hinge on assumed European superiority.⁶⁴³ Thomas Hobbes, for example, in theorizing the social contract, and thereby a theory of sovereignty, would portray Indigenous peoples, governance, and relationships with land as a form of savagery characteristic of the “state of nature”; a life which he saw as “nasty, brutish, and short”.⁶⁴⁴ For Hobbes, the way (and necessity) to escape this “state of nature” was an absolute sovereign rule that could enforce the social contract.⁶⁴⁵ Hobbes clearly draws on a binary between Nature and Society,⁶⁴⁶ creating a distinction between “civilized” and “uncivilized”. John Locke, discussed below, would also expand on this notion. For our purposes here, I hope to indicate that sovereignty, from the outset, was a racialized concept meant to exclude Indigenous peoples and the more-than-human world through deeming them inferior.⁶⁴⁷ While sovereignty was once a radical idea, it now serves as the presumed “precondition for politics” around the globe, despite its specific European “cultural entailments” and visions of

640 Treaty between early settlers and Indigenous nations offered, and may still offer, an alternative, however, those promises and mutual relationships have long been ignored and systematically undermined.

641 The fact that colonialism has, and continues to be, about achieving access and control of Indigenous lands and resources is well established by many scholars. See, for example, Coulthard, *Red Skin, White Masks*.

642 Eva Mackey, *Unsettled Expectations: Uncertainty, Land and Settler Decolonization* (Halifax: Fernwood Publishing, 2016) [Mackey, *Unsettled Expectations*].

643 See Bhandar, *Colonial Lives of Property* for an analysis of what she calls “racial regimes of ownership”.

644 Thomas Hobbes, *Leviathan: or the Matter, Forme, & Power of a Common-wealth Ecclesiasticall and Civill* (London, 1651).

645 In short, the social contract is an implicit agreement between citizens to sacrifice certain individual freedoms in return for state protection.

646 This binary preexisted Hobbes, finding its place in the Old Testament as well. For example, see Genesis 1:28: “And God blessed them. And God said to them, ‘Be fruitful and multiply and fill the earth and subdue it, and have dominion over the fish of the sea and over the birds of the heavens and over every living thing that moves on the earth.’”

647 Paul Nadasdy writes: “Hobbes himself was clear about the need to exclude animals and inanimate objects from the realm of the political. Not only did he explicitly reject them as potential members of the sovereign community (on the grounds that, lacking language, they do not have the rational capacity to enter into the social contract), he also marked as illegitimate many of the ways of knowing and being in the world (dreams, visions, traditional stories, nonlinear temporal frameworks) that together frame Yukon [and other Indigenous people’s] interactions with the other-than-human persons that inhabit the world” (Nadasdy, *Sovereignty’s Entailments* at 44-45).

power.⁶⁴⁸ Blanket assertions of sovereignty premised on this conception of superiority have been a staple of colonialism, and have been actualized through the creation of property regimes.⁶⁴⁹

Picking up where Thomas Hobbes left off is the work of John Locke.⁶⁵⁰ If “first possession” was a longstanding method in establishing property rights, but Indigenous peoples were already present in what is now North America, then some other specific justification for colonial objectives would be required.⁶⁵¹ The Doctrine of Discovery and the concept of *terra nullius* become central in attempts to justify colonial expansion. *Terra nullius* does not simply mean “empty” land, but rather “legally vacant” land, and thus hinges once again on concepts of superiority, as we will see, in its process of self-legitimizing appropriation. A slightly closer look at how Indigenous lands were conceptualized as legally vacant is helpful in this regard.

Property law from England was not simply imported to the colony, but rather, “modern property laws emerged along with and through colonial modes of appropriation.”⁶⁵² But again, this is not merely about property, but how racial subjects and modern property law are co-produced; i.e., what Brenna Bhandar calls the “identity-property nexus.”⁶⁵³ While the granting of property ownership may have had “divine origins,”⁶⁵⁴ John Locke also made it thoroughly racialized.⁶⁵⁵ It was understood that within the “state of nature” all property belonged to “the commons” (i.e., endowed by God to all mankind). The way property moved from the commons to individual possession was through labour. The “role of labour in transforming nature into property was a task [also] commanded by God.”⁶⁵⁶ But, the *type* of labour was “defined solely in terms of the use of land for agricultural purposes.”⁶⁵⁷ Land that was not “improved” in this precise way, which again, resulted in individual ownership, was deemed a “waste” or “wasteland”. And, in a circular sort of fashion, those who didn’t “improve” the earth in this particular way were deemed to be “less than human beings” (or at the very least, less

648 *Ibid.* at 3-4.

649 Bhandar, *Colonial Lives of Property* at 161. The idea here is that sovereignty claims can be made, but it is also necessary to cement those claims and to actualize them by moving people into those lands being claimed.

650 John Locke, *Second Treatise on Government* (1690), ed. by C.B. Macpherson (Indianapolis: Hackett Publishing, 1980).

651 The concept of first possession dates back, in general, to Roman Law. See Mackey, *Unsettled Expectations* at 44-45 for more discussion on this point.

652 Bhandar, *Colonial Lives of Property* at 3.

653 *Ibid.* at 8 and 30.

654 Mackey, *Unsettled Expectations* at 50-52.

655 Bhandar, *Colonial Lives of Property* at 49. Bhandar also discusses the role William Petty had in setting the stage for the work of Locke, see *ibid.* at 39-44 in that regard.

656 Mackey, *Unsettled Expectations* at 50.

657 Bhandar, *Colonial Lives of Property* at 48.

civilized).⁶⁵⁸ Again, my central point is that, like sovereignty, the modern concept of property was created in direct opposition to (i.e., meant to exclude)⁶⁵⁹ Indigenous peoples, governance, and ways of relating to land, while also deeming them inferior.

These types of theorizations provided “justification” for broad sovereignty claims, which then need to be actualized and continually reinforced.⁶⁶⁰ Property, again, plays a central role. In British Columbia, for example, the Torrens system erases and deems irrelevant all prior relationships with those lands, affixing fee-simple ownership to that which is registered in the Land Title Office, despite the fact that the fee-simple ownership in question originated in unjust dispossession.⁶⁶¹ At a basic level, property is meant to create certainty, or a “settled expectation.” The average person need not trace their understandings of property and sovereignty back to the writings of Locke and Hobbes, although, as Mackey argues, “such ideas do have purchase because they have, over time, become subtly yet deeply infused in common-sense settler thinking.”⁶⁶² These “settled expectations” are “centuries-long-processes that normalized” feelings of “settled entitlement to the land taken from Indigenous peoples.”⁶⁶³ In other words, “settled expectations” are the “taken-for-granted settler frameworks and practices of entitlement and expectation of ongoing privilege.”⁶⁶⁴

Before moving on a few additional points are helpful. While earlier colonial processes were premised largely on exclusion, this is less the case today. Rather, contemporary colonial and assimilative powers work significantly through the inclusion and shaping of Indigenous perspectives and practices by state processes and discourses, as opposed merely to a process of exclusion.⁶⁶⁵ Glen Coulthard has persuasively argued that various processes of state recognition and *misrecognition* of Indigenous claims *within* various state processes (Aboriginal rights and title and co-management agreements are two examples) have actually worked to “reproduce the very configurations” of colonial power that Indigenous “demands for recognition have

658 Mackey, *Unsettled Expectations* at 52.

659 During the James Douglas era Indigenous peoples in British Columbia were permitted to pre-empt land and become “owners” in a manner similar to settlers, although the requirements for doing so were virtually unattainable. In this case, the process worked more as a form of assimilation than direct exclusion. See C. Harris, *Making Native Space* at 35-36 for more discussion. This is also a point I will return to.

660 Nadasdy, *Sovereignty's Entailments* at 12-13, discusses sovereignty “not as a timeless principle”, but rather, something that must constantly be produced and negotiated. That is, states such as Canada achieve their sovereignty viz-a-vis the mutual recognition of sovereignty amongst other sovereign states internationally.

661 Bhandar, *Colonial Lives of Property*, discusses the Torrens system and its origins in her work.

662 Mackey, *Unsettled Expectations* at 73.

663 *Ibid.* at 8-9.

664 *Ibid.* at 11.

665 The depth of this argument cannot be addressed here, although it is thoroughly argued in Coulthard, *Red Skin, White Masks*.

historically sought to transcend.”⁶⁶⁶ While I cannot here account for the structural and subjective elements involved in this process, Coulthard diagnoses “colonialism as a form of structured dispossession” that is most foundationally concerned with guaranteeing “ongoing state access to the land and resources” of Indigenous peoples.⁶⁶⁷

Briefly returning to the supremacy of Canadian sovereignty as a central “settled expectation” is helpful in illustrating these points. Through one lens, we might view Aboriginal law⁶⁶⁸ as increasingly “progressive” over the last several decades. For example, the Supreme Court of Canada finally recognized Aboriginal title for the Tsilhqot’in.⁶⁶⁹ Within that judgement, the court purported that *terra nullius* “never applied in Canada.”⁶⁷⁰ Yet, as John Borrows notes, “Canadian law still has *terra nullius* written all over it.”⁶⁷¹ Consider, how is it that the Crown has radical and underlying title if we in fact recognize that Indigenous peoples were here first and that *terra nullius* does not apply?⁶⁷² How did the Crown acquire any title at all beyond merely asserting sovereignty? The court doesn’t say, it is simply “sovereignty’s alchemy.”⁶⁷³

Much of Aboriginal law, its tests and burdens of proof, the Crown’s abilities to infringe Aboriginal rights, and the very fact that the Crown is the ultimate adjudicator of its own injustices, are equally “puzzling” unless seen as a continuation of colonialism.⁶⁷⁴ We seem to begin and end with supreme Crown sovereignty and its unquestioned power over Aboriginal peoples. The overriding presumption is that “Indigenous peoples are *already* subsumed within the nation state of Canada”⁶⁷⁵ and the only question that remains is what space “might open up *within* the Canadian legal and political landscape for powers of Aboriginal communities.”⁶⁷⁶ What is removed is Indigenous self-determination⁶⁷⁷ and anything that would “throw into question the background legal, political, and economic framework of the colonial relationship

⁶⁶⁶ *Ibid.* at 3.

⁶⁶⁷ *Ibid.* at 7.

⁶⁶⁸ To be clear, I use the term Aboriginal law in reference to the branch of Canadian law that deals with Aboriginal peoples and issues, which is quite distinct from Indigenous law, which I use to discuss Indigenous peoples own systems of law and governance and the ways in which they flow from Indigenous worldviews and lifeways.

⁶⁶⁹ *Tsilhqot’in Nation v. British Columbia* 2014 SCC 44.

⁶⁷⁰ *Ibid.* at para. 69.

⁶⁷¹ John Borrows, “The Durability of *Terra Nullius*: *Tsilhqot’in Nation v. British Columbia* (2015) UBC Law Review Vol 48:3 701 at 702.

⁶⁷² See *ibid.* for a more in-depth analysis of the case.

⁶⁷³ John Borrows made very similar observations regarding the Delgamuukw case. See John Borrows, “Sovereignty’s Alchemy: An Analysis of *Delgamuukw v. British Columbia*” *Osgoode Hall Law Journal* 37:3 (1999): 537-596.

⁶⁷⁴ See Christie, *Canadian Law and Indigenous Self-Determination* for a much more robust analysis of what he refers to as the “puzzles” of Canadian Aboriginal law.

⁶⁷⁵ *Ibid.* at 126.

⁶⁷⁶ *Ibid.* at 122.

⁶⁷⁷ *Ibid.*

itself.”⁶⁷⁸ However, this subsumption and background framework is, of course, the very thing Indigenous peoples have resisted all along. It is colonialism and imperialism. To that end, in moving through our analysis of the dispossession of LEL,TOS we should certainly ask to what extent might an Aboriginal Title and Treaty case for LEL,TOS actually function to undermine the foundations of colonialism?

2.1.2. Climate Crisis

Briefly, these critiques of sovereignty and property, and the theorizations and ideologies that underlie them, are not only relevant because of their role in the dispossession of Indigenous peoples, but also because of their role in climate crisis. I discussed climate crisis at greater lengths in the last chapter. However, it is important to recall that colonialism and climate crisis are intricately entwined, with climate crisis being the manifestation of harms brought on by a global web of relationships, ideologies, and actions, including those which underlie and flow through the concepts of sovereignty and property.

Sovereignty and property sought to erase and replace Indigenous ways of relating to land, but also to access Indigenous lands and resources so as to open them up to emerging capitalism.⁶⁷⁹ Aside from property’s role in colonialism, private property is also a central pillar of capitalism. That is, land becomes increasingly abstracted, commoditized, and fungible in a way that all other moveable property already was.⁶⁸⁰ This is relevant because climate crisis and capitalism are intimately linked as we see an exponential rise in carbon emissions alongside the global reach of capitalist relations in the late 1700’s.⁶⁸¹ It would, again, be impossible to reiterate Marxist and political ecologist’s critiques of capitalism within this chapter. For example, capitalism’s inherent need for exponential growth is certainly a foundational problem.⁶⁸² Here, however, the most relevant consideration to recall is capitalism’s externalization of nature and then its relevance for imagining alternatives.

I have emphasized that capitalism should not be seen as merely an economic system. Capitalism, like colonialism, is better seen as a relational dynamic, and in that vein, can be

⁶⁷⁸ Coulthard, *Red Skin, White Masks* at 41.

⁶⁷⁹ A central strategy of capitalism in creating surplus-value and meeting its need for exponential growth is extending its reach and constantly bringing new spaces and places within its orbit and logic.

⁶⁸⁰ Bhandar, *Colonial Lives of Property* at 88-89.

⁶⁸¹ See Malm, *Fossil Capital* for an in-depth analysis.

⁶⁸² Refer to my previous chapter and Harvey, *Seventeen Contradictions* for more.

thought of as a “way of organizing nature.”⁶⁸³ While traditional Marxist critiques tend to focus on the exploitation of the proletariat, political ecologists writing from Marxist roots tend to focus more centrally on capitalism’s appropriation of nature. That is, the tendency to see nature as a store of resources and to compel nature “to work harder and harder – for free, or at a very low cost.”⁶⁸⁴ In order to do this, capitalism uses the Nature / Society binary we saw at work above in theorizing sovereignty. Nature is viewed as “external” to society (i.e., that society is somehow separate and distinct from nature) so as to make it “cheap” and thus open for “appropriation.” Colonialism has been a massive appropriation of nature.⁶⁸⁵ Glen Coulthard’s proclamation that, “for Indigenous nations to live, capitalism must die” is aimed at how capitalism necessitates the continued exploitation of Indigenous lands and resources, thus fueling dispossession and providing enormous tension with Indigenous practices and understandings of land, and relationships with land.⁶⁸⁶

Coulthard’s assertion rings true in a broader sense as well. We are all entangled within the web of climate crisis. While we may witness local manifestations of climate crisis, the diffuse and cumulative effects cannot be confined to the actions and practices of one nation or actor. It is one thing to re-imagine relationships in localized places and instances, but that is not enough. This is because each of these places are necessarily entangled in global climate crisis. The fact is that Earth’s systems are strained by human action at a *global* level. It is, therefore, quite another thing to embark on creating the deep and extensive changes needed to meaningfully address climate crisis. So, while we can now move on to examining the more local process of dispossession as it relates to LEL,TOS, it is essential to keep these broader brush strokes in mind throughout.

3. Dispossession of LEL,TOS

For over 150 years LEL,TOS has been in private ownership and subject to harm. Understanding the nature of this impact is the first step in working toward healthier relationships and coexistence in place. Unfortunately, LEL,TOS has a long and troubling history, including

683 Moore, *Capitalism in the Web of Life* at 2.

684 *Ibid.* at 13. Moore refers to this as capitalism’s “Cheap Nature” strategy (or the Four Cheaps). Consider, using the atmosphere as a garbage dump, or the vast amount of time it takes the Earth to transform decomposing organic materials into what we call (through a capitalist lens) fossil fuels.

685 Coulthard, *Red Skin, White Masks* explores the link between capitalism and colonialism.

686 *Ibid.* at 170-173. Indigenous resistances to the Dakota Access Pipeline, the Trans Mountain Pipeline, the Coast Gas Link Project, to name a few, are all illustrative of this deep tension.

decades of environmental degradation from industrial waste. While the current owner, Craig McCaw, has generally maintained a more ecological approach to developing the island, the right of exclusion within fee-simple ownership clashes with W̱SÁNEĆ culture and beliefs insofar as that private (and exclusionary) ownership only works to perpetuate the harm that arises in specific connection to the dispossession and inaccessibility of the island to the W̱SÁNEĆ people. In exploring the long and complex history of LEL,TOS for the purposes of this section, I will begin with the period leading up to the assertion of British sovereignty, the signing of the Douglas Treaty in 1852, and the early reserve creation and land policy of the time.⁶⁸⁷ From there, more recent and specific reference to LEL,TOS can be made.

3.1. Sovereignty Claims, the Douglas Treaties, and Indian Reserves

Mercantile capitalism arrived in what is now British Columbia prior to any form of settler-colonialism.⁶⁸⁸ As Paul Tennant writes, “for seventy years after the first white contact (of Juan Pérez Hernandez in 1774) the fur trade between Indians and Europeans developed without any formal colonial control.”⁶⁸⁹ Prior to the signing of the Oregon Treaty of 1846 between the United Kingdom and the United States, all lands west of the Rocky Mountains were considered a free trade area and in terms of sovereignty, a “disputed territory.”⁶⁹⁰ This “disputed territory” included all of Vancouver Island, and obviously W̱SÁNEĆ territory (the Saanich Peninsula, Southern Gulf Islands and parts of the San Juan Islands). During this time the fur trade in the Pacific Northwest came to be dominated by the Hudson’s Bay Company (HBC),⁶⁹¹ and in 1838 the Imperial Crown granted exclusive trade with the Indians of the north-west coast to the HBC.⁶⁹² After the Oregon Treaty of 1846, Vancouver Island, and the mainland north of the 49th

⁶⁸⁷ The history of the Indian Land Question and the colonization of British Columbia has been written on in much more detail than I will apply here. See, for example, C. Harris, *Making Native Space*; Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: UBC Press, 1990) [Tennant, *Indian Land Question*]; Doug Harris, *Landing Native Fisheries*; Wilson Duff, *The Indian History of British Columbia: The Impact of the White Man* (Victoria: Royal BC Museum, 1997); Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774-1890 (2nd edition)* (Vancouver, UBC Press, 1992); and Robert Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871-1913* (Vancouver: UBC Press, 1974).

⁶⁸⁸ Rennie Warburton & Stephen Scott, “The Fur Trade and Early Capitalist Development in British Columbia” *The Canadian Journal of Native Studies* V, 1(1985):27-46.

⁶⁸⁹ Tennant, *Indian Land Question* at 17.

⁶⁹⁰ The dispute was between the United Kingdom and The United States for sovereignty over the area known as the Oregon Territory. Neil Vallance also notes, however, that “no joint administration was set up to govern the Oregon Territory or its native inhabitants. Under this arrangement, Indigenous, British, and American residents managed to co-exist for twenty-eight years” (Neil Vallance, *Sharing The Land: The Formation of the Vancouver Island (or ‘Douglas’) Treaties of 1850-1854 in Historical, Legal and Comparative Context* (PhD Dissertation, University of Victoria, Faculty of Law, 2015) [Vallance, *Sharing The Land*] at 60-61.

⁶⁹¹ *Ibid.* at 61.

⁶⁹² Her Majesty the Queen in the right of British Columbia, Response to Civil Claim, Supreme Court of British Columbia, Victoria Registry, Court File No. VIC-S-S-180772 (Filed: 1 May 2018) [HMQBC, “Response to Civil Claim”] at 6.

parallel, came under the sovereignty of the British Imperial Crown.⁶⁹³ The Oregon Treaty makes no mention of the Indigenous peoples of the area, but was seen as settling the sovereignty question and leaving the British Crown “free to make proprietary grants within its new territories.”⁶⁹⁴ Three years later, in 1849, the Imperial Crown did just that, granting to HBC all lands of Vancouver Island for the “maintenance of peace, justice and good order, the advancement of colonization, the promotion and encouragement of trade and commerce, and the protection and welfare of the native Indians.”⁶⁹⁵ Such was “the creation of the proprietary colony of Vancouver Island.”⁶⁹⁶ Up to this point, Natives and Europeans were not competing for lands.⁶⁹⁷ A colony on the mainland (the colony of British Columbia) would not be established until 1858,⁶⁹⁸ with the mainland and Vancouver Island colonies being merged into a single colony of British Columbia in 1866.⁶⁹⁹ British Columbia would not join Canada, thereby becoming a province, until 1871.

Along with the introduction of common law to the colony of Vancouver Island, the creation of a settler-colony also necessitated the freeing up of land for that settlement. “Colonists would expect to own land in fee simple. Their ownership of land would depend, in turn, on the Crown’s prior sovereign rights, and on a system whereby land was allocated and surveyed.”⁷⁰⁰ To begin, this duty fell principally on Sir James Douglas, chief factor of HBC and later governor of Vancouver Island (1851) and British Columbia (1858), who was instructed to purchase Indian lands in the area.⁷⁰¹ In regard to the first instructions Douglas received, “Archibald Barclay, the secretary of the [HBC] Company, wrote from London outlining the general principles which the Governor and Committee authorized Douglas to adopt in treating with the Indian tribes.”⁷⁰² He wrote:

⁶⁹³ *The Oregon Treaty*, United States and United Kingdom, 15 June 1846.

⁶⁹⁴ C. Harris, *Making Native Space* at 15.

⁶⁹⁵ HMQBC, “Response to Civil Claim” at 6. Also see Richard Mackie, “The Colonization of Vancouver Island, 1849-1851”, *BC Studies*, no. 96, (Winter) 1992-93 at 6.

⁶⁹⁶ C. Harris, *Making Native Space* at xviii.

⁶⁹⁷ *Ibid.* Tennant, *Indian Land Question* at 17 also writes: “Between 1774 and 1849 nothing occurred that can reasonably be regarded as having affected aboriginal title in British Columbia. The trading companies did build fortified posts, but the few Whites were everywhere vastly outnumbered, and the companies did not seek to intrude directly into the life or politics of the Indians. Control over Indian societies and Indian lands thus “remained in Indian hands” [footnotes omitted].

⁶⁹⁸ This was principally done in response to the gold rush and influx of settlers through the region, and the need for control.

⁶⁹⁹ Tennant, *Indian Land Question* at 17.

⁷⁰⁰ C. Harris, *Making Native Space* at 17.

⁷⁰¹ “An Act to Provide for the Administration of Justice in Vancouver’s Island” (Brought from the Lords 5 July 1849) Ordered, by the House of Commons, to be printed, 5 July 1849. Cited in Mackie, *Unsettled Expectations* at 7. See also Wilson Duff, “The Fort Victoria Treaties”, *BC Studies* 3 (Fall 1969) 3 [Duff, “Fort Victoria Treaties”] for more on James Douglas and his approach to the Fort Victoria Treaties.

⁷⁰² Duff, “Fort Victoria Treaties” at 6. See also HMQBC, “Response to Civil Claim” at 7.

With respect to the rights of the natives, you will have to confer with the Chiefs of the tribes on that subject; and in your negotiations with them you are to consider the natives as the rightful possessors of such lands only as they occupied by cultivation, or had houses built on, at the time when the island came under the undivided sovereignty of Great Britain in 1846. All other land is to be regarded as waste, and applicable to the purposes of colonization.”⁷⁰³

Based on these instructions Douglas set out to purchase lands on Vancouver Island prior to settlement, eventually amounting to 14 treaties on Vancouver Island.⁷⁰⁴ Here I pause to make two points. First, that (at least initially) under the Douglas system some notion of Aboriginal title, or Indigenous ownership of the land, was accepted, something that later administrators would deny outright and that British Columbia, as a province, would strongly reject and counter for years to come.⁷⁰⁵ Aside from comprising the small number of historical treaties present in British Columbia,⁷⁰⁶ the Douglas treaties can be read as standing as “unequivocal recognition of aboriginal title.”⁷⁰⁷ Yet, the foundations of Barclay’s instructions to Douglas are clearly problematic and thoroughly colonial. “Douglas in fact departed from those instructions” but the logic was pervasive.⁷⁰⁸

It is clear that the notion of “property” underlying these negotiations is being informed in a Lockean way, in which not just labour, but a particular type of “civilized labour”, is the requirement for any type of claim to land. As W̱SÁNEĆ we cultivated numerous camas fields throughout our territory, but the “civilized” cultivation Barclay portrays in his letter to Douglas is based solely on a Eurocentric understanding of agriculture and “improvement”. Everything outside that conception is to be deemed “waste”. In other words, “nature” or “the commons” is not being used as it should and, within this logic, is free for the taking.

In addition to cultivation, Barclay also references land with “houses built on” it. W̱SÁNEĆ, in line with our governance structure, which was focused around the 13 moons of the

703 Randy Bouchard & Dorothy Kennedy, “An Ethnographic Examination of the First Nations’ Land Use of the area of Potential Selection: Pacific Marine Heritage Legacy” paper prepared for Professional and Technical Services Department of Canadian Heritage (31 March 1996) [Bouchard & Kennedy, “Ethnographic Examination”] at 26.

704 These treaties are principally based around southern Vancouver Island and comprise less than 3 percent of the land area of Vancouver Island (C. Harris, *Making Native Space* at 21). For more on these treaties in general, see Peter Cook, et. al., eds., *To Share, Not Surrender: Indigenous and Settler Visions of Treaty Making in the Colonies of Vancouver Island and British Columbia* (Vancouver: UBC Press, 2022).

705 James Douglas’ land policy seems to have shifted by the time the mainland colony of British Columbia was created, and subsequent administrators, such as Joseph Trutch and Peter O’Reilly, firmly denied Indigenous title and prior ownership. The Province of British Columbia also strongly rejected the applicability of the Royal Proclamation of 1763 to British Columbia.

706 The western boundary of Treaty 8 also extends into what is now British Columbia.

707 Tennant, *Indian Land Question* at 20.

708 *Ibid.* at 20.

W̱SÁNEĆ calendar,⁷⁰⁹ moved throughout our territory and various village sites, bringing the boards of our housing along with us for use.⁷¹⁰ While winter village sites would have appeared more permanent to European eyes, such a narrow understanding of village sites is inadequate. The temporary village site, ḴELJ̱I,EWEḺ, on the northern tip of ḺEḺ,TOS, is one such village site that was not considered within the narrow lens adopted in this process. The Eurocentric view of “the natives as the rightful possessors of such lands only as they occupied by cultivation, or had houses built on” is a clear mechanisms through which W̱SÁNEĆ claims and relationship to land, and thus W̱SÁNEĆ governance structures, were delegitimized and deeply infringed.

Nonetheless, in May of 1850 Douglas began to make treaties in the colony through nine separate agreements with Indigenous groups around Fort Victoria and along the Strait of Juan de Fuca.⁷¹¹ These agreements were oral, with Douglas having “the chiefs indicate their approval at the foot of a blank sheet of paper.”⁷¹² Approval was marked by an ‘x’ (all in the same hand) next to each name.⁷¹³ Douglas then wrote to Barclay to request wording for the agreements, which was added at a later date.⁷¹⁴ The wording that came was based on that used by “the New Zealand Company in purchasing land from the Maori.”⁷¹⁵ While the wording reflects an intention of the Imperial Crown of extinguishing title, Douglas was also meant to be guided by “principles established in New Zealand, where the native residents were granted rights to those lands under cultivation in addition to their right to hunt and fish in the customary manner.”⁷¹⁶

After these original nine treaties, centered primarily around Fort Victoria, Douglas entered two similar agreements in 1851 with the Kwagiulth at the north end of Vancouver Island, where HBC was developing coal deposits,⁷¹⁷ and in 1852, two additional treaties with W̱SÁNEĆ

709 Claxton & Elliott, *Saanich Year*.

710 Richling, *The W̱SÁNEĆ* at 31.

711 C. Harris, *Making Native Space* at 19.

712 Tennant, *Indian Land Question* at 19.

713 Duff, “Fort Victoria Treaties”.

714 This communication is provided in full in Arnett, *Terror of the Coast*. Also, for a record of these types of communications see *Papers Connected with the Indian Land Question 1850-19875* (Victoria: Printed by Richard Wolfenden, Government Printer, and the Government Printing Office, James Bay, 1875).

715 Tennant, *Indian Land Question* at 19.

716 *Ibid*. Also note that James Douglas previously wrote to HBC with his own recommendations. He wrote: “Some arrangement should be made as soon as possible with the notice Tribes for the purchase of their lands and I would recommend payment being made in the shape of an annual allowance instead of the whole sum being given at one time; they will thus derive a permanent benefit from the sale of their lands and the Colony will have a degree of security from their future good behaviour. I would also strongly recommend, equally as a measure of justice, and from a regard to the future peace of the colony, that the Indians Fisheries, Village Sites and Fields, should be reserved for their benefit and fully secured to them by law” (HMQBC, “Response to Civil Claim” at 7). For more on the Treaty of Waitangi, and more particularly modern treaty remedies, including granting legal personality to the environment (to be discussed in more detail in the next chapter), see Jacinta Ruru, “A Treaty in Another Context: Creating Reimagined Treaty Relationships in Aotearoa New Zealand” in John Borrows & Michael Coyle, eds., *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: UTP, 2017) [Ruru, “Treaty in Another Context”].

717 C. Harris, *Making Native Space* at 19.

on the Saanich Peninsula (the South Saanich and North Saanich Treaties), “where a steam sawmill company (in which Douglas was an investor) was contemplating operations.”⁷¹⁸ In 1854 one final agreement was made at Nanaimo, where HBC was contemplating development of another coal deposit.⁷¹⁹ After 1854 Douglas ceased entering into treaties on Vancouver Island, and on the mainland arranged no treaties at all.⁷²⁰ While these Treaties were entered into by the HBC, the HBC did so as an instrument of the Imperial Crown, and as such, the Supreme Court of Canada has ruled that they are in fact enforceable Treaties.⁷²¹ The written version of these Treaties states that:

The condition of our understanding of this sale is this that our village sites and enclosed fields are to be kept for our own use, for the use of our children, and for those who may follow after us, and the lands shall be properly surveyed hereafter; it is understood however, that the land itself, with these small exceptions, becomes the entire property of the white people for ever, it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly.⁷²²

Payment in consideration of these Treaties was made by “four bundles of blankets.”⁷²³

A number of court cases have since added some clarity to the seemingly broad scope of the promises made in the Treaty. *R. v. Bartleman* addressed the right to “hunt over the unoccupied land.”⁷²⁴ The court ruled that Bartleman was permitted to hunt over all unoccupied lands within W̱SÁNEĆ territory, not just those lands expressly mentioned in the written text of the Treaty.⁷²⁵ The court in *R. v. Morris* further confirmed that the Treaty protected the right to hunt “as formerly”, even when the hunting techniques used would normally be prohibited under the *Wildlife Act*.⁷²⁶ Interestingly, the lands in which Bartleman hunted out of season were

⁷¹⁸ *Ibid.*

⁷¹⁹ *Ibid.*

⁷²⁰ Tennant, *Indian Land Question* at 26.

⁷²¹ *Regina v. White and Bob* (1964), 50 DLR (2d) 613 (BCCA), aff’d (1966), 52 DLR (2d) 481 (SCC).

⁷²² Saanich Tribe – South Saanich, “Conveyance of Land to Hudson’s Bay Company by Indian Tribes” in *Papers Connected with the Indian Land Question 1850-1875* (Victoria: Printed by Richard Wolfenden, Government Printer, and the Government Printing Office, James Bay, 1875) [“Douglas Treaty, 1852”]. Note that the South Saanich and North Saanich Treaties have identical wording, except for the description of lands which they cover.

⁷²³ The Attorney General of Canada, Response To Civil Claim, Supreme Court of British Columbia, Victoria Registry, Court File No. VIC-S-S-180427 (Filed: 14 May 2018) [AGC, “Response to Civil Claim”]. Note that Canada also filed an Amended Response to Civil Claim (The Attorney General of Canada, Amended Response To Civil Claim, Supreme Court of British Columbia, Victoria Registry, Court File No. VIC-S-S-180427 (Filed: 25 July 2018) [AGC, “Amended Response to Civil Claim”].

⁷²⁴ *R. v. Bartleman* [1984] 55 B.C.L.R. 78 (B.C.C.A.) [*R. v. Bartleman*].

⁷²⁵ *Ibid.*

⁷²⁶ *R. v. Morris* [2006] 2 S.C.R. 915. Specifically, this case involved hunting at night with the use of a lamp.

privately owned, although still fell within the meaning of “unoccupied lands”. Unoccupied lands in W̱SÁNEĆ territory continue to shrink, meaning that our rights are continually reduced.

In *Claxton v. Saanichton Bay Marina Ltd.* the court turned to the right “to carry on our fishery as formerly”.⁷²⁷ In this case the Tsawout First Nation was able to obtain a permanent injunction against the creation of a marina in Saanichton Bay in that it would derogate the W̱SÁNEĆ fishery and thus the right to fish as formerly. It seems simple enough that a right to fish as formerly, if it is to have any meaning and substance at all, requires the ability to carry out that fishery, including the existence and maintenance of a healthy and sustainable fishery.⁷²⁸ Like mentioned above in regard to *R. v. Bartleman* and the continual shrinking of unoccupied lands, salmon stocks are largely decimated, the shell fish fishery is almost always closed due to pollution, and the Department of Fisheries and Oceans continues to operate in a way that give little serious consideration to these issues or their impacts on W̱SÁNEĆ inherent and treaty rights.

Despite the above caselaw, until Tsawout’s current claim for James Island, there has not been a case that attempts to clarify the right to “our village sites and enclosed fields” within the wording of the Treaty. Again, since the time of the treaty, the W̱SÁNEĆ land base has continued to shrink through dispossession. While sovereignty had been “settled” by the Oregon Treaty, and a number of treaties had been created, in the early 1850’s “there were only a handful of whites on Vancouver Island, and there was no reason for Natives to think that their own land uses were threatened by these few outsiders.”⁷²⁹ What had happened, though, was that the Douglas treaties opened up the agricultural land settlement that Douglas required, while also meeting the terms of the HBC grant.⁷³⁰ Control of this process had often been backed by “carefully choreographed display of violence, of which Douglas was a master.”⁷³¹ What was left, for Douglas, then, in entrenching control of this territory was the implementation of “the other two elements of his system: Indian reserves and Indian land pre-emption.”⁷³²

727 *Claxton v. Saanichton Bay Marina Ltd.* (1989) 36 B.C.L.R. (2d) 79 (B.C.C.A.).

728 I will return to the marine component of W̱SÁNEĆ territory in the next chapter, and make connection back to reserves and the work of D. Harris, *Landing Native Fisheries*.

729 C. Harris, *Making Native Space* at 24. Note that Tennant, *Indian Land Question* at 20 gives the following estimate: “by 1852 fewer than five hundred Britons had emigrated to the Island colony, and about thirty had made some move to acquire land.” Regardless, Indigenous populations far outnumbered settler populations.

730 C. Harris, *Making Native Space* Harris at 21.

731 C. Harris, *Making Native Space* at 22.

732 Tennant, *Indian Land Question* at 31.

Policies around reserve creation throughout British Columbia are best understood through reading the legal historians who have already undertaken this work.⁷³³ Generally speaking, the four reserves Douglas established in W̱SÁNEĆ were amongst the earliest in British Columbia given their proximity to Fort Victoria.⁷³⁴ While Douglas' approach to reserves and the land question differed on the mainland as compared to his early years on Vancouver Island, it is also the case that subsequent policies and administrators followed an even more racialized and subsequently restrictive allocation policy, which outright denied any Indigenous ownership or rights to land. Some of the broader processes of reserve creation in British Columbia, including the Joint Indian Reserve Commission and the McKenna-McBride Commission, will be discussed more directly in specific relation to the arguments made in pleadings for the court action regarding LEL, TOS.

The final general point to be made on Douglas' reserve and land policy relates to the issue of pre-emption. "The ability to occupy and farm vacant unowned land as the first step in obtaining eventual ownership of it, that is, to pre-empt it, was a major aspect of white settlement on both the Island and the Mainland. Indeed, the ability of an enterprising individual to obtain free farm land and make it his own through his own labour was central to the white immigrant dream throughout North America."⁷³⁵ What was unique about Douglas' land policy was that Indians could also pre-empt land, although even when permissible it remained largely unattainable for those who might choose to.⁷³⁶ Douglas' approach was therefore two pronged – remove the Indians and place them onto reserves,⁷³⁷ or induce them into giving up traditional ways (in other words, an assimilationist and civilizing agenda).⁷³⁸

While the Imperial British Crown may have at first had some notion of protecting some interests of the Indigenous populations in what is now British Columbia,⁷³⁹ by the time British Columbia joined confederation in 1871 the stage was set for tension between the provincial and

733 See particularly C. Harris, *Making Native Space* and D. Harris, *Landing Native Fisheries*.

734 See C. Harris, *Making Native Space* at Appendix I for a table illustrating the reserves of British Columbia, their size, when they were created, and who created them.

735 Tennant, *Indian Land Question* at 34.

736 See C. Harris, *Making Native Space* at 36 for requirements. This ability was terminated in 1866 (Tennant, *Indian Land Question* at 41).

737 C. Harris, *Making Native Space* at 17 writes: "[Native peoples] were spread across the land, and if colonization were to proceed, they had to be got out of the way. Settler would have to know that their title was secure and that they could keep Native people of their newly acquired properties."

738 "Widespread Indian pre-emption could occur only if many Indians were willing to give up traditional ways, to live in solitary families, to become farmers, and to forget aboriginal title. Pre-emption would be a process drawing out those Indians most amenable to assimilation and to co-operation with Whites" (Tennant, *Indian Land Question* at 35).

739 See, for example, George R, Proclamation, 7 October 1763, reprinted in RSC 1985, App II, No. 1 [Royal Proclamation 1763]. The Province of BC rejected that the Royal Proclamation 1763 had any application to British Columbia (Tennant, *Indian Land Question* at 11).

federal governments on the issue of Indigenous land rights and reserve land allocation.⁷⁴⁰ The province would not convey title of Indian reserves to the federal government (a promise made upon entering Confederation) until 1938 (67 years later).⁷⁴¹ In fact, during that time the province actively hindered and undermined protections of Indians and Indian land, something the federal government did little to push back against.⁷⁴² As we will see in the pleadings regarding the claim for LEL,TOS, the province continues to take the more troubling position.

Prior to discussing that court action in greater detail, for proper context we must first take a more detailed look at the specific history on LEL,TOS.

4. History and the Harm to LEL,TOS

LEL,TOS has had a long and unique history. In 1854 it was named James Island, after Sir James Douglas, Governor of Vancouver Island.⁷⁴³ In December of 1874 the Scottish family Munro purchased 201 acres and settled James Island.⁷⁴⁴ The family farmed the island until 1910. In 1907, Sir Richard McBride, premier of British Columbia, established a private hunting club on the island. Various foreign species were imported for this purpose, most notably the fallow deer that still occupy the general area today.⁷⁴⁵

Between approximately 1904-05 local First Nations were ordered to vacate James Island in anticipation of building a planned munitions plant.⁷⁴⁶ In 1915 the island changed ownership when Canadian Explosives Ltd. purchased 330 acres of the island.⁷⁴⁷ Prior to 1915, the Victoria Chemical Co. and the Nichols Chemical Co. were manufacturing nitro-glycerin in both Victoria and Nanaimo. Local residents were becoming increasingly annoyed with the heavy pollution and dangerous works. In response, both plants were closed and the companies amalgamated into Canadian Explosives Ltd. (CEL). CEL then proceeded to establish the “largest powder

⁷⁴⁰ *British Columbia Terms of Union* (UK), 1871, reprinted in RSC 1985, App II, No. 10 [“*BC Terms of Union*”] (See <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/constitution/lawreg-loireg/pl141.html>). Under the Distribution of Legislative Powers the federal government, by way of *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3, s.19(24) reprinted in RSC 1985, App II, No. 5 are to have jurisdiction over “Indians and lands reserved for Indians.” C. Harris, *Making Native Space* at xxvii: “By the 1871 terms of union, Native peoples in the new province became a federal responsibility and land a provincial one, a division that laid the basis for a great deal of federal-provincial wrangling over reserve land allocation.”

⁷⁴¹ Tennant, *Indian Land Question* at 114.

⁷⁴² See *ibid.* as well as C. Harris, *Making Native Space* for much more discussion on this point.

⁷⁴³ Bond, *James Island* at 10.

⁷⁴⁴ *Ibid.* at 9.

⁷⁴⁵ *Ibid.* at 11. Importing foreign species is damaging to the natural ecology of the island.

⁷⁴⁶ Susan Chung, “An Island Under Question” *The Times Colonist* (2 December 1996) A1 from Sidney Archives, Vertical File Subject: James Island [Chung, “An Island Under Question”].

⁷⁴⁷ Bond, *James Island* at 11.

manufacturing plant in Canada on James Island.”⁷⁴⁸ One reason for the move to James Island was mitigating the negative impacts the factory would have had on the private owners and citizens of Victoria and Nanaimo.⁷⁴⁹ However, the impact this move had on the local First Nations was not (and is still not) mitigated in the same way.

Once industrial development was underway, the island grew enormously in terms of population and development. At one point more than 1,200 people lived on the island (many in tents to begin with). Eventually, the village on the island would have its own local store, proper sidewalks, cinema, bowling alley, school, post office, railway, housing units, and even a Chinatown. At the peak of its production, the dynamite factory on the island produced 2 million pounds of TNT monthly. Over the period of World War I the factory produced 35 million pounds of explosives to aid the war effort.⁷⁵⁰ In the event of an accident, this amount of explosives would have been enough to demolish not only the island, but the peninsula and Victoria as well. While such an accident was avoided, severe contamination of the island was not.

After the war, a significant percentage of the population left the island. Eventually, in 1961 CEL closed the village, leaving most residents to move their houses by barge to new locations. In 1977 timber rights on the island were granted to J. Langdon Logging. In one year the company harvested over one million board feet of Douglas fir, hemlock, balsam and red cedar.⁷⁵¹ Certainly, clear-cutting portions of the island would have been detrimental to its ecological integrity and was something W̱SÁNEĆ people clearly view as inconsistent with our obligations to TEṮÁĆES. Regardless, the dynamite plant continued to operate up until 1978, and in 1979 was demolished.⁷⁵² A subsidiary company of CEL would continue to manufacture nitro-carbo-nitrates on the island until 1985.

When CEL left the island they did virtually no clean up, leaving James Island significantly contaminated. The island was left with “large quantities of contaminated soil, heavy

⁷⁴⁸ *Ibid.* at 12.

⁷⁴⁹ *Ibid.* at 13.

⁷⁵⁰ *Ibid.* at 16-28. Also see Ken Hancock & Gary Steeves, “The James Island Issue: A Solution For An Ill-Treated Island?” *Island Tides* (4 October 2007) at 8 from Sidney Archives, Vertical File Subject: James Island [Hancock & Steeves, “A Solution For An Ill-Treated Island”]. Ken Hancock and Gary Steeves are Trustees on the North Pender Island Local Trust Committee (LTC). The LTC seeks to protect the ecological integrity of several local islands, now including James Island.

⁷⁵¹ Bond, *James Island* at 54.

⁷⁵² As will be briefly discussed later, the word “demolished” is very appropriate for the actions taken in closing the plant. Little effort appears to have been given to clean up. My grandfather used to work on the island and has told me that the rail cars that were at one time used to transport dynamite to the shipping dock were simply driven off the rails into the ocean. In her book, Bond, *James Island*, Bea Bond notes that the wooden building were simply “torched” at this time.

fuel oil storage tanks, crates of buried explosives and other remnants of seven decades of industrial use.”⁷⁵³ In the late 1970’s, federal fisheries officials granted CEL permission to dump 6,000 cubic meters of soil contaminated with lead, mercury and other residues into the ocean off the west coast of Vancouver Island.⁷⁵⁴

Without question, the unfettered contamination and degradation associated with the industrial use of James Island is something completely offensive to the W̱SÁNEĆ legal tradition. Drawing on the story of TETÁĆES (‘Relatives of the Deep’), as W̱SÁNEĆ people we view ourselves as stewards of the land, and we have to understand the harm to both LEL,TOS and the W̱SÁNEĆ people through that lens. The harm extends beyond the physical (although that was immense) to include damage to W̱SÁNEĆ culture, beliefs, and legal system. Despite this fact, plans to further develop James Island once again arose in 1988.

In 1988 James Island was sold to Pacific Parkland Properties (PPP). In purchasing the land PPP envisioned James Island as a world-class golf resort. Jack Nicklaus (the premier course designer in North America) was brought in to develop the course. Reid Topp, PPP’s managing director, was quoted as saying: “We want the top course in North America. There are no parameters [on the design]. What [Jack Nicklaus] wants, he gets.”⁷⁵⁵ Certainly a design with no parameters is troubling on an island with archeologically sensitive material (including a temporary village site, shell midden and burial ground). It also pays no attention to the agency of LEL,TOS herself. Aside from the 18-hole golf course, plans for the resort also included a 64,000 square foot clubhouse, 210 residential lots, a public marina, public swimming pool and tennis court, restaurant, paved roads, and a ferry system to transport golfers.⁷⁵⁶

W̱SÁNEĆ people were not the only group concerned with a development of this magnitude on James Island. In response to these development plans, the North Pender Island Local Trust Committee (North Pender LTC) stepped in to protect James Island’s sensitive environmental qualities and species.⁷⁵⁷ The island is home to several rare species. It is one of the

753 Ken Hancock & Gary Steeves, “The “James Island Issue”: A Local Trustee’s Perspective” from Sidney Archives, Vertical File Subject: James Island [Hancock & Steeves, “A Local Trustee’s Perspective”].

754 Bill Smith, “They’re one step closer to ‘paradise’: James Island soil, water checks planned” *The Times Colonist* (15 September 1990) B11 from Sidney Archives, Vertical File Subject: James Island.

755 Girard Hengen, “Golden Bear makes the rounds on James Island course” *The Review* (13 November 1991) A25 from Sidney Archives, Vertical File Subject: James Island.

756 Hancock & Steeves, “A Solution For An Ill-Treated Island” and Hancock & Steeves, “A Local Trustee’s Perspective”.

757 “Islands Trust is a special purpose government mandated to preserve and protect over 450 islands in the Salish Sea” (Islands Trust, “Overview of Islands Trust” website at <https://islandstrust.bc.ca/about-us/overview-of-islands-trust/>). Islands Trust was created in 1974 by the Government of British Columbia through enacting the *Islands Trust Act* [RCBC 1996] c. 239. Islands Trust is broken up into a number of different Local Trust Areas, one of which is the North Pender Local Trust Area. LEL,TOS (or James Island) falls within the North Pender Local Trust Area. In terms of governance, each Local Trust Area elects two representatives to sit on the Islands Trust Council. The Islands Trust Council

few locations where the common nighthawk, a threatened species according to the Committee on the Status of Endangered Wildlife in Canada, can safely nest. Additionally, the yellow sand verbena, a rare flower existing in only a few micro-ecosystems, as well as the yellow sand verbena moth, a moth which eats only the nectar from the flower, are found on James Island. The contorted-pod evening primrose is federally listed as endangered, and is found in only five other places in the world - James Island having the largest population. The graceful arrow-grass is provincially red-listed, and the extremely rare Edward's beach moth (which only exists in a few locations on the Pacific coast), are also both located on the island.⁷⁵⁸ In an attempt to protect these species, the North Pender LTC implemented new land use by-laws. The sensitive areas were set aside as public parks. Since such time there has been debate over whether the lands should be protected as parks (which could potentially threaten the species through allowing too much human interaction) or conservation (which would prohibit human access).⁷⁵⁹

The cost of rehabilitating the island, given the decades of industrial use, proved too costly for PPP and plans for the development were abandoned.⁷⁶⁰ In 1994 PPP sold the island to JI Properties, a company owned by Seattle billionaire Craig McCaw. The following section illustrates McCaw's environmental conscience, but also his desire to keep James Island private. While environmental conservation of the island is admirable as compared to previous devastation of the island, the conservation covenants provide virtually no access to James Island and are problematic for the WSÁNEĆ people (who strive to remain connected with our traditional territory).

4.1. The McCaw Era

consists of 26 members, from which the Council will then elect a Chair and three vice-chairs. In addition to the Islands Trust Council, there are Local Trust Committees. Local Trust Committees are made up of the two locally elected representatives to the Islands Trust Council, along with the Chair or a vice-chair of the Islands Trust Council. This three person Local Trust Committee takes up local land-use planning within the Local Trust Area. The North Pender Local Trust Committee is this body for the North Pender Local Trust Area within Islands Trust.

⁷⁵⁸ Andrew Findlay, "An Island of His Own" *Harbour Air Magazine* (July 2010) [Findlay, "An Island of His Own"] at 14.

⁷⁵⁹ A parkland designation, by its nature, provides for public access to the protected area. Parkland is protected for the benefit of the public. Therefore, the general public can access the park for their enjoyment, interest or education. Land that is subject to a conservation covenant is protected for the quality of the ecological resource. Public access is not permitted because it would provide undue hardship on the environmentally sensitive area. Conservation and parkland designations each have their own unique benefits. In terms of James Island, debate centered around which approach was favourable in protecting these rare and environmentally sensitive area. Because high levels of human interaction might threaten the sensitive ecology and species on James Island, a parkland designation might be costly. However, the land now subject to the conservation covenants were previously designated as parkland when Pacific Parkland Properties proposed the development of a world-class golf resort. On the other hand, a conservation covenant has the benefit of better protecting sensitive habitat and species. However, the fact that James Island contains rare ecosystems and species might influence allowing public access. Observation of these ecosystems and species might not be possible in many other locations.

⁷⁶⁰ The Ministry of Environment held a covenant which required extensive remediation work to be done.

Craig McCaw purchased James Island for US\$19 million in 1994. McCaw immediately dedicated his personal finances to removing the large quantities of industrial waste and invasive species that littered the island as a result of its past uses. More specifically, contaminated soil was replaced with new clean soil, the large amount of invasive scotch broom and buried oil storage tanks and explosives were removed, and the female members of the invasive and rampant fallow deer population were sterilized with an injection to prevent further problems. McCaw even banned gas-powered vehicles from operating on the island. Aside from the single fire-truck, only electric vehicles are permitted on the island. In rehabilitating the island, money has not been an object.⁷⁶¹

After remediating the island, McCaw has set about realizing his vision of an ‘eco-paradise’ where like-minded wealthy individuals can enjoy the splendors of nature. McCaw has been working closely with the North Pender LTC and the Nature Conservancy of Canada (NCC)⁷⁶² to amend by-laws, put protective land covenants in place, and re-zone the island to better reflect his vision.⁷⁶³ The residential zoning on the island was decreased from 201 lots to 80 lots, and the commercial zoning was reduced from 377,000 square feet to 35,000 square feet.⁷⁶⁴ Approximately 20% of the island has also been set aside for conservation purposes.⁷⁶⁵ In moving toward his vision of an ‘eco-paradise’ retreat, McCaw has made applications to subdivide portions of the island. Per the *Local Government Act* a subdivision of this nature would require McCaw to provide park land on the island in an amount acceptable to the local government.⁷⁶⁶ As opposed to dedicating the minimum 5% of the island to parkland, JI Properties has opted to pay \$1.5 million in lieu of the designation.

McCaw also had plans in place to expand the existing marina located in Melanie Bay on the island. The proposed marina was to be expanded by 0.31ha to meet the larger demands

761 For more discussion on the rehabilitation efforts mentioned above, see Hancock & Steeves, “A Solution For An Ill-Treated Island” and Hancock & Steeves, “A Local Trustee’s Perspective”. Also see Findlay, “An Island of His Own”.

762 The Nature Conservancy of Canada is a private, non-profit national land conservation organization. The NCC works with various partners in working toward their conservation goals. See the Nature Conservancy Canada website at <https://www.natureconservancy.ca/en/> for more information.

763 The scope of this chapter does not permit a detailed analysis of each of these applications and advancements. For more information refer to Victoria, *Islands Trust*, James Island File # NP-RZ-2005.1.

764 Hancock & Steeves, “A Solution For An Ill-Treated Island” and Hancock & Steeves, “A Local Trustee’s Perspective”.

765 See North Pender Island Local Trust Committee Bylaw No. 169, Schedule 3 “Land Use Map” for a map of the zoning for the island.

766 Section 510(1)(a) and (b) of the *Local Government Act* RSBC 1996, Ch. 323 requires where land is being subdivided that the owner provide park land in an amount acceptable to the local government (in this case it appears to be a 5% dedication of the land to parkland) or to pay an amount equal to market value of that land in lieu of the dedication. The section 219 Covenant Agreement between J.I. Properties and North Pender Island Local Trust Committee (10 June 2008) from Victoria, *Islands Trust*, James Island File # NP-RZ-2005.1 indicates that JI Properties has chosen to pay cash in lieu of the designation. Presumably the decision to provide cash in lieu of parkland was to maintain privacy and to promote conservation over access. The Capital Regional District can use this \$1.5 million to purchase parkland elsewhere.

associated with this ‘eco-paradise’.⁷⁶⁷ A biological assessment was conducted in connection with the marina expansion, showing no significant impact on habitat.⁷⁶⁸ The expansion has not yet happened.

Consistent with his vision, McCaw has placed several covenants on the island to protect its sensitive species and ecology.⁷⁶⁹ Notably, one of the covenants is designed to allow access to the island for educational and research purposes. It was noted above that for some time debate has centered on whether the sensitive areas of the island are best protected through parkland or conservation measures. Ultimately, McCaw’s large conservation efforts provided the incentive necessary to sacrifice public access to the island. While the covenants are admirable in their protection, each of them is very clear in maintaining complete private ownership and access to the island.⁷⁷⁰

Negotiating the abovementioned educational and research covenant was likely important to the LTC and NCC due to the rare and fragile flora and fauna located on the island. Under the covenant the NCC and LTC are each solely responsible for determining the qualifications of applicants requesting access for education and research purposes. In defining “Educational and Research Purposes” the covenant stated:

“Educational and Research Purposes” means the purposes of reasonable and *bona fide* education and research relating to wildlife and habitat located upon the Lands and within the Conservation Areas by researchers and primary, secondary, post-secondary and other students, based upon applications to the NCC and to the Local Trust Committee for access across the Lands.⁷⁷¹

It is unclear if cultural education would fall within this scope, or if any WSÁNEĆ member has ever applied for or been granted access in such a manner.

⁷⁶⁷ See Michael Claxton, Land Surveying Inc. “Site plan to accompany an application for area of unsurveyed Crown Foreshore or land covered by water being part of the bed of Cordova Channel, Cowichan District and accompanying documents from Victoria, *Islands Trust*, James Island File # NP-RZ-2005.1.

⁷⁶⁸ James Island – Melanie Bay Marina Proposal – Biological Assessment (18 February 2010) from Victoria, *Islands Trust*, James Island File # NP-RZ-2005.1. I am not surprised by these findings. The current marina has been in existence for some time and previous use has likely already negatively altered the habitat. Note that the Supreme Court of Canada in *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43 ruled that consultation is required where there is a causal relationship between the proposed government action or decision and the potential for adverse effects on the Aboriginal claimant’s rights. Therefore, continuing breeches, including past failures to consult, will not trigger the duty to consult unless the present action potentially creates a novel impact. The Court ruled that damages are a more appropriate remedy in such circumstances.

⁷⁶⁹ The covenants on various areas of the island include a subdivision control covenant, an environmental conservation covenant, an existing parks covenant, a wildlife trees protection covenant and a raptor nesting protection covenant. Statutory right of ways, including an educational access right or way, are also in place. See Victoria, *Islands Trust*, James Island File # NP-RZ-2005.1 for more information.

⁷⁷⁰ Refer to Victoria, *Islands Trust*, James Island File # NP-RZ-2005.1 for more information.

⁷⁷¹ Statutory Right of Way Agreement between J.I. Properties Inc., North Pender Island Local Trust Committee and The Nature Conservancy of Canada (10 June 2008) from Victoria, *Islands Trust*, James Island File # NP-RZ-2005.1.

McCaw has certainly shown a willingness to care for the island in ways previous owners have not. However, he has also clearly been determined to keep the island as private as possible throughout much of his ownership. The general public and First Nations alike are not permitted on the island, although more recent attempts at relationship building with W̱SÁNEĆ Bands have been started. Everything above the high-water mark is, however, private property. Jason Thrupp, the island manager and caretaker, has in several interviews previously confirmed his duty to keep trespassers of the island.⁷⁷² Stemming from an interview of Thrupp, Andrew Findlay for *Harbour Air Magazine* characterized McCaw's guests as "often include[ing] members of the business and social elite" looking to avoid the public and escape into nature.⁷⁷³

The tone of words from those close to McCaw over the last several decades does not indicate much willingness to allow access to the island. A strong indication came in 1996 from the words of Bob Ratliffe, a long-time friend of McCaw and vice-president of Eagle River (the company which manages McCaw's properties). In response to a question regarding the Tsawout band's attempt to reach McCaw, Ratliffe stated he had only heard rumors of these attempts. In commenting further on the archaeological significance the island might have to the Band, he stated, "The island has been so chewed up by the previous ownership and by the munitions plants...it's hard to imagine there's anything there."⁷⁷⁴ He went on to further discuss his opinion about conducting archaeological excavations on the island at that time. "If they want to go out and start digging, we'd have something to say about it. [But he did believe the island might be sold]. Everything is for sale at a price." Ratliffe seems to be implying that if the island was worth that much to the Tsawout Band, they could always choose to make an offer of purchase. To me, these statements clearly miss the point, though also shed light on prevalent settler attitudes and assumptions about property, particularly the right of exclusion. Not only does this pose difficulties for W̱SÁNEĆ attempts to access and maintain relationships with the island, it also highlights a gap between settler and W̱SÁNEĆ understandings of the harm and loss W̱SÁNEĆ people feel in respect to LEL,TOS.

It is not widely understood that LEL,TOS is intimately connected to the W̱SÁNEĆ way of life. The land is integral to (and cannot be separated from) our culture, our belief system, and or

⁷⁷² See Findlay, "An Island of His Own" and Chung, "An Island Under Question" for more.

⁷⁷³ Findlay, "An Island of His Own" at 18.

⁷⁷⁴ Chung, "An Island Under Question" at A1.

our legal system. The final sections of this chapter will be meant to help bridge the gap in understandings between the W̱SÁNEĆ people and settler individuals. Until the parties involved with James Island achieve a deeper understanding of these issues it will not be possible to have any meaningful discussion around the development, privatization, and historical mistreatment of LEL,TOS. The extent of these disagreements came to a head with the Tsawout First Nation launching a court action for the return of LEL,TOS to the W̱SÁNEĆ people. Discussion of that action will allow us to start to merge the various discussions and histories related up to this point of the chapter.

5. Broken Treaty and Severed Relationships

In January of 2018 the Tsawout First Nation filed a Notice of Civil Claim in which it sought, among other things, an order of specific performance whereby the owner of James Island would transfer ownership of the island back to Tsawout, after receiving compensation from either the Federal or Provincial government.⁷⁷⁵ The central argument made by Tsawout relates to a breach of the Douglas Treaty of 1852, under which the Crown was required to set aside Tsawout's village sites and enclosed fields.⁷⁷⁶ Tsawout maintained a village site at James Island. However, as opposed to being set aside under the terms of the Treaty, it was soon pre-empted and Crown grants were issued. As I just related, the island ultimately became privately owned and the W̱SÁNEĆ people were forced off and excluded from the island and our traditional relationships with that place.⁷⁷⁷ Canadian law, including its system of private property and the corresponding tort of trespass, has supported and maintained that dispossession. Since James Island has long been in fee-simple ownership it presents unique challenges to retain access, maintain relationships, and ultimately recover legal rights and responsibilities to the island; which Tsawout has long desired to accomplish.

As described above, Douglas was instructed to utilize a Eurocentric understanding of property in negotiating these treaties. The issue, however, is not only that the colonial logic of

⁷⁷⁵ Tsawout, "Notice of Civil Claim". Tsawout also filed Tsawout, "Amended Notice of Civil Claim", in which they removed J.I. Properties Inc. (the owner of the Island) as a Defendant in the proceedings.

⁷⁷⁶ "Douglas Treaty, 1852".

⁷⁷⁷ At the time of the signing of the Douglas Treaty (1852) most of W̱SÁNEĆ territory would have been characterized as "unoccupied lands" (in the wording of the Treaty). Today, quite the opposite is true, with most of W̱SÁNEĆ territory either in fee-simple ownership, or designated as Federal or Provincial park lands. The type of constant "slow violence" that resulted in this scenario is well exemplified in connection with LEL,TOS (Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (Cambridge: Harvard University Press, 2011) [Nixon, *Slow Violence*]).

property and sovereignty were used as a tool to delegitimize W̱SÁNEĆ claims and connections to land, but also, that in many ways the same logic remains firmly entrenched in both the Federal and Provincial government's approaches to arguing against the W̱SÁNEĆ's claim and connection to James Island.

Tsawout is arguing that pursuant to the Treaty the Crown had an obligation to protect and survey all W̱SÁNEĆ village sites and enclosed fields, of which James Island was one. In the alternative, Tsawout argues that they have Aboriginal title to James Island. The argument is strong and straightforward in the sense that James Island was either a village site and burial ground, and therefore should have been protected by the Treaty, or, if it is found not to be within the scope of the Treaty for any reason, then Aboriginal title would remain as a burden on the Crown's assertion of sovereignty. Both the Federal and Provincial governments feel the need to argue that neither of these claims are the case.⁷⁷⁸

Since W̱SÁNEĆ were not in the habit of using fences, enclosed fields seem to have essentially come to coincide with village sites, and more specifically, the particular village sites that were in use at the precise time of the Treaty signing. The Province, for instance, has argued that the village sites and enclosed fields where W̱SÁNEĆ were residing "by 1846 or by 1852, and at all material times thereafter" coincide with the four primary reserve locations set aside for the W̱SÁNEĆ Bands.⁷⁷⁹ The Attorney General of Canada (AGC) similarly argued that the lands set aside fulfilled any obligations regarding village sites and enclosed fields. In addition, the AGC argues that there were "common intentions, understanding, and expectation that only those village sites and enclosed fields in actual use and occupation as village sites and enclosed fields by the Saanich Tribe and located on the Saanich Peninsula would be set aside for the use of the Saanich Tribe and surveyed thereafter."⁷⁸⁰ Both the AGC and the Province assert that there was no obligations to set aside James Island as a village site, and that Tsawout's connection with James Island does not qualify as Aboriginal title. Both levels of government claim some quality of absence or mobility in negating these claims.⁷⁸¹ In short, Tsawout did not occupy James Island in a sufficient way.

778 The Attorney General of Canada did soften their wording in an Amended Response to Civil Claim (AGC, "Amended Response to Civil Claim") recognizing the need under Canadian law to consider Indigenous understandings of the Treaty, which may include oral traditions of the Treaty. In short, they "respectfully acknowledge" Tsawout's claims but remain firm on their positioning.

779 HMQBC, "Response to Civil Claim" at 8-9.

780 AGC, "Response to Civil Claim" at 18.

781 See Borrows, *Freedom* at Chapter One: Physical Philosophy: Mobility and Indigenous Freedom for commentary on issues around mobility.

The AGC references the oral tradition of WSÁNEĆ and movement of village sites in response to the “introduction of infectious diseases” and to war and raiders from the north.⁷⁸² The implication of the movement, it is argued, has implications for both the treaty and title claims made by Tsawout. That is, as a result of this movement, James Island was not a village site at the time of the Treaty and so there was no requirement to set it aside, or in regard to title, that Tsawout did not have exclusive and continuous occupation of the island to meet the requirements for Aboriginal title. Within the Canadian law Aboriginal rights and title framework these arguments are not a particularly surprising or novel way of delegitimizing Indigenous claims. However, they completely mischaracterize the issue through the lens of WSÁNEĆ law. Movement can never equate with an abandonment of responsibility and connection, or relationality. That is, moving from one place to another does not mean that relationship with that other place stops, or that a connection to that place somehow disappears. As will be discussed in regard to a relational ontology, in the sections that follow, particular relationships are contextual and may shift over time, but the fact of those relationships is inescapable.

Beyond arguments regarding Tsawout presence at James Island at the time of the Treaty, both the AGC and the Province essentially argue that Tsawout acquiesced for almost the last 170 years to James Island not being set aside as a village site under the terms of the Treaty.⁷⁸³ The Province takes a particularly troubling stance, stating that if there ever was a village site on James Island, it had been “permanently abandoned” when WSÁNEĆ “voluntarily took up residence on lands now contained within the Colonial Reserves.”⁷⁸⁴ The flippant claim that any Indigenous group “voluntarily” moved to colonial reserves, while “permanently abandoning” the rest of their traditional territory, is ridiculous and only perpetuates the oppressive use of power and the coinciding harms which characterize colonialism since the outset. It also ignores the ways in which the colonial system made it virtually impossible for an Indigenous group to legally challenge the dispossession that was occurring.⁷⁸⁵

Tsawout, of course, asserts that LEL, TOS remained an important location and area of use at the time of the assertion of sovereignty, and until the 1870’s when British Columbia “forced

782 AGC, “Response to Civil Claim” at 9.

783 AGC, “Response to Civil Claim” at 18.

784 HMQRBC, “Response to Civil Claim” at 9.

785 In 1927 the *Indian Act* was amended to include s. 141, which made it illegal to gathering funds or hiring legal counsel.

the remaining [W̱SÁNEĆ] members off the island.”⁷⁸⁶ Although “Band members were not allowed to return to James Island to reside or harvest any of its resources”⁷⁸⁷ my late grandfather, Earl Claxton Sr., noted that W̱SÁNEĆ continued to occupy ḴELJ,EWEL until the 1930s or 1940s.⁷⁸⁸ The fact that I can reiterate the creation story of ṮEṮÁĆES and of ḺEL,TOS means that colonialism, despite its best attempts, including present attempts through troubling arguments and standards for claiming Aboriginal title and treaty rights, has failed to erase our responsibilities, laws, and connections to our homelands, and specifically, to James Island.

Both the AGC and the Province argue that the four reserves on the Saanich Peninsula satisfied any and all obligations under the Treaty.⁷⁸⁹ Yet, additional reserves were also later identified as necessary and set aside in the process of settling the Indian Land Question.⁷⁹⁰ As mentioned, the colony of British Columbia joined confederation in 1871.⁷⁹¹ Soon after, in 1876, the first *Indian Act* was enacted in Canada.⁷⁹² The same year, 1876, Canada and British Columbia determined to settle their disagreements regarding reserve lands allocation. The Joint Indian Reserve Commission,⁷⁹³ and subsequently, the McKenna-McBride Commission⁷⁹⁴ set out to settle these questions. The Province, for example, specifically argues that Tsawout should have raised the issue of James Island not being included as a reserve at these times, while additional reserves were being added.⁷⁹⁵ Again, such a comment is willfully ignorant to the fact

⁷⁸⁶ Tsawout, “Notice of Civil Claim” at 6.

⁷⁸⁷ *Ibid.* at 6.

⁷⁸⁸ Millennia Research Limited, “Archaeological Reconnaissance Proposed Re-zoning Application James Island” prepared for James Island Properties Inc. (7 June 2006) [Millennia Research, “Archaeological Reconnaissance”] at 6.

⁷⁸⁹ These reserves are described in the HMQBC, “Response to Civil Claim” at 8-9 as follows: “Indian Reserve No. 1 on the western side of the Saanich Peninsula (Brentwood Bay) (475 acres), now occupied by the Tsartlip Indian Band; Indian Reserve No. 2 on the eastern side of the Saanich Peninsula (Saanichton Bay) and directly across from James Island (593 acres), now occupied by the Tsawout Indian Band; Indian Reserve No. 3 on the [western] side of the Saanich Peninsula (Coles Bay) (698 acres), now occupied by the Paquachin Indian Band; and Indian Reserve No. 4 on the [western] side of the Saanich Peninsula (Patricia or Union Bay) (65 acres) now occupied by the Tsecum [*sic*] Indian Band.”

⁷⁹⁰ Additional reserves listed by the HMQBC, “Response to Civil Claim” at 10 is as follows: “Indian Reserve No. 5 in Fulford Harbour, Saltspring Island (43 acres); Indian Reserve No. 6 on Mayne Island on Active Pass (323 acres); Indian Reserve No. 7 on Saturna Island (360 acres); Indian Reserve No. 8 on Pender Island (8 acres); Indian Reserve No. 9 on Bare Island (26 acres); Indian Reserve No 10 on Seanus [*sic*] Island (39 acres); Indian Reserve No 11 on the Malahat on the western side of Finlayson Arm (568 acres); Indian Reserve No. 12 in the Shawnigan District (92 acres); and Indian Reserve No. 13 at Goldstream (12)”. Note that Indian Reserves No. 11 and 12 are connected specifically with the Malahat First Nation, which no longer specifically identifies as W̱SÁNEĆ.

⁷⁹¹ “*BC Terms of Union*”.

⁷⁹² Chap. 18, *An Act to amend and consolidate the laws respecting Indians* (Assented to April 12, 1876) [*Indian Act, 1867*] available at https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/1876c18_1100100010253_eng.pdf.

⁷⁹³ The Joint Reserve Commission was established by the federal and provincial governments to fix the boundaries of Indian reserves in British Columbia. See the Union of British Columbia Indian Chiefs webpage for more information at <http://jirc.ubcic.bc.ca/>.

⁷⁹⁴ Canada, Privy Council Office, *Report of the Royal Commission on Indian Affairs for the Province of British Columbia (1913-1916)* [aka the McKenna-McBride Commission] (Victoria: Printed by Acme Press Ltd., 1916) available online at <https://publications.gc.ca/site/eng/9.828361/publication.html>. See also the Union of British Columbia Indian Chiefs webpage for more information at https://www.ubcic.bc.ca/mckenna_mcbride_royal_commission.

⁷⁹⁵ HMQBC, “Response to Civil Claim” at 10.

of the pervasive racist ideology and structures in which those commissions existed, and the fact that existing reserves also risked being made *smaller* during this time.⁷⁹⁶ Additionally, by 1873, approximately three years before the Joint Reserve Commission, James Island was surveyed and subdivided into four lots, followed by pre-emptions and Crown Grants beginning in 1874.⁷⁹⁷ Interestingly, in 1907, roughly six years before the McKenna-McBride Commission, “a syndicate of British Columbia’s political elite, including then Premier Richard McBride” established a private hunting reserve on James Island.⁷⁹⁸ None of this could be seen as particularly conducive to a political climate in which a successful attempt by Tsawout to have the island set aside as a reserve would be in any way likely.⁷⁹⁹

In terms of the Douglas Treaty, James Island is not specifically included in the wording or lands identified in the Saanich Treaties. However, the court in *R. v. Bartleman* ruled that the right to hunt over unoccupied lands included the entirety of W̱SÁNEĆ traditional territory, not just over the specific lands identified in the treaty.⁸⁰⁰ It would seem that the same would then be true of the protection of village sites and enclosed fields, which existed throughout W̱SÁNEĆ territory, not just the specific area mentioned by the Treaty. Interestingly, in *R. v. Bartleman* the court determined that although the area in which the plaintiffs were hunting was private property, it still qualified as unoccupied lands within the meaning of the Treaty. While James Island is privately owned, it is almost always unoccupied as it serves as a type of (rare) ecological retreat for Craig McCaw. It is unknown how the Supreme Court action will unfold. While both parties have moved toward more cooperative relationships and engagement, within the context of the existing private property framework, it is fair to say that both parties seem entrenched around the concept of ownership (either Tsawout ownership or JI Properties ownership). But was that always the case?

5.1. Written and Oral Versions of the Treaty

⁷⁹⁶ See C. Harris, *Making Native Space* Part 3 for more on this process and context.

⁷⁹⁷ AGC, “Response to Civil Claim” at 7 and 15-16. See also Tsawout, “Notice of Civil Claim” at 6.

⁷⁹⁸ Tsawout, “Notice of Civil Claim” at 7. See also Bond, *James Island* at 11.

⁷⁹⁹ Tsawout First Nation, Reply to Her Majesty the Queen in the right of British Columbia, Supreme Court of British Columbia, Victoria Registry, Court File No. VIC-S-S-180772 (Filed: 21 June 2018) [Tsawout, “Reply to HMQBC”] at 3 argues that the McKenna-McBride commission was not created to disrupt fee simple ownership, such as that of James Island.

⁸⁰⁰ *R. v. Bartleman*.

The written version of the Treaties, and corresponding arguments made in the Civil Claim, particularly by the Province, appear to stress the extinguishment of title. The Province, for example, argues that “the Saanich Treaties, in their written form, accurately reflects the terms of the agreement...and is the complete and full extent of the agreements.”⁸⁰¹ Such a position leaves no room for W̱SÁNEĆ oral tradition or alternative perspectives. In addition, the extinguishment to which the Province refers, they argue, applies to the entirety of W̱SÁNEĆ territory, not just the lands specifically mentioned within the wording of the Treaty.⁸⁰² By extension, the Province takes the position that Aboriginal title no longer exists within W̱SÁNEĆ territory. In seeking to reinforce this outright extinguishment, the Province argues that if Tsawout did establish Aboriginal title to James Island, that title is “inconsistent with and is displaced by the estate of any fee simple land owner or other tenure holder.”⁸⁰³ Since much of W̱SÁNEĆ territory is now held in fee simple ownership, such an argument leaves little room for meaningful reconciliation. It simply assumes the supremacy of private property over Aboriginal title. It is true, however, that “The question of how a court will reconcile Aboriginal title interests with fee simple remains unanswered.”⁸⁰⁴

While the written version of the Treaties, and the positioning of the Provincial Crown, emphasizes extinguishment, it is important to understand the W̱SÁNEĆ perspective. The context of the creation of the Treaty, W̱SÁNEĆ oral history, and understandings from W̱SÁNEĆ law provide a very different orientation to that of extinguishment. The first nine Fort Victoria Treaties were negotiated prior to any written text being developed, and the signatories made an ‘x’ on a blank piece of paper after coming to an oral understanding.⁸⁰⁵ The court in *R. v. Bartleman* found that the same was true in the context of the Saanich Treaties.⁸⁰⁶ The court also found that the ‘x’s’ attached to the Treaty were all clearly made by the same hand, and were not actual signatures from Saanich leaders.⁸⁰⁷ It is also clear that, even if the text were made available, it was written in English, and full of technical jargon, which the W̱SÁNEĆ would not

801 HMQBC, “Response to Civil Claim” at 9.

802 *Ibid.*

803 *Ibid.* at 12.

804 Tsawout, “Reply to HMQBC” at 3.

805 Harriet Van Wart, *A Bibliography and Discussion of Douglas Treaty Materials: Phase One of Research on the Tsawout First Nation’s Douglas Treaty* (Master’s Thesis, University of Victoria, 2001) [unpublished] at 6-7. Douglas confirms this in a letter to Barclay in May 16, 1850 (See Duff, “Fort Victoria Treaties” at 7-8).

806 *R. v. Bartleman*.

807 *Ibid.*

have been able to fully understand. The agreement, then, had to have been based principally on oral understandings.

For many interpreters of the Treaties, especially the W̱SÁNEĆ and other Indigenous signatories, the oral versions of these Treaties remain paramount.⁸⁰⁸ In order to understand the oral versions, we first need to understand the context of the Saanich Treaties, which was the procurement of peace. W̱SÁNEĆ had been opposed to the felling of trees in Cordova Bay, and a young W̱SÁNEĆ boy of 14 years, who was running to deliver a message and thus passed over ‘property’ of an early settler, was shot and killed.⁸⁰⁹ W̱SÁNEĆ intended to bring war to Douglas and his men in absence of any type of restorative action by Douglas. At that time, the settler population was still vastly outnumbered.⁸¹⁰ W̱SÁNEĆ intended to kill Douglas and his men, but when Douglas met the W̱SÁNEĆ for talks, and gave blankets to W̱SÁNEĆ leaders, the understanding that W̱SÁNEĆ had was that of a peace treaty, whereby settlers could continue to share the land in good faith, and that W̱SÁNEĆ could continue on as they always had. Any notion of keeping their village sites, fishing as formerly, or hunting over unoccupied lands, would appear as continuing on as normal, particularly given the small number of colonial settlements and settler population.

Importantly, the concept of ‘selling’ land such that all the land would become the “property of the white people for ever” was contrary to W̱SÁNEĆ understandings of land and relationships. Given the concept of NEHIYMET, different families and societal groups would have had unique responsibilities to a variety of places, which could not simply be given away. It would also have been understood that the land was not ours to sell or abandon in any way. As also mentioned, as W̱SÁNEĆ (“the emerging people”) our identity, language, and laws are intimately connected to these lands. My point is best emphasized in reference to the creation of a SENĆOTEN version of the Douglas Treaty. John Elliott, a respected elder from Tsartlip, was asked to translate the wording of the Treaty into SENĆOTEN. However, after struggling with the

808 For some examples of interpretations that give weight to the oral tradition on the Treaty see Poth, *Saltwater People*; Janice Rose Knighton, *The Oral History of the 1852 Saanich Douglas Treaty: a Treaty For Peace* (Master’s Thesis, Indigenous Governance, The University of Victoria, 2004) [unpublished] [Knighton, *Douglas Treaty*]; Jack Horne, “Emerging Land or Emerging People”, *The Arbutus Review*, Vol. 3., No. 2 (2012) [Horne, “Emerging Land”]; Nick Claxton, *The Douglas Treaty and W̱SÁNEĆ Traditional Fisheries: A Model for Saanich Peoples Governance*, (Master’s Thesis, Indigenous Governance, The University of Victoria, 2003) [unpublished]; Claxton, *To Fish as Formerly*; Hamar Foster, “The Saanichton Bay Marina Case: Imperial Law, Colonial History, and Competing Theories of Aboriginal Title” *U.B.C. Law Review* 23 (1989) 629; Hamar Foster, “Letting Go the Bone: The Idea of Indian Title in British Columbia, 1849-1927” in Hamar Foster & John McLaren, eds., *Essays in the History of Canadian Law, Vol. VI: British Columbia and the Yukon* (Toronto: University of Toronto Press and the Osgoode Society for Legal History, 1995) 3-27; and Arnett, *Terror of the Coast*.

809 See for example Poth, *Saltwater People*; Horne, “Emerging Land”; Knighton, *Douglas Treaty*; Claxton, *To Fish as Formerly*; and Arnett, *Terror of the Coast* for more.

810 I cannot be sure of exact numbers, but sources indicate that the Indigenous population on Vancouver Island in 1856 was just under 26,000, while the non-Indigenous population was 774 (another source saying 600) in 1854. In addition, the population at Fort Victoria, in 1848, was 30 people. See Duff, “Fort Victoria Treaties” at 23 and 29.

task he realized that the translation was not possible. The concepts and worldview inherent to the written version of the Saanich Treaty cannot be expressed in the language and thought of SENĆOTEN. Instead, Elliott decided to translate the Treaty based on our oral understanding and worldview, which has no mention of extinguishment or sale.⁸¹¹ Given the importance of this understanding, it is worth presenting the SENĆOTEN version of the Treaty in its entirety:

NIŁ ÇE SKÁLS ET ŁNENEŁ WILNEW
TTE WSÁNEĆ

U. WSÁNEĆ ŁTE/ U.DOT ŁTE ÁŁE E ŁÁ,E TÍA TENEW. NIŁ ÇE TTE
ÁLENENEÇ ŁTE TÍA. U, SNÁTW ÇE TÍA TENEW ČSE ŁÁ,E ET TIFEŁ
SIÁM TÍA TENEW TTE ÁLENENEÇ ŁTE. HIIIT JE ÇE ČÁŁE ET
ŁNINEŁ, WILNEW ÁŁE E TÍA TENEW. ŁÁ,TEN ÇO, U, MEQ TENEW
ŁTE ET XÁLS TIFEŁ SIÁM. I, TÁU L',TEN MEQ TTE SKÁLS I TTE
ŠXENÁNS I, TTE S,OXHELI ET ŁNINEŁ WILNEW ET XÁLS. NIŁ ÇE
TTE STI, ET XÁLS HIT LE SČELÁ,NEN Çs QENT ŁTE TTE ČELÁNEN
LE ŁTE. SKÁLS E TTE TENEW, I TTE SČÁČEL, I. TTE MEQ SELSELI
TELETOTELNEW, SKELKELÁŁNEW, TTE SČÁÁNEW, SJESENEČ
ŁTE, MEQ U, TTE KEPILEN ŁTE. NIŁ ÇE TFA,E Çs STI, E TTE XAXE ET
ŁNINEŁ ÇS QENT TTE ÁLENENEÇ ŁTE TÍA. ČSE, ŁÁ,E E TÍA TENEW
ET ŁNINEŁ WSÁ,NEĆ WILNEW E TTE SČÁ,s S,TUO,s. LO,E ÇO
XELTEN ET TTE TENEW ŁTE E TTE O,MET SNÁNET ET XÁLS Çs ÁŁE
I, ŠENTEN LE E ŁÁ,E HIT LE ÇENTOL TTE ČELÁNEN LE ŁTE.

HIT LE SČELÁNEN, NIŁ WEXES ŁKÁLJ TÍA. ÁŁE ŁTE STÁTE E TTE
TIFEŁ SNÁNET PKOLS E TTE SKÁPEŁ E ŁÁ,E KÓKEL ŁTE ET James
Douglas S,HIWEK E TTE KÍYES TÁ,ČEL WELNI,TEM. I, NIŁ TÍA
ÁNEČ KELNEUEL SE ŁTE TTE XEUES S,TUOs ÍY, NEUEL SE ŁTE OL
ÁŁE E TÍA TENEW. ÍY, ŠKÁLEČEN. TTE WELNI,TEM T, TTE
WILNEW WSÁNEĆ. MEDOST SE, ŁTE E TTE MEQ SČÁ, ŁTE TENEW
WILNEW. U, TOLNEW ET ŁNINEŁ WILNEW TUE HIT SE ŁTE ČOČES
TTE TENEW I, TTE Á,LENENEČ ŁTE EMNI,EN I XOLE TEW U, XENÁN
Çs HIT LE ČELÁNEN. ÁŁE E ŁÁE E TÍA TTE Á,LENENEČ ŁTE. NIŁ ÇO
LÁTEN ET XÁLS. ÇE ONESTEN TTE SKÁLS I, TTE ŠXENÁNS Çs
LÁ,TEN. MEQ EXIN YÁ, OLEXET TTE SDÁŁNEW I, SJESENEČ I,
IST E TTE SČÁ, ŁTE ŠWISTs WILNEW. ČENEW ŁTE E TTE ÁLI SNÁTW
ČSE LA,E E TTE KÍYES TÁČEL SČALEČE ŁTE. NIŁ ÇE TFA,E PITNESS
Á,TOL EL TTE ŠXENÁNS ŠTENIST SE ŁTE E TTE TE,ITKEN ŠXENÁNs.

⁸¹¹ John Elliott was asked to translate the North and South Saanich Treaties into SENĆOTEN as part of the Symposium, First Nations, Land, and James Douglas: Indigenous and Treaty Rights in the Colonies of Vancouver Island and British Columbia, 1849-1864, February 24-26, 2017, Songhees Wellness Centre, Victoria B.C., (see <https://hcmc.uvic.ca/songheesconference/treaties.php> in general for an overview of the conference), which is quoted in full below. Tsawout, "Reply to HRMQBC" at 2 argues that "the written text of the Treaty did not record the full extent of the oral agreement and is no more than evidence of what was generally agreed to."

XELTEN ŁTE ÇO TTE SMEDOSTEN SXEL LÁ,E E TTE PIPE. HIT SE
ŁTE ŠTENIST ÇENTOL E TTE ÍY, ŠKÁLEÇEN, ÁTOL E'LE TIÁ TENEW.

We are the Saanich People. We are the original people of this land. This is our homeland. This land, our homeland, is a gift from the High honoured Most Respected one, Creator. Creator made all of this our homelands. And, in making all of this our homeland and the creation, made our laws and beliefs and our Sacred teachings of Life. Creator wants us to remember these Sacred Teachings of Life. Creator marked our Homelands with Monumental Stones, for us to remember his presence on these lands with our ancestors of the past.

Many years ago, in the moon of the Frogs. There was a gathering on the top of PKOLS, there was a meeting with James Douglas. The leader of the newly arrived White People. We were talking about a new beginning, on our land together with the White People. A new good beginning together with the White People and the WŚÁNEĆ People. And, there we would point out the extent of our Saanich homelands. The lands that our people used for all time for hunting and setting our reef nets. Where we harvested food and medicines and fished. The places that Creator (XÁLS) had made our laws, Sacred Teachings of Life, and our ways. We were given some gifts to acknowledge that we met and to make a new beginning. Because there was a threat of attack made by the WŚÁNEĆ on the new Fort in Victoria. There were crosses marked on paper to signify a sacredness to the meeting. And, how the newly arrived people recognized our responsibilities to the land. And, that with the new beginning that we would live on these lands with respectful relationship to one another. The WŚÁNEĆ and the White people. This was to make a new beginning because there was a threat on the Fort Victoria by the WŚÁNEĆ.⁸¹²

The WŚÁNEĆ continue to place significant value on the agreements made with Douglas, and continue to assert our rights, which weren't created through the Douglas Treaty, but preexisted the creation of the Treaty. Rather, the Treaty signaled the making of promises to live together peacefully and productively. Although WŚÁNEĆ continues to hold on to our intentions with the Treaty, it is clear that the logic of sovereignty and the exploitation of place that can occur under private property has tainted these relationships since the outset.

We can briefly return to the work of Robert Nichols. Nichols argues that theft is property. In other words, that the *making* and *taking* of property happen together. Within this process of dispossession a non-proprietary relationship is also transformed into a proprietary one. We have tracked how aspects of this dispossession has unfolded in regard to ŁEL,TOS, as well as

812 An Interpretation of the Vancouver Island (Douglas) Treaties with the Saanich Peoples in SENĆOTEN, by Tsartlip Elder, STOLÇEL John Elliott Sr. For presentation to the Royal British Columbia Museum at the joint University of Victoria-Songhees Conference: First Nations, Land, and James Douglas: Indigenous and Treaty Rights in the Colonies of Vancouver Island and British Columbia, 1849-1864, February 24-26 2017, Songhees Wellness Centre, Victoria, B.C. See <https://hmc.uvic.ca/songheesconference/pdf/treatiesInterpretation.pdf> for a copy of this document.

considered what the different understandings of land and the Douglas Treaty looked like. In short, we have seen what some of the *making* and *taking* of ŁEL,TOS as *property* has looked like. Yet, the final point I wish to make is that this work of *making* and *taking* of property also remains ongoing and unfinished. Since relationships are never static, there is a systemic component to maintaining a particular system and conceptions of proprietary relationships. The Supreme Court claim made by Tsawout, and the body of law the court applies, is part of this systemic maintenance of proprietary relationships. Tsawout is making a claim of *ownership* of ŁEL,TOS because strategically that is what is required of us in a successful action. Such a requirement is the ongoing maintenance of the colonial and proprietary relationships that have been created. At a broader societal level, colonialism and imperialism have normalized the concept of property in our lives, to a significant extent. Coulthard has observed this aspect of “discursive translation” whereby Indigenous struggles that were “once deeply *informed* by the land” have increasingly become reoriented toward struggles “*for* land, understood now as material resource.”⁸¹³ While these systemic forces are at play, they have never been complete. In W̱SÁNEĆ, for example, we have not forgotten our relationships and responsibilities to ŁEL,TOS, even while engaged in other state processes.

6. We Hear the Call

On September 2, 2018 hundreds of people, both W̱SÁNEĆ and W̱SÁNEĆ allies, gathered on the shores of TIX̱EṈ (Cordova Spit) at the Tsawout First Nation to paddle across to, and around, ŁEL,TOS (James Island). ŁEL,TOS is a 779 acres island adjacent to the shores of the Tsawout Reserve. Following the paddle was a feast and fundraiser at the Tsawout auditorium. The event was organized to achieve multiple purposes. The first was to foster support and understanding for Tsawout’s recent claim in the British Columbia Supreme Court to have James Island returned to the Tsawout First Nation. In that regard, Tsawout knowledge-holders shared important elements about W̱SÁNEĆ culture and Tsawout’s connection to ŁEL,TOS.⁸¹⁴ The other prominent purpose was to raise funds in support of Tsawout’s legal costs in making this claim. The event was by donation and also had raffles, gift baskets, and more.

⁸¹³ Coulthard, *Red Skin, White Masks* at 78.

⁸¹⁴ See Turning the Tide, “Paddle for ŁEL,TOS film” at <https://turningthetide.ca.wordpress.com/2018/08/20/paddle-for-letos-video/>.



Figure 22: "Paddle For LEL,TOS Poster"

Importantly, though less prominent and recognized, the event also was an embodiment of W̱SÁNEĆ law. During the time of creation, the Creator, XÁLS, threw a number of W̱SÁNEĆ ancestors out into the ocean, making the islands that are there today. That is why, in SENĆOTEN, we refer to islands as TETÁĆES, meaning “Relatives of the Deep”. At the time of creating the islands within W̱SÁNEĆ territory, XÁLS spoke to both W̱SÁNEĆ and TETÁĆES. XÁLS spoke of a reciprocal relationship of care and responsibility between TETÁĆES and W̱SÁNEĆ. As an ocean people, TETÁĆES have provided much of the W̱SÁNEĆ way of life. Much has intervened and hindered W̱SÁNEĆ’s ability to care for LEL,TOS over the years – as we have seen - but the Paddle for LEL,TOS once again foregrounded this important relationship.



Figure 35: "Paddle for ŁEL,TOS Participants" Photo, 2018.

When I think of the responsibility of care we have for TETÁĆES through our creation story, the paddle for ŁEL,TOS event was an illustration of this responsibility. Coming out and paddling around the island was a revitalization of that relationship; a revitalization of the notion that we are here to care for these islands, and that there is still an important relationship between ŁEL,TOS and the WSÁNEĆ people. To me, we were saying, through our actions, that we are here, we care, and we remember our obligations. I sometimes slip into foregrounding the importance of substance over relation.⁸¹⁵ That is, I fall into the illusion that WSÁNEĆ law cannot, or will not, be enacted or upheld so long as ŁEL,TOS, for instance, remains harmed or that WSÁNEĆ relationships with ŁEL,TOS remains impeded. But such a perspective is forgetting that relationships are fluid, not fixed states. The outcome or current state is not the defining factor of the relationship; the constant struggle and intention to cultivate a healthy and productive relationship is. We are always confronted with “the challenges of negotiating coexistence in a world marked by diversity of places and people, and the messy entanglement with our human relatives and the institutions they create, as well as the more-than-human relatives with whom we share this blue-green planet.”⁸¹⁶ It also forgets the agency of place.

815 Moore, *Capitalism in the Web of Life* at 7 refers to the “cartesian privileging of substances over relations.”

816 Soren C. Larsen & Jay T. Johnson, *Being Together In Place: Indigenous Coexistence in a More Than Human World* (Minneapolis: University of Minnesota Press, 2017) [Larsen & Johnson, *Being Together In Place*] at ix in Forward by Daniel R. Wildcat.

“Place calls us to the challenge of living together.”⁸¹⁷ Larsen and Johnson “describe the agency of place as a “call””⁸¹⁸ in the following way:

Because place is a more-than-human engagement, its call is unusual - it is not like a calling to a faith or profession, but rather a summons to encounter, dialogue, and relationship among the humans and nonhumans who share the landscape. For humankind, this call arrives in many different ways. It may come through tragedy and grief, as when a place offers solace after the death of a loved one; or in seeing a place you care for under threat and coming to its defence; or intense moments of protest when activism becomes a kind of ceremony for healing and renewal; or in the negotiation of relationship, from the reciprocities involved in place-based coalition work to the constitutionalism of nation-to-nation partnership.”⁸¹⁹

Personally, I have heard the call of ŁEL,TOS for many years and it has taken shape in many things I have written and spoken about in regard to WŚÁNEĆ law thus far in my academic career. For me, ŁEL,TOS (James Island) has always been an important place. As a young boy, and to this day, it is one of my favorite places to fish for salmon. When I was younger I didn’t know the island as ŁEL,TOS, or even really as James Island. I most often used the term powder wharf in reference to the northern end of the island, where I usually visited, which has the old gunpowder factory and wharf on the foreshore. I remember being very curious about the old wharf and building as it was an uncommon sight, particularly given its previous use in making dynamite. More importantly, my memory is filled with so many wonderful family experiences there. I knew it could be a good place to fish for salmon, and I knew where we could drop our crab traps. Since there was often no one (or very few people) around it felt like our special place. However, I also knew that when we pulled the boat onto the beach for some lunch or for a break from fishing, I wasn’t allowed to go up past the beach.

The beach was a great place to play. My family and friends would build little villages out of sticks and stones, play frisbee, cast off the beach for fish, or just relax. Yet, I was still always fascinated by what was on the other side of the beach. There is an embankment backing the beach that I would climb and peer over toward the rest of the island. You couldn’t see a whole lot from there – just enough to let your imagination run free. I always wanted to explore farther, and I couldn’t really grasp why I was allowed on the beach but not beyond where the sand ended. I

⁸¹⁷ *Ibid.* at 1.

⁸¹⁸ *Ibid.* at 2

⁸¹⁹ *Ibid.* Umeek, *Principles of Tsawalk* also makes clear that place can call to you through vision quest, and thus there is a spiritual component to the call of place as well.

was told that someone owned the island. How could someone own an island? I had never heard of such a thing and at the time I couldn't comprehend it. It wasn't only the sheer amount of money needed to own an island - though that was part of it. It was also the fact that someone could keep everyone else from stepping foot onto an entire island. But why then could we be on the beach without any issues?⁸²⁰ It was confusing to me. I recall all of this being enforced as well. Signs saying no trespassing. Workers on the island would at times come down to where we were to keep an eye on things or to make sure we were not moving up beyond the beach.

As I grew older the island continued to change before my eyes. One predominant change was that a new owner began to build the golf course on the island. From the beach or ocean you could basically see only one hole of the golf course. It was kept extremely green, and looked to be very well maintained. I didn't, however, ever see anyone actually playing golf on it. For a long time I abandoned the idea of ever seeing ŁEL,TOS from a perspective other than from the beach or ocean. Today, I can see it from the front window of my home at Tsawout, across the channel and Saanichton Bay. ŁEL,TOS is one of the first sights I see out my window each morning, and for basically the first year of my son's life I walked every day with him in a pack strapped to my chest along the beach near my home, directly across from ŁEL,TOS. Although he is young, I often tell him about that island and its SENĆOŦEN name, and about our creation stories for TETÁĆES and for ŁEL,TOS. In doing so, I guess my hope is that it will be an important place for him too, but that he will be able to visit ŁEL,TOS from somewhere other than the beach or ocean.

All that I have related thus far about the colonial history of ŁEL,TOS needs to be understood through this lens and the need to uphold our responsibilities to our TETÁĆES. Understanding those responsibilities must be understood within the context and power of place, and the logics of relationality.

7. Bridging the Gap

⁸²⁰ According to conventional understanding of property in settler law, in most instances ownership of the foreshore is vested in the Province, and thus may be accessed by the public, whereas beyond the foreshore may be privately owned. British Columbia, Ministry of Environment, Lands and Parks: Land and Water Programs Branch, *Riparian Rights and Public Foreshore Use in the Administration of Aquatic Crown Land* (Victoria: Ministry of Environment, Lands and Parks: Land and Water Programs Branch, 1995) at 5. For an interesting discussion of Native Title in Australia and Aotearoa (New Zealand) and whether title could be found in regard to the foreshore and seabed, see Jacinta Ruru, "What Could Have Been?: The Common Law Doctrine of Native Title in Land Under Salt Water in Australia and Aotearoa/New Zealand" (2006) 32:1 *Monash University Law Review* 116 [Ruru, "What Could Have Been?"].

Before moving on to provide a more in-depth discussion of LEL, TOS, it is helpful to expand upon foundational questions. What does it mean to have an island as a relative? That is, to place an island firmly within the realm of kinship – something contrary to many of our assumptions about agency and being. To broach these questions, I want to expand upon the notion of place and “locality”, including what Brian Burkhardt calls “epistemic locality”.⁸²¹ Burkhardt, in *Indigenizing Philosophy Through the Land: A Trickster Methodology for Decolonizing Environmental Ethics and Indigenous Futures*, builds on his work with Vine Deloria Jr., and goes a long way in outlining the characteristics of “locality” and “delocality” as distinct underpinnings of Indigenous and Western systems of thought. “Delocality”, as we will see, is part and parcel of coloniality. “The goal of coloniality in the first place is to erase the actual locality through delocality, which is to say the injecting of the unmoored European locality into the Indigenous land, and that can only be accomplished by removing the original Indigenous locality from the land itself.”⁸²² In following Deloria Jr., it is only through the removal of “spatiality”, or the process of developing abstract concepts that “float free from land,” that something can be seen and presented as ‘universal’.⁸²³ Once abstracted free from the land, “Particular needs, values, and knowledge can be universalized across time and space and forced onto people of other places at any time.”⁸²⁴

Conversely, “locality”, Burkhardt writes, is a “way to reference the manner in which being, meaning, and knowing are rooted in the land.”⁸²⁵ This assertion, in itself, is not particularly unique in that many Indigenous authors give emphasis to important connections with land. In fact, I have touched on it in preceding chapters as well, in a way which aligns closely with Burkhardt. While claiming this type of ontological and epistemic connection with land may not be unique, those interpreting these claims often continue to misunderstand those assertions due in part to their attempts to view them *through the lens of delocality*. As such, we need to understand how those claims function through the lens of locality. As we will see, claims to interconnectedness and kinship relationships are expressed through, and make sense within,

821 Brian Burkhardt, *Indigenizing Philosophy Through the Land: A Trickster Methodology for Decolonizing Environmental Ethics and Indigenous Futures* (East Lansing: Michigan State University Press, 2019) [Burkhardt, *Indigenizing Philosophy*].

822 *Ibid.* at xvii.

823 Burkhardt, *supra* note 610 at xii. It is also helpful to see Deloria Jr., *God is Red*, from more on his distinction between spatial and temporal thinking.

824 Burkhardt, *Indigenizing Philosophy* at 24.

825 *Ibid.* at xiv.

locality. Conversely, critiques of ‘romanticism’, ‘fundamentalism’ and the like only make sense when these claims are mistakenly viewed through the lens of delocality.

For Burkhart, “Locality is a way of conceptualizing place in Indigenous philosophy. It is more than place in the abstract, however. It is place as land. It is more than a concept; it is materiality, but it is also a reconceptualization of materiality itself.”⁸²⁶ ‘Place’ can only be viewed in the abstract through the lens of delocality.⁸²⁷ TETÁĆES (or Relatives of the Deep) is in some sense an abstraction. However, I am not trying to delocalize the concept in a true sense. Rather, to use it as a guidepost for relationality which must then be put back firmly in place – in this case, at ŁEL,TOS. Without that resituating “there will always be a lack of clarity to any expression of locality.”⁸²⁸ From a methodological perspective, through my reading of WŚÁNEĆ creation stories, I tried to make clear this deep relationship with place. Here, I tackle similar issues but from more of a philosophical and epistemological perspective, and in relation to ŁEL,TOS. In doing so, I find synergies with Deloria Jr. and Burkhart in asserting that “From a spatial point of view, the actual land and the particularity of that actual land matter much and function formatively and continually in the moral, epistemological, historical, and religious life of a people.”⁸²⁹

Burkhart’s sustained attention to outlining the philosophical distinction between “locality” and “delocality”, as well as their characteristic tendencies in regard to systems of thought and action, is helpful; particularly so in this chapter as we try to grapple with the ways in which to understand ŁEL,TOS as place, agent, and being in relationship with WŚÁNEĆ. Further, since the current owner of James Island has worked to turn ŁEL,TOS into an ‘eco-paradise retreat’ for himself and the wealthy elite, Burkhart’s work is also contextually relevant and useful given his critique of “environmental ethics” and the ways in which those commonly stem from “delocality”, and thus still stand in stark contrast to Indigenous locality. It is from these perspectives that we can “begin to understand the morality in the context of locality” and

⁸²⁶ *Ibid.* at xvi.

⁸²⁷ Burkhart writes: “The earth or the land then become both the ground and the limit of thought and being. The land or the earth cannot be thought of just as the planet or the human being cannot be thought of except through the imitating forms of delocalized thought in which what is thought is an imitation earth or human being” (*ibid.* at xxviii).

⁸²⁸ *Ibid.* at xxii.

⁸²⁹ *Ibid.* at 26.

how that applies to WSÁNEĆ law,⁸³⁰ as well as how the “coloniality” of “delocality” works to subjugate not just Indigenous peoples, but land as well.⁸³¹

7.1. Nature, Property and Delocality

Removing Indigenous peoples from their lands, and the relationality they had with those lands, has been a foundational purpose of colonialism; something we have seen in specific relation to LEL,TOS. This colonization was not just of people, but of land, in a very specific sense, as well. Since the processes of settler colonialism could not be justified under International Law, certain philosophical justifications had to play a role. Conceptions of land, nature, and private property become central.

James Tully has shown that John Locke’s re-theorization of private property was of central significance in direct efforts to justify European settlement and colonization.⁸³² As we have touched on, within his re-theorization of private property Locke begins with the premise that, in the State of Nature, all of the earth is common property. The way in which individual private property is then created is through mixing one’s labour (“one drop of labour”) with the land.⁸³³ However, since Indigenous peoples did mix their labour with the land, what is actually required is a very particular Eurocentric understanding of “civilized labour.”⁸³⁴ As Burkhart notes, “dominating and so possessing land, land that then can become mine in this very particular way, is what defines proper civilizing acts of labour that Locke requires for land to become property.”⁸³⁵ Such a move does two things. First, it delegitimizes Indigenous relationships with land, characterizing them through a binary of either ‘savage’ and ‘primitive’ or ‘noble’ and

⁸³⁰ *Ibid.* at 200.

⁸³¹ Burkhart writes: “The layering of European delocality onto Indigenous locality obscures the ontological and epistemological relationship between morality and the land that arises in locality” (*ibid.* at xxxi).

⁸³² James Tully, “Rediscovering America: The Two Treaties and Aboriginal Rights” in G.A.J. Rogers, ed., *Locke’s Philosophy: Content and Context*, (Oxford: Clarendon Press, 1997). Additional, see Burkhart, *Indigenizing Philosophy* at 38 (“Until the seventeenth century, when Great Britain colonized America, the common understanding of property was defined by occupation or settlement. This definition did not serve the purposes of settler colonialism because it severely limited the European land claims in America due to the prior occupation of these lands by American Indians”).

⁸³³ Once this labour has been mixed with the land, no additional labour is required for ownership. *Ibid.* at 35. Also note that this corresponds with “the logic of elimination” (Patrick Wolfe, “Settler Colonialism and the Elimination of the Native”, (2006) *Journal of Genocide Research* 8(4): 387 at 388) embedded in colonialism and racialized blood quantum. Burkhart writes: “Black people in the United States are racialized as slaves, and so they are labour resources for the state. Regarding blood, then, they are racialized as black by “one drop of blood,” because the logic of elimination does not apply to them, only the general coloniality of power and the domination and even ownership of their labour as a resource. American Indians are racialized in the exact opposite manner because any benefit of their labor is mitigated by their ownership relationship to the land that is needed in order to create the new nation. Regarding blood, then, Indians are racialized as “half-breeds” and “white” with one drop of European blood. Being racialized as such, for Indians, has the effect of genocide through blood quantum” (Burkhart, *Indigenizing Philosophy* at 28).

⁸³⁴ *Ibid.* at 41.

⁸³⁵ *Ibid.* at 42.

‘ecological’, both of which place them within a state of ‘nature’ thereby justifying the removal of Indigenous peoples from the land, as well as their claims to land. At the same time, as European labour is mixed with land, thereby ‘civilizing’ that land, it is removed from ‘nature’, and thus from the commons and into private property. It is this “attempted erasure of the power of locality that gives way to domination and enslavement of the land itself.”⁸³⁶

As Burkhart frames it, “just as coloniality tries to remove Indigenous human agency, settler coloniality tries to remove the locality of land, which is its power or agency. The power or agency of land in the context of locality is a necessary feature of Indigenous morality in general and Indigenous relationship to land in particular as a manifestation of kinship.”⁸³⁷ In general, we can view this as the shift toward “delocality”, or the “lamination of European delocality onto Indigenous American locality.”⁸³⁸ The “resistance strategy” that Burkhart therefore proposes is one of “epistemic locality” whereby there is an active effort to inject the power of locality, or the agency of place, into the alienating tendencies of delocality⁸³⁹ and through that process reopen the possibility of establishing relationships based in kinship.⁸⁴⁰

As we have seen, LEL, TOS became private property almost immediately after promises were made in connection with the Douglas Treaty. That moment marked the beginning of a great deal of harm being done to LEL, TOS. We can also see the ironic role that the concepts of “nature” and “property” have to play in this narrative. First, however, it is helpful to better understand the practice of “epistemic locality” (premised on kinship and relationality) and how that helps us understand LEL, TOS as kin.

7.2. Epistemic Locality, Morality in Locality, and Environmental Ethics

At its most basic, “Epistemic locality is resituating thinking in locality.”⁸⁴¹ As we have seen above, as well as in previous chapters, the processes of colonialism, sovereignty, and global capitalism necessitate an externalization, or delocality, of ‘nature’ and ‘resources’. Canadian law, and more broadly western philosophy, does of course have an environmental ethic component. This environmental ethic cannot be considered uniform. However, for the most part debates

⁸³⁶ *Ibid.* at 44.

⁸³⁷ *Ibid.* at 43.

⁸³⁸ *Ibid.* at 50. Burkhart notes that this process “is never complete and always needs to be maintained, there is always left a remainder – the remainder of locality” (*ibid.*).

⁸³⁹ *Ibid.* at 50.

⁸⁴⁰ *Ibid.* at xxxiv. Burkhart also writes that “Locality is a process, not an abstract limit” (*ibid.* at 88).

⁸⁴¹ *Ibid.* at 50.

hinge on binaries such as subject / object, instrumental value / intrinsic value, and the like. Within these types of oppositional binaries, the choice is an either/or and one cannot exist independently of the other – that is, the existence of subjects depend on there being objects. For example, (the abstract subject) ‘I’ thinks of themselves in relationship to another – an object that is either a “you” or an “it”.⁸⁴² Whether that object is a “you” or an “it” corresponds generally with conceptions of animacy.⁸⁴³ At a very general level, animacy and agency are interrelated. If something is animate it has agency, and if something has agency it is animate. While it varies across cultures, and manifests differently in languages, animacy can have levels of hierarchy to it. For instance, we might call a cat ‘she’ (signaling animacy), but we would never call a rock a ‘she’ (unless we mean it in some playful sense) because it is inanimate - without agency, and thus an ‘it’.

Unsurprisingly, most of us also know these distinctions to be anthropocentric – humans are at the top of this hierarchy.⁸⁴⁴ Those which follow, or are higher on the animacy scale, tend to exhibit characteristics that are more akin to humans (reason, interests, pleasure, etc.). In other words, it is largely the presence of these values or characteristics that determine place on the hierarchy. Further cementing their place atop the hierarchy, humans also have the privilege of possessing ‘personhood’, something particularly important in regard to legal rights and responsibilities in Canadian and western law. It is self-evident that western philosophy and law has been resistant to including much else at the top of this hierarchy.⁸⁴⁵

To consider this hierarchy, and the way in which it is constructed and maintained, is also to consider conceptions and processes of value, and attributing value. Does something have value “in and of itself” (intrinsic value), or does it have value “for the sake of something else” (instrumental value)? A human clearly has obligations to another human because they are both subjects with intrinsic value. But what about animals, land, water, or more broadly, the environment? Making these distinctions, however, go beyond the philosophical in that these

842 *Ibid.* at 100.

843 For an interesting and helpful book on animacy and its connections with gender, race, and sexuality, see Mel Y. Chen, *Animacies: Biopolitics, Racial Mattering, and Queer Affect* (Durham: Duke University Press, 2012).

844 It would be difficult to pinpoint the exact onset of this notion, but, as mentioned in a previous chapter, the Bible is a clear example of this thinking: “God created man in his own image...[and] said to them, “Be fruitful and increase in number; fill the earth and subdue it. Rule over the fish in the sea and the birds in the sky and over every living creature that moves on the ground” (Genesis 1:27-28). Burkhart also points to several foundational western thinkers who uphold this “anthropocentric hierarchy”, including Aristotle and Immanuel Kant (Burkhart, *Indigenizing Philosophy* at 168-169).

845 Corporations have long had legal personhood, and more recently, in New Zealand, the Whanganui River was also given legal personhood under the law. The legal personhood of the river will be given further consideration in the following chapter.

value assignments thereby connect with our moral positioning. Morally, we have stronger obligations to a cat than to a rock.

There are obvious relationships between law and morality, meaning that the above distinctions then have clear implications for how they shape our decision making and legal processes.⁸⁴⁶ Importantly, the above discussion also serves to illustrate the way in which western philosophy is based on abstract and delocalized thought – none of the above discussion necessitate reference to any *particular* place or being(s). The relationships and value assignments are abstract and seemingly universalized.⁸⁴⁷ The motivations, and seeming necessity, of this abstraction and attempted universalization (i.e., process of delocality) is achieving a notion of certainty.⁸⁴⁸ As we will see below, when WSÁNEĆ claims, which are deeply rooted in place, or locality, are viewed superficially through the lens of delocality, they are often misrepresented as being uncertain, romanticized, fundamentalist, and the like. We need to understand more about relational ontologies to understand why this is the case.

7.2.1. Relational Ontology and Value

As mentioned, environmental ethics has long hinged on the debate between intrinsic and instrumental value, both of which are delocalized abstractions and value assignments. Burkhart's philosophical intervention, in that it hinges on locality in Indigenous philosophy, comes in at a more foundational level.⁸⁴⁹ He uses a Trickster Methodology in so far as that he is showing us how through the creation of false binaries (such as intrinsic and instrumental value) we are often unwittingly drawn into the realm of "delocality", when in actuality, through the lens of epistemic locality, such binaries and value assignments are irrelevant.⁸⁵⁰

846 For an introductory text to law and morality see David Dyzenhaus, et. al., eds., *Law and Morality: Readings in Legal Philosophy: Third Edition* (Toronto: University of Toronto Press, 2007).

847 There are, of course, always outliers within such a system. However, these are viewed as 'anomalies' and thus always in contrast to the more generalized 'universal'.

848 Burkhart, *Indigenizing Philosophy* at 115. Burkhart writes: "The sense of security that is achieved by absolute, eternal, unchangeable knowledge is gained by delocality, which provides an illusion of removing the originary manifestation and context in knowing and meaning in order to maintain universal consistency across all places and times" (*ibid.*)

"Thus, at this deeper level, the choice to see the world through delocality is not merely a choice to see the world as a world of things rather than relations, but to see things as a static substratum that underlies an abstract and delocalized world rather than to see things themselves as a form of interconnectedness in the context of particular capacities for kinship. Of course, seeing things as a static substratum on which knowledge must depend is only possible or even necessary because the world has been abstracted from locality, which means static things are a delocalized abstraction of localized things in multiplicity. Things can only become concrete enough for grounding knowledge or being that around which value and life can be framed when they are not truly things in their multiplicity in locality, from the land. Knowledge through abstracted and delocalized things seems to create something permanent or static only by being abstracted from locality where things and knowledge float free from the land" (*ibid.* at 195-196).

849 Burkhart writes: "...the seemingly simple choice between the binary oppositions of intrinsic value and instrumental value can reveal a deeper choice between paths of delocality and locality" (*ibid.* at 177).

850 *Ibid.* at 179. "The issue should not be seen as the choice between intrinsic and instrumental value but as the choices that lead to this forked dead end. The trickster methodology toward epistemic locality is intended to reveal how the moral status of and our moral obligation to nonhumans is constructed through delocality."

Burkhardt argues that “a main stumbling block in the way of thinking nonanthropocentrically and through locality is the thought that we must begin our reflections from the determination of the levels of value that things have.”⁸⁵¹ One of the assumptions required in attempt to create such generalizations within this type of western valuation is that things (entities / subjects / subjectivities) are foundational, or exist prior to relationships.⁸⁵² In contrast, epistemic locality points us toward relationality and kinship, beginning from the realization that nothing exists in isolation, and so cannot be valued as such. In fact, in so far as theoretically possible, “nothing has value in isolation.”⁸⁵³ Since a relational ontology begins by placing relationships as ontologically prior to entities or subjects, all subjects are necessarily formed intersubjectively.⁸⁵⁴

The strong notion of intersubjectivity, interconnectedness, or kinship present in epistemic locality has significant implications in regard to ethics and morality. Since nothing can exist in isolation, it is untenable to begin with an assumption that we can structure our relationships by assigning different values to things, particularly based on anthropocentric criteria. Rather, since we begin with relationships as being ontologically prior, and nothing can exist in isolation, then “there are no levels of value.”⁸⁵⁵ Similarly, foregrounding relationality over subjectivity impacts how we see being and agency in the world. The implication of a strong relational ontology entails that “this way of thinking about life means that everything is alive at some level. Being alive is not dependent on any particular property that a thing might have but on having relationality or interconnectedness itself. Life is not the possession of consciousness, the ability to experience pleasure or pain, the power of self-movement, or any biological process inherent in a particular organism, from this perspective of life. Life is fundamentally the capacity for

851 *Ibid.* at 217-18.

852 It is also anthropocentric in the sense that it necessitates human valuation.

853 *Ibid.* at 200.

854 See *Ibid.* at 104-05 for more on relational ontologies. “The first psychological sense of intersubjectivity arises from Cartesian subjectivity (private egos). In this sense, the private ego subjectivity is ontologically prior to intersubjectivity. Individual private egos come into relationship with other such egos through external signs of communication that create a context for agreement and consensus. In the stronger sense of intersubjectivity, the subjectivity itself is in relationships with other subjectivities. Intersubjectivity is a cocreation of individual subjectivities, and so relatedness is ontologically foundational and primary. All individual subjects coemerge from a holistic field of relationships. The being of any one subject is ontologically dependent on the being of all other subjects, and so each is ontologically dependent on the being of relationship between subjects prior to any individuating subjectivity. Intersubjectivity, in this sense, precedes Cartesian subjectivity” (*ibid.* at 104).

855 *Ibid.* at 200.

kinship.”⁸⁵⁶ Since nothing can exist in isolation, it is from this perspective that – “*Everything has all the value there is. Everything is sacred.*”⁸⁵⁷

The foundational question that then arises is: Without any distinction in value how do we have ethics or morality?⁸⁵⁸ Burkhart recognizes that from a relational ontology “Our relationships to different things require different behaviors in order to act rightly...but this does not require different kinds of significance for the things to which we are related.”⁸⁵⁹ In fact, “if value is shared equally by all (everything is sacred) but moral action is determined by relational context, then equal things in different relations might not in fact require equal treatment since it is the relationship that is primary and not the individuals or the value of those individuals – human or nonhuman.”⁸⁶⁰ We must therefore turn our attention to *particular* relationships.

Again, the point of epistemic locality is not to set in advance what our (abstract) relationships or moral requirement ought to be.⁸⁶¹ It is to recognize that kinship relationships, like the world, are dynamic and never complete.⁸⁶² As I noted in my methodology chapter, W̱SÁNEĆ stories recognize this fluidity and should be viewed as a snap shot of a particular time and telling; while many stories still contain generations of experience in kinship (“intimate knowing relationship ” with place), they are still always pointing toward living relationships that are still in motion.⁸⁶³ The power of those stories are that they “provide a concrete but dynamically layered framework for the world and seeing ourselves through a lens of kinship and relationality.”⁸⁶⁴ It is from there that we must determine right action.

It is through epistemic locality and relational ontology that we begin to see the shape of “morality in locality”.⁸⁶⁵ Our search for right action begins “with an attitude of respect. This attitude first arises from the background context of universal sacrality.”⁸⁶⁶ “The value of universal sacrality” is meant to provide “an extra sense of care” in our moral deliberations

856 *Ibid.* at 194.

857 *Ibid.* at 200.

858 “If there is no value by which to determine right action, then there would be, the line of thinking goes, no way to determine, even in the loosest sense, which actions were right and which were wrong” (*ibid.* at 223).

859 *Ibid.* at 201-202.

860 *Ibid.* at 227.

861 “To attempt to construct right action in advance or external to our relationship, just as with constructing value in the abstract, is an attempt to construct these from outside of kinship, from delocality” (*ibid.* at 202).

862 *Ibid.* at 235.

863 Burkhart defines kinship as an intimate knowing relationship (*ibid.* at 234).

864 *Ibid.* at 133.

865 *Ibid.* at 218.

866 *Ibid.* at 298-299.

regarding us and all that is around us.⁸⁶⁷ In that sense, the concept of sacredness functions as a limit to acceptable behaviour, but “it does not tell us how we actually ought to act.”⁸⁶⁸ Our particular moral reflections, therefore, are primarily relational, contextual, and non-linear, given the dynamic nature of kinship and the fluidity of two moving points (agent to agent).⁸⁶⁹ That is, it is the context of our relationships that determine “what sorts of actions are respectful and what sorts are not.”⁸⁷⁰ It is clear then that from this perspective, responsibly navigating right action requires intimate knowing.⁸⁷¹ Within epistemic locality, the “manner in which one goes about finding knowledge is in relation.”⁸⁷² Or, as I expressed in regard to WSÁNEĆ law, knowledge is not abstracted from relationships, but rather, premised on those relationships. Through intimate and intersubjective relationships with all that is around us, the process of moral reasoning is aimed at the ability to build and “sustain kinship relationships” within a “dynamic space of being and kinship.”⁸⁷³ That is, “first-person experience in the act of “seeing” through relational kinship.”⁸⁷⁴

There is no attempt to objectify place in epistemic locality, or to erase the multitude of kinship relationships within locality.⁸⁷⁵ As I described, it is about attaching ourselves to place in respectful ways, and within the boundaries of kinship and universal sacrality.⁸⁷⁶ This requires a type of weaving of “bottom-up unity”⁸⁷⁷ in which stability is achieved through “individuals [that] are taught values in locality that make them capable of functioning in relational reciprocity to a dynamic *We* of community.”⁸⁷⁸

7.2.2. Were Islands Once People?

⁸⁶⁷ *Ibid.* at 227.

⁸⁶⁸ *Ibid.* at 271.

⁸⁶⁹ Burkhart similarly notes that “Relationships are never one-sided” (*ibid.* at 287). That is, “kinship requires a response [and] kinship is sustained by adjusting to the response” (*ibid.* at 250). Finally, since relationships are always in motion, there can be no final or fixed state.

⁸⁷⁰ *Ibid.* at 287.

⁸⁷¹ “...in Indigenous epistemologies we find lived, experiential, and embodied knowledge achieved through kinship” (*ibid.* at 116).

⁸⁷² *Ibid.* at 292.

⁸⁷³ *Ibid.* at 238 and 250.

⁸⁷⁴ *Ibid.* at 119.

⁸⁷⁵ As Burkhart frames it: “The diversity of experiences around a particular thing is an aspect of the continual unfolding of that thing. The manifestation of things in our experience is also a part of us and a part of our unfolding, our unfolding kinship relationships, which are both a part of us and also a part of the world” (*ibid.* at 196).

⁸⁷⁶ Yes, relationships can go badly, but continually acting in harmful ways will, unsurprisingly, tend to result in the termination of relationships. Therefore, the requirement of maintaining kinship, and the backdrop of everything is sacred, results in an ‘outer limit’ to acceptable behaviour.

⁸⁷⁷ *Ibid.* at 267.

⁸⁷⁸ *Ibid.* at 243.

I have drawn on Burkhart in an attempt to help clarify, or bridge a gap, to the way I have described W̱SÁNEĆ relationship to place. As mentioned, however, such claims are commonly misunderstood in predictable ways. For example, it can be the case that “Western thinkers scoff at what they see as hypocritical, romanticized, or nonsensical primitive morality” contained within these claims.⁸⁷⁹ Similarly, these claims to strong and spiritual connections with land are often critiqued as guarding ‘traditionalism’, and thus fundamentalism, thereby functioning as potentially oppressive and stymieing adaptation and change. I will seek to address spirituality and reconciliation further in Chapter Seven, but for now, it is important to touch briefly on these superficial misunderstandings before finally moving on once again to a more specific discussion of ŁEL,TOS.

One of the first critiques is that speaking of ṮEṮÁCES (islands) as ancient relatives who were created when thrown into the ocean by X̱ÁLS is simply “nonsensical primitive morality.” In other words, can it really be the case that W̱SÁNEĆ believe that islands were once people? There are at least two important issues at play in this line of questioning, both relating back to epistemic locality. The first is in regard to what is “true”. To ask if islands actually were W̱SÁNEĆ people at one point is to seek a “delocalized truth.”⁸⁸⁰ Burkhart argues that a fixation on “what *actually happened* – a common question under Western epistemic practices that requires a delocalized investigation into... “truth”” misses the point of epistemic locality.⁸⁸¹ That is, that “Indigenous philosophizing focuses on meaning and understanding (which are relational and dynamic) rather than truth and proof (which is static and delocalized).”⁸⁸² The more informative question, then, is how we understand and see this to be true, which is not a softening of the notion of kinship. Rather, given the relational ontology described above, as opposed to imposing an anthropocentric and hierarchical valuation of entities or subject, we are always brought firmly back to relationship and locality. “The context for understanding moral relationships, of any kind, is, then, kinship. All beings around us are our relatives, not simply in some metaphorical sense where we understand inanimate, lifeless objects as somehow related to us, but in the fullest sense of moral relationships between agents, between people.”⁸⁸³ As

⁸⁷⁹ *Ibid.* at 226.

⁸⁸⁰ *Ibid.* at 121.

⁸⁸¹ *Ibid.*

⁸⁸² *Ibid.* at xxx.

⁸⁸³ *Ibid.* at 295.

Burkhart notes, “the question regarding what is alive or what is an agency in isolation, a question that is often raised by philosophers, does not arise since the metaphor under the metaphor of life and agency is relationship or kinship.”⁸⁸⁴

The critique that follows is that such proclamations of kinship must be “hypocritical” or “romanticized”.⁸⁸⁵ “The worry here is if we take the idea that the environment has intrinsic value to what seems like its natural end, we might be required to not eat animals and even plants, to not walk on the earth, or to not scrub the bacteria off our bodies in the shower.”⁸⁸⁶ Again, this critique is to fall back into viewing the claim through a lens of delocality. You cannot live in this world without being dependent on innumerable relationships – nothing can! You cannot remove all of these relationships of interdependence in that way even if you wanted to – the air you breath, the water you drink, the food you eat, the bacteria in your stomach, is all necessary for your life. From a relational ontology perspective, these relationships constitute the entirety of value in life. Morality arises out of these interdependent relationships – to see and act as though you are in kinship with all around you, which *by definition* requires a give and take. And so, to be clear, this notion of kinship is not one-sided. As Robin Kimmerer so poignantly puts it, “What do you suppose would happen *if* people believed this crazy notion that the earth loved them back?”⁸⁸⁷

In W̱SÁNEĆ we speak of our Reef-net technology, our traditional and sustainable fishery governance and method, as being gifted to us by the Salmon People. This gift came from a time when one of the Salmon People visited us in the form of a young man, and married a woman from W̱SÁNEĆ. After having stayed with the community he could see we were suffering in our abilities to obtain enough food. Prior to leaving, he taught W̱SÁNEĆ the reef-net technology and the ceremonial component of the fishery, so that we would never have to go hungry. In return, W̱SÁNEĆ have several protocols built into our governance structure in terms of reciprocating that gift and of maintaining that connection and gratitude toward the Salmon People. From a relational ontology, it isn’t accurate to see an inconsistency between seeing the Salmon People as our relatives, and us depending on them for sustenance and survival.⁸⁸⁸

⁸⁸⁴ *Ibid.* at 297.

⁸⁸⁵ *Ibid.* at 226.

⁸⁸⁶ *Ibid.* at 219.

⁸⁸⁷ Kimmerer, *Braiding Sweetgrass* at 124.

⁸⁸⁸ In Burkhart’s utilization of a trickster methodology, in which Iktomi plays the Trickster, he writes: “Iktomi...can’t understand why what one eats has a negative relation to value” (Burkhart, *Indigenizing Philosophy* at 209).

To view any of these orientations as traditional, and thus fundamentalist, is misguided. More appropriately, we should seek to look under the false binary between tradition and change, to the more central point of the distinction between locality and delocality. From “the perspective of locality, the identity of a tradition is not changed by incorporating or responding to newly encountered narratives and metaphors any more than a river becomes new when it cuts through a new valley.”⁸⁸⁹ To the extent that I emphasize these particular relationships with land is not in opposition to fluidity of relationships and context. Fluidity in relationships is inherent. The troubling issue is when attempts are made to remove things from locality. As Aaron Mills so brilliantly and concisely puts it – “change is ceaseless, but never, ever groundless.”⁸⁹⁰

Returning to the opening of this section, the Paddle for ŁEL,TOS was an exercise and embodiment of WŚÁNEĆ law, and the kinship relationship of care WŚÁNEĆ have with TETÁĆES (Relatives of the Deep). We heard the call of place; as opposed to taking that relationship for granted, we remember our responsibilities. Even injecting a bit of locality into the status quo can create significant change in our understanding of relationships.⁸⁹¹ From this vantage point we can begin to look at ŁEL,TOS differently.

8. Relating to ŁEL,TOS

The WŚÁNEĆ depended greatly on salmon, crabs, clams, ducks, geese, seabird eggs, berry picking, gathering, hunting and the like. The WŚÁNEĆ actively maintained harvesting sites, including camas fields, and hunting locations. Sites throughout the peninsula and neighboring islands provided plentiful sources for subsistence. Not only were these locations necessary for subsistence, they also provided medicines and materials for making baskets, and other cultural items. Spiritual locations and sacred burial sites also exist throughout WŚÁNEĆ territory. ŁEL,TOS is one location that has all these attributes and connections with the WŚÁNEĆ.

⁸⁸⁹ *Ibid.* at 199.

⁸⁹⁰ Mills, “Rooted Constitutionalism” at 155.

⁸⁹¹ Burkhart, *Indigenizing Philosophy* at xxxiv.

The Tsawout band⁸⁹² had a temporary village site, KĒLJI,EWĒĒ (relating to the concept of “shelter”, or “sheltered canoes”),⁸⁹³ toward the north end of the island.⁸⁹⁴ The island also has a known burial ground.⁸⁹⁵ As far as sustenance, the island was rich in salmon and halibut fishing, as well as crabbing, clamming, and other seafood.⁸⁹⁶ My Auntie Belinda speaks of a time when giants lived on ĒĒĒ,TOS, and of the particularly large and purple dungeness crabs (a favoured food of these giants) that still live near ĒĒĒ,TOS.⁸⁹⁷ According to Dave Elliott Sr. this place was called TĒUXÁĒĒĆ (meaning “giant” and that it “refers to a story”).⁸⁹⁸ My relative, Philip Pelkey, related a similar story. He told that TĒUXÁĒĒĆ “was the name of a “monster” who killed people and used to live in “the shallow water over the sandspit on James Island.”⁸⁹⁹ Randy Bouchard and Dorothy Kennedy, ethnohistorians, related the words of Philip Pelkey as follows – “The people decided to get rid of this monster; they put him in a canoe where he fell asleep. The leader of the people told Mr. Crab to bite him. This he did, and the monster fell overboard in the shallow waters of James Island spit, where other crabs killed him. In the course of telling this story, Mr. Pelkey stated: “The shallow water over the sandspit is now called *th’ew’xilets* as that is where the monster was killed.”⁹⁰⁰

Important plant resources, such as licorice ferns (TĒSIP), which were used for medicine, and the salal bush (DAKĒ,ĒĒĆ), were also located throughout the islands. Cedar trees and numerous other resources were abundant at one time, and the WŚÁNEĆ people made use of all

892 Up to this point I have generally used the term WŚÁNEĆ to refer collectively to each of the different Bands now in existence. The Bands in existence today (Tsawout, Tsartlip, Tsyecum and Paquachin) are not distinct peoples (we are all WŚÁNEĆ), but rather, at most reflected inter-societal connections to specific villages. In the context of ĒĒĒ,TOS, and the current litigation in that regard, it makes sense to refer here specifically to Tsawout as a way to indicate that those from that village (and now Band) have a particular and strong connection to the island. As noted above, ĒĒĒ,TOS is located directly across from the Tsawout reserve.

893 Poth, *Saltwater People* at 29.

894 Millennia Research Ltd., in their archaeological survey of James Island, considered the oral tradition of WŚÁNEĆ elders in accounting for the likely presence of archaeological material at KĒLJIEŪĒ during their archaeological survey of James Island. Millennia Research considered the meaning of KĒLJIEŪĒ (which relates to the concept of “shelter”) to indicate the possible presence of an occupation site. Archaeological materials, including fire-cracked rocks, were found at the location. The report also noted a high potential for other archaeological deposits, including canoe skids. However, note that there does appear to be some inconsistency between the location of KĒLJIEŪĒ on the map provided in the Millennia Research report and that in Poth, *Saltwater People*. The location of KĒLJIEŪĒ on the map provided in *Saltwater People* more closely relates to the location described as archaeological site DdRu40 on the Millennia Research map. The archaeological report confirmed that DdRu 40 contained a significant amount of archaeological material, including shell midden, fire-cracked rock, a possible fish-trap feature, and considerable potential for yielding cultural items (such as basketry) in a nearby marsh. See Millennia Research, “Archaeological Reconnaissance” for more detail.

895 Millennia Research, “Archaeological Reconnaissance” confirmed that archaeological site DdRu-10 held reported human remains which were initially discovered in a 1974 archaeological project. WŚÁNEĆ oral tradition also speaks of a burial ground on the island.

896 *Ibid.* confirms shell midden sites throughout the shoreline of the island. WŚÁNEĆ oral tradition also speaks about the use of these resources.

897 Dungeness crabs vary in size, with 6.5 inches being the legal limit for male dungeness crabs (fishery of female crabs is illegal). Dungeness crabs, however, can be in the range of up to 10 inches in shell width. Typically, Dungeness crabs have a brown shell with a purple tinge. The crabs my Auntie speaks of are large in size and have a decidedly more purple colour to their shell.

898 Poth, *Saltwater People* at 29.

899 Bouchard & Kennedy, “Ethnographic Examination” at 51.

900 *Ibid.* [internal citation omitted].

these resources. These were the gifts provided by the Creator. For thousands of years our ‘Relatives of the Deep’ have followed the promise of creation and cared for us, the W̱SÁNEĆ people. W̱SÁNEĆ reciprocated in a number of ways, but John Elliott has spoken about the following ceremony in particular.

When the ocean spray would bloom it was a sign that the salmon were arriving. At this time a single man would paddle in his canoe to Point Roberts (SMOKEĆ) to make a sacrifice for the upcoming fishing. Each stroke was a sacrifice. The man travelled to SMOKEĆ with the memory of the words of the Creator (if the W̱SÁNEĆ people looked after the ‘Relatives of the Deep’, they would in turn look after the people). His travel was the ceremony that acknowledges that law. When he reached SMOKEĆ he would stand in his canoe and face all of the Gulf Islands. He would speak to them like they were human. He told them that soon their relatives would return to their waters to fish the salmon that were coming. He reminded them of what the Creator had told them long ago (that they need to look after each other). After speaking to the islands he also spoke to the spirit of the salmon. He asked them to take pity on the people and to feed them once more. If they fed the people, he told them the people would respect them like they always did. He then said a prayer name for each of the four types of salmon. After saying the prayer he began to paddle back home. On his way he stopped to gather the people and to tell them he had made a sacrifice and prayer for each of them. He told them that they would all look after each other.⁹⁰¹

The story John Elliott relates above is foundationally rooted in a relational ontology and epistemic locality. Through that lens, to remove ŁEL,TOS from our traditional territory and place it under private ownership is to take more than an island from the W̱SÁNEĆ people, it also takes from us an element of our culture, our belief system, and our legal system. I have already related the deeper meaning islands (TETÁĆES) have to the W̱SÁNEĆ people, as well as the creation story of ŁEL,TOS and the obligations passed by the Creator. These obligations are part of our S,OXHELI (our sacred teachings of life). Upholding our obligations of care for ŁEL,TOS is important to the W̱SÁNEĆ people, though becomes increasingly difficult the longer our people are restricted from accessing our traditional territory and from ŁEL,TOS. The dislocation we experience deprives us of more than access, but also of the connection we have with place through our belief system (our ĆELÁNEN – ancestry or birthright).

901 Teaching of John Elliot (24 September 2010) at ŁÁU,WELNEW Tribal School.



Figure 36: "LEL,TOS ("Splashed on the Face")" Photo, 2018.

While it would appear that “belief” is protected under the Canadian constitution and freedom of religion,⁹⁰² such protections are, in fact, wholly inadequate for such Indigenous claims. John Borrows identifies the inadequacy of the law in protecting religious beliefs that are outside the law’s “institutional receptiveness and interpretive competency.”⁹⁰³ Similar difficulties exist within the framework of s. 35(1) claims.⁹⁰⁴ More recently, Nicholas Shrubsole has written a detailed exploration of the challenges Indigenous Peoples face in terms of their religious freedoms in Canada.⁹⁰⁵ Shrubsole concludes that “Indigenous religious freedom is currently an impossibility in contemporary Canada, where mechanisms of the colonial project continue to manifest. Assumptions, institutions, and systems persist that exclude Indigenous perspectives and mask culturally specific ideas regarding religion generally and Indigenous religions specifically. Legally, politically, and socially, these assumptions, institutions, and systems continue the colonial project of marginalization, forced reshaping, and erasure of Indigenous cultures and ways of life.”⁹⁰⁶

902 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 at s. 2(a).

903 John Borrows, *Indigenous Constitution* at chapter 9. The law has difficulty in sufficiently protecting cultural beliefs that are outside its informing values. For instance, the concept of TETÁCES, which involves attributing a level of autonomy and reciprocal obligations between islands and the WSÁNEĆ people, might stretch the common law beyond its point of receptiveness. The common law might feel uncomfortable with the implications of recognizing this level of connection between, what western ideology views as an inanimate object and resource, and a group of peoples. Also see Benjamin L. Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015) for an assessment of law and religion within a liberal multicultural framework.

904 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 at 35(1). Refer to *R. v. Sparrow*, [1990] 1 S.C.R. 1075 for case law interpreting s. 35, as well as many other cases that followed. Also refer to Borrows, *Indigenous Constitution* at chapter 9 for a more thorough analysis and application of s. 35(1) and s. 2(a) in respect to Anishinabek legal traditions. Some of the general difficulties that may arise are that protection of WSÁNEĆ spiritual beliefs respecting TETÁCES might not be protected by a s.35(1) argument if they are not found integral to our distinctive culture prior to European contact, or the rights connected with these spiritual beliefs may also be viewed as extinguished by the common law and arrival of the common law and private property. Of course, valid legislative objectives that are consistent with the honour of the Crown may also serve to justifiably infringe Aboriginal rights. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 provided a broad scope of legislative objectives that could validly infringe aboriginal rights.

905 Nicholas Shrubsole, *What Has No Place, Remains: The Challenges for Indigenous Religious Freedom in Canada Today* (Toronto: University of Toronto Press, 2019).

906 *Ibid.* at 7.

Shrubsole's analysis pays particular attention to Indigenous culture and perspectives on land. Rather than referring to Indigenous "beliefs" about land, he references "cosmologically significant space", which he uses to "emphasize that the space is not just an outgrowth of belief but something that may be the origin of knowledge and belief, temporally, relationally, and spiritually orienting a community."⁹⁰⁷ Here again lies the particular problem – "Canada's legal culture presupposes a particular kind of land-person relationship."⁹⁰⁸ Rather than meaningful consideration of these differences in perspectives, Indigenous peoples, and their particular perspectives on land, are excluded or forced to assimilate.⁹⁰⁹ Shrubsole's argument, and my intention, is not to say that Indigenous claims can never receive any protection under Canadian law, but rather, to point to the more foundational divide; a divide which will never be conducive to a meaningful 'reconciliation'. As Shrubsole writes: "While the courts seem more willing to accept a wide breadth of features of Indigenous religions, they have made it abundantly clear that any such protections are superficial – meaning, conceptual integrity and the objects of belief are not protected under the Charter right to religious freedom."⁹¹⁰

The recent case, *Ktunaxa Nation v. B.C.*, the Supreme Court of Canada (SCC) made a clear statement in regard to how they would interpret Indigenous religious freedom in Canada.⁹¹¹ In this case the Ktunaxa Nation opposed the development of a ski resort that was to be built on Qat'muk, "a place of spiritual significance for them [because] it is home to Grizzly Bear Spirit... a principle spirit within Ktunaxa religious beliefs and cosmology."⁹¹² The Ktunaxa argued that the ski resort would scare away the Grizzly Bear Spirit. The Ktunaxa argued that the departure of Grizzly Bear Spirit would "remove the basis of their beliefs and render their practices futile."⁹¹³ As such, "the vitality of their religious community depends on maintaining the presence of Grizzly Bear Spirit in Qat'muk."⁹¹⁴ In drawing on precedent, the majority ruling of the SCC, written by Chief Justice McLachlin, stated that s. 2(a) is limited to "the freedom to hold religious beliefs and the freedom to manifest those beliefs."⁹¹⁵ The decision to allow a year-round ski

⁹⁰⁷ *Ibid.* at x.

⁹⁰⁸ *Ibid.* at 11.

⁹⁰⁹ *Ibid.* at 12.

⁹¹⁰ *Ibid.* at 25.

⁹¹¹ *Ktunaxa Nation v. British Columbia (Forrests, Lands and Natural Resource Operations)* 2017 2 S.C.C. 54 [*Ktunaxa Nation*].

⁹¹² *Ibid.* at para. 5.

⁹¹³ *Ibid.* at para. 59.

⁹¹⁴ *Ibid.*

⁹¹⁵ *Ibid.* at para. 63.

resort in Qat'muk interfered with neither the “freedom to believe in Grizzly Bear Spirit or their freedom to manifest that belief”, such as through worship, practice, or teaching those beliefs.⁹¹⁶ In that regard, the majority of the court was clear that “the state’s duty under s. 2(a) is not to protect the object of beliefs, such as Grizzly Bear Spirit.”⁹¹⁷ While the dissenting opinion of Justices Moldaver and Cote still upheld the Minister’s decision to approve the resort, they did characterize the majority’s reasoning as one which “amounts to protecting empty gestures and hollow rituals.”⁹¹⁸ While the Ktunaxa lost their case at the SCC, ultimately the ski resort was defeated and the Ktunaxa received \$21 millions dollars in establishing an Indigenous Protected and Conserved Area (IPCA) at Qat'muk (IPCA’s will be returned to in the following chapter).

It is clear that the Ktunaxa’s belief in Grizzly Bear Spirit is intimately tied with the object of belief, that is, it is “tied to the land itself.”⁹¹⁹ Such a realization brings back to our attention the intimacy of “locality” and “epistemic locality” described by Brian Burkhardt. When the Ktunaxa claim to religious freedom is viewed outside of that locality, it is subject to violence and misunderstanding. Like Ktunaxa and Grizzly Bear Spirit, many W̱SÁNEĆ beliefs are intimately tied to land in the same way.

In SENĆOTEN we speak of ŚWIST - “where we paddle to, to sustain our way of life.” It is our sacred connection to the land. It encompasses our traditional territory as provided by the Creator. Our ŚWIST includes all the locations we went to hunt, fish, crab, to see relatives - it encompasses everything. ŁEL,TOS is part of our ŚWIST. Therefore, like the concepts of S,OXHELI and ĆELÁNEN, to take ŁEL,TOS from our ŚWIST is also to take an element of our sacred connection to the land. A belief system intimately entwined with the land is critically harmed when that land is taken without justification. Caring for our ‘Relatives of the Deep’ goes beyond maintaining ecological integrity – something the current owner of James Island has endeavored to achieve. It also includes a spiritual element that incorporates active practice of our culture and belief system on the land and in relationship with ŁEL,TOS.

Colonialism and the privatization of ŁEL,TOS has hindered these practices, but they remain a strong and integral component of the W̱SÁNEĆ culture, belief system, and legal

⁹¹⁶ *Ibid.* at para. 70.

⁹¹⁷ *Ibid.* at para. 71.

⁹¹⁸ *Ibid.* at para. 130.

⁹¹⁹ Shrubsole, *What Has No Place* at 46.

order.⁹²⁰ It is through the framework outlined in this section that we understand the full harm experienced by the W̱SÁNEĆ and ŁEL,TOS. For decades ŁEL,TOS has been degraded and privatized. Within a western environmental ethic, which hinges on a Nature/Society binary, it would appear that ecological restoration of the island alone will lead to the ecological integrity of the island. From a W̱SÁNEĆ perspective, the harm continues and the ecological integrity of ŁEL,TOS cannot be achieved without connection, reciprocity, and good relationships with W̱SÁNEĆ.⁹²¹

With a better understanding of relational ontology and W̱SÁNEĆ's relationship with ŁEL,TOS, and in working to, finally, bring this chapter to a close, I wish to briefly highlight some of the ironies in the Nature/Society binary, the harms it has caused, and its relationship with capitalism.

9. Nature and Capitalists

Throughout the above section many ironies relating to capitalism and conceptions of “nature” are apparent, as well as the ways in which these clash with W̱SÁNEĆ thought as I have been attempting to relate it. We see the conceptual divide between Nature/Society throughout, including the naming of ŁEL,TOS as James Island, in 1854. I have already described how this is contrary to the W̱SÁNEĆ naming system, and how such an approach to naming functions to set humans apart from, and even impose them over, nature. Given the tendency to name places after ‘significant individuals’ is equally telling of what type of humans (those sitting atop the social hierarchy) have unique privileges in connection with place. A clear example of this at James Island was Richard McBride, and others, establishing a private hunting club on the island. In that sense, James Island has been a type of retreat from early on in its relationship with the settler community.

The impacts of this hunting club are in fact still felt. A number of foreign species were introduced for those to hunt on the island, including the fallow deer. While McCaw may have solved the fallow deer issue on James Island, the W̱SÁNEĆ still struggle to deal with the

920 I can say that the W̱SÁNEĆ people continued to use their land even throughout the 1870's to the present. My grandfather, Earl Claxton Sr., has indicated that James Island continued to be used by the W̱SÁNEĆ people even as a temporary village site until the 1930' or 1940's. Earl Claxton Sr.'s comments were cited in Millennia Research, “Archaeological Reconnaissance” at 15. Clearly the W̱SÁNEĆ have not forgotten their obligations to their ‘Relatives of the Deep’, proof of which resides in the continued passing on of the creation story of ŁEL,TOS.

921 To my mind falling back on the ecological integrity of the island brought about by the current owner of the island would be akin to condoning kidnapping, so long as the kidnapper, or persons who followed, cared well for the child that had been taken. Such a conclusion is absurd, and largely irrelevant to the harms already done.

rampant fallow deer population on other islands, including Sidney Island. In an act of resurgence the W̱SÁNEĆ Leadership Council has initiated the Fur to Forest program.⁹²² The program seeks to manage an ecological restoration of the forest ecosystem, including removal of the rampant invasive deer population. Managing the invasive deer population goes hand in hand with the development of a hunter training and mentorship initiative. W̱SÁNEĆ members and youth are taught safe hunting practices with elders, while also able and encouraged to exercise their Douglas Treaty hunting rights within the Gulf Islands National Park Reserve.

The poisoning of the island and its rare ecosystem was most clearly affected by the development of the munitions plant on the island. It is interesting to see how the conceptions of ‘nature’ and ‘away’ have oscillated over time. In connection with McBride and other social elites who developed a private hunting reserve at James Island, the island was a type of private ‘nature’ away from Fort Victoria to which one could escape to. With the munitions plant, the notion of the island as being a place ‘away from’ the city is used in a different sense. The reason the munitions plant was moved to James Island was to mitigate the impact the heavy pollution from the plant had on private land owners in the Victoria and Nanaimo areas. In that sense, James Island was a place ‘away’ from civilization and thus not a disturbance. Yet, what climate crisis has so clearly illustrated is that there is no legitimacy in conceptualizing pollution as ‘away’ from us, and thus no longer our concern. It is this very type of faulty logic and industrial capitalism that has propelled us into the depths of climate crisis.

It is, of course, also troubling that the notion of having the munitions plant ‘away’ from civilization gave no consideration to the W̱SÁNEĆ. The W̱SÁNEĆ were clearly present, and the Tsawout reserve is located directly across from James Island. The fact that this was not of concern reflects the dehumanizing aspect of colonialism and its impacts.⁹²³ That is, within the binary of Nature/Society, the W̱SÁNEĆ were not civilized enough to escape the conceptual category of ‘nature’. Thus, to the extent that nature is used as a dumping ground, there need be little concern regarding the pollution from the plant being ‘away from’ W̱SÁNEĆ in the same sense that it was necessary for the general population of Victoria.

922 The program is a partnership with Parks Canada, private land owners, the province of BC, and the W̱SÁNEĆ and Hul’qumi’num Nations. See the W̱SÁNEĆ Leadership Council website for more at https://wsanec.com/avada_portfolio/fur-to-forest-2/.

923 Dayna Scott and Adrian A. Smith have also given critical reflection on “sacrifice zones” in the green energy economy where low-income and racialized groups are forced to bear more environmental harms. See Dayna Scott & Adrian A. Smith, “Sacrifice Zones” in the Green Energy Economy: Toward an Environmental Justice Framework” (2017) 62:3 *McGill LJ* 861.

When the munitions plant closed, no clean-up of the contamination created by the plant was undertaken. The island, and the services it had to offer to the company as a site for operating the munitions plant, were simply exploited and appropriated. The relationship between the company and the land was clearly non-reciprocal, which is not entirely surprising since, as discussed in previous chapters, capitalism, as a way of organizing nature, depends on this externalization and appropriation of nature. Having to meaningfully account for those costs within the logic of capital would have been too high. In fact, as we saw, the cost of clean-up was enough for one corporation their project of a golf resort. It is also worth mentioning that within WŚÁNEĆ thought, such treatment of the island (and the gifts it has to offer the WŚÁNEĆ) would fall well outside the zone of acceptable behavior within the realm of kinship and relational ontology.

The next obstacle that came to James Island was the world-class golf resort that was envisioned. I have already mentioned how the “no limits” design of the course is problematic within an archeologically sensitive area. However, such a golf resort is clearly another capitalist project, albeit less industrial than the munitions plant. Enjoying a round of golf within a beautiful setting can be seen as a chance to be outside and in ‘nature’. However, like Butchart Gardens, for example, the type of ‘nature’ envisioned is one that is highly controlled, shaped, and manicured.

Some of the most interesting, and ironic, points on nature and capitalism come with attention to the McCaw era. On the one hand, the extensive work McCaw has undertaken to clean-up the pollution and contamination on the island is a vast improvement from previous owners of the island. As I have indicated, however, issues remain. Most noteworthy involves returning to the notion of ‘away’ that I brought up in relation to the munitions plant being moved to James Island. With McCaw we see an ironic shift in this conceptualization. In purchasing the island McCaw set out to create an eco-paradise retreat. In that sense, he is seeking a different type of ‘away’. As a capitalist and telecom billionaire, his carbon footprint is huge in comparison to the average citizen, and of course, also compared to the average WŚÁNEĆ member. In his desire to escape the business life – a life in which he has clearly profited greatly – he retreats to “nature” and his private island, when desired. In doing so, his actions are also consistent with the observations of Mann and Wainwright in *Climate Leviathan* in which they predict a doubling down on the capitalist project whereby the elite, through their wealth and privilege, seek to

insulate themselves from the harshest effects of climate crisis. Owning your own private eco-paradise is certainly one way in which that can manifest.

The attempt to insulate himself on the island, along with other business and social elite, is telling of the way in which McCaw upholds the Nature/Society binary. That is, even his escape to nature fundamentally upholds the binary in that it relies on private ownership and a compartmentalization of nature from society. Through his restrictive access and narrow focus on his interests, he forgets that LEL, TOS is a part of a much broader nature. For instance, while he addressed the issue of fallow deer on James Island, the same invasive species run rampant on the adjacent island. His concern then, it would seem, is less about fostering healthy ecosystems through removal of invasive species, as it is with fulfilling a particular vision contained within his own personal property.

Similarly, the plan to build a larger dock on Melanie Bay is also narrowly focused. Melanie Bay is located directly across from the Tsawout reserve on Saanichton Bay. While the dock expansion is not to the same scale as the proposed marine contemplated in *Claxton v. Saanichton Bay Marina Ltd.*, it is troubling that an expansion would be considered directly adjacent to the location where Tsawout successfully asserted their Douglas Treaty right to fish as formerly to block a marina development.⁹²⁴ I am told by W̱SÁNEĆ members involved in that court case that, if money were not an issue, they would have asserted their rights beyond Saanichton Bay to include other nearby areas, including James Island. Unfortunately, the case virtually bankrupt the Tsawout First Nations as is.

In a previous chapter I also related my uncle Earl Claxton Jr.'s actions to physically stop the dredger by jumping on to it in Saanichton Bay. In telling that story today, he describes how he felt an obligation to act, and how he knew he had to defend the bay and W̱SÁNEĆ. He ties this obligation back to his initiation as a SX̱ÍXI. He embodied not only an exercise of his societal rights through our TEXTÁN, but also his societal *responsibilities* as a SX̱ÍXI warrior. Such aspects and exercises of W̱SÁNEĆ law are given little consideration in connection with activities that occur on the island.

⁹²⁴ *Claxton v. Saanichton Bay Marina Ltd.*, (1989), 36 B.C.L.R. (2d) 79 (BCCA).



Figure 37: "The Paddle for ŁEL,TOS preparing to leave from TIXEN" (left) and "ŁEL,TOS in the Distance from My Home" (right). Photo, 2018.

The fact that W̱SÁNEĆ law is not considered in connection with developments on James Island can be linked more broadly back to the strict exclusion of W̱SÁNEĆ people from that place. The W̱SÁNEĆ people are part of the ecosystem. To deny our access to lands, forests, clam beds, plants, and others within our homelands, negatively effects the health of the environment and ecosystem. The same is the case when you remove any aspect of the ecosystem from the rest. An ecosystem functions as a whole; a whole that includes us. The notion of a private retreat to nature only works to perpetuate the problematic view that humans are somehow separate from nature. While McCaw may believe he can escape to nature, for the W̱SÁNEĆ, we realize that we cannot escape our relationship and responsibilities to ŁEL,TOS. To care for a place goes beyond ecological integrity.

In past statements, a representative of McCaw's was asked to comment on the archaeological significance of James Island to the Tsawout First Nation. He opted to downplay that claim by asserting that the island was so "chewed up" by previous developments on the island that is "hard to imagine anything there."⁹²⁵ Such a statement clearly misunderstands the concepts of epistemic locality and relational ontology identified in connection with Burkhart. McCaw's representative believes that W̱SÁNEĆ would only be concerned with the presence of 'thing's – i.e., shell midden, archeological objects, and the like. While W̱SÁNEĆ of course have interest in protecting these types of material finds, the comment overlooks the larger point of relational ontology. That is, that W̱SÁNEĆ is primarily concerned with our relationship, and our ancestor's and our children's relationship, with that place. McCaw's representative sees W̱SÁNEĆ claim and connection with ŁEL,TOS as something static, and as captured merely by

⁹²⁵ Chung, "An Island Under Question" at A1.

archaeological objects. Quite the contrary, W̱SÁNEĆ's relationship with ŁEL,TOS is living and dynamic. As described earlier, the Paddle for ŁEL,TOS was exactly about that dynamic relationship.

Finally, McCaw's agent also seemed to imply that if James Island was that important to W̱SÁNEĆ then they could always purchase the island. Such a statement is familiar within the logic of capital where again, such a comment misses the point of a relational ontology that takes the concept of ṮEṮÁĆES seriously. Through the lens of ṮEṮÁĆES, the comment reflects something akin to a kidnapper arguing that a ransom should just be paid for a loved one. Similarly, the notion of a *bona fide* purchaser somehow negates the fact that ŁEL,TOS was previously stolen and harmed. To argue over ŁEL,TOS in this way is dehumanizing, but we are often forced into it.

10. Conclusion

To the W̱SÁNEĆ People, ŁEL,TOS is more than just an 'island'. Language "is a way of thinking, or viewing the human experience in the world, as much as it is about communicating."⁹²⁶ ŁEL,TOS is part of W̱SÁNEĆ; it is our 'Relative of the Deep'. To the W̱SÁNEĆ, place names have great significance. Every name, whether for a location or person, has deep roots and a history that comes with it. Each name is connected to our ancestors (this is known as our NEHIYMET). Each name is passed along by S̱EMEŴ and provides a connection to the land from which we come. I was taught that, to earn a name is a great honour, and responsibility. Names are a responsibility because they create a duty to remember (and pass on) the history of the name and where it comes from. A name is worth little without the history behind it. A significant part of W̱SÁNEĆ oral history is entwined with these place names.⁹²⁷ In this way, names and naming is a distinct component of W̱SÁNEĆ law. They are an important legal practice because with each name comes status, obligations, and procedural requirements. In general, names and naming can be viewed as a legal practice that creates and formally recognizes and enforces obligations that are integral to W̱SÁNEĆ culture. In the case of ŁEL,TOS, that name reminds me of our obligations to our 'Relatives of the Deep'.

⁹²⁶ Poth, *Saltwater People* at 19.

⁹²⁷ This paragraph is derived from my personal experience as well as from a story related in Jack, "ṈIL EN S̱ÉLÁNEN" at 29.

While the principal goal of this chapter has been to create a framework for understanding ŁEL,TOS and relational ontology, I do offer some practical considerations. Tsawout has obviously turned to the common law in hopes of obtaining a solution to these ongoing harms. WŚÁNEĆ have used the Douglas Treaty in the past to assert and protect our rights, and the choice to do so may again may yield positive results. Soon after Tsawout removed JI Properties as a defendant in the Civil Claim, the company again posted James Island for sale. Having the island for sale does invite the possibility of having the government purchase the island and return it to Tsawout. Such a process might also involve some type of claim for damages. While litigation may certainly have its downsides (being uncertain and expensive to name only two), a successful claim would position Tsawout well in reestablishing our connection and relationships with ŁEL,TOS. Of course, much of WŚÁNEĆ territory, as mentioned, is in private ownership and Aboriginal or Treaty rights claims for all those different areas will not be feasible. While it is troubling that the concept of *bona fide* purchaser should unquestionably trump the unjustifiable taking of WŚÁNEĆ territory, that is often the reality we are faced with.

Despite the efforts by McCaw to revitalize the island, WŚÁNEĆ are still left without a remedy for ŁEL,TOS being wrongfully taken nearly 170 years ago. These long-standing harms associated with ŁEL,TOS need to be addressed with attention to WŚÁNEĆ perspectives. On a personal note, I hope to one-day see ŁEL,TOS from a perspective other than the foreshore! Until then, we will continue to “hear the call” of place and actively foreground our relationship and responsibilities to ŁEL,TOS in the hopes that injecting even a bit of locality into the discussion can make a difference.



Figure 38: " WŚÁNEĆ Place Names Map, with ŁEL,TOS Circled" in Poth, *Saltwater People* at 20.

Chapter Six

A Saltwater People

Water, Jurisdiction, and Dispossession: Protecting the Salish Sea



Figure 39: “SXOLE (Reef-net fishery) at SXIXFE (Bedwell Harbour)” Photo from WSÁNEĆ Leadership Council (<https://wsanec.com/w%CC%B1sanec-youth-revitalize-ancient-practice-of-sx%CC%B1ole-reef-net-fishing/>).

1. Introduction

As a Saltwater People⁹²⁸ our relationships with the ocean and the beings who call it home are vital to WSÁNEĆ peoples. Regarding the dispossession of land we might demand #LandBack or make the enduring claim against the state that our lands have been *stolen*. But what of the equally pervasive dispossession of saltwater territory and our ability and authority to relate to those waters in accordance with our own Indigenous legal orders? “What do we call a process of colonization where the effect of dispossession is not removal but the perpetuation of a set of exhaustive administrative regimes that undermine, erase, and choke out the exercise of Indigenous jurisdiction, rendering Indigenous people peripheral to effective participation in land

928 Poth, *Saltwater People*.

[and water] governance?”⁹²⁹ What about when these same administrative regimes function to propel climate crisis and other harms? As we will see, this has been more the case when we turn our attention to W̱SÁNEĆ ocean territory. In order to understand dispossession in this sense I will draw more directly on the concept of jurisdiction, and the work of Shiri Pasternak.

In this chapter I will look at the role jurisdiction has in dispossession, particularly in relation to the ocean waters around W̱SÁNEĆ, and then, in more depth, I will examine what tools might be available in W̱SÁNEĆ to reverse this trend of jurisdictional dispossession.⁹³⁰ Specifically, I will look at the National Marine Conservation Area Reserve (NMCAR) regime, the Indigenous Protected and Conserved Areas (IPCA) concept, and more briefly, the rights of nature movement, including a look at what these tools are, how they function, and what possibilities they might present. Might any of these tools help mitigate the concerns I have been raising throughout this work? In what ways do they fall short? Before we can answer those questions we need to better understand how W̱SÁNEĆ law and jurisdiction has been displaced over this marine area. First, I will situate this ongoing reality with an example prior to offering more theoretical understandings.

2. The Trans Mountain Pipeline: A Jurisdictional Conflict⁹³¹

On November 28, 2018, I testified in front of the National Energy Board (NEB) in continued opposition to the Trans Mountain pipeline expansion project (TMX), alongside a handful of others from the Tsawout First Nation.⁹³² We opened with drumming and a prayer song about the 13 W̱SÁNEĆ Moons; a song that ties us to the lands, waters, and more-than-human world within our homelands. The W̱SÁNEĆ year is divided into 13 Moons that represent not calendar months but social, cultural, economic, spiritual, and legal practices that correspond with the weather and

929 Shiri Pasternak, *Grounded Authority: The Algonquins of Barriere Lake Against the State* (Minneapolis: University of Minnesota Press, 2017) [Pasternak, *Grounded Authority*] at 55. Pasternak does note that “Among the strategies of perfecting settler sovereignty, the imposition of Western property rights onto Indigenous forms of landholding has been pivotal” (*ibid.* at 27). In that sense, while in relation to EEL, TOS and exclusive fee-simple property ownership we were able to speak of dispossession in a somewhat straightforward and physical sense – we were removed from and prohibited from returning to the island, we also began to think of it in this broader sense as well. Here I will continue with that thread.

930 See Ruru, “What Could Have Been?” for reflections on whether Native Title could ever apply to saltwater territory.

931 Aspects of this section have been previously published as an essay on the Centre for International Governance Innovation website. See Robert YELKÁTTE Clifford, “Saanich Law and the Trans Mountain Pipeline Expansion” in Centre for International Governance Innovation, Digital Essay Series, *Environmental Challenges on Indigenous Lands* (4 July 2019).

932 Tsawout presented at both the original NEB hearings, as well as the reconsideration hearings. The Tsartlip First Nation also participated in reconsideration hearings on this date, and was also in opposition to the project. I also acknowledge that the project impacts a significant number of Indigenous groups along the pipeline and tanker route. I approach my thoughts in this section from a W̱SÁNEĆ perspective, as opposed to offering a pan-Indigenous response.

cycle of seasons. As a Saltwater People, much of our traditional homelands span the southern Gulf Islands (Canadian side) and the San Juan Islands (American side). Our jurisdiction respecting these places has been organized in many ways around our NEHIYMET, or ancestral lines, which grant family groups certain privileges and responsibilities to various locations, including our SXOLE (reef-net fishing stations). Speaking at the NEB was *one way* for us to assert WSÁNEĆ jurisdiction in relation to these places, and was an *enactment* of our laws.

In addition to inherent rights and responsibilities in WSÁNEĆ, as Douglas Treaty signatories we also have an established agreement with the Crown regarding jurisdiction and living together, which among other things protects our rights and responsibilities to “carry on our fisheries as formerly.”⁹³³ Concerns relating to the significant harm that would result from an oil spill, as well as the damage caused by increased tanker traffic, including continued erosion, damage to eel grass beds, and harm to endangered species such as the Southern Resident killer whales (SRKW), are at the forefront in WSÁNEĆ. The marine shipping route taken by the tankers also impacts most of our reef-net fishing sites. As my cousin, Nick Claxton, testified: “Overall, this project runs counter to our efforts as WSÁNEĆ people, our efforts to regain and revitalize our ways of being and living, our ways of life that were developed and stood for a millennia, the many gifts that were given to us by the creator, XALS, such as the SXOLE, and these things were promised to be respected through our treaty relationship, which are still being ignored and pushed aside by the settler colonial state.”⁹³⁴

In addition to obvious concerns relating to the specific project and its potential approval, for Tsawout there was also something larger at stake. I based my own testimony along those lines.⁹³⁵ Opening with a prayer, as we did at the NEB, is meant to shape the way we relate to each other, to open hearts and minds, and to honour and respect the relationships that are all around us. I invited the NEB panel to listen with an open heart and open mind because to us “consultation” requires not just hearing but *understanding* our laws, including their standards of judgment, the obligations they create, the worldview from which they flow, and their relevance and legitimacy in relation to these lands and waters.

933 “Douglas Treaty, 1852”. See also Claxton, “The Douglas Treaties” for a WSÁNEĆ perspective on the right to “fish as formerly”. For case law in which the WSÁNEĆ have upheld their rights under the Douglas Treaty, see for example: *R v Bartleman*, [1984] 55 BCLR 78 (BCCA); *Claxton v. Saanichton Bay Marina Ltd.* (1989), 36 B.C.L.R. (2d) 79 (BCCA); and *R. v. Morris* [2006] 2 S.C.R. 915.

934 National Energy Board, Past Hearings, Trans Mountain Pipeline ULC Reconsideration (MH-052-2018) 2018-11-28 audio accessed at <https://www.neb-one.gc.ca/prcptn/hrng/hrngnspst-eng.html>.

935 *Ibid.*

In the February 2019 reconsideration of the TMX, the NEB once again decided that the expansion project is in the public interest of Canadians, despite acknowledging that it will cause “significant adverse environmental effects” on the marine environment and Indigenous cultural uses.⁹³⁶ The TMX would see the total capacity of the pipeline increase from 300,000 to 890,000 barrels of crude oil per day, as well as a seven-fold increase in tanker traffic along the coast of British Columbia.⁹³⁷ The NEB offered 16 new recommendations aimed at marine protection while concluding that any risks associated with the project are outweighed by the “considerable benefits” that the project offers. While to many the NEB ruling might appear to settle the issue, rather, it represents only one of the more recent conflicts of jurisdiction; that is, as Shiri Pasternak frames it, the conflict “over *the authority to have authority*.”⁹³⁸ Stated differently, it was a conflict “over whose laws of belonging will apply on those lands – and on what grounds.”⁹³⁹

Indigenous peoples have been standing in front of Canadian institutions such as the NEB for decades, often with very little success in creating what we would call meaningful change. One reason we do this, and will continue to do it, is because we are *obligated* to act, and speaking to these institutions is *one of the ways* in which we do so. We act in other ways as well, and we are aware of the limitations, the dangers and the misinterpretations that can occur through these processes, but we feel obligated to do so when necessary.⁹⁴⁰ W̱SÁNEĆ law requires that we act to protect our homelands and other beings within them, including islands, salmon, whales, water, and others. This is a positive obligation within our law.

In W̱SÁNEĆ, we will continue to resist and to emphasize the legitimacy and importance of our SKÁLS (laws and beliefs). However, faced with large and pressing problems such as the TMX and global climate crisis more generally, we also need more people to listen and to act. My late grandfather recalled words his father spoke to him while visiting a river in W̱SÁNEĆ. He said that “the river is a living thing, and if you listen, he will speak to you.” In the same way, not long before the NEB rehearing, a Southern Resident killer whale named J35, who carried the

936 National Energy Board, Trans Mountain Expansion Project Reconsideration Report (MH-052-2018, February 2019) at Introduction and Disposition p. i.

937 For more general information about the Trans Mountain Pipeline expansion see the Trans Mountain web page: <https://www.transmountain.com/project-overview> and The Globe and Mail, ‘What the Trans Mountain pipeline will mean for B.C.’s coast’: <https://www.theglobeandmail.com/news/british-columbia/kinder-morgan-trans-mountain-pipeline-bc-coast/article35043172/>.

938 Pasternak, *Grounded Authority* at 2.

939 *Ibid.*

940 Glen Coulthard provides an important critique of what he calls the colonial politics or recognition. See Coulthard, *Red Skin, White Masks*.

body of her dead calf for 17 days for all to see, was telling us something.⁹⁴¹ For those who were listening, she was telling us that we have responsibilities we are not meeting. There are signs all around us that we need to stop recklessly burning through fossil fuels, depleting salmon stocks, and carrying out other destructive behaviours. These are the larger issues that are at stake, and the fundamental changes that must be made.

Although Tsawout attempted to assert WSÁNEĆ law and jurisdiction within the NEB process (because that was one of the paths available to us), this is not a long-term solution. From a WSÁNEĆ perspective, the NEB cannot (on multiple grounds) provide a meaningful and just determination of the issues at hand, particularly when divorced from any type of intimate relationship with the lands, waters, and other beings over which it claims to preside. At most, the NEB process seeks to *speak of* the islands, the water, and the whales, whereas a meaningful reciprocal relationship *with* these beings is what is required. It is time for a different way of being, and that includes all of us. While the NEB attempts to impose, what Shiri Pasternak calls, a jurisdiction of “supply” over these waters through furthering extractivism and propelling us toward climate crisis, many in WSÁNEĆ continue to assert the opposite - a jurisdiction of “care” in relationship with these same places.⁹⁴²

3. Theorizing Dispossession Through Jurisdiction

How does the concept of jurisdiction open another lens on dispossession, and how does jurisdiction differ from sovereignty? Shiri Pasternak investigates a gap that she sees as existing between sovereignty and jurisdiction. She writes, “Jurisdiction is not a technicality of sovereignty... It is the apparatus through which sovereignty is rendered meaningful, because it is through jurisdiction that settler sovereignty organizes and manages authority.”⁹⁴³ As we have already noted in the last chapter, *asserting* sovereignty is one thing, but sovereignty needs to be actualized and continually reinforced. In the preceding chapter we examined how private property and the right to exclude others played a role in actualizing sovereignty claims over land and thereby facilitating the dispossession of LEL, TOS. In that regard, property worked as a

941 See Lori Cuthbert & Douglas Main, “Orca Mother Drops Calf, After Unprecedented 17 Days of Mourning” *National Geographic* (13 August 2018) online: <https://www.nationalgeographic.com/animals/2018/08/orca-mourning-calf-killer-whale-northwest-news/> for more.

942 Pasternak makes a distinction between jurisdiction of “care” and jurisdiction of “supply”, which I will return to below.

943 Pasternak, *Grounded Authority* at 3.

central technique of jurisdiction.⁹⁴⁴ Over tidal waters, and specifically the fisheries they supported, property did still function as a technique of jurisdiction, as we will see, however, as opposed to private property, it was the concept of *common* property and the right *not* to be excluded that did much of the work of dispossession.⁹⁴⁵ Of course, other techniques of jurisdiction also apply. Either way, the machinery of jurisdiction works to buttress and actualize sovereignty claims and the elusive search for the perfection of settler sovereignty.⁹⁴⁶ In that regard, foregrounding jurisdiction and the day-to-day work of jurisdictional borders, along with the perpetual struggles it produces, also allows us to see the ongoing and unfinished nature of colonialism.⁹⁴⁷

In using the term jurisdiction, we mean “first and foremost...the power to speak the law.”⁹⁴⁸ But how does the lens of jurisdiction, or the ability to speak the law, help us to conceptualize another form of dispossession? As Pasternak, in her work with the Algonquins of Barriere Lake, invites us, we can imagine a map of place entangled with jurisdictional lines, each of which presents a potential limit in that it represents jurisdiction, or in other words, the power to speak some aspect of the law that applies to that area. In that regard, she writes: “To visualize the dense jurisdictional overlap of legal pluralities, we can map the thickening heap of lines that construct barriers against Algonquin exercises of jurisdiction and thus self-determination on their lands.”⁹⁴⁹ “In this way we can see that the effect on the Algonquins’ ability to exercise their self-determination as Algonquin peoples is the result not merely of Canada’s assertion of sovereignty, but also of this jurisdictional commotion on their land.”⁹⁵⁰

To bring this back to W̱SÁNEĆ, these layers of commotion, of which Pasternak speaks, might include provincial parks, conservation areas, municipalities, different jurisdictional roles within federal powers, such as between Parks Canada and the Department of Fisheries and Oceans, and even other authorities, such as Islands Trust, who have authority delegated from the Crown, to name but a few. Such a layering of jurisdiction clearly does not occur all at once, but

944 See *ibid.* at Chapter 4, “Property as Technique of Jurisdiction: Traplines and Tenure” for more discussion.

945 D. Harris, *Landing Native Fisheries*.

946 Shiri Pasternak, *Grounded Authority* writes: “The perfection of settler sovereignty – that is, the fusing of sovereignty claims with the effective exercise of territorial jurisdiction over Indigenous lands – remains unfinished today” (Pasternak, *Grounded Authority* at 14-15).

947 Pasternak notes that “in the absence of legal agreement, a perpetual struggle over jurisdiction defines the terrain” (*ibid.* at 3).

948 *Ibid.* at 10.

949 *Ibid.* at 18.

950 *Ibid.*

rather, is a form of “slow violence” that builds over time.⁹⁵¹ Equally clear is that this cacophony need “not result in the removal of the community” but, rather, is a process whereby Indigenous territory is “alienated and reterritorialized through competing use and jurisdictional claims.”⁹⁵² Importantly, this superimposition of jurisdiction relies not only on a strategy to erase and choke out Indigenous jurisdictional authority, but also on an ability “to replace and undermine inherent Indigenous jurisdiction with a state-delegated form of authority.”⁹⁵³ Given the importance of this last observation it is worth flagging now that approved co-management agreements, such as those under the National Marine Conservation Area regime, which I will discuss below, don’t simply recognize and make space for inherent Indigenous jurisdictions, but rather, create a new form of state delegated authority, and as such, have to be approached with at least some level of skepticism from the outset.⁹⁵⁴

The extent to which we can see and act through this superimposed mass of jurisdictional lines and through to underlying and inherent Indigenous jurisdiction of course varies. Certain regions may be more opaque than others, including around “critical infrastructure.”⁹⁵⁵ It is therefore helpful, as Pasternak does, to conceptualize this process of jurisdictional dispossession as existing on a spectrum. She writes, “Colonialism in Canada seems to present a continuum between the uncontested exercise of Indigenous jurisdiction, the steady accretion of restrictions and regulations that control the use and access of Indigenous peoples to their lands, and the perfection of state sovereignty in the form of absolute dispossession and obliteration of Indigenous law.”⁹⁵⁶ I would add that, as opposed to a single spectrum, we might also imagine multiple-spectra that relate to various aspects of Indigenous lifeways and places within Indigenous territories over time.

Pasternak’s efforts to foreground jurisdiction in this way is not to negate the relevance nor effects of sovereignty claims,⁹⁵⁷ but rather, to argue that “the *legitimacy* and *legality* of

951 Pasternak refers to the work of Rob Nixon in this regard. See *ibid.* at 56 and Nixon, *Slow Violence*.

952 Pasternak, *Grounded Authority* at 55.

953 *Ibid.* at 5.

954 Paul Nadasdy, who has worked extensively on analysing the impacts these types of co-management agreements have on inherent Indigenous governance structures, makes this point (Nadasdy, *Sovereignty’s Entailments*). Also see Paul Nadasdy, *Hunters and Bureaucrats: Power, Knowledge, and Aboriginal-State Relations in the Southwest Yukon* (Vancouver: UBC Press, 2003) [Nadasdy, *Hunters and Bureaucrats*]. For a perspective that focuses more on empowerment that might flow from co-management agreements see Graham White, *Indigenous Empowerment Through Co-Management: Land Claims Boards, Wildlife Management, and Environmental Regulation* (Vancouver: UBC Press, 2020).

955 Pasternak, *Grounded Authority* has a focus on critical infrastructure and this is a discussion we will return to.

956 *Ibid.* at 64.

957 “By disentangling jurisdiction from sovereignty, I do not mean to argue that sovereignty is an illusion: it is the dominant political-territorial ideal of the nation-state, which has had an incalculable effect on Indigenous legal orders” (*ibid.* at 15).

sovereignty can be called into question in the register of jurisdiction.”⁹⁵⁸ Continued enactments of Indigenous laws and self-determining authority play an important and ongoing role in this regard.⁹⁵⁹ Where Indigenous laws have been asserted, “new kinds of differentiated legal zones have emerged where Indigenous territorial jurisdiction forms lumps that betray patterns of partial and uneven state sovereignty.”⁹⁶⁰

Prior to moving on, it is important to note that the jurisdictional commotion on Algonquin and W̱SÁNEĆ lands facilitate not only Indigenous dispossession, but climate crisis and the dispossession of other beings within these territories. The jurisdictional lines of “supply” – i.e., that “literally *supplies* the geographic context for the political economy of the settler state”⁹⁶¹ – that overlay Indigenous territories also create space for capital and ongoing accumulation.⁹⁶² It is, therefore, not just dispossession but the production of “all life on the territory as *supply* [that] ensures a structure of elimination.”⁹⁶³ “Even as a principle of conservation, *supply* is a key goal of maintaining wildlife populations, for the purposes of human consumption, survival of the species, and recreational hunting.”⁹⁶⁴ On a more positive note, enactments of Indigenous law and jurisdiction that resist the dispossession created through settler colonialism can, therefore, also “create the barriers to penetration by capitalism”, and thus combat climate crisis.⁹⁶⁵ Combating climate crisis is vital because climate crisis is, in itself, also a form of dispossession in the sense we have been discussing – “the slow violence of losing the capacity to exercise care” for our homelands.⁹⁶⁶ That is, it is a “theft of the ability to act and govern when [our] homelands are damaged” by such diffuse (spatial and temporal) sources.⁹⁶⁷

As I hope to have related, the lens of jurisdiction opens effective avenues for thinking about dispossession. However, is there anything it distracts us from seeing? I have, in the past, expressed concern that a fixation on jurisdiction, that is *who* gets to speak, might distract us from

⁹⁵⁸ *Ibid.*

⁹⁵⁹ *Ibid.* at 9. Note that Pasternak speaks of dispossession in two interrelated ways. First, is dispossession of a communities ability to reproduce their social, economic, and legal orders. The second form involves both state-based and private claims over Indigenous territory. See *ibid.* at 26 for more.

⁹⁶⁰ *Ibid.* at 7.

⁹⁶¹ *Ibid.* at 105.

⁹⁶² By “supply” Pasternak is referencing a process of abstraction in which “the commodity form of land in liberal capitalist society aims to erase value other than that which can be expressed in market terms” (*ibid.* at 105).

⁹⁶³ *Ibid.* at 123. Here Pasternak is drawing on the work of Patrick Wolfe on settler colonialism as a structure of elimination, as well as the work of Scott Lauria Mogensen.

⁹⁶⁴ *Ibid.* at 105

⁹⁶⁵ *Ibid.* at 56.

⁹⁶⁶ *Ibid.* at 71.

⁹⁶⁷ *Ibid.* at 123.

remembering what our *responsibilities* actually are.⁹⁶⁸ That is, it matters not only that we speak, but also *how* we speak and *how* we act. Some of this concern is addressed in that Pasternak does couple Algonquin jurisdiction with an “*ontology of care*,”⁹⁶⁹ giving rise to what she calls a “jurisdiction of *care*.” That is, we could say that Indigenous jurisdiction “is not tied to colonial legalities and imagined sovereignty but to the source of their own legal responsibilities: their relation to the land.”⁹⁷⁰ In that regard, jurisdiction and the power to determine “which laws will apply in a given context”⁹⁷¹ is shaped by foundational principles, such as reciprocity.⁹⁷² To that extent, while I have in previous chapters taken a critical stance on the concept and appropriateness of sovereignty, perhaps jurisdiction, “whereupon authorities of various kinds govern the ways in which these laws will be ordered and organized in space, and define its subjects and scope,” allows for more flexibility.⁹⁷³

In order to have a better sense of this theoretical orientation we need to put it into practice in a specific place and context. To do so I will now turn more specifically to the Salish Sea and W̱SÁNEĆ ocean territory.

4. Dispossession and the Reterritorialization of the Salish Sea

Despite an 1852 Treaty promise to protect our right to “fish as formerly” there has been a steady and persistent eroding of W̱SÁNEĆ jurisdiction within our ocean territory, harm to those waters and the beings who call them home, and a dispossession of our ability to uphold care for these places and beings. We will explore this here principally in relation to fisheries, as it provided the initial impetus for asserting settler jurisdiction over W̱SÁNEĆ waters.

As I claimed in the chapter on LEL,TOS, understanding the process and nature of this dispossession, and the harms it creates, is the first step in working toward healthier relationships and coexistence in place. A thorough and complete analysis of the unfolding of the many layers of jurisdiction that have been asserted over W̱SÁNEĆ marine territory is not possible here. Yet,

968 Clifford, “W̱SÁNEĆ Legal Theory”.

969 Pasternak, *Grounded Authority* at 6. Pasternak goes on to explain that “This ontology of care not only directs the external organization of authority: it also orders the community internally, within bodies, families, and the nation. It orders relations between the human and other-than-human worlds, too – for example, in the way that Algonquins gather intelligence from the animal and plant worlds” (*ibid.* at 27).

970 *Ibid.* at 35. It is worth noting that “from Indigenous perspectives, the meaning of authority can also be sourced within a range of legal traditions. For some, legal authority circles back to Creation and the myriad forms of intelligence and spiritual force animating life on these lands” (*ibid.* at 6).

971 *Ibid.* at 100.

972 “This legal order of care that gives rise to Algonquin jurisdiction organizes land management according to principles of respect” (*ibid.* at 88).

973 *Ibid.* at 10. I recognize there is some ambiguity here on whether the legal order gives rise to jurisdiction, or jurisdiction inaugurates a legal order. Regardless, there does seem to be an intimate connection between the two.

“However arduous these expositions may be to undertake, mapping the boundaries of administrative authority is an exercise instrumental to understanding the production of space under settler colonialism.”⁹⁷⁴ Understanding how these colonial processes have unfolded is also a necessary backdrop in considering to what extent the tools we will soon look at can function to create change, or alternatively, work to replicate the logics that have facilitated this dispossession to begin with. The context from which we will judge this change is the full exercise of W̱SÁNEĆ law and jurisdiction.

4.1. W̱SÁNEĆ Jurisdiction

While I discussed the nature of W̱SÁNEĆ law in more detail earlier in this work, it is worth recapping a few points about how W̱SÁNEĆ law and jurisdiction goes about organizing relationships with territory. In some instances of W̱SÁNEĆ jurisdiction “legal authority circles back to Creation.”⁹⁷⁵ Responsibilities and obligations with TETÁĆES (Relatives of the Deep, or islands) is one such example. Yet, there are also examples of a “kinship-based tenure system, where families responsible for particular ranges hold the legal decision-making power.”⁹⁷⁶ Such a tenure system is not based on strict ownership. Rather, the “tenure system differentiates the landscape into spaces of kinship-based care to ensure self-preservation and to protect the land base for future generations.”⁹⁷⁷ In W̱SÁNEĆ, access to and care for these locations, such as SXOLE, or reef-net fishing sites, for example, is inheritable through our NEHIYMET. In addition to inheritance, intermarriage has also been a component of buttressing this system of borders and jurisdiction, creating opportunities to open sites to broader kinship groups.

It is important to note that the W̱SÁNEĆ tenure system is not strictly anthropocentric. Generally speaking, “Where Indigenous peoples assert jurisdiction through protection of their tenure system, they are also extending this care to other-than-human “tenures” or ecosystems.”⁹⁷⁸ This jurisdiction of care is dynamic. As seen with the 13 W̱SÁNEĆ Moons calendar, at the root of this tenure system is the cycle of seasons.⁹⁷⁹ “Each season brings its own particular regimes of

⁹⁷⁴ *Ibid.* at 18.

⁹⁷⁵ *Ibid.* at 6. In this section I find it helpful to again draw on the work of Pasternak because she frames her discussion of Algonquin law in the register of jurisdiction. While Algonquin law and jurisdiction will differ in various respects to W̱SÁNEĆ law and jurisdiction, there are enough points of connection that Pasternak’s observations and arguments regarding the nature of Indigenous jurisdiction are applicable to the arguments I am laying out here in regard to W̱SÁNEĆ.

⁹⁷⁶ *Ibid.* at 3.

⁹⁷⁷ *Ibid.* at 27.

⁹⁷⁸ *Ibid.* at 122.

⁹⁷⁹ Claxton & Elliott, *Saanich Year*.

care and reciprocal obligations and connects the small community to broader ecological and social changes in the world.”⁹⁸⁰ While our NEHIYMET attaches certain families to specific places in relationships of care, there are also areas throughout W̱SÁNEĆ that are “commons”, although the “tragedy” that is thought to necessarily accompany such a “commons” need not be present. Through W̱SÁNEĆ law and jurisdiction “landholding practices balance the need for responsibility without requiring exclusive forms of ownership.”⁹⁸¹ This system of law and jurisdiction “orders the community internally, within bodies, families, and the nation”, as well as externally, through “treaties, agreements, assertions, and mobilizations [that] have secured this tenure across a range of time and against a variety of encroachments.”⁹⁸² It also orders the community in regard to “relations between the human and other-than-human worlds, too.”⁹⁸³ These have been effective and strong systems of law and jurisdiction asserted in connection with these territories, and it has been precisely this reason they “have been relentlessly attacked by colonial authorities” throughout colonial history.⁹⁸⁴

4.2. Sovereignty Claims, the Douglas Treaties, and Indian Reserves

I discussed the contexts and details of early settler-colonialism in what is now British Columbia in the preceding chapter on ŁEL,TOS. I need not duplicate that history here aside from a few general points, as well as to link those processes more clearly together with the marine territory. To begin, early fur trade developed absent any colonial control.⁹⁸⁵ For example, HBC employees traded for salmon, though made no attempt to regulate a fishery.⁹⁸⁶ Even as settlement began, the focus of settlers was originally on farming and prospecting, not on exploiting the fishery.⁹⁸⁷ In terms of sovereignty claims, prior to the Oregon Treaty of 1846 between the United Kingdom and the United States, this area was considered “disputed territory.”⁹⁸⁸ With the signing of the Oregon Treaty, Vancouver Island and the mainland north of the 49th parallel fell under the

980 Pasternak, *Grounded Authority* at 84.

981 *Ibid.* at 102.

982 *Ibid.* at 103.

983 *Ibid.* at 27.

984 *Ibid.* at 115.

985 Tennant, *Indian Land Question* at 17.

986 D. Harris, *Landing Native Fisheries* at 26.

987 *Ibid.*

988 The dispute was between the United Kingdom and The United States for sovereignty over the area known as the Oregon Territory. Neil Vallance also notes, however, that “no joint administration was set up to govern the Oregon Territory or its native inhabitants. Under this arrangement, Indigenous, British and American residents managed to co-exist for twenty-eight years” (Vallance, *Sharing The Land* at 60-61).

sovereignty of the British Imperial Crown.⁹⁸⁹ Since assertions of sovereignty must be followed by processes to solidify those assertions, the creation of property regimes and Indian Reserves followed. However, as Doug Harris notes, creation of Indian reserves was also intimately linked with fisheries in the process of Indigenous dispossession.⁹⁹⁰ For example, in WSÁNEĆ, the addition of post-Confederation reserves, which are very small in land mass, are, in terms of location and size, linked principally to fishing stations and access to fishery.⁹⁹¹ Much is the case for other post-Confederation reserves on the coast of British Columbia. “To the extent that Dominion and provincial officials sought to justify the unusually small reserve acreage in British Columbia, they did so on the grounds that Native peoples on the Pacific coast were primarily fishing peoples who did not need a large land base.”⁹⁹² In short, as Harris notes in regard to those reserves, “Land followed fish.”⁹⁹³

In WSÁNEĆ, pre-Confederation reserves were also tied to fisheries, though in a different manner. As noted, opening space for settlement involved sovereignty claims followed by consolidation of control within those areas.⁹⁹⁴ Space to “physically occupy and legally possess”, in other words, land, was initially the primary settler focus.⁹⁹⁵ The creation of the so-called Douglas Treaties, including those with WSÁNEĆ in 1852, were a central aspect of this process of colonialism and freeing up land for settlement. In that regard, the written version of the Douglas Treaty appears to offer a more narrow focus on land rights, referencing protection of “village sites and enclosed fields”, while appearing to present more general and expansive protections for the right to carry on our “fisheries as formerly,” and as though we were the sole occupants.⁹⁹⁶ A potential rationale for this strategy, in addition to a perceived abundance of fish during this time, may have been that “fishing could be secured without much impact on the land available for incoming settlers.”⁹⁹⁷ It wouldn’t be until later that non-Native fisheries became

989 *The Oregon Treaty*, United States and United Kingdom, 15 June 1846,

990 D. Harris, *Landing Native Fisheries* at 4.

991 These include reserves at Bedwell Harbour on Pender Island, Fulford Harbour on Saltspring Island, Mandarte Island, East Point on Saturna Island, and at Goldstream River. See *ibid.* at 7 for more on the prominence of these types of reserves.

992 *Ibid.* at 6.

993 *Ibid.* at 8.

994 *Ibid.* at 9.

995 *Ibid.*

996 *Ibid.* at 187.

997 *Ibid.* at 23. We should note that there were various dynamics at play. There was a goal of assimilation of Indigenous peoples, which having Indigenous people take up farming would have fostered. At the same time, there was limited farming land, which needed to be opened up to settlers. Additionally, local officials were conscious of preventing too much unrest from Indigenous populations and allowing for fisheries did much to quell unrest.

more important, and the squeezing out of Indigenous fisheries would occur. Nonetheless, the foundations for doing so began to be laid. I will return to how this occurred shortly.

While the Oregon Treaty directly contemplated land, it left tidal waters ambiguous. “How that border would apply to the Puget Sound/Georgia Strait...was more complicated and would not be settled until 1872”, one year after British Columbia joined Canadian Confederation, when the emperor of Germany, as arbiter, determined that the United States would have authority over the San Juan Islands, and Canada the Gulf Islands.⁹⁹⁸ In short, and in contrast to W̱SÁNEĆ jurisdiction outlined above, this is “a border determined by international politics and understandings of latitude and longitude, not family status, lineage, or salmon availability.”⁹⁹⁹ Nor is it a border that gives any “consideration of ecological or biological factors.”¹⁰⁰⁰ For our purposes, it is also important to note that this international border, and the division of sovereignty between the United States and Canada, dissects W̱SÁNEĆ marine territory and is a significant part of the unfolding and imposition of settler jurisdictional orders over that of W̱SÁNEĆ. While “the 1794 Jay’s Treaty guaranteed Native peoples’ freedom of movement across the border,”¹⁰⁰¹ this movement was not desired nor unrestricted, even if not always obeyed by Indigenous peoples in the Salish Sea.¹⁰⁰²

By this point we have multiple jurisdictional lines taking shape in addition to the international border, including through reception of the common law. While there was no Imperial statute passed to create the colony of Vancouver Island, the English Parliament did enact legislation in 1849 for the administration of justice on the island.¹⁰⁰³ During this time the common law, specifically the principle of inheritance of English law,¹⁰⁰⁴ would also have been

998 Lissa K. Wadewitz, *The Nature of Borders: Salmon, Boundaries, and Bandits on the Salish Sea* (Seattle: University of Washington Press, 2012) [Wadewitz, *Nature of Borders*] at 68. See *Ibid.* at note 57 for more on Germany as arbiter in this dispute.

999 *Ibid.* at 68.

1000 *Ibid.* at 7.

1001 *Ibid.* at 72. See Great Britain & United States, *John Jay’s Treaty*, 19 November 1794 (Senate Ratified June 1795).

1002 See Wadewitz, *Nature of Borders* for more in-depth discussion about the various ways this unfolded. As one example, Wadewitz writes, “authorities on both sides of the border sought to limit the crossings of all Native peoples in the 1850s and 1860s. Washington Territorial Governor Stevens built a clause into every 1855 Indian Treaty that prohibited Indians from crossing the border for trade purposes, but the Natives ignored it and no one enforced it” (*ibid.* at 69).

1003 John C. Bouck, “Introducing English Statute Law Into The Provinces: Time For A Change? (1979) *The Canadian Bar Review* Vol. LVII CanLIIDocs 15 [Bouck, “Introducing English Statute Law”] at 76. See also “An Act to Provide for the Administration of Justice in Vancouver’s Island” (Brought from the Lords 5 July 1849) Ordered, by the House of Commons, to be printed, 5 July 1849.

British Columbia Terms of Union (UK), 1871, reprinted in RSC 1985, App II, No. 10.

1004 William Blackstone, *Commentaries on the Laws of England (1767-1770)* at Vol. 1 107 cited in Bouck, “Introducing English Statute Law” at 76: “For it hath been held, that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony; such, for instance, as the general rules of inheritance, and of protection from personal injuries. The artificial refinements and distinctions incident

seen to apply in specific ways, although beginning precisely when is a bit unclear.¹⁰⁰⁵ On the mainland things are more clear as “the common law was formally received by statute with the founding of the mainland colony of British Columbia in 1858.”¹⁰⁰⁶ However, it would not be until 1866 that the colony of Vancouver Island joined that of British Columbia,¹⁰⁰⁷ and 1871 when British Columbia would join Canadian Confederation. A result of British Columbia joining confederation is a jurisdictional shift with British Columbia “ceding jurisdiction over “Seacoast and Inland Fisheries” and “Indians and Lands Reserved for Indians” to the Dominion government.”¹⁰⁰⁸ The relevance is that it was fisheries that brought the most significant jurisdictional tensions within the marine territory, and more importantly for our purposes, as Harris observes, “When one fishery sought to replace another, its laws had to replace the others.”¹⁰⁰⁹ Although the rationale for granting the Dominion government the head of power relating to “Indians and Lands Reserved for Indians” was to protect Indian interests from the pressures of more local government, Canada, just as it was in regard to the land question, ultimately proved to be a weak advocate in protecting Native fisheries.¹⁰¹⁰ To see how this unfolded over the marine territory we can now turn more specifically to fisheries. Our focus is less on the fisheries itself, as it is on a process of dispossession through a steady imposition of jurisdiction.

4.3. (Common) Property, Jurisdictional Commotion and Extractivism

Understanding “the differential extension of state sovereignty over land and water is crucial to understanding the process of dispossession in British Columbia”¹⁰¹¹ – a topic on which I draw heavily on the work of Doug Harris. “These two legal constructs – the Indian reserve and the Indian food fishery – were two of the principle instruments of state power and colonial control in British Columbia. Although nested in two quite different legal regimes – one governing land use

to the property of a great and commercial people, the laws of police and revenue, (such especially as are enforced by penalties), the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force.”

1005 Bouck, “Introducing English Statute Law” notes a few possible interpretations. Bouck writes: “Was it in 1843 when work first commenced on the erection of Fort Victoria, or August 27th, 1850 when the first Executive Council was established, or August 12th, 1856 when the first House of Assembly met? Alternatively was it 1849 when the courts of Vancouver Island were first authorized by the Imperial Parliament?” [footnotes omitted] (*ibid.* at 77).

1006 D.Harris, *Landing Native Fisheries* at 78.

1007 Tennant, *Indian Land Question* at 17.

1008 D. Harris, *Landing Native Fisheries* at 31.

1009 Douglas C. Harris, *Fish, Law and Colonialism: The Legal Capture of Salmon in British Columbia* (Toronto: University of Toronto Press, 2001) at 3.

1010 D. Harris, *Landing Native Fisheries* at 105.

1011 *Ibid.* at 8. Also see Ruru, “What Could Have Been?”.

and structured around notions of private property, the other governing fisheries and premised primarily on the resource as common property – the reserve and the food fishery served the same purpose.”¹⁰¹² Dispossession. While an individual could hold an interest in private property, where the property was adjacent to navigable waters that interest would only extend to the foreshore.¹⁰¹³ The Crown owned the bed of navigable waters, as well as the right to alienate that interest, including the right to fish.¹⁰¹⁴ However, the Crown’s ownership, as we will see, was restricted by the common law and the doctrine of the public right to fish. While the common law, through the principle of inheritance of English law, was seen to apply, it would only have been to the extent it was not “inapplicable” to local circumstances. By 1852, the treaty right to fish as formerly, as though we were the sole occupants, would, one would have thought, have created a local circumstance rendering the public right to fish “inapplicable”. As we will see, that was not the case.

As mentioned, in 1852, at the time of creating the Douglas Treaty, there was “little non-Native interest in prosecuting a fishery” and for settlers “it was more efficient and effective to purchase fish from Native fishers.”¹⁰¹⁵ The right to “fish as formerly”, therefore, would have been viewed in broad terms. “It was not until the creation and expansion of the industrial commercial fishery in the 1870s that Native rights to fish began to be challenged and that the meaning of the fisheries clause in the Douglas Treaties began to matter – and to be forgotten or ignored.”¹⁰¹⁶ The rise of the commercial fishing industry came about through “the arrival of canning technology.”¹⁰¹⁷ In other words, the impetus to Canada’s use of jurisdiction to choke out Indigenous fisheries and its governance was the introduction of technology that could extend the reach of the market and thereby the opportunity to create more capital, which in turn triggered the need to extract more salmon as resource in service to that production of capital.

Specifically, in response to the increased desire to give settler fishers greater access to the fishery, the Dominion government “introduced the *Fisheries Act* of 1868 to British Columbia in

¹⁰¹² *Ibid.* at 4.

¹⁰¹³ *Ibid.* at 14.

¹⁰¹⁴ *Ibid.*

¹⁰¹⁵ *Ibid.* at 24.

¹⁰¹⁶ *Ibid.* at 25.

¹⁰¹⁷ *Ibid.* at 35. Without canning technology it was not possible to ship fish any significant distance without spoiling.

1877 and the first set of regulations for the province in 1878.”¹⁰¹⁸ More broadly, “Canada’s Department of Fisheries...sought to ensure that any proprietary interest held by Native peoples in their reserves remained on dry land; the exclusive rights that characterized the occupation of land, Fisheries maintained, did not extend to the fisheries....fisheries were common property.”¹⁰¹⁹ As common property, “the underlying presumption in the common law was that the Crown’s subjects had a right not to be excluded from the fisheries.”¹⁰²⁰ This “right not to be excluded emanated from the state and was assumed to supplant whatever preceded it.”¹⁰²¹ Given our focus on jurisdiction, it is worth noting that the Department of Fisheries and the Department of Indian Affairs, given their different mandates, did not always agree on matters.¹⁰²² “Although officials within Indian Affairs spoke out against the policies of the Department of Fisheries from time to time” they were, as noted, a weak advocate.¹⁰²³ Ultimately, Native fishers were left with little recourse in protecting their interests and treaty rights to a fishery.

The doctrine of the public right to fish functioned to open the fishery to everyone, while the introduction of an Indian food fishery functioned to domesticate Indigenous rights and simultaneously truncate the Indigenous fishery. Since the public right to fish opened the fishery to everyone, “Native fishers could participate on the same terms as everyone else. However, this was the problem. In opening the fishery to everyone, the public right to fish (at least as interpreted by Fisheries) erased the prior rights of Native peoples to their fisheries. The radical simplification of Native customary tenure in the fisheries was achieved simply by denying its existence.”¹⁰²⁴ With those prior rights erased, and as a legal and jurisdictional framework around fisheries began to develop in British Columbia, Native fisheries began to be truncated, principally through the concept of an Indian food fishery.

1018 *Ibid.* at 31. Harris also notes that “Fisheries did little in the 1870s to enforce these laws, and Native fishers were informally exempted from the regulations, but the beginnings of the legal framework that would govern the fishery were in place” (*ibid.*). See also *Salmon Fishery Regulations for the Province of British Columbia*, Order-in-Council, 30 May 1878, *Canada Gazette*, vol. 11, . 1258.

1019 D. Harris, *Landing Native Fisheries* at 8.

1020 *Ibid.* at 13.

1021 *Ibid.* at 14.

1022 See for example Harris, *Landing Native Fisheries* and his discussion of the tensions between reserve commissioner O’Rielly’s granting of exclusive fisheries in connection with the setting aside of certain fishing stations and the Department of Fisheries insistence on those being “unauthorized appropriations of public fishing rights” (*ibid* at 83).

1023 *Ibid.* at 104. Harris goes on to note that “Indian Affairs represented a marginalized community without much voice in Ottawa, and it was part of a series of Dominion governments that conceded the question of Native title in British Columbia to a province that denied its existence. Indian Affairs also conceded the prior existence of Native fishing rights to the Department of Fisheries” (*ibid.*).

1024 *Ibid.* at 90-91.

The *Fisheries Act* of 1868 became law in British Columbia in 1877 and simply states, in its only mention of Indians, that the Department of Fisheries has discretion to allow them “*to fish for their own use.*”¹⁰²⁵ While the regulations introduced in 1878 created certain limits to fisheries,¹⁰²⁶ “an informal exemption for Native fishers” was at first recognized.¹⁰²⁷ However, growth of the canning industry corresponded with “a focused effort to limit Native fishing.”¹⁰²⁸ For example, in 1888 the fisheries regulations in British Columbia were rewritten to create licensing requirements, and while Indians remained largely exempt from those requirements in terms of fishing for food, the regulation precluded any fishing “for sale, barter or traffic, by any means other than with drift nets, or spearing.”¹⁰²⁹ More regulations would follow in 1894. At that point the Indian food fishery remained exempt from the regulations but required a permit through “permission of inspector of fisheries.”¹⁰³⁰ In other words, fishing for food was no longer a right, but a privilege bestowed by the state.¹⁰³¹ Concern over Indians selling fish also increased. By 1915 food fishing permits could be revoked if the Indians were caught selling fish,¹⁰³² and in 1917 these permits explicitly allowed fishing for “no other purpose” than for food.¹⁰³³ The 1917 regulations also extended the power of fisheries officials “to fix the places, methods, and timing of the food fishery” and provided a “reverse-onus provision” for any Indian selling fish to prove it was not caught under a food fish license.¹⁰³⁴

Stepping back, we can see that while commercial fishing escalated, it was the Native fishery that was blamed for declining salmon stocks, and as such, was correspondingly further minimized. In line with traditional Marxist critiques, this process of divesting Indigenous groups from the resources and subsistence provided by fisheries functioned to push Indigenous peoples into what was ultimately a gendered and racialized wage labour economy, particularly the cannery operations.¹⁰³⁵ However, by the 1890s a “technological change in the fishery” resulted in the canneries relying instead upon “salmon traps, which were massive, capital-intensive

1025 *Ibid.* at 107. See *Fisheries Act*, S.C. 1868, 31 V. c. 60, at s. 13(8) [emphasis added].

1026 The three regulations, in short, “confined the fishery to tidal waters, restricted net sizes, and closed the fishery on the weekends” (D. Harris, *Landing Native Fisheries* at 107).

1027 *Ibid.* at 109.

1028 *Ibid.*

1029 *Ibid.*

1030 *Fisheries Regulations for the Province of British Columbia*, ss. 1, 6, Order-in-Council, 3 March 1894, *Canada Gazette*, vol. 27, p. 1579.

1031 D. Harris, *Landing Native Fisheries* at 111. There was some back and forth on the requirement for permits, which was lifted in 1908 and reinstated in 1910.

1032 *Ibid.* at 112.

1033 *Ibid.* at 113.

1034 *Ibid.* at 113.

1035 *Ibid.* at 15 and 128.

operations that extended almost a kilometer from shore, creating a fence and a series of impoundments to trap migrating salmon.”¹⁰³⁶ Not only did these traps displace “other fishing methods” they also “physically displaced important Indian...reef-net fishing grounds” and rendered “irrelevant” the “Indian labour” that was previously relied upon by the canneries.¹⁰³⁷

Throughout this time, the issuing of seine-net licenses, through which large numbers of salmon could be caught, also began to take shape. As Harris found, these licenses were again limited to “white fishers and primarily cannery operators.”¹⁰³⁸ The expressed rationale was that “Indians as a rule cannot be relied on to abide by strict rules, and were sein and reef net privileges granted to them serious abuses would immediately arise.”¹⁰³⁹ Such a statement is to simply ignore the system of law and governance intimately connected to the SXOLE (reef-net fishery), and an erasure of WSÁNEĆ jurisdiction. Creating additional harm, these sein-net fisheries “frequently occupied waters adjacent to a reserve, including those set aside by the reserve commission for fishing. [A] seine of two working in the bay could catch most of these fish, dramatically reducing the numbers available to the Native peoples who lived on the reserve.”¹⁰⁴⁰ This extraction of salmon and Indigenous food sources only increased when “Large boats with power winches began to appear in the late 1920s.”¹⁰⁴¹ It also illustrates the hypocrisy of the Department of Fisheries and Oceans. Despite the common law’s public right to fish, “Fisheries modified the principle of common property when it was in the interests of the canneries to do so – for example, by issuing exclusive area licenses for seine fisheries on many of the smaller salmon rivers along the coast.”¹⁰⁴² An exclusive fishery was frequently denied as a possibility for Native-fishers, even when adjacent to reserves created specifically as fishing stations.

These regulations and the process of dispossession took a toll on Indigenous communities. As the McKenna-McBride Commission brought the Indian land question back into focus, a frequent complaint heard by the commissioners was in regard to “insufficient land and lack of access to the fishery.”¹⁰⁴³ These complaints only continued to grow, with “restrictions

¹⁰³⁶ *Ibid.* at 137.

¹⁰³⁷ *Ibid.*

¹⁰³⁸ *Ibid.* at 149.

¹⁰³⁹ Letter, F. Gourdeau to G. O’Reilly, MP, 19 May 1902, DMF, RG 23, file 678, pt. 4 (UBC Reel 28), LAC, quoted in D. Harris, *Landing Native Fisheries* at 149.

¹⁰⁴⁰ D. Harris, *Landing Native Fisheries* at 153.

¹⁰⁴¹ *Ibid.* at 147.

¹⁰⁴² *Ibid.* at 163.

¹⁰⁴³ *Ibid.* at 168.

and levels of enforcement only increas[ing] in the decade following the McKenna-McBride Commission's report."¹⁰⁴⁴ In attempt to implement some version of the McKenna-McBride Commission's report, Ditchburn and Clarke modified the report, which was then accepted in July of 1923.¹⁰⁴⁵ This process of accepting the McKenna-McBride report did not serve to remedy the underlying issues, including access to fisheries, between Indigenous peoples and the Crown. However, by 1927 the Dominion government modified the *Indian Act* to make it illegal to raise funds for Native land claims or title cases without the permission of Indian Affairs, thereby seriously undermining any ability for recourse.¹⁰⁴⁶ With the Indian Land Question between the Dominion and Provincial governments settled, at least in their eyes, tensions relating to fisheries shifted to those created by different mandates within the Dominion government. That is, "debates over access pitted the Dominion departments of Indian Affairs and Fisheries against each other instead of Ottawa against Victoria. As the province succeeded in denying Native title and restricting reserve size, so Fisheries was successful in denying the recognition of Native fishing rights and confining the food fisheries."¹⁰⁴⁷

As Harris concludes, "the Dominion constructed the Indian food fishery as a privilege that performed the same function for the fisheries as Indian reserves did with respect to land. It set aside a small portion of the fisheries for Native peoples, at the same time opening the rest of the resource to an immigrant society."¹⁰⁴⁸ This process relied upon not only a choking out of Indigenous jurisdiction and an inherent right to fish, but also the implementation of a granted privilege within the food fishery, and later a delegated jurisdiction in the form of "harvesting agreements."¹⁰⁴⁹ Creation of the food fishery therefore worked in a way analogous to that described by Robert Nichols in relation to property formation in the last chapter. As Nichols argues, property formation has a recursive nature. That is, the *making* and *taking* of property are happening together, at the same time. In other words, a non-proprietary relationship is transformed into a proprietary one, while at the same time systematically divesting Indigenous peoples from that property. Any form of minimal property interest projected on to Indigenous

¹⁰⁴⁴ *Ibid.* at 181.

¹⁰⁴⁵ *Ibid.* at 183.

¹⁰⁴⁶ *Indian Act*, R.S.C. 1927, c.98, s.141.

¹⁰⁴⁷ D. Harris, *Landing Native Fisheries* at 186.

¹⁰⁴⁸ *Ibid.* at 188.

¹⁰⁴⁹ Harris provides more discussion of these harvesting agreements (*ibid.* at 198).

peoples is immediately truncated and minimized.¹⁰⁵⁰ The Indian food fishery did just that. While creating and granting a limited right to a food fishery, it simultaneously stripped away Indigenous jurisdiction over fisheries and truncated access to those fisheries.

4.4. Jurisdiction and Declining Fish Stocks

While this jurisdictional commotion and extractivism had an impact on W̱SÁNEĆ peoples, so too did it on our more-than-human relatives. For example, “The Canada-U.S. border – constructed and artificial – is invisible to people, orcas, salmon, and birds, but it is very much there, and it has played a critical role in the history of the Pacific salmon fishery that straddles it.”¹⁰⁵¹

W̱SÁNEĆ reef-net fishing sites were strategically located, but regulated such that they were cared for and not overfished. Salmon, as a result, were abundant.¹⁰⁵² “Many people who witnessed these [salmon] runs at their height claimed that it was possible to cross entire waterways on the backs of salmon. Their numbers inspired awe, but such abundance also translated into a false sense of security about their future health.”¹⁰⁵³ “Recognizing the fecundity of these Native fishing places, however, industry players with capital sought to take over the sites for their own exclusive use.”¹⁰⁵⁴ With that dispossession also came the displacement of an ethic of care and responsibility. The canneries that owned the fish traps imposed in these areas overfished, and were incredibly wasteful.¹⁰⁵⁵ Additionally, the international border between Canada and the United States only worked to fuel fisheries competition and stymie conservation, “even as the number of returning salmon decreased each year.”¹⁰⁵⁶ In terms of increased competition, “the realization that American fishermen could catch sockeye in boundary waters prior to their entry into the Fraser River spurred the industry’s growth south of the forty-ninth parallel.”¹⁰⁵⁷ Additionally, “Washington State’s unwillingness to match Canada’s more

1050 See Nichols, *Theft Is Property!* for more.

1051 Wadewitz, *Nature of Borders* at 6.

1052 Abundance was not the result of an inability to capture large numbers of fish. In fact, the reef-net fishery was later banned based on the stated rationale that it functioned too well.

1053 Wadewitz, *Nature of Borders* at 4.

1054 *Ibid.* at 75.

1055 Wadewitz notes how “For years many canners instructed their workers to use only the prime bellies of the fish and throw out the rest” (*ibid.* at 138). Additionally, “In 1901 the B.C. commissioner of fisheries found that canneries on both sides of the international border not only filled every can available, but they threw away more salmon than they used” (*ibid.* at 139).

1056 *Ibid.* at 145.

1057 *Ibid.* at 75.

comprehensive fishery laws prompted Canadian officials to repeatedly relax their own conservation regulations.”¹⁰⁵⁸

Declining salmon stocks remain a central concern to date, including in relation to endangered southern resident killer whales, of which they are a main food source. Conservation also remains an issue in which jurisdiction plays a central role in that different regulatory regimes, enforcement levels, and priorities exist across settler jurisdictional boundaries in the Salish Sea. I also intend this discussion to have briefly highlighted, once again, that Indigenous jurisdictional dispossession, the reach of capital and accumulation, and environmental harm, have tended to go together. Having set this significant context, we can now begin to consider the extent to which the following tools might help mitigate this jurisdictional dispossession.

5. NMCAR, IPCA, and Legal Personhood: Potential Jurisdictional Tools?

As an ocean people, WSÁNEĆ have strong interests, and responsibilities under WSÁNEĆ laws, to uphold healthy relationships within the marine environment. Salmon, herring, SRKWs, clam beds, and more, have all been threatened from myriad of harmful actions and detriments to their living environments locally, but also internationally and at a global level. Within WSÁNEĆ politics and governance, there is a constant struggle to navigate possible tools, approaches, and actions that can function to uphold WSÁNEĆ responsibilities to these relatives in the sea. To reiterate, these responsibilities relate not only to actions internal to WSÁNEĆ, but also to harmful actions of others. The difficulties that arise in this regard are immense. As WSÁNEĆ are entangled in a web of colonial and global relationships and impacts, difficult choices and paradoxes constantly arise.

In this section I will examine WSÁNEĆ efforts to protect the marine environment through the use of three potential tools – a National Marine Conservation Area Reserve (NMCAR), an Indigenous Protected and Conserved Area (IPCA), and Legal Personhood of the environment. These tools have been chosen based on WSÁNEĆ being presented with, or otherwise having interest in, utilizing these tools within our territory. A full understanding of these tools and the implications they have regarding jurisdiction requires significant attention to the frameworks through which these mechanisms operate and come into being. For example, regarding the NMCAR, this means considering not only enabling legislation and policy

¹⁰⁵⁸ *Ibid.* at 162. I do not have the space to explore the various transborder conservation efforts made over this period of time. Refer to Wadewitz for more.

orientations, but also the nature of various potential management, co-management, or consensus management agreements that might take shape through these processes, and more. The challenges and uncertainties involved in trying to grasp the jurisdictional implications in all of this speaks, in and of itself, to the type of jurisdictional commotion that functions to choke out W̱SÁNEĆ law and jurisdiction, or to replace it with a delegated alternative. While I have worked with the W̱SÁNEĆ Leadership Council to understand some of these technicalities, the scope of this chapter requires far more streamlined observations.¹⁰⁵⁹

As we saw above in relation to fisheries, dispossession of the marine territory has occurred through an erasure of W̱SÁNEĆ jurisdiction, the imposition of foreign jurisdictions, and a reinscribing of more limited rights and truncated forms of delegated jurisdiction to Indigenous Nations. While not so draconian as the early fisheries examples, the concept remains largely the same within the NMCAR framework. There is no return to, nor even recognition of, the right to “fish as formerly” and the jurisdiction in relation to fisheries that should flow from that, let alone any serious questioning of how it is that Canada has come to have any legitimate jurisdictional authority over these waters *whatsoever*. While these agreements are often spoken of as compromises, rarely do they seem to consider from what starting point.

Prior to introducing the NMCAR tool in more detail, and remaining consistent with the argument I have been developing throughout this dissertation, I want to therefore highlight the need to continue to re-build and emphasize W̱SÁNEĆ ways of being, or what Aaron Mills would call *lifeways*.¹⁰⁶⁰ At the same time, we have responsibilities and obligations to care for the ocean and our more-than-human relatives who also call it home. What remains, then, is actually an impossible political decision – is the net harm of re-inscribing much of the logic that has brought on these harms in the first place better or worse than foregoing the use of a tool that can create conservation measures that are undoubtedly better than what currently exist? It is difficult to say for certain. Again, what actually needs to change is being forced to choose between these two strategies. With that said, the NMCAR processes may provide tangible benefits to W̱SÁNEĆ despite clear trade-offs. If, however, W̱SÁNEĆ chooses to embrace NMCAR, we should be clear that it is not a W̱SÁNEĆ tool. We have our own laws and responsibilities that we will continue

1059 I undertook work for the W̱SÁNEĆ Leadership Council with the support of a MITACS Grant to research and write a much longer report on these various tools and possibilities. I have condensed that work here for the purposes of this chapter.

1060 Aaron James Mills (Waabishki Ma'iingan), *Miinigowiziwin: All That Has Been Given For Living Well Together*, One Vision of Anishinaabe Constitutionalism (PhD Dissertation, University of Victoria, Faculty of Law, 2019) [unpublished] [Mills, *Miinigowiziwin*].

to assert and enforce, and which require much broader and foundational change. Rather, the NMCAR is a tool of Canadian law that, in respectful relationship, we may choose to help Canada to use in more effective and efficient ways. The risk inherent in this strategy, however, is becoming caught up in “regulatory capture” and power dynamics that end up co-opting what was initially a strategic and more peripheral intervention within settler jurisdictional frameworks, thereby shifting focus, energy, and ability away from enacting the broader and deeper changes required in restoring WSÁNEĆ jurisdiction and combating climate crisis.¹⁰⁶¹

With such an orientation in mind, I will now examine the NMCAR framework, along with potential co-management or Indigenous management board models and the processes they may entail, followed by a consideration of an IPCA. While the management board models I will examine are principally from the Canadian context, I will briefly look at innovative international examples, specifically recognition of the “legal personhood” of nature.¹⁰⁶² Throughout I will offer some guidance on what does or does not have a clear fit with WSÁNEĆ law and thought.¹⁰⁶³

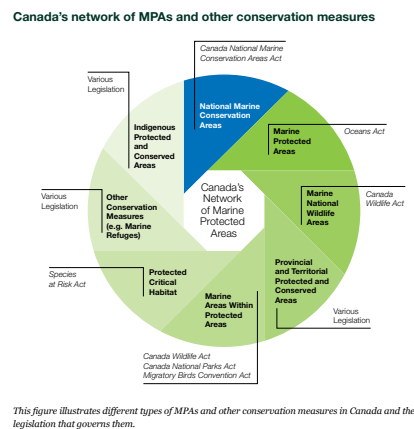


Figure 40: "Canada's Network of Marine Protected Areas and Conservation Measures" Parks Canada, Backgrounder at 7.

¹⁰⁶¹ In many ways this mirrors the debate between the works of Coulthard, *Red Skin, White Masks* and Dale Turner, *This Is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: UTP, 2006). Dale Turner seems to accept that some form of intervention within settler frameworks is necessary considering the power they exert over Indigenous peoples and lives. He writes: “If Aboriginal peoples want to assert that they possess different world views, and that these differences ought to matter in the political relationships between Aboriginal peoples and the Canadian state, they will have to engage the Canadian state’s legal and political discourses in more effective ways” (*ibid.* at 5). For Turner, the task of engaging the state in these more effective ways “is the responsibility of a group of indigenous intellectuals called ‘word warriors.’ Word warriors reconcile the forms of knowledge rooted in indigenous communities with the legal and political discourses of the state” (*ibid.* at 7). The critique that Coulthard offers with respect to this strategy is that it presumes that colonial power operates principally by excluding Indigenous perspectives from these discourses, as well as undervalues the assimilative power of the legal and political discourses of the state “in relation to the word warriors who are to engage them” (Glen Coulthard, Book Review of *This Is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* by Dale Turner (2008) 77:1 University of Toronto Quarterly 164 at 165).

¹⁰⁶² As indicated in the figure below, measures for protecting the marine environment are available under a variety of different pieces of legislation. Examining each of these is beyond the scope of this project. My understanding, however, is that the CNMCA is a tool under Canadian law and legislation that can offer one of the broadest and most comprehensive system of protection for marine areas.

¹⁰⁶³ I am indebted to Aaron Mills and John Borrows for personal communications on this topics, which has helped me further clarify my own thinking and over-arching position.

5.1. National Marine Conservation Areas

Despite a large network of terrestrial National Parks within Canada, including among coastal areas, “few of these terrestrial parks provide any direct measure of protection for the adjacent marine resources.”¹⁰⁶⁴ Beginning in the late 1980’s, and in connection with an international push for greater marine conservation, Canada began to address this gap with the *National Marine Parks Policy*¹⁰⁶⁵ in 1986, and development of the first NMCA in 1987 – Fathom Five National Marine Park.¹⁰⁶⁶ Since then, Parks Canada has been tasked with establishing a system¹⁰⁶⁷ of NMCAs that, as a whole, represent the full range of marine ecosystems within Canada.¹⁰⁶⁸ These NMCAs are created and managed with the “purpose of protecting and conserving representative marine areas for the benefit, education and enjoyment of the people of Canada and the world.”¹⁰⁶⁹ Currently, there are three established NMCAs and one NMCAR.¹⁰⁷⁰ An NMCAR is identical to an NMCA, with the same protections,¹⁰⁷¹ but the additional “Reserve” designation signifies that all, or part of, the conservation (or proposed conservation) area is “subject to a claim in respect of aboriginal rights that has been accepted for negotiation by the Government of Canada.”¹⁰⁷²

1064 Francine Mercier and Claude Mondor, *Sea to Sea to Sea: Canada’s National Marine Conservation Areas System Plan* (1995) Parks Canada, Department of Canadian Heritage [CNMCA System Plan] at p. 7.

1065 Jon Lien & Robert Graham, eds., *Marine Parks and Conservation: Challenge and Promise, Vol.1 &2*, The National and Provincial Parks Association of Canada, NPPAC Henderson Park Book Series No. 10, 1985 [*National Marine Parks Policy*, 1985]. The *National Marine Parks Policy* was revised in 1994. See Parks Canada, *Parks Canada Guiding Principles and Operational Policies, Part II - Activity Policies: National Marine Conservation Areas Policy*, 1994 [*National Marine Conservation Areas Policy*, 1994].

1066 Fathom Five National Marine Park is on the tip of the Bruce Peninsula on Georgian Bay of Lake Huron (Government of Canada/Government of Ontario, 1987, *Federal/Provincial Agreement for the Establishment of the proposed National Park in the Township of St. Edmunds*, Environment Canada, Ottawa, Ontario).

1067 “A first step in the process of creating a finite network of national marine conservation areas is to prepare a blueprint to guide its overall design. The *National Marine Conservation Areas System Plan* is an important step in this regard” (CNMCA System Plan at 5).

1068 See Parks Canada, National Marine Conservation Areas website at <https://www.pc.gc.ca/en/amnc-nmca> for more general information.

1069 *Canada National Marine Conservation Areas Act*, S.C. 2002, c.18, Assented to 2002-06-13 [CNMCA Act] at s.4(1).

1070 The three established NMCAs are Saguenay-St. Lawrence Marine Park (established under the *Saguenay-St. Lawrence Marine Park Act*, s.c. 1997, c. 37), Lake Superior National Marine Conservation Area (established under the *Lake Superior National Marine Conservation Area Act*, s.c. 2015, c. 38), and Fathom Five National Marine Park on the tip of the Bruce Peninsula on Georgian Bay of Lake Huron (Government of Canada/Government of Ontario, 1987, *Federal/Provincial Agreement for the Establishment of the proposed National Park in the Township of St. Edmunds*, Environment Canada, Ottawa, Ontario). The lone NMCAR is Gwaii Haanas National Marine Conservation Area Reserve and Haida Heritage Site (established as an NMCAR under the CNMCA Act at Schedule 2).

1071 “This Act applies to a reserve as if it were a marine conservation area” (CNMCA Act at s. 2(4)).

1072 CNMCA Act at s. 4(2).

Parks Canada has identified and divided the marine areas within Canada – the Atlantic, Arctic and Pacific oceans, and the great lakes¹⁰⁷³ – into 29 distinctive regions,¹⁰⁷⁴ with the goal of establishing marine conservation areas within each region.¹⁰⁷⁵ A single NMCA or NMCAR can, however, be representative of more than one region, as is the case with the Gwaii Haanas NMCAR.¹⁰⁷⁶

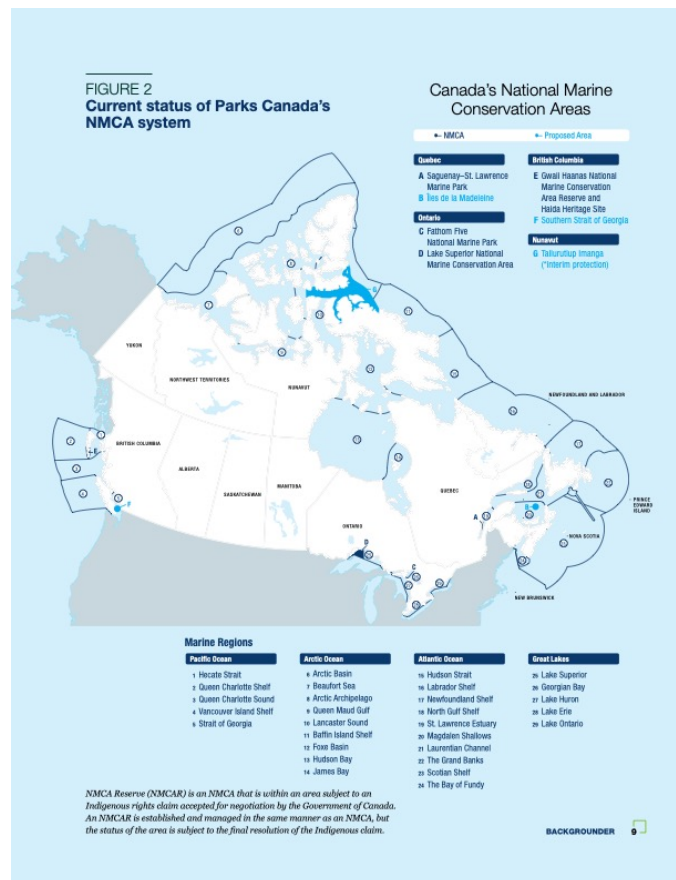


Figure 41: "NMCA System Plan" Parks Canada, Backgrounder at 6.

1073 "Though in a strict sense the Great Lakes are not "marine," they were included in the NMCA system for several reasons. First, as the world's largest freshwater lake system they display many of the same attributes as marine environments. Secondly, there is little difference between the Great Lakes and ocean areas in terms of conservation potential, and commercial and recreational usage. And lastly, as one of Canada's first highways and shipping corridors, they have helped share this country's history and economy" (CNMCA System Plan at 10.)

1074 See CNMCA System Plan at 10 for an overview of how these regions were identified. Briefly, a "regional sampling approach" was used, drawing on oceanographic and biological characteristics that include temperature, salinity, currents, depth profiles, and species distribution. The CNMCA System Plan as whole provides a description of each of the 29 marine regions identified, as well as the current status (at the time) of creating an NMCA or NMCAR within that region.

1075 *Ibid.* at 11. Demarcating boundaries within the marine environment obviously poses challenges. "Terrestrial natural regions tend to be readily distinguishable – plains, mountains, lowlands and uplands are visually different features which are not likely to change in the foreseeable future. Because water is the primary element in a marine environment, the factor which separate one marine regions from another are not immediately obvious from the surface and are based on characteristics such as temperature, salinity, currents, depth profiles and species distribution" (CNMCA System Plan at 10). It is also worth noting that these boundaries are not necessarily cast in stone. "Better information and improved technology are stimulating the development of new classification systems which may provide a better basis for the design of the national marine conservation areas system....and more effective means of protecting our fragile and valued marine environment" (*ibid.*).

1076 The Gwaii Haanas NMCAR is representative of both the Hecate Strait (Pacific Region 1) and Queen Charlotte Islands Shelf (Pacific Region 2) regions within the Pacific Marine Regions. See *ibid.* at 20-23 for a description of the Hecate Strait and Queen Charlotte Islands Shelf regions.

NMCAs are principally about conservation¹⁰⁷⁷ and managing marine areas for sustainable use and enjoyment.¹⁰⁷⁸ NMCARs have the same purpose, though are generally understood to also honour Aboriginal and treaty rights.¹⁰⁷⁹ Since each NMCA or NMCAR is unique, the creation of an individual “management plan”¹⁰⁸⁰ is intended to be done “on a partnership basis.”¹⁰⁸¹ Existing agencies,¹⁰⁸² such as the Department of Fisheries and Oceans (fisheries and ocean management)¹⁰⁸³ and Transport Canada (marine navigation and shipping management),¹⁰⁸⁴ will continue in their own management roles,¹⁰⁸⁵ however, within an NMCA or NMCAR those agencies must co-operate with Parks Canada to create management plans.¹⁰⁸⁶ Once those agencies sign-off on a management plan they also have responsibility to uphold conservation objectives.¹⁰⁸⁷ In Canada’s view, “First Nations and local government may also have roles in

1077 Given the priority on conservation, certain activities, such as “undersea mining, oil and gas exploration and extraction, and ocean dumping would not be permitted within the boundaries” of an established NMCA or NMCAR (*ibid.* at 8). We will see below that this is usually considered *before* an NMCA or NMCAR is deemed feasible. Other prohibitions of acts inconsistent with conservation are explicit within the *CNMCA Act*. For example, “No person shall explore for or exploit hydrocarbons, minerals, aggregates or any other inorganic matter within a marine conservation area” (*CNMCA Act* at s. 12(13)), “No person shall dispose of any substance in waters within a marine conservation area except as authorized by permit issued by a superintendent pursuant to this Act” (*ibid.* at s. 12(14)) or as allowed for under the *Canadian Environmental Protection Act, 1999*, s.c. 1999, c. 33 [CEPA, 1999], which essentially amounts to permission through an existing authorized permit or for reasons pertaining to personal safety. Any new permit authorized under the *CEPA, 1999* requires concurrence of the Minister under the *CNMCA Act* (*CNMCA Act* at s. 12(2)). Public land within an NMCA or NMCAR can also not be sold or used and occupied (*CNMCA Act* at s. 12 (a)(b)).

1078 *CNMCA System Plan* at 8 and *CNMCA Act* at s. 4(3).

1079 *CNMCA System Plan* at 8 and *CNMCA Act* at s. 2(2). Aboriginal rights are, of course, constitutionally protected rights, which legislation such as the *CNMCA Act* could not unjustifiably infringe.

1080 *CNMCA Act* at s. 9(1). For examples of management plans see Canadian Heritage & Parks Canada, *Fathom Five National Marine Management Plan, 1998* (available online at <https://www.pc.gc.ca/en/amnc-nmca/on/fathomfive/info/plan>), Minister of Environment, Government of Canada & Minister of Sustainable Development, Environment and Parks, Government of Quebec, *Saguenay-St. Lawrence Marine Park Management Plan, 2010* (available online at <https://www.pc.gc.ca/en/amnc-nmca/qc/saguenay/info/plan>), Parks Canada, *Lake Superior National Marine Conservation Area Interim Management Plan, 2016* (available online at <https://www.pc.gc.ca/en/amnc-nmca/on/super/info/index/gestion-management-2016>) [*Lake Superior Interim Management Plan*] and the Haida Nation & Parks Canada, *Gwaii Haanas Gina 'Waadluxan Kilguhlga Land-Sea-People Management Plan, 2018* (available online at <https://www.pc.gc.ca/en/pn-np/bc/gwaiihaanas/info/consultations/gestion-management-2018>) [*Land-Sea-People Management Plan*].

1081 *CNMCA System Plan* at 8.

1082 “The Minister is responsible for the administration, management and control of marine conservation areas in relation to matters not assigned by law to any other Minister of the Crown” (*CNMCA Act* at s. 8(1)).

1083 “Provisions of a management plan or an interim management plan respecting fishing, aquaculture and fisheries management are subject to an agreement between the Minister and the Minister of Fisheries and Oceans” (*CNMCA Act* at s. 9(4)).

1084 “Provisions of a management or an interim management plan respecting marine navigation and marine safety are subject to an agreement between the Minister, the Minister of Transport and the Minister of Fisheries and Oceans” (*CNMCA Act* at s. 9(4.1)).

1085 “The Minister may enter into agreement with other federal and provincial ministers and agencies, local and aboriginal governments, bodies established under land claims agreements and other persons and organizations for carrying out the purposes of this Act” (*CNMCA Act* at s. 9(4)).

1086 “The Minister shall, within five years after a marine conservation area is established, in consultation with relevant federal and provincial ministers and agencies, with affected coast communities, aboriginal organizations, aboriginal governments and bodies established under land claims agreements, and with other persons and bodies that the Minister considers appropriate, prepare a management plan for the marine conservation area that includes a long-term ecological vision for the marine conservation area and provision for ecosystem protection, human use, zoning, public awareness and performance evaluation, which shall be tabled in each House of Parliament” (*CNMCA Act* at s. 9(1)).

1087 *CNMCA System Plan* at 8 and *CNMCA Act* at s. 9(3). Also note that “In order to protect marine ecosystems and maintain marine biodiversity, the primary considerations in the development and modification of management plans and interim management plans shall be principles of ecosystem management and the precautionary principle.” These requirements stay up to date through mandatory reviews of management plans at least every 10 years (*CNMCA Act* at s. 9(2)).

managing NMCAs”, with those roles being laid out in the NMCAR “management plan.”¹⁰⁸⁸ Jurisdictionally, NMCAs “include the seabed, its subsoil and overlying water column and may encompass wetlands, river estuaries, islands and other coastal lands.”¹⁰⁸⁹ As *national* conservation areas, jurisdiction needs to be transferred to the federal government to be “owned and managed by the Government of Canada.”¹⁰⁹⁰ Only a small degree of flexibility seems to currently exist in this requirement.¹⁰⁹¹

With broad and far-reaching conservation goals,¹⁰⁹² NMCAs are meant to be large and to work in conjunction with neighbouring parks.¹⁰⁹³ Parks Canada continues to work on updating policy objectives¹⁰⁹⁴ and implementing regulatory frameworks,¹⁰⁹⁵ but the development of marine conservation areas continue at a slow pace.¹⁰⁹⁶ An absence of updated policies and the creation of enforceable regulations certainly contribute to a lack of clarity in what exact protection measures an NMCAR might offer W̱SÁNEĆ. What we can glean from the proposed

1088 CNMCA System Plan at 8. The Preamble to the *CNMCA Act* also specifically identifies the need to “consider traditional ecological knowledge in the planning and management of marine conservation areas.”

1089 CNMCA System Plan at 8. The Lake Superior National Marine Conservation Area is an example of an NMCA that includes hundreds of small islands within the marine protected area. See the *Lake Superior Interim Management Plan* for more.

1090 CNMCA System Plan at 8 and *CNMCA Act* at s. 5(2). An NMCA can only be established if (a) Canada has “clear title” or “unencumbered right of ownership” in the lands to be included; (b) the provincial government has agreed to use the lands as an NMCA and will transfer administration and control to Canada; (c) the “requirements of any applicable land claim agreement respecting the establishment of the marine conservation area have been fulfilled.” Also note that, in the Gwaii Haanas agreement, the preamble to the management agreement does state that the parties agree to disagree on the point of sovereignty, and thus who “owns” the lands and waters in question.

1091 For example, the Province of Quebec retained a significant jurisdictional role within the Saguenay-St. Lawrence Marine Park. While Saguenay-St. Lawrence is generally considered an NMCA area, it is not actually established under the CNMCA Act, nor is it a *national* marine park, but rather, has the Province of Quebec retaining ownership of the seabed, as well as a significant jurisdictional role within the marine park (see *Saguenay-St. Lawrence Marine Park Act*, s.c. 1997, c. 37). To some extent the Gwaii Hannas NMCAR might be viewed in a similar way. While the Haida Nation and the Government of Canada have agreed to disagree on the issue of sovereignty and ownership (see Canada & The Council of the Haida Nation, *Gwaii Haanas Agreement* (1993) at 1.1 [*Gwaii Haanas Agreement*]) the Province of British Columbia did still transfer title to Canada. I would also note that to a much lesser extent, the Lake Superior National Marine Conservation Area also maintained space for certain provisions for the laws of Ontario to apply (see *Lake Superior National Marine Conservation Area Act*, S.C. 2015, c. 38).

1092 The stated goals of an NMCAR are to: Represent the diversity of our nation’s marine ecosystems; Maintain marine ecological processes and life support systems; Preserve biodiversity; Serves as “models” of sustainable utilization of species and ecosystems; Facilitate and encourage marine research and ecological monitoring; Protect depleted, vulnerable, threatened, or endangered species and populations... and preserve habitats considered critical to the survival of these species; Protect and maintain areas of critical to the lifecycles of economically important species; and Provide interpretation of marine areas for the purposes of conservation, education and tourism (CNMCA System Plan at p. 8).

1093 “Human activities, both on adjacent lands (pollution, degradation of coastal habitats) and within the marine environment (over-exploitation of resources, pollution) have detrimental effects over wide areas. As a result, Parks Canada will work closely with others to develop a better understanding of the relationship between these activities and their impact on NMCA ecosystems. Mutually satisfactory solutions will be sought to mitigate the effects of such activities both within and beyond the boundaries of a NMCA which could threaten the long-term sustainability of its resources and ecosystems” (*ibid.* at p. 8). The extent to which tools actually exist to do so remains inadequate.

1094 The current policy framework is from 1994 and updates are needed to bring those policies in line with the *CNMCA Act*, 2002. See Parks Canada, *Parks Canada’s Policy Framework: For the management of national marine conservation areas, Backgrounder* (May 2019) [Parks Canada, *Backgrounder*] and Parks Canada, *What We Heard: National Marine Conservation Areas Policy and Regulations* (July 2020) [Parks Canada, *What We Heard*], which summarizes feedback received during Parks Canada’s consultation on proposed policy revisions.

1095 See Parks Canada, *Protecting Canada’s Marine Heritage: Proposed policy and regulations for Canada’s national marine conservation areas, Discussion Paper* (2019) [Parks Canada, *Discussion Paper*] for more on the proposed regulations. Also see Parks Canada, *What We Heard* for a summary of feedback received during Parks Canada’s consultations on proposed regulations.

1096 In 1990 the federal government aimed to create four new marine conservation areas by the year 2000. As of the year, 2020, no new additional marine conservation areas have been established, although a few have moved toward completion (*ibid.* at 7).

policy updates¹⁰⁹⁷ is a greater attention to climate crisis and Indigenous peoples long-standing connection with the lands and waters within NMCAs, even if those remain inadequate¹⁰⁹⁸ - as are Canada's actions as a nation-state, more broadly. The guiding question will be, does this tool open enough jurisdictional space to meaningfully uphold and protect W̱SÁNEĆ laws and interests and does it orient our jurisdictional trajectory in a positive direction?¹⁰⁹⁹ Or, does it risk reinscribing too much of the jurisdictional framework that has fostered dispossession and inhibited structural responses to climate crisis?

Parks Canada's re-cast policy framework focusses on nine overarching objectives for managing NMCAs.¹¹⁰⁰ To briefly summarize a few relevant points, these policies do contemplate actively pursuing a range of cooperative management agreements with Indigenous Nations,¹¹⁰¹ which are meant to respect Indigenous knowledge systems.¹¹⁰² They are also intended, at least in word, to respect "the spirit and intent of treaties"¹¹⁰³ and to recognize "the social, cultural and

1097 See Parks Canada, *Backgrounder* and Parks Canada, *Discussion Paper*.

1098 First, there is now acknowledgement that climate change is an important context in considering marine health and conservation. "Increasingly under pressure from intensive use, climate change and pollution, the health of our oceans and Great Lakes is under threat" (Parks Canada, *Backgrounder* at 6). NMCAs, then, are seen as an important tool not only at a local level, but "provide a range of benefits that contribute to the well-being of people and the world" (*ibid.* at 10). In addition to other benefits, NMCAs "provide ecosystem services such as the provision of water and food, climate regulation, spiritual experiences and sense of place" (*ibid.*). At the same time, a common theme Parks Canada heard during their public consultations was that these policies did not adequately address the urgency or impact of climate change (Parks Canada, *What We Heard*). Second, the most recent policy objectives from Parks Canada, at least in theory, seem to stress greater attention to the ways NMCAs can benefit "Indigenous peoples and coastal communities" (Parks Canada, *Backgrounder* at 10). Specifically, "Indigenous peoples often have long-standing connections with the lands and waters of NMCAs through generations of use, occupancy and stewardship. NMCAs are places where Indigenous rights are respected, where Indigenous peoples continue their traditional and cultural practices – including accessing traditional foods – and fulfill their roles as stewards" (*ibid.*).

1099 It is worth noting that the historical tendency of parks and conservation areas to infringe upon and limit the exercise of Indigenous rights and practices certainly is a factor in considering this point. For a critical perspective on parks see, for example, Daisy Couture, et al., *On This Patch of Grass: City Parks on Occupied Lands* (Halifax: Fernwood Publishing, 2018).

1100 The nine objectives are: Collaborate and consult on the planning and management of NMCAs; Protect and conserve marine biodiversity and ecosystems within NMCAs; Ensure that marine uses in NMCAs are ecologically sustainable; Conserve cultural heritage in NMCAs; Recognize Indigenous peoples' responsibilities as stewards of NMCAs; Support the social, cultural and economic well-being of Indigenous peoples and coastal communities adjacent to NMCAs; Foster visitor experiences that build strong connections to and enjoyment of NMCAs; Promote awareness, understanding and appreciation of the natural and cultural heritage in NMCAs; and Advance knowledge and understanding of marine environments in NMCAs. See Parks Canada, *Backgrounder* at 11 and in general for greater detail on these objectives. In public consultation on these proposed objectives Parks Canada received feedback that this list included too many objectives, as well as the suggestion that these objectives need to be prioritized in the event of conflict (Parks Canada, *What We Heard*). NGO's in particular emphasized that the first priority of an NMCA or NMCAR should be protection of the ecosystem, with all others coming secondary. For W̱SÁNEĆ, given our inherent, treaty, and constitutionally protected rights and responsibilities under W̱SÁNEĆ law, we would give particular priority and emphasis to objective number 5, the need to recognize Indigenous peoples' responsibilities as stewards of NMCAs.

1101 Parks Canada, *Backgrounder* at 12.

1102 Indigenous knowledge is defined as "Knowledge of Indigenous traditional and cultural activities, as well as knowledge of the natural world, including physical environments, the cosmos and the spirit world, and the values and principles governing Indigenous person's conduct and interactions with one another, the natural world, the cosmos and the spirit world, transmitted through oral tradition, ceremonies, song, pneumatic devices, laws and stories, and by conducting and observing Indigenous traditional and cultural practices" (*ibid.* at 25).

1103 *Ibid.* at 19. For W̱SÁNEĆ, this would imply not just the written text of the Douglas Treaty, but the oral version of the Douglas Treaty. For a nation-state, this appears to always be easier said than done. While the policy indicated here speaks to the spirit and intent of treaties, the legislation (*CNMCA Act*) makes no specific mention of this approach. This is noteworthy given that policy holds less sway than legislation. Competing mandates and jurisdictions between federal branches also poses a challenge. The reality is that Parks Canada, and its various representatives, have the authority and mandate to recognize the Douglas Treaty only to a certain extent.

economic well-being of Indigenous peoples” tied to these waters.¹¹⁰⁴ In short, within this proposed policy framework reconciliation¹¹⁰⁵ is seen as manifesting through Indigenous cultural heritage protection,¹¹⁰⁶ Indigenous monitoring¹¹⁰⁷ and co-management agreements,¹¹⁰⁸ and “opportunities for Indigenous peoples to present and share their heritage and culture with visitors.”¹¹⁰⁹ Since a management plan “is a key document that helps guide decision-making,”¹¹¹⁰ there is potentially an opening for increased W̱SÁNEĆ decision-making powers, depending on the management model negotiated.

In terms of actual management of NMCAs, a great deal of focus is given to zoning.¹¹¹¹ All lands and waters within an NMCA are legislatively required to be zoned.¹¹¹² In order to implement and enforce zoning within NMCAs, Parks Canada has drafted regulations.¹¹¹³ Proposed are four different zones with varying levels of protections and permitting requirements.¹¹¹⁴ While legislation requires one “fully protected zone” and one “ecologically sustainable zone,”¹¹¹⁵ the rest is open to negotiation.¹¹¹⁶ In general, the four different proposed zones will have the following purposes:¹¹¹⁷

1104 Economically, NMCAs and healthy ecosystems can be beneficial in two senses – “enabling communities to pursue sustainable livelihoods and access sustainable food sources” as well as attracting visitors and generating “tourism-related economic opportunities and development” (*ibid.* at 20). Opportunities for developing sustainable Indigenous economies in place of extractive and exploitative ones is one of the more significant potential benefits of an NMCAR (and Indigenous Protected and Conserved Area, discussed later).

1105 Parks Canada views an NMCAR as a process and tool toward reconciliation. “Efforts to advance reconciliation lead to recognition of the important role of Indigenous peoples as stewards of traditional lands and waters within NMCAs” (*ibid.* at 19).

1106 The objective to protect cultural heritage sites reflects “the past and ongoing use of cultural landscapes and seascapes by many generations of Indigenous peoples and coastal communities” (*ibid.* at 18). See *ibid.* for some listed examples of cultural resources. Ultimately, Parks Canada, *Cultural Resource Management Policy* (2013) (available online at <https://www.pc.gc.ca/en/docs/pc/poli/gre-crm>) will apply to all cultural resources within an NMCA and NMCAR as well.

1107 “Adaptive and evidence-based monitoring” within NMCAs requires “robust and timely monitoring information” (Parks Canada, *Backgrounder* at 20). This level of monitoring requires the development of partnerships, including with Indigenous peoples. Being directly involved in the monitoring and management of the marine area may be of significant interest to W̱SÁNEĆ, as well as create training and employment opportunities for our communities.

1108 Parks Canada looks to seek out and support partnerships that “may take the form of various cooperative management arrangements” in the management of NMCARs (*ibid.* at 19).

1109 *Ibid.*

1110 *Ibid.* at 12.

1111 This zoning may “restrict or prohibit specific activities and uses” through a management plan, or identify “special management areas” that may “need more protection at particular times of the year for a specific conservation purpose, or that apply to only a specific area of the NMCA” (*ibid.* at 14).

1112 Parks Canada, *Discussion Paper* at 9.

1113 The *CNMCA Act* at s. 16 references the development of regulations. The creation of new regulations for NMCAs appear to currently have six broad intentions. These are creating or facilitating: A revised NMCA zoning framework; Enhanced protection of marine biodiversity and ecosystems within NMCAs; Ecologically sustainable land use in NMCAs; Protection of cultural resources in NMCAs; Promotion and management of marine tourism and recreation in NMCAs; and Management of research and collection activities in NMCAs. See Parks Canada, *Discussion Paper* at 7.

1114 *Ibid.* at 9.

1115 *CNMCA Act* at s. 4(4).

1116 Parks Canada does, however, propose that most of an NMCA be zoned in a manner that provides a greater degree of protection, and thus a more effective avenue in achieving its objectives (Parks Canada, *Discussion Paper* at 9).

1117 See Appendix I for a chart indicating more specific activities permitted in each zone. You can also see stakeholder responses to these zoning proposal and regulations in Parks Canada, *What We Heard*. In response to the public consultation process Parks Canada is proposing a change to Zone 3, which would be recast as a “Habitat Protection”

Table 1: Zoning purposes

Zone 1 (Restricted Access) will fully protect special features (including cultural resources) and/or sensitive ecosystem elements that are susceptible to or intolerant of disturbance through a prohibition on extractive use and restrictions on access.	Zone 2 (General Protection) will fully protect special features and/or sensitive ecosystem elements and/or representative characteristics of the marine region. Extractive use is prohibited.	Zone 3 (Multiple Use with Lakebed or Seabed Protection) will provide protection to lakebed or seabed ecosystems and/or cultural resources located on the lakebed or seabed while allowing for a range of uses of renewable marine resources that are compatible with the protection objectives of the zone.	Zone 4 (Multiple Use) will sustain the greatest range of uses that do not compromise the ecosystem structure and function.
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Figure 42: “NMCA Zoning Purposes” Parks Canada, Discussion Paper at 10.

While the zoning framework has a focus on preventing extraction, there is less regulation of marine travel.¹¹¹⁸ The Saguenay-St. Lawrence Marine Park, a location of heavy ship traffic and critical beluga habitat, is, however, an interesting example of regulating marine travel within an NMCA.¹¹¹⁹

While some “ecological restoration activities” are contemplated within NMCAs,¹¹²⁰ it is fair to say that a lack of specific focus on restoration, and exclusion of already developed or ecologically damaged areas, is a significant weakness.¹¹²¹ While prohibition of extractive

Zone. A Habitat Protection Zone would be flexible enough to provide protections to specific habitats, while also allowing for access and extractive uses that are consistent with the protection of the given specific habitat being considered.

1118 In regard to zoning more broadly, public consultation raised the issue that protections within this zoning model focused too heavily on extraction, with little attention to travel. The concern is that ship and boat traffic, specifically the noise it creates, is detrimental to the Southern Resident killer whales and their use of eco-location, for example. Additionally, it is not surprising that the public would consider oil tanker or shipping traffic as a threat to the purposes and objectives of an NMCAR. While I fully agree with these concerns, the jurisdictional difficulty is that travel and anchorage falls within the jurisdiction of Transport Canada, adding a layer of complexity. An NMCAR can influence the jurisdiction and decision making of the Department of Fisheries and Ocean and Transport Canada, for instance, but only once those branches of government sign off on a management plan.

1119 During the negotiation of the Marine Park the boundary was close to doubled to include a greater proportion of critical Beluga habitat. Quebec is also currently looking at establishing additional protected areas surrounding the NMCA border under the Provincial *Oceans Act* to incorporate protection of the complete critical habitat of the Beluga whale in the area. A no travel zone within a particularly important area for beluga calving was established. A limit was placed on the number of whale watching boats operating in the area, as was their speed, distance from and time in contact with whales. This initiative was achieved through regulations and in cooperation with the whale watching industry and involved limiting the number of permitted boats. This changes allowed companies to use fewer, but larger capacity, boats in their operations. Additionally, to limit the number of instances of ships striking Beluga whales, as well as to help curb the noise pollution in the heavily trafficked marine area, there has been an implementation of a “voluntary reduction in vessel speed” during certain times of the year (Parks Canada, *Background* at 17). While understanding the extent to which slower ship speed equates with less noise is complicated, it does appear to have some positive effects. A study by the Port of Vancouver in the Salish Sea has provided some interim findings on this type of voluntary reduction in vessel speed. See Vancouver Fraser Port Authority, *ECHO Program Slowdown Trial – Interim Findings*, March 1, 2018.

1120 See Parks Canada, *Background* at 14. For instance, the Gwaii Haanas NMCAR and Haida Heritage Site is undertaking a restoration of kelp forests along a 3km stretch of coastal habitat that is central to the endangered northern abalone (*ibid.* at 15).

1121 Areas included within an NMCA “should be in a natural state, or be capable of being restored to a natural condition” (CNMCA System Plan at 12).

infrastructure¹¹²² in favour of renewable infrastructure¹¹²³ is positive, the primacy of an NMCA's conservation purposes and objectives also remains secondary to "any activity undertaken in the interests of Canadian sovereignty or security."¹¹²⁴

5.2. Establishing a Proposed Southern Strait of Georgia NMCAR

Broadly speaking, there are five steps in establishing an NMCA or NMCAR.¹¹²⁵ Step one involves the preliminary identification of representative marine areas within a given region which are "in a natural state, or...capable of being restored to a natural condition."¹¹²⁶ Step 2 involves additional "studies and consultations" in narrowing in on a specific site.¹¹²⁷ In Pacific Region 5, this has become the Southern Strait of Georgia location.¹¹²⁸ While the federal and provincial governments signed a memorandum of understanding in 2003,¹¹²⁹ Step 2 appears to have been done with little to no consultation with WSÁNEĆ.¹¹³⁰

Step Three is the "most complex and time consuming step" of the process, requiring a more detailed feasibility and consultation process.¹¹³¹ Determining whether an NMCAR in this location is "both practical and desirable"¹¹³² has been underway since 2004,¹¹³³ and prioritized

1122 New "infrastructure with the potential to disturb and pollute (e.g. marine terminals, ports, dams, large renewable energy or aquaculture operations)" is prohibited (Parks Canada, *Backgrounder* at 14).

1123 Renewable resources, including harvesting, shipping, recreation and tourism, scientific research, and shoreline and marine infrastructure, as well as "wind, wave or tidal energy" are permissible (*ibid.* at 16). I note that tidal energy has been something loosely explored in the area of active pass, within the Southern Strait of Georgia proposed NMCAR.

1124 *Ibid.* at 16.

1125 See CNMCA System Plan at 12-13 for a general overview of these steps.

1126 *Ibid.* at 12.

1127 *Ibid.* "In comparing representative marine areas at this stage, a wide range of factors is [*sic*] considered, including: quality of regional representation; importance of the area in maintaining biodiversity and protecting critical habitats for endangered species; occurrence of exceptional natural and cultural features; existing or probable marine resource uses; actual and potential threats to the sustainability of the area's marine ecosystem; the implications of aboriginal claims and treaties; potential for public understanding, education and enjoyment; and value of the area for ecological research and monitoring" (*ibid.*). Parks Canada also does note an explicit preference for locations "in proximity to an existing national park or another protected area" (*National Marine Conservation Areas Policy*, 1994 at 48).

1128 The only other identified representative site within Pacific Region 5 is Blackfish Sound, near Alert Bay.

1129 Canada and the Province of British Columbia signed a memorandum of understanding committing them to assess the feasibility of an NMCA in this area. See Parks Canada, National Marine Conservation Areas, at <https://www.pc.gc.ca/en/amnc-nmca/cnamnc-cnnmca/dgs-ssg/intro>.

1130 The decision to focus in on the Southern Gulf Islands location for a potential NMCA has seemed to go somewhat hand-in-hand with the decision to establish the Gulf Islands National Park Reserve (GINPR), which was established without consultation with WSÁNEĆ, despite clear Douglas Treaty and Aboriginal rights in the area. Parks Canada, *Proposed National Marine Conservation Area Reserve Southern Strait of Georgia: Project Update, Spring 2012* [Parks Canada, 2012 Update] at 4 indicates: "Gulf Islands National Park Reserve, established in 2003, is located in the southern Gulf Islands. The park safeguards a mosaic of meadows, forested hills, rocky headlands, quiet coves and sandy beaches, and includes some marine waters. Some of these waters could be included in the NMCA reserve, if it is established. The proposed NMCA reserve would surround the Gulf Islands National Park Reserve. Together, they would provide visitor opportunities and significant protection for both the land and waters." The Gulf Islands National Park Reserve is a network of terrestrial park lands located primarily on and around the Southern Gulf Islands. The decision to establish the GINPR was finalized in 1995, and the GINPR was formally established in 2003. See Parks Canada, Gulf Islands National Park Reserve website at <https://www.pc.gc.ca/en/pn-np/bc/gulf>.

1131 CNMCA System Plan at 12.

1132 Parks Canada, National Marine Conservation Areas, What is a Feasibility Study? website at <https://www.pc.gc.ca/en/amnc-nmca/cnamnc-cnnmca/dgs-ssg/contexte-background/quoi-what>.

1133 Parks Canada, National Marine Conservation Areas, at <https://www.pc.gc.ca/en/amnc-nmca/cnamnc-cnnmca/dgs-ssg/intro>.

Based on this proposed boundary, Parks Canada understands themselves to have a responsibility to consult with 19 different First Nations regarding the feasibility of an NMCAR in this location.¹¹³⁵ For W̱SÁNEĆ, consultation is channeled through the W̱SÁNEĆ Leadership Council Society (WLC) and the Paquachin First Nation.¹¹³⁶ A significant achievement shaping this process is the recently signed IEḺC̱I̱TEL or *Nuṯsa matt kws ‘i shul’ hwilasmut tu Skwul ‘i kwthe’* Accord (IEḺC̱I̱TEL Accord) in which many of the Nations being consulted on issues such as NMCAR have agreed to work together.¹¹³⁷ Should these Nations agree to the feasibility of an NMCAR in the Southern Strait of Georgia, then Step Four proceeds to the negotiation of a marine conservation area agreement.¹¹³⁸ These agreements, “setting out the terms and conditions under which the NMCA will be established and managed,” are complex.¹¹³⁹ Once agreed upon, the final step is to bring the NMCA into force through legislation of the Parliament of Canada.¹¹⁴⁰ In the case of an NMCAR, the *CNMCA Act* will still apply, “but the status of the

area would be subject to the final resolution of the aboriginal claim.”¹¹⁴¹ The fact that an NMCAR provides legislated protection measures over an area can be seen as a distinct advantage of the process, at least to the extent that it creates greater enforcement and funding opportunities than might otherwise be available.

5.3. NMCAR Themes and Considerations

In order to assess the feasibility of the proposed NMCAR the WLC has had to consider issues relating to conservation potential, boundaries, tenures, ownership, areas of exclusions, zoning analysis, potential economic benefits, potential co-management structures, Douglas Treaty Rights/ Responsibilities, W̱SÁNEĆ Laws, and more. Some of the challenges, or weaknesses, can be grouped into broader themes. For our purposes, we can group those into exclusions, boundaries, and zoning.

5.3.1. Exclusions

The Southern Strait of Georgia NMCAR is complicated by heavy marine use and close urban centres in the area. Current exclusions within the proposed boundary relate primarily to areas with high tenure concentration,¹¹⁴² or the incompatibility of specific tenures in the area, which can include issues of jurisdictional complexity.¹¹⁴³ In large part, these are jurisdictional issues relevant within Canadian law, but represent little more than a self-imposed bureaucratic barrier in W̱SÁNEĆ thought. Referencing the map in Appendix B, exclusion of most harbours in the proposed NMCAR occur not only due to high tenure concentration, but also for ease of navigation. The trouble with moving from one jurisdictional area to another is that you need to have some reasonable idea of when you are, or are not, within an NMCAR area. The trouble with the presumptive exclusion of various harbours is that those areas are incredibly important both culturally and ecologically.

establishment of the area or reserve, (c) the results of any assessments of mineral and energy resources undertaken, and (d) an interim management plan that sets out management objectives and a zoning plan” (*CNMCA Act* at s. 7(2)(3)(4)). If no formal disapproval is motioned, by either House, then the NMCA or NMCAR can be completed.

1141 CNMCA System Plan at 13.

1142 “Areas with high concentrations of commercial and industrial uses have been excluded from the proposed boundaries including: Sidney, Swartz Bay, Brentwood Bay, Mill Bay, Ganges Harbour, Maple Bay, Crofton, Chemainus, Ladysmith, Telegraph Harbour, and portions of Cowichan Bay” (Parks Canada, 2012 *Update* at 4).

1143 “The following tenures have been excluded from the proposed boundary: ferry terminals, marinas, sewer/effluent lines, and all commercial and industrial tenures except shellfish aquaculture. There is a 200-metre buffer around the excluded tenures to allow for possible future tenure expansion or changes in location” (*ibid.* at 5). Jurisdictional complexity arises from the requirement under the *CNMCA Act* of having to transfer tenure to the federal government within an NMCA. Ferry terminals, for instance, are of provincial interests and having the tenure transferred to the Federal Government would be incompatible, among other reasons.

Herring, for example, are keystone species essential to the marine foodweb. Not only have herring been depleted from drastic overfishing, spawning grounds within harbours have been heavily impacted and several important spawning grounds would be excluded from the NMCAR boundary for these reasons.¹¹⁴⁴ Ganges Harbour, a traditional W̱SÁNEĆ village site, which W̱SÁNEĆ pushed to have included as a Reserve specifically because of the herring fishery and its importance, as well as Tod Inlet, where our first ancestor came to the Earth as rain and is the location of the first W̱SÁNEĆ village site, are two examples.¹¹⁴⁵ Harbours are home to seagrass beds and different types of kelp.¹¹⁴⁶ The fact they are heavily used, or more challenging to navigate, does not change that. From a W̱SÁNEĆ perspective, that these are the most vulnerable areas to the impacts of cumulative effects does not contribute to a rationale for exclusion, but rather, an increased rationale for “care” - restoration and conservation

A similar tension between a rationale for exclusion and a rationale for increased care can be seen in regards to the presumptive exclusion of sewage lines and outfalls.¹¹⁴⁷ The cumulative effects of pollution in the Salish Sea has resulted in near constant sanitary closures of most clam beds.¹¹⁴⁸ In W̱SÁNEĆ we have a saying – “when the tide is out, the table is set.” Clams beds have been a central aspect of W̱SÁNEĆ economy and culture, which the cumulative effects of pollution has taken from us and remains an issue over which we have little decision making authority. How can an NMCAR help the health of these clam beds and foster a better relationships with clams? Excluding effluent outfalls from the NMCAR boundary, as though they aren’t really there, seems misguided. Climate crisis makes it abundantly clear that rationalizing pollution as “away”, or “out of sight, out of mind,” is inappropriate and dangerous. A better approach, and one more consistent with ecological integrity and sustainability, would be

1144 See Parks Canada, *Proposed Southern Strait of Georgia National Marine Conservation Area Reserve Atlas* (2009) [Parks Canada, *Atlas*] at 78 for a map illustrating “Pacific Herring Spawning Areas” within the proposed NMCAR boundary.

1145 The exclusion of SNIDĆEL (Tod Inlet) is particularly troubling and ironic given that this area was where the first W̱SÁNEĆ ancestor, SLEMEW, came to the earth in the form of rain and helped form the ocean, lakes, and rivers, as well as shape the land, and where the first W̱SÁNEĆ village site was located. It is in that sense that water is sacred and has spiritual power, and why past harms and damage done to that site of particularly troubling.

1146 See Parks Canada, *Atlas* at 95-103 for more on kelp and seagrass, along with accompanying maps.

1147 The principle concern here is whether a sewage outfall constitutes “ocean dumping”, which is prohibited within the boundaries of an NMCAR (the same is true of bilge pumps on boats moored in harbours).

1148 For a better sense of “Sanitary Shellfish Closures” see Appendix III (Parks Canada, *Atlas* at 48).

to use an NMCAR as a tool to regulate effluent treatment levels and bilge pump dumping¹¹⁴⁹ to help restore the health of clam beds.¹¹⁵⁰

Ultimately, since NMCAs prohibit activities that are inconsistent with sustainable use and require the rehabilitation of areas previously degraded or polluted, there is hesitancy to include heavily used harbours, industrialized areas,¹¹⁵¹ or previously degraded areas.¹¹⁵² These types of considerations play far too great a role, and within the jurisdictional realm of Canadian law, they continue to pose huge challenges and limit the possibility of meaningful ecological rehabilitation.¹¹⁵³ The very notion of exclusions and compartmentalization is difficult to grasp within W̱SÁNEĆ thought. To make exclusions is to ask us to leave behind part of our culture, beliefs, and laws; to fetter our jurisdiction to care for our relatives within the sea, and for future generations. To quote my uncle John Elliott on this point: “We can’t let that go. We can’t put it aside. It is a part of who we are.”¹¹⁵⁴ Seen through the lens of relational ontology, Elliott does not mean this as hyperbole, but quite literally.

5.3.2. Boundary

Similar difficulties arise in regard to creating an NMCAR boundary. Rather than focusing on responsibilities and an assessment of what it would actually take to protect, for example, Southern Resident killer whales, the NMCAR framework is sidetracked by jurisdictional complexities from the outset.¹¹⁵⁵ The NMCAR boundary avoids extending around the southern tip of Vancouver Island and up the Strait of Juan de Fuca based on the complex infrastructure

1149 Some areas within the NMCAR boundary have designated “pump-out” locations, where instead of dumping the bilge into the ocean, the effluent is collected and then treated. Very few areas, however, are designated as “no discharge areas.” See Parks Canada, *Atlas* at 42 for “Pump Outs and No Discharge Areas” map.

1150 I have not done a full survey of what treatment level each outfall within the boundary currently receives. In general, wastewater may receive no treatment, ranging from there up through primary, secondary, or tertiary treatment. For more general information see Government of Canada, Wastewater Management website at <https://www.canada.ca/en/environment-climate-change/services/wastewater/management.html>. I also note that the Georgia Strait Alliance is currently petitioning to have tertiary treatment of wastewater in the Salish Sea (see Georgia Strait Alliance, “The Salish Sea Needs Tertiary Wastewater Treatment, Without Delay” online at <https://georgiastrait.org/a-rare-chance-for-a-healthier-salish-sea/>).

1151 For example, the southern boundary of the NMCAR was originally planned to extend around Victoria and out toward Sooke. However, the amount of industrial activity within that area meant that it was easier to remove that section of the proposed boundary.

1152 Perhaps the best example of this tendency when looking at the proposed boundary is the odd-looking rectangular cutout north-east of Galiano and Valdes Islands (called ‘the bite’), which was an area previously used for ocean dumping, and thus excluded from the NMCAR boundary. Parks Canada claims that this area was excluded “in order to minimize the overall size of the NMCA reserve” (Parks Canada, *2012 Update* at 5), but that is misleading. In fact, Parks Canada’s policy is to have NMCAs be purposefully large in size, and this area was actually excluded based on its previous use as an ocean dumping site and the unknown impact it had on that specific area.

1153 Parks Canada is clear that there is a limited scope and budget for rehabilitation purposes, and that plays a role in the creation of the NMCAR boundary.

1154 Teaching of John Elliott (27 February 2019) W̱SÁNEĆ Leadership Council Office.

1155 I wrote about this in connection with a fuel spill at Goldstream River as well, arguing that being overly focused on who can do what leads to missing what our responsibilities actually entail. See Clifford, “W̱SÁNEĆ Legal Theory”.

and jurisdictional issues around the city of Victoria.¹¹⁵⁶ A similar rationale results in excluding the mouth of the Fraser River from the NMCAR boundary. The Fraser River is the largest river in British Columbia, one of the largest salmon spawning rivers in the world, and brings millions of migrant birds every year. Seemingly more important, however, is the river's importance for industrial activities and port access to metro Vancouver.¹¹⁵⁷ Jurisdictional complexity, heavy use of the marine area, and potential interaction with the Tsawassen Treaty¹¹⁵⁸ make it incompatible with an NMCAR.¹¹⁵⁹

The international border between Canada and the United States, which intersects W̱SÁNEĆ territory, the Strait of Georgia, the Strait of Juan de Fuca, and functions as the boundary of the proposed NMCAR, is another example – perhaps the most obvious – of how jurisdiction precedes conservation. What do our relatives, KELLELMÉĆEN (Orca), know of these boundaries? It takes only one look at the critical habitat of SRKWs to see the inconsistencies with the NMCAR boundaries.¹¹⁶⁰ Is this inability to work cooperatively and across the international border not the same issue we saw in depletion of salmon stocks, the primary food source of KELLELMÉĆEN, in the first place? I do not claim that the NMCAR would not benefit KELLELMÉĆEN.¹¹⁶¹ However, as opposed to asking what it would actually take to save the endangered SRKW, the logic of the NMCAR boundaries, and the jurisdiction that enables it, seemingly works backward to ask what are we able to do given what we already have in place – even despite the fact that what is currently in place is exactly what is doing the central harm.¹¹⁶²

5.3.3. Zoning

1156 There are already a number of smaller ecological reserves and marine parks located in this vicinity, highlighting the ecological importance. For example, there is Race Rocks Ecological Reserve, Trail Islands Ecological Reserve, Oak Bay Islands Ecological Reserve, Ten Mile Point Ecological Reserve, and Discovery Island Marine Provincial Park. See Government of British Columbia, BC Parks website at <http://bcparks.ca/explore/map.html> for a map and more information on these locations.

1157 For a 2014 review see Richmond Chamber of Commerce, *The Economic Importance of the Lower Fraser River* (July 2014) available online at <https://abbotsford.civicweb.net/document/42001>.

1158 Tsawassen First Nation & The Governments of Canada and British Columbia, *Tsawassen First Nation Final Agreement* (2010) available online at https://tsawassenfirstnation.com/wp-content/uploads/2019/07/1_Tsawassen_First_Nation_Final_Agreement.pdf [*Tsawassen Final Agreement*].

1159 Also note that the W̱SÁNEĆ, as part of the SENĆOŦEN Alliance, intervened in the development of this treaty in that the *Tsawassen Final Agreement* incorporates areas we consider also within W̱SÁNEĆ territory and overlooks the fact that W̱SÁNEĆ had seasonal fishing rights at the mouth of the Fraser River. Diamon Jenness, for example, recorded that “The Saanich had an immemorial claim to the fishing off Point Roberts, near the mouth of the Fraser River” (Richling, *The W̱SÁNEĆ* at 18).

1160 See Parks Canada, *Atlas* at 91 for a map of “Critical Killer What Habitat”.

1161 Recall that the Beluga whale was a central impetus around much of the work done by the Saugenay St. Lawrence Marine Park, creating a point of connection through which several people and stakeholders could come together for a common goal.

1162 “Environmental degradation, depletion of prey species, conflicts with fishing activities, pollution and habitat degradation are currently the most significant threats to killer whales worldwide. In this region, declining numbers of salmon and high levels of accumulated PCB poisoning are among the greatest concerns.” (Parks Canada, *Atlas* at 89).

In establishing an NMCA a series of studies and mapping is done as a way to determine areas of high importance based on a variety of different considerations and interests.¹¹⁶³ These maps are created by using a “spatial decision-support tool” called Marxan.¹¹⁶⁴ A Marxan analysis breaks down the area of study into a large number of “planning units”¹¹⁶⁵ as a way to “identify areas of high conservation value that would fully represent the species and habitats found within the study area.”¹¹⁶⁶ In doing this, “Marxan uses a complex mathematical method to select different combination of areas that achieve conservation objectives while minimizing negative impacts to marine users and coastal communities.”¹¹⁶⁷ Like any tool of this nature, the data input shapes the resultant output.¹¹⁶⁸ A Marxan analysis is a long and expensive process.

What would a map projecting a loss of fishery and changes in marine life over time, the historical trends of degradation and contaminated sites, or the cacophony of jurisdictional lines imposed over W̱SÁNEĆ jurisdiction look like? How would that recast the actual challenges being faced? In Appendix IV we can see what vessel traffic in the region looks like for the year 2017, and that is only from vessels required to carry an Automatic Identification System (AIS).¹¹⁶⁹ Considering the noise alone generated from these ships, which impacts SRKW echolocation abilities, is striking, let alone any type of analysis of where these ships are heading and what they are carrying.

W̱SÁNEĆ cannot conduct our own Marxan analysis¹¹⁷⁰ and Parks Canada is reluctant to conduct another Marxan analysis prior to a decision on feasibility.¹¹⁷¹ As such, two paradox arise. First, W̱SÁNEĆ is asked to put the cart before the horse; that is, to proclaim an NMCAR

1163 See Parks Canada, *Atlas* for a collection of maps illustrating species distribution, critical habitat, ocean features, ecosystems, recreational and commercial activities, and more.

1164 See *ibid.* at 61 for more on Marxan.

1165 “Using available biological and physical data, Marxan ensured the representation of 121 different species and habitats in a study area comprised of approximately 60,000 three-hectare planning units (hexagons)” (*ibid.*).

1166 *Ibid.*

1167 *Ibid.*

1168 “Marxan can accommodate a wide variety of data including ecological, socio-economic, cultural, and visitor experience information” (*ibid.*). Parks Canada’s maps present important information, yet, no one (including Parks Canada) is sure of the exact data originally used to create current maps, which is now out of date regardless of what data inputs are used. It is also fair to note that the information and maps created by Parks Canada are meant only to be a “tool” that can provide “a starting point for more detailed discussions involving First Nations, government partners, stakeholders and the general public” (*ibid.*).

1169 Trailmark Systems, *All Vessel Traffic 2017* (Nov 2018). Requirements to carry an AIS is based on certain factors such as vessel size. It is beyond my scope here, but it would be interesting to do a more in depth analysis on what vessels carry AIS, which routes they are taking, and what they are transporting.

1170 Canadian Parks and Wilderness Society (CPAWS), on the other hand, does have their own Marxan analysis of the area and are willing to work alongside W̱SÁNEĆ in exploring the most appropriate protection measures. See Canadian Parks and Wilderness Society website at <https://cpaws.org/>.

1171 “If the proposed NMCA Reserve moves into the Interim Management Planning phase, a second Marxan analysis will be used to identify areas of high conservation value that minimize impacts on commercial, recreational and cultural activities. To achieve this more challenging goal, Marxan will perform an increasingly complex analysis that incorporates the biophysical data as well as information on the commercial activities, First Nation’s values and recreational uses in the area” (Parks Canada, *Atlas* at 61).

feasible in our territory (a significant commitment) prior to fully understanding if a Marxan analysis can capture our most significant concerns, or what a management framework would actually entail. Second, to identify and utilize ecological protections within an NMCAR framework, the way in which we speak of our relationships with territory and the beings within it becomes shaped by a very technical and bureaucratic process.¹¹⁷² Much of how this all plays out, and how decision-making is structured, ultimately depends on the type of co-management agreement negotiated after the feasibility stage. While any final co-management agreement will be context dependent, some sense of the possibilities is necessary.

5.4. Cooperative Management

The term Cooperative Management is used by Parks Canada to describe any number of models in which Indigenous peoples are involved in the planning and management of national parks, but which do not limit the authority of the Minister under the *Canada National Parks Act*.¹¹⁷³ To be clear, these agreements, therefore, do not necessarily envision a transition to *Indigenous management* as a stand-alone option.¹¹⁷⁴ While many of these examples are terrestrial parks, they remain relevant in considering the spectrum of potential management models.¹¹⁷⁵ To be fair, Parks Canada does explicitly consider this spectrum of co-management report, and thus the options and analysis of “legal context” it presents, to be outdated given an increased emphasis on being guided by the “spirit and intent” of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).¹¹⁷⁶ While future co-management agreements may go beyond these examples, we don’t yet have a clear picture of what those agreements might look like, or the extent they might move beyond these frameworks. Additionally, the same s. 35 case law remains in the background. As such, I think legitimate concerns remain, and the following examples remain relevant for our purposes.

5.4.1. Parks Canada Co-Management Spectrum and “Legal Context”

¹¹⁷² Paul Nadasdy offers a critique of co-management agreements along these lines in Nadasdy, *Hunters and Bureaucrats*.

¹¹⁷³ Parks Canada, *Spectrum of Cooperative Management Agreements at Parks Canada* (date unknown) [Parks Canada, *Spectrum Report*] at 4.

¹¹⁷⁴ The creation of any National Park Reserve, however, does leave space for the potential settlement of a land claim or title claim, under which this might change.

¹¹⁷⁵ Parks Canada is also interested in a management framework that would apply to both the GINPR and the proposed NMCAR. Such an approach would have similarities to the management framework used in Gwaii Haanas. See *Land-Sea-People Management Plan*.

¹¹⁷⁶ Personal communication, 4 March 2022, WSÁNEĆ Leadership Council and Parks Canada representatives.

There are currently 35 heritage places in regard to which Parks Canada has entered into cooperative management structures in Canada,¹¹⁷⁷ the first dating back to 1922.¹¹⁷⁸ Each cooperative management agreement is necessarily unique and context dependent. Parks Canada does, however, identify three broad models for agreements to follow: 1) Relationship Building Body; 2) Cooperative Management Board; and 3) Consensus Management Body.¹¹⁷⁹ Internally, Parks Canada has identified the need to understand the “legal context” in determining which model is most appropriate.¹¹⁸⁰ The structure of a negotiated agreement therefore seems to flow, at least in part, from an interpretation of this legal context. Understanding the “legal context” makes sense in terms of establishing a *bare minimum* in engaging Indigenous groups.¹¹⁸¹ However, presuming Canadian Aboriginal law is the starting point is problematic. Indigenous laws, norms, and decision-making mechanisms, which pre-exist Canada, are a more appropriate reference point, opposed to a secondary consideration.¹¹⁸² If Parks Canada is truly “working towards a new model of collaborative conservation” and seeking “innovative approaches to Reconciliation” that “honour the spirit and intent of treaties,”¹¹⁸³ then taking Canadian Aboriginal law as a structural limitation is backward looking. In addition, this “legal context” is also framed such that, thus far, only the Haida Nation have been able to achieve a consensus management agreement. A significant factor is that the “legal context” guiding the development of a consensus management body requires “no overlapping claims” and the requirement to have “one body to represent all nations.”¹¹⁸⁴

1177 Parks Canada, *Spectrum Report* at Appendix C. A number of cooperative management agreements arose following the 1973 Calder decision, from which there was an influx of Indigenous land claims, and subsequently the establishment of National Parks and National Park Reserves as central component in the settlement of these types of claims (*ibid.* at 4). There are, of course, implications to this decision. Having ‘settlement lands’ incorporated into a park with a co-management structure is of benefit to an Indigenous Nation. However, it is also a compromise in the sense that the land enters a structure that is necessarily limited by Parks Canada retaining some form of authority and say *over* those lands. In contrast, in finding Aboriginal title, those lands are removed from the national park system and the Indigenous Nation gains full authority within those lands.

1178 *Ibid.* at 4. The first collaborative management situation arose in connection with wildlife management following the 1922 establishment of the Wood Buffalo National Park. Wood Buffalo National Park is the largest National Park in Canada and is located in northern Alberta and the Northwest Territories.

1179 I will speak to each of these in more detail. However, see *ibid.* for greater detail on each of these different models.

1180 Specifically, Parks Canada’s policy is that “before entering into any form of cooperative arrangement discussions with Indigenous peoples, be sure that you understand the particular legal context” (*ibid.* at 8). That is, “in order to understand the nature of what is possible through collaboration with Inuit, Métis and First Nations, it is imperative to understand the statutory/legislative/policy and constitutional/common law environments and the legal contexts that inform Parks Canada’s work with Indigenous peoples” (*ibid.*). Three broad legal context categories are identified 1) pre-1975 Treaty; 2) Modern Land Claims and Section 35 Rights; and 3) Legal cases – asserted/established rights (*ibid.* at 7).

1181 The Honour of the Crown and Canadian Aboriginal and treaty rights case law creates a number of requirements regarding consultation and accommodation. It is important to note that the management bodies created in these agreements may or may not function as vehicles for fulfilling the Crown’s duty to consult. In this regard, a distinction is made between the concept of “engagement” (relationship building) and “consultation” (a legal requirement). See *ibid.* at 5 for more.

1182 With respect to W̱SÁNEĆ and the Douglas Treaty, it is the difference between beginning with the written text of the Treaty, and subsequent court cases, as the “legal context”, and beginning with an understanding of our oral history, legal tradition, and ontological grounding that takes a completely different starting point on core principles of the relationships being addressed, including the ability to *sell* or *own* land in a property law sense.

1183 *Ibid.* at 2.

1184 *Ibid.* at 12.

From a relational ontology lens, “overlapping” relationships with place and other beings is not a problem, but a fact of life; one which our own legal orders have regulated for millennia. We can also see in the requirement of “one body to represent all nations” that these co-management agreements do not simply recognizing existing forms of Indigenous governance, but rather, are a process through which a governance structure and the polity it represents is brought into being.¹¹⁸⁵ Squeezing a decentralized kinship governance structure, such as W̱SÁNEĆ NEHIYMET, into a single decision-making body is no straightforward task. When coupled with the notion that place and the more-than-human world have being and agency, it is difficult to see how a management board can meaningfully represent that form of W̱SÁNEĆ governance. Again, Parks Canada (at least) may be willing to begin to move beyond these limitations, but the legal landscape and limited jurisdictional authority of Parks Canada, as but one branch of the federal government, means these concerns will not simply disappear.

I return now to the three cooperative management models identified above. The first type are Relationship Building Bodies. These bodies produce recommendations that are not necessarily legally binding,¹¹⁸⁶ that focus on the process of sharing knowledge, and that do not provide Indigenous groups with decision-making authority.¹¹⁸⁷ These models are not relevant to our context.¹¹⁸⁸ The second type are Cooperative Management Boards (CMBs) aimed at facilitating long-term relationships.¹¹⁸⁹ A CMB is a potential model within the context of an NMCA,¹¹⁹⁰ and Parks Canada’s “legal context” may also suggest this model with respect to W̱SÁNEĆ.¹¹⁹¹ The exact structure of a CMB can vary, however, they generally involve representation on the management board from Parks Canada and the Indigenous group(s), with the chair of the board being appointed jointly, or by the Minister.¹¹⁹² Consensus is not

1185 Nadasdy, *Sovereignty’s Entailments*.

1186 Common tools used that are generally not legally binding are Memorandum of Understandings (MOU), Good Spirit Agreements, Cooperation Agreements, or Terms of Reference (TOR) agreements. Legally binding agreements might include Memorandum of Agreements (MOA).

1187 See Parks Canada, *Spectrum Report* at Table 1 on 12.

1188 Some examples within this model are Parks Canada, *Fundy National Park of Canada Management Plan, 2011* (available online at <http://parkscanadahistory.com/publications/fundy/mgt-plan-e-2011.pdf>) and Stoney Nakota First Nation & Parks Canada Banff Field Unit, Memorandum of Understanding (Parks Canada, *Spectrum Report* at 12).

1189 The impetus for creating such a board may be through the completion of a Modern Treaty, or a through negotiation of as a Rights Reconciliation Agreement, for example (*ibid.*). The W̱SÁNEĆ Leadership Council currently sits at a Canada Recognition of Indigenous Rights and Self-Determination Exploratory Table (RIRSD Table). The Parks Canada, *Spectrum Report* also lists MOAs, Incremental Treaty Agreements, and Side Agreements as additional possibilities for establishing a CMB.

1190 *Ibid.* at 12.

1191 Under “Legal Context” for Model 2 at *ibid.* it lists, “Pre-1975 Treaty; Aboriginal rights being asserted; Negotiations underway regarding rights; Court case(s) defining rights; Complete Modern Treaty.” All but the final legal context, “Completed Modern Treaty”, apply to W̱SÁNEĆ. Additionally, W̱SÁNEĆ would appear to not fall within the “legal context” of Model 3 insofar as it seems to require, in particular, “no overlapping claims.”

1192 *Ibid.* at 15.

required¹¹⁹³ and final decisions rest with the relevant Minister.¹¹⁹⁴ CMBs may also be purposefully limited in scope.¹¹⁹⁵ Two examples utilizing the CMB model are Tongait KakKasuangita SilakKijapvinga / Torngat Mountains National Park¹¹⁹⁶ and the Kluane National Park and Reserve.¹¹⁹⁷ This model of co-management can offer significant powers to their Indigenous signatories, however, they are also riddled with complexities, trade-offs, and tensions. While the same critiques may apply to the next option – consensus management (or co-governance) – that model does have the additional incentive of creating more decision making authority for Indigenous partners.

Beginning from a Haida Heritage Site,¹¹⁹⁸ and then a National Park Reserve,¹¹⁹⁹ the *Gwaii Haanas Agreement* has become the sole example of an Indigenous group negotiating a consensus management agreement, thus far.¹²⁰⁰ An often noted strength of the *Gwaii Haanas*

1193 *Ibid.*

1194 “A CMB may produce either advice or decisions depending on the particulars of the agreement that formalizes the CMB, however it is important to note that CMB decisions are deemed to be advice provided to the Minister, or her designate for consideration” (*Ibid.* at 15).

1195 A CMB can be granted scope over a particular range of topics on which it can make recommendations for management decisions on, as opposed to being granted scope to make recommendations on all matters within the area. For example, with the Kluane National Park and Reserve, the CMB can make recommendations on “the park management plan, the development of the park, park boundary adjustments, existing and proposed legislation relating to the park, integration of traditional and scientific knowledge, and coordinating the management of fish and wildlife populations. Other topics can be contemplated by the board with agreement from all the parties” (Katrina Annett, Sean Rupka & Leah Hughes, Memorandum: To WSÁNEĆ Leadership Council & Technical Advisory Committee, December 14, 2018 Re: Proposed National Marine Conservation Area Reserve, in author’s personal possession and onfile at the WLC Offices).

1196 The Tongait KakKasuangita SilakKijapvinga (TKS), or Torngat Mountains National Park, covers 9,700 square kilometers and is located on the Labrador Peninsula of Newfoundland and Labrador. The Torngat Mountains National Park Reserve was created through The Inuit of Labrador, Her Majesty the Queen in Right of Newfoundland and Labrador & Her Majesty the Queen in Right of Canada, *Labrador Inuit Land Claims Agreement* (2005) (available online at <https://www.gov.nl.ca/exec/iar/files/January212005AgreementComplete.pdf>) [*Labrador Inuit Land Claims Agreement*] and transitioned to a National Park with the Nunavik Inuit & Her Majesty the Queen in Right of Canada, *Nunavik Inuit Lands Claims Agreement* (2006) (available online at https://www.rcaanc-cirnac.gc.ca/DAM/DAM-CIRNAC-RCAANC/DAM-TAG/STAGING/texte-text/ldc_ccl_fagr_nk_lca_1309284365020_eng.pdf) [*Nunavik Inuit Lands Claims Agreement*]. The CMB for the park has seven members, all of whom are currently Inuit, although representing different interests. See Parks Canada, *Tongait KakKasuangita SilakKijapvinga Torngat Mountains National Park of Canada Management Plan, 2010* (available online at <https://www.pc.gc.ca/en/pn-np/nl/torgats/info/~media/00F0A58B55634EBB8F2E9CC78DB1FECA.ashx>).

1197 The Kluane National Park and Reserve is located in the Yukon Territory. In 1993 the Yukon Umbrella Agreement set a framework and structure for co-operative management of the park (The Government of Canada, The Council for Yukon Indians, and The Government of the Yukon, *Umbrella Final Agreement* (1993) (available online at <https://yukon.ca/sites/yukon.ca/files/eco/eco-ar-umbrella-final-agreement.pdf>)). The Champagne and Aishihik First Nations signed the first Final Agreement in the area and were added to the co-operative management board. See The Government of Canada, The Champagne and Aishihik First Nations, and the Government of the Yukon, *Champagne and Aishihik First Nations Final Agreement* (1992) (available online at https://www.rcaanc-cirnac.gc.ca/DAM/DAM-CIRNAC-RCAANC/DAM-TAG/STAGING/texte-text/al_ldc_ccl_fagr_ykn_chama_cham_1330355378500_eng.pdf)). The Kluane First Nation then signed their Final Agreement and were added to the management board in 2003. See The Government of Canada, The Kluane First Nations, and the Government of the Yukon, *Kluane First Nation Final Agreement* (2003) (available online at https://www.rcaanc-cirnac.gc.ca/DAM/DAM-CIRNAC-RCAANC/DAM-TAG/STAGING/texte-text/al_ldc_ccl_fagr_ykn_klu_fia_1330357096505_eng.pdf)). The Management Plan for the park see Parks Canada, *Kluane National Park and Reserve of Canada Management Plan, 2010* (available online at <https://www.pc.gc.ca/en/pn-np/yt/kluane/gestion-management/~media/BA77CFCF253443CCAE7A2E724AF99CD2.ashx>)). For an excellent analysis of the process of establishing the Kluane National Park and Reserve, as well as a critical perspective on the implications it has had for the Kluane People, see Nadasday, *Hunters and Bureaucrats* and Nadasday, *Sovereignty's Entailments*.

1198 In 1985 the Haida Nation declared the creation of a Haida Heritage Site in direct response to logging and set up a blockade on Lyell Island.

1199 In response to the anti-logging protests, the governments of Canada and British Columbia worked to designate Gwaii Haanas as a National Park Reserve. This was done through the *South Moresby Memorandum of Understanding* and then the *South Moresby Agreement*. For a timeline of establishment see Parks Canada, “Gwaii Haanas National Park Reserve, National Marine Conservation Area Reserve, and Haida Heritage Site: History of Establishment” at <https://www.pc.gc.ca/en/pn-np/bc/gwaiihaanas/info/histoire-history>.

1200 The Government of Canada & The Council of the Haida Nation, *Gwaii Haanas Agreement* (1993) (available online at <http://www.haidanation.ca/wp-content/uploads/2017/03/GwaiiHaanasAgreement.pdf>).

Agreement is both parties continued to assert “sovereignty, title or ownership” over Gwaii Haanas/ The Archipelago¹²⁰¹ while agreeing to work toward “long-term protective measures” “without prejudice” to those claims.¹²⁰² The Archipelago Management Board (AMP) is the mechanism through which the parties “share and co-operate in the planning, operation and management of the Archipelago,”¹²⁰³ based on consensus,¹²⁰⁴ and flowing from their own jurisdictional authority.¹²⁰⁵ The 2003 Management Plan for the terrestrial area¹²⁰⁶ was followed in 2010 by the *Gwaii Haanas Marine Agreement*.¹²⁰⁷ The *Marine Agreement* required adding the Department of Fisheries and Oceans to the AMB for jurisdictional reasons and resulted in the first real dispute between the parties, which revolved around a roe herring fishery.¹²⁰⁸ In addressing that dispute, in the eyes of the court the dual assertion of sovereignty within the *Gwaii Haanas Agreement* gave DFO “a heightened duty”¹²⁰⁹ regarding accommodation, but “did not give the Haida any veto” regarding the roe herring fishery, and balancing commercial rights and public interests were still a factor.¹²¹⁰ Ultimately, in the ruling of the court, “there is no question the Minister enjoys deference in governing the roe herring fishery.”¹²¹¹

Through the *Gwaii Haanas Agreement* the Haida Nation is able to assert a form of “nested sovereignty”¹²¹² and exercise of jurisdiction, although the presumed supremacy of Canadian sovereignty remains a concern. There is also no escaping the fact that Canadian

1201 *Ibid.* at s. 1.1.

1202 *Ibid.* at 1.2 and 1.3.

1203 *Ibid.* at s. 3.4. See *ibid.* at s. 4.0 for more on the Archipelago Management Board.

1204 *Ibid.* at s. 5.0. In the event of “clear and final disagreement”, decisions and actions are “held in abeyance” while being referred back to both the Government of Canada and The Council of the Haida Nation in attempt to reach an agreement, including the potential of utilizing a neutral third party (*ibid.* at 5.3).

1205 As the court in *Moresby Explorers Ltd. v. Canada (Attorney General)* (T.D.), 2001 FCT 780, [2001] 4 F.C. 591 put it, “the requirement that consensus be sought on all decisions is a device for allowing decision to be made without allocating jurisdiction for the subject-matter of the decision to one party or the other. It is fundamental to the interests of both parties to be able to say that a particular decision was made by their authority.”

1206 Archipelago Management Board, *Gwaii Haanas National Park Reserve and Haida Heritage Site: Management Plan for the Terrestrial Area* (2003) (available online at <https://www.pc.gc.ca/en/pn-np/bc/gwaiihaanas/info/coop/plans>).

1207 Government of Canada & Council of the Haida Nation, *Gwaii Haanas Marine Agreement* (2010) (available online at <https://www.pc.gc.ca/en/pn-np/bc/gwaiihaanas/info/coop/plans>).

1208 In 2014 and 2015, the Minister of DFO authorized a herring fishery in Haida Gwaii despite strong opposition from the Council of the Haida Nation, and against recommendations of staff at DFO. Ultimately, the Council of the Haida Nation brought the matter to Federal Court and were successful in obtaining an interlocutory injunction against the Minister of DFO to prevent the re-opening of the fishery. See *Haida Nation v Canada (Minister of Fisheries and Oceans)*, 2015 FC 290 [*Haida Nation 2015*].

1209 *Ibid.* at para. 53 and 55.

1210 *Ibid.* at 54. Ultimately the court found a failure to consult and a finding of irreparable harm and granted the injunction. The three aspects of the legal test require the party seeking the injunction to prove 1) there is a serious issue to be tried; 2) irreparable harm would result if an injunction is not granted; and 3) the balance of convenience, considering all the circumstances, favours granting the order. See *RJR-MacDonald Inc. Canada (Attorney General)*, [1994] SCR 311 in general, and specifically at para. 43 for the legal test. Note that interlocutory injunctions tend to be granted sparingly.

1211 In this case it was simply found “that deference does not trump the real and serious concerns raised in respect of the Haida Gwaii roe herring fishery this season” (*Haida Nation 2015* at para. 62). It is not entirely clear that the court would have upheld the injunction if not for the fact that the decision of the Minister of DFO was so blatantly questionable.

1212 A. Simpson, *Mohawk Interruptus*.

sovereignty is territorially broader and thus can impact upon Haida jurisdiction, let alone global harms and dynamics.¹²¹³ Nonetheless, the Council of the Haida Nation continues to push jurisdictional boundaries in merging their terrestrial and marine agreements into a holistic and comprehensive management plan, the *Gwaii Haanas Gina ‘Waadluxan Kilguhlga Land-Sea-People Management Plan*, again a first of its kind.¹²¹⁴ The management plan is a first for an NMCAR and approaches Gwaii Haanas management “from mountaintop to seafloor as a single, interconnected ecosystem.”¹²¹⁵ The plan utilizes six guiding principles¹²¹⁶ and seven goals, each with their own particular objectives and targets.¹²¹⁷ These goals are supported through zoning processes for both terrestrial and marine components.¹²¹⁸ Haida’s role in actively implementing zoning restrictions relies on the Haida Watchmen Program.

As a final note, while the Council of the Haida Nation acts as the unified body representing Haida interests as party to the *Agreement*, significant internal governance occurs in the background of that structure.¹²¹⁹ The CHN remains accountable to the hereditary chiefs of the Haida Nation, each of whom have come together through signing the Haida Accord.¹²²⁰ While the CHN is vested with governing power for the Haida Nation, the CHN “shall uphold the principles embodied in the Haida Accord.”¹²²¹ Internal disputes therefore continue to be addressed through traditional governance structures, which then inform the CHN body.¹²²²

1213 While the Haida may successfully stop a herring fishery within Haida Gwaii, there is nothing preventing DFO from opening a similar herring fishery down the coast. The same irreparable damage results. That is without even mentioning the impacts arising from the acidification of ocean and global climate change more broadly, fuelled by the actions of Canada as a nation-state, and the global dynamic of other nation-states around the globe. The fundamental issues remain, and it appears difficult to envision meaningful change without a broader shift in understanding herring as a keystone species on which many of our ocean relatives depend upon for survival, and which rely on a healthy and stable living environment, as opposed to a commercial resource that is but a link in the extractivist and capitalist system.

1214 *Land-Sea-People Management Plan*.

1215 *Ibid.* at 2.

1216 Yahguudang – Respect (Precautionary approach); ‘Laa guu ga kanhlins – Responsibility (Inclusive and participatory); Gina ‘waadluxan gud ad kwaagid – Interconnectedness (Integrated management); Giid tljuus – Balance (Sustainable use); Gina kaadang,nga gii uu k’anguudang – Seeking Wise Counsel (Adaptive management); and Isda ad dii gii isda – Giving and Receiving (Equitable sharing). See *ibid.* at 7.

1217 The seven goals are 1) Implement effective collaboration for planning and management; 2) Protect, conserve and restore biodiversity and ecosystems; 3) Support the continuity of Haida culture; 4) Foster ecologically sustainable resource use that benefits Haida Gwaii communities; 5) Advance knowledge and understanding of Gwaii Haanas; 6) Enhance public awareness of and appreciation for Gwaii Haanas; and 7) Facilitate opportunities for meaningful visitor experiences. See *ibid.* at 13-27 for more on the particular objectives and targets for each of these broad goals.

1218 See *ibid.* at 28 for more.

1219 The CHN is comprised of 14 elected representatives.

1220 The Haida people are a matrilineal society consisting of a number of different clans, each with its own chief. Each of the hereditary chiefs have come together through signing the *Haida Accord* (May 13, 2013) (available online at http://www.haidanation.ca/wp-content/uploads/2017/03/the_haida_accord.pdf) and agree to work collectively as a Nation for the well-being of Haida Gwaii. The Haida Accord is also constantly renewed according to Haida protocols.

1221 Haida Nation, *Constitution of the Haida Nation* (adopted by the House of Assembly on October 19, 2018) (available online at <http://www.haidanation.ca/wp-content/uploads/2018/10/Constitution-2018-10-signed.pdf>) at Article 5 section 2.

1222 The Hereditary Chiefs continue to sit on an advisory council (*ibid.* at Article 5 Sections 7-8). See also *ibid.* at Article 9 for more specifics on the Hereditary Chiefs Council and the traditional protocols associated with it. There are Village Councils as well (see *ibid.* at Article 10 for more on Village Councils and their role and representation). The Haida also have a House of Assembly where all Haida citizens come together to feast and to raise questions or concerns (see *ibid.* at Article 12 for more on the House of

5.5. IEḺI̱TEL or Nuts'a maat kws 'i' shul' hwilasmut tu Skwul 'i' kwthe' Accord

To recap, a significant reason Haida has thus far been the only Indigenous group able to negotiate a consensus management agreement, aside from constant political pressure from Haida, is the lack of “overlap” within the boundaries of their traditional territory. The “legal context” identified by Parks Canada in establishing a consensus management body has tended to require “no overlapping claims” and “one body to represent all nations.”¹²²³ On the face of it, the complexity and “legal context” around the proposed Southern Strait of Georgia NMCAR would preclude a consensus body model, such as that used by Haida. Again, Parks Canada has more recently indicated that UNDRIP is a more relevant guide post, and thus expressed a willingness to potentially move beyond the Haida model. Nonetheless, the fact that the Southern Strait of Georgia NMCAR is in close proximity to an urban centre, and that Parks Canada identifies 19 different First Nations as having interests within the proposed NMCAR boundary, creates certain challenges within the NMCAR framework.

W̱SÁNEĆ, along with our relatives and neighbours, have taken this “overlap” issue into our own hands. In November of 2019, south island First Nations, from Nanaimo to Saanich, signed the IEḺI̱TEL or *Nuts'a maat kws 'i' shul' hwilasmut tu Skwul 'i' kwthe'* Accord to work together on issues relating to Parks Canada within our territories.¹²²⁴ In SENĆOTEN, IEḺE̱TEL means “to paddle together.” In taking this step we relied upon our own legal traditions and protocols.¹²²⁵ I consider the IEḺE̱TEL Accord to be a central aspect of moving forward, and while I will return to it below, it is here a reminder that we can consider the benefits offered by tools such as an NMCAR while also refusing to be limited by those frameworks.

6. Legal Personhood and Indigenous Protected and Conserved Areas

The NMCAR framework can present opportunities for increased conservation efforts and protections within the Salish Sea. Depending on the negotiated agreement reached, W̱SÁNEĆ might find access to greater decision-making powers that could have a positive impact on the

Assembly). These feasts take between four and five days. The House of Assembly has “law making authority” and decisions made within the House of Assembly are “binding upon the Council of the Haida Nation” (*ibid at.* Article 5 Sections 11-13).

1223 Parks Canada, *Spectrum Report* at 12.

1224 The IEḺI̱TEL Accord united the W̱SÁNEĆ Leadership Council (representing Tsawout, Tsartlip, and Tseycum First Nations) the Historic Cowichan Nation (Cowichan Tribes, Stz'uminus First Nation, Lyackson First Nation, Halalt First Nation, and Penelakut Tribe), the Malahat First Nation, Snuneymuxw First Nation, and Pauquachin First Nation. See IEḺI̱TEL Accord for more.

1225 Historically, for example, W̱SÁNEĆ and Cowichan warriors have allied together to protect ourselves and areas important to us when facing raiders from the north. We were also brought together by ceremonial protocol in reinvigorating our unity in this regard.

Salish Sea and the more-than-human beings who also call it home. Yet, ultimately, an NMCAR does not result in a full restoration of W̱SÁNEĆ jurisdiction and in order to actually grapple with the reality of climate crisis, we need more than a patchwork approach to environmental conservation. As such, we should be clear that the NMCAR framework, and corresponding co-management agreements, remain firmly rooted in, and thus limited by, the idiom of sovereignty and its associated and complex entailments, power relations, and structures.¹²²⁶ The most striking example in this regard is the way these structures seem to foreclose the very possibility of place and the more-than-human world as *subjects*, as opposed to *objects*, of law and politics.¹²²⁷

The gap between the epistemic locality and relational ontology described through our focus on Burkhart in the previous chapter, and the liberal and rights oriented framework of Canadian law, is vast. It is in no way clear that a middle-ground between the two orientations is possible, and the attempt to exercise one jurisdiction (W̱SÁNEĆ law and responsibilities) through the other (NMCAR framework) may be misguided. At the same time, given the constant harms felt by our relatives in the marine environment and to ŚWOMETs TFE SELSELI ØSI ŚĆENNE (“ancestral beds of the lives within the sea”), we cannot afford shirking the need to take responsible action to help them, even if it may not be our most ideal scenario. If we choose to strategically participate in the NMCAR framework, as a tool of Canadian law, we should be keenly aware of the dynamics at play and maintain our principal focus on the fact that participating in the NMCAR should not negate or distract us from implementing our ongoing Indigenous laws and jurisdiction. In moving away from a perceived either/or choice, in the following section I will turn my attention to other innovative tools we might consider, as well as explore the possibility of layering multiple tools and strategies.

6.1. Legal Personhood

Internationally, there have been a number of legal advances in terms of environmental protection and the rights of nature around the globe.¹²²⁸ In some cases these are embedded in the constitutions of nation-states.¹²²⁹ Often these are framed as human rights, though some examples

¹²²⁶ Nadasdy, *Sovereignty's Entailment's*.

¹²²⁷ This observation is consistent with the arguments and observations made by Paul Nadasdy in his detailed analysis of co-management structures. See *ibid.* for more.

¹²²⁸ See David R. Boyd, *The Rights of Nature: A Legal Revolution That Could Save The World* (Toronto: ECW Press, 2017).

¹²²⁹ See David R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (Vancouver: UBC Press, 2012) [Boyd, *Environmental Rights*]. “Today, three-quarters of the world’s constitutions (147 out of 193) include explicit references to environmental rights and/or environmental responsibilities” (*ibid.* at 47). Of these 147 constitutions, 92 of them specifically provide recognition of “a right to live in a healthy environment, with sixty-seven of those

move beyond human rights to protecting the rights of Nature, including the examples of Ecuador¹²³⁰ and Bolivia.¹²³¹ Contradictions, lack of enforcement, and “empty promises” certainly remain.¹²³² As David Boyd indicates, “neither constitution nor human rights can magically solve deep-rooted societal problems related to capitalism, globalization, and the growing gap between rich and poor.”¹²³³ Yet, some sense of optimism may also be gleaned from these advances in law.¹²³⁴ One international innovation receiving a great deal of attention is the granting of legal personhood to the environment.¹²³⁵ The two most prominent examples, Te Urewera and the Whanganui River in Aotearoa (New Zealand), are interesting developments occurring in somewhat similar contexts to those in WSÁNEĆ.¹²³⁶

Te Awa Tupua is the legal person created through the Whanganui River Claims Settlement.¹²³⁷ “Te Awa Tupua is an indivisible and living whole, comprising the Whanganui

including clear enforcement principles (*ibid.* at 72). “Portugal (1976) and Spain (1978) were the first nations to recognize the right to live in a healthy environment” (*ibid.* at 62). It is, however, Latin America that remains “a global leader in recognizing the constitutional right to live in a healthy environment” (*ibid.* at 143). The predominant pattern is that English speaking, former British colonies, with common law systems of law – as well as small island states – are the nations without constitutional provisions for environmental protections. “The United Kingdom is one of the forty-six, as are twenty-nine nations that are former British colonies. Almost all (eleven out of thirteen) of the English-speaking nations of the Americas are among the nations without environmental provisions in their constitutions. Belize and Jamaica are the sole exceptions. In contrast, all of the twenty-two non-English speaking nations in the Americas have incorporated environmental protection provisions into their constitutions. It is also noteworthy that twenty-four of the forty six nations without constitutional environmental protections are small island states” (*ibid.* at 49). It would be interesting to think more in-depth about why this pattern exists (see also *ibid.* at 288).

1230 “In 2008, Ecuador became the first nation in the world to provide explicit constitutional recognition of rights of Nature, followed by Bolivia in 2009” (*ibid.* at 70). See, *The Constitution of The Republic of Ecuador*, National Assembly and Legislative Oversight Committee, October 20, 2008 [English] at Article 71 and 72, for example.

1231 In 2010 Bolivia followed up their constitutional amendments with their *Law of the Rights of Mother Earth* (Legislative Assembly of the Multi-National State of Bolivia, *Law of the Rights of Mother Earth*, Law No. 71 of December 7, 2010), which “sets out a series of ecological principles; describes the rights held by Mother Earth; imposes a responsibility on the state, individuals, and organizations to respect those rights; and authorizes a new ombudsperson to ensure the implementation of Mother Earth’s rights” (Boyd, *Environmental Rights* at 126). “In 2012, Bolivia enacted a second complementary law that is far more detailed (see The Plurinational State of Bolivia, Legislative Assembly, Decree: *Framework Law on Mother Earth and Integral Development for Living Well*, Law. No. 300 of October 15, 2012). See also Boyd, *Rights of Nature* at 194 for discussion.

1232 Boyd, *Environmental Rights* at 197.

1233 *Ibid.* at 249.

1234 David R. Boyd, *The Optimistic Environmentalist: Progressing Towards a Greener Future* (Toronto: ECW Press, 2015).

1235 Extending legal personhood, particularly the granting of legal rights to Nature, is not as recent of an idea within western law as one might think. The idea obtained a particular following with Christopher Stone’s 1972 publication of *Should Trees Have Standing?* Now in its third edition, see Christopher D. Stone, *Should Trees Have Standing? Law, Morality, and the Environment* (Oxford: Oxford University Press, 2010). The author is deeply committed to a rights framework that has little resonance (at least in my eyes) for Indigenous peoples. It can, however, be seen as significant for our discussion here in so far as it sought to stretch the rights framework to include “natural objects.” David Boyd in Boyd, *The Rights of Nature* has explored a similar avenue for a potential “legal revolution.” Boyd provides a thorough reflection on the rights of (individual) animals, the rights of species (particularly endangered species), the rights of nature (ecosystems, for example), and the constitutional innovations (along with international initiatives) outlined above.

1236 The Maori are signatories to the Treaty of Waitangi, which has both an English and a Maori version of the Treaty, and which differ on what was being agreed to, even to this day. See Treaty of Waitangi / Te Tiriti o Waitangi, February 6, 1840. Both Maori and WSÁNEĆ worldview maintain that nature cannot be seen as a property interest. The Douglas Treaties were based on the then recent Waitangi Treaty between the Maori and New Zealand government. Additionally, Te Urewera was also a New Zealand National Park, which mirrors the current situation in WSÁNEĆ where reconciliation negotiations are dealing, in part, with the unilateral creation of the Gulf Islands National Park Reserve. Maori *iwi* (or tribes) also hold distinct responsibilities in connection to specific places, reflecting a similarity, generally speaking, to WSÁNEĆ NEHIYMET. Finally, both New Zealand and Canada are also common law countries. See Ruru, *Settling Indigenous Place*; Ruru, “Legal Personality of Nature”; and Ruru, “Treaty in Another Context” for more on all of these points. For those interested in this area of law, Jacinta Ruru is a leading scholar with many publications, including those cited above, relating to the granting of legal personality to nature. I highly recommend her work for more discussion on this topic from a Maori perspective.

1237 *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017*, 2017 No. 17, 20 March 2017.

River from the mountains to the sea, incorporating all its physical and meta-physical elements.”¹²³⁸ Stated from a Maori perspective, *Ko au te awa, ko te awa ko au* (“I am the river, and the river is me”).¹²³⁹ Upon its recognition of legal personhood, the New Zealand Crown transferred ownership of the river bed to Te Awa Tupua itself. As such, “Te Awa Tupua is a legal person and has all the rights, powers, duties, and liabilities of a legal person,”¹²⁴⁰ which are exercised and upheld by Te Pou Tupua (“the human face of Te Awa Tupua”)¹²⁴¹ in speaking and acting “on behalf of, and in the name of, Te Awa Tupua.”¹²⁴² Ongoing management of the surface water is collaborative¹²⁴³ and “must consult Te Pou Tupua, as appropriate,”¹²⁴⁴ although existing property rights are grandfathered in.¹²⁴⁵

Much like the Whanganui River, Te Urewera, once a New Zealand national park,¹²⁴⁶ also became its own legal person.¹²⁴⁷ Te Urewera is established in much the same way as Te Awa Tupua (Whanganui River), described above.¹²⁴⁸ Fee simple ownership now vests with Te Urewera itself,¹²⁴⁹ with the Tu Urewera Board acting on behalf of, and in the name of, Te Urewera.¹²⁵⁰ In undertaking its duties, the Te Urewera Board has developed the Te Kawa o Te Urewera Management Plan (“Te Kawa”).¹²⁵¹ Principally, “Te Kawa is about the management of

¹²³⁸ *Ibid.* at s. 12.

¹²³⁹ See *ibid.* at s. 13 for a more thorough description of Te Awa Tupua.

¹²⁴⁰ *Ibid.* at s. 14(1).

¹²⁴¹ *Ibid.* at s. 18(2).

¹²⁴² *Ibid.* at s. 14(2). Te Pou Tupua is comprised of one representative for the Whanganui *iwi* and one government representative (*ibid.* at s. 20). Each appointee must have “the mana, skills, knowledge, and experience to achieve the purpose and perform the functions of Te Pou Tupua” (*ibid.* at s. 20(5)). *Mana*, as a verb, means to be binding or authoritative. As a noun, it refers to a certain prestige, influence, or spiritual power.

¹²⁴³ *Ibid.* at s. 64.

¹²⁴⁴ *Ibid.* at s. 64(4)(a). A fisheries co-ordination group must be created in the similar manner (*ibid.* at 66).

¹²⁴⁵ *Ibid.* at s. 16 reads – “Unless expressly provided for by or under this Act, nothing in this Act— (a) limits any existing private property rights in the Whanganui River; or (b) creates, limits, transfers, extinguishes, or otherwise affects any rights to, or interests in, water; or (c) creates, limits, transfers, extinguishes, or otherwise affects any rights to, or interests in, wildlife, fish, aquatic life, seaweeds, or plants; or (d) affects the application of any enactment.”

¹²⁴⁶ No meaningful consultation was done in creating this national park, nor were any Maori interests expressly provided for (Boyd, *Rights of Nature* at 150).

¹²⁴⁷ *Te Urewera Act 2014*, 2014 No 51, 27 July 2014 [*Te Urewera Act*].

¹²⁴⁸ See *ibid.* for a more in-depth description of Te Urewera. Note that in addition to being grounded in Maori cosmology, some of the concepts are presented only in the Maori language “due to concerns about the impossibility of defining them in English, and fears that they could be misinterpreted” (Boyd, *Rights of Nature* at 152).

¹²⁴⁹ *Te Urewera Act* at s. 12.

¹²⁵⁰ *Ibid.* at s. 11(2)(a) and s. 11(2)(a)(i). See also *ibid.* at s. 16 and 17 for the establishment and purpose of the Te Urewera Board. See *ibid.* at 18(3) for more on the concepts guiding the Board’s functions. Again, any member appointed to the Te Urewera Board must have “the mana, standing in the community, skills, knowledge, or experience to participate effectively in the Board, and to contribute to achieving the purposes of the Board” (*ibid.* at 21(3)(a) and (b)). With respect to the membership structure of the Board, during the first three years representation on the Te Urewera Board is equal (4 members appointed by Tuhoe Te Uru Taumatua and 4 members by New Zealand Ministers), after which representation changes to greater Maori representation (6 members appointed by Tuhoe Te Uru Taumatua and 3 members by the Ministers) (*ibid.* at s. 21(1) and (2)). The Board must strive to make a number of its decisions unanimously, and in some cases by consensus (see *ibid.* at s. 33 for unanimous decisions and *ibid.* at s. 34 for consensus decisions.). If that is not possible, mediation (see *ibid.* at s. 35), voting (see *ibid.* at s. 36), or delegation to a decision-making committee is possible (see *ibid.* at s. 37).

¹²⁵¹ The *Te Urewera Act* required the Te Urewera Board to create a management plan as a way to achieve the purposes of the Act (*ibid.* at s. 44-46). The Management Plan created is Te Urewera Board, *Te Kawa o Te Urewera Management Plan* (available online at <https://www.ngaituhoe.iwi.nz/te-kawa-o-te-urewera>).

people for the benefit of the land – it is not about land management.”¹²⁵² It is “a series of protocols established to promote the human-nature relationship. In doing so, it also establishes a way of life for those who have a relationship with Te Urewera.”¹²⁵³ Te Kawa recognizes that “Nature speaks all the time and is understood only by the sincere observer and heedful mind and heart.”¹²⁵⁴ To read Te Kawa it is to be inspired. As a “management plan” it is the best that I have seen, and W̄SÁNEĆ would do well to follow a similar vision in terms of commitment to centering W̄SÁNEĆ belief and worldview with the objective of fundamentally shifting human behaviour in these lands.

Legal personhood, however, is not without its challenges. First, Te Urewera was nearly returned directly to the Ngai Tuhoe (a Maori *iwi*) through a claims settlement. On the eve of finalizing the agreement Prime Minister John Key backed out of the deal, indicating that returning the national park to the *iwi* was “a bridge too far.”¹²⁵⁵ Instead, the national park was recognized as its own person. How is it that giving back undeniably stolen land to compensate for historical and ongoing injustices was more difficult than conceptualizing a legal arrangement unlike anything else that existed in the world? How is it that having a former national park own *itself* is a shorter bridge to cross than returning those lands to the Maori *iwi*? This should be striking. Giving the land back to the Maori could be seen as highly uncertain.¹²⁵⁶ It therefore seems to me that the only way to answer such a questions is that a Board structure that acts for, and on behalf of, Te Urewera allows the New Zealand government or people it trusts to have representation on the Board, and thus to speak for the river, to some extent. It also allows grandfathering in existing agreements, expectations, and uses. Potentially, then, such an approach more centrally aligns with continued capitalist and neoliberal agendas and ideologies around land, despite the hugely innovative step of recognizing Maori cosmology and the legal personhood of nature.

The second consideration is whether legal personhood is an appropriate concept in regard to Indigenous cosmologies. Underlying legal personhood is a broader moral claim about “personhood” more generally. Personhood has clearly been a gendered, racialized, and

¹²⁵² *Ibid.*

¹²⁵³ Maiora Clarke Puketapu-Dentice, *He Mauri to Te Turewera: Understanding Legal Entities: The Transition from Resource Management to Human Management with Te Urewera*, Master of Planning thesis, University of Otago, 2018.

¹²⁵⁴ *Ibid.* at 11.

¹²⁵⁵ Boyd, *Rights of Nature* at 144-146.

¹²⁵⁶ Mackey, *Settled Expectations*.

hierarchical concept throughout. Expanding what counts as a legal person, on its own, will not solved deep-seated societal issues, nor should it be expected to. The concept *itself*, however, may also have its own limitations. Western law and philosophy has spent significant effort to pin down what sets humans apart from the rest of nature (language, culture, rationality, sentience, agency, etc.).¹²⁵⁷ Yet, personhood is an oppositional binary, meaning that to have “personhood” something else necessarily *does not have* personhood, nor the associated rights of that personhood status. To be a “subject” in this sense necessitates the existence of some (or many) other “objects”. In that sense, legal personhood is still a valuation of one thing over another, and it is reserved for the privileged few. Thus, while the category of “personhood” expands, is it not actually falling quite short of what Indigenous worldviews and cosmology envision? From within a relational ontology, no subject can exist in isolation. “Being alive is not dependent on any particular property that a thing might have but on having relationality or interconnectedness itself.”¹²⁵⁸ In that sense, everything is alive and related through kinship. “Personifying” the environment, then, may in fact be backward in a certain sense. As Aaron Mills might frame it, regarding Anishinaabe law, the *Earthway* is premised on kinship and relationality, while “legal personhood”, as a component of a rights framework, is premised principally on autonomy.¹²⁵⁹

Granting legal personhood to the environment is a movement that hopes to stretch the rights framework. Within the rights framework, granting legal personhood to KĒĒĒĒMEĆEN (Orcas), or TĒTÁĆE (islands, or ‘Relatives of the Deep’), may provide some advantages and seem to more closely align with understandings of WŚÁNEĆ laws and jurisdiction. Yet, like an NMCAR, we have seen how legal personhood is a tool *within* a colonial state and does not fully depart from all the structural limitations that are compatible with extractivism. While it may be a tool worth exploring, should not be expected to be the final, nor only, solution.

6.2. Indigenous Protected and Conserved Areas

In addition to layering the colonial legal tools of an NMCAR and legal personhood, there is also space for asserting WŚÁNEĆ jurisdiction by declaring Indigenous Protected and Conserved Areas (IPCAs).

¹²⁵⁷ Such debates can be found in the works of Aristotle, Rene Descartes, Immanuel Kant, and others.

¹²⁵⁸ Burkhart, *Indigenizing Philosophy* at 200.

¹²⁵⁹ Mills, *Mtinigowiziwin*.

The Indigenous Circle of Experts (ICE)¹²⁶⁰ define the term IPCA broadly, indicating they are “lands and waters where Indigenous governments have the primary role in protecting and conserving ecosystems through Indigenous laws, governance, and knowledge systems.”¹²⁶¹ ICE was one of the bodies created by the federal government to provide recommendations on how to meet previously agreed upon targets in protecting biodiversity, which we can generally refer to as the Aichi Targets.¹²⁶² Both bodies created, the National Advisory Panel and ICE, issued extensive reports on how to meet these targets, with ICE, in particular, promoting the use of IPCAs.¹²⁶³ Increased attention to IPCAs has resulted, including from Parks Canada.¹²⁶⁴

Whether the Aichi Targets are adequate or enforceable is beyond my scope.¹²⁶⁵ Relevant, however, is that the ICE Report is both aspirational and critical of the status quo regarding

1260 See The Indigenous Circle of Experts, *We Rise Together: Achieving Pathway to Canada Target 1 through the creation of Indigenous Protected and Conserved Areas in the spirit and practice of reconciliation, The Indigenous Circle of Experts' Report and Recommendations, March 2018* [ICE, *We Rise Together*].

1261 *Ibid.* at 35. The term IPCA is inclusive of “Tribal Parks, Indigenous Cultural Landscapes, Indigenous Protected Areas, and Indigenous conserved areas” (*ibid.* at 5). Internationally, the term Indigenous Peoples' and Community Conserved Territories and Areas (ICCA) is used. See ICCA Consortium webpage at <https://www.iccaconsortium.org/> for more information.

1262 Canada ratified the 1992 United Nations' Convention on Biological Diversity (CBD). See United Nations, *Convention on Biological Diversity, 1992* (available online at <https://www.cbd.int/doc/legal/cbd-en.pdf>). The convention has 196 parties and has three main objectives: 1) the conservation of biological diversity; 2) the sustainable use of the components of biological diversity; and 3) the fair and equitable sharing of the benefits arising out of the utilization of genetic resources. See Convention on Biological Diversity website at <https://www.cbd.int/> for more general information. In October of 2010, in Japan, The Conference of the Parties for the CBD adopted The Strategic Plan for Biodiversity, which have become known as the Aichi Targets (Conference of the Parties to the Convention on Biological Diversity, Tenth Meeting, Nagoya, Japan, 18-29 October, 2010, Agenda Item 4.4 available at <https://www.cbd.int/doc/decisions/cop-10/cop-10-dec-02-en.pdf>) [The Aichi Targets]. The Aichi Targets set out a range of objectives relating to protecting biodiversity. Parties to the Convention agreed to meet these targets by the end of 2020. For their part, in 2015, Canada adopted four goals and 19 targets in an effort to meet its Aichi Targets commitment (Environment and Climate Change Canada, *2020 Biodiversity Goals and Targets for Canada* (2016) (available online at https://static1.squarespace.com/static/613fb778a76e244cef08775d/t/619a942bd9d01b27f1cf83c3/1637520474350/2020_Biodiversity_Goals_Targets_for_Canada.pdf) [2020 *Biodiversity Goals Canada*]). Also see Biodivcanada website at <https://www.biodivcanada.ca/home> and the Convention on Biological Diversity website at <https://www.cbd.int/countries/targets/?country=ca> for more information on these goals and targets. Target 1 of these goals and targets, which states that “By 2020, at least 17% of terrestrial and inland water, and 10% of coastal and marine areas, are conserved through networks of protected areas and other effective area-based conservation measures”, has received perhaps the most attention (2020 *Biodiversity Goals Canada* at Target 1). Target 1 relates specifically to Aichi Target 11. It was recognized that the scope of Canada Target 1 would require extensive collaboration and innovative approaches to conservation, and so a National Advisory Panel (NAP) (see Pathway to Canada Target 1 website at <https://www.conservation2020canada.ca/nap> for more on the National Advisory Panel and its members) and ICE (see the Pathway to Canada Target 1 website at <https://www.conservation2020canada.ca/ice> for more on the ICE and its members) were formed. In regard to ICE specifically, “ICE is a key element of the Pathway, comprising Indigenous experts from across Canada working together with members from federal, provincial and territorial jurisdictions. It was established to provide recommendations and guidance on developing new types of protected and conserved areas that are Indigenous-led, and on how a spectrum of IPCAs could contribute to Pathway to Canada Target 1 in the spirit and practice of reconciliation” (ICE, *We Rise Together* at 19.). See also Indigenous Circle of Experts, Terms of Reference (available online at <https://static1.squarespace.com/static/57e007452e69cf9a7af0a033/t/5ab9501f88251bc9e1432c7e/1522094111382/ICE+Terms+of+Reference+EN.pdf>).

1263 See ICE, *We Rise Together*. Also see National Advisory Panel, *Canada's Conservation Vision: A Report of the National Advisory Panel* (March 23, 2018) [NAP, *Canada's Conservation Vision*]. For a response by the federal government to each of these reports see Canada's Federal, Provincial & Territorial Governments, *One With Nature: A Renewed Approach to Land and Freshwater Conservation in Canada, A Report of Canada's Federal, Provincial and Territorial Departments Responsible for Parks, Protected Areas, Conservation, Wildlife and Biodiversity* (2018) [*One With Nature Report*].

1264 I was part of a two part international dialogue organized by Parks Canada on this topic. Parks Canada, “Indigenous-Crown Protected Area Partnerships Dialogues” (December 2020 & April 2021).

1265 There is the issue of enforcement of the treaty if Canada does not meet its obligations. See Stuart R. Harrop & Diana J. Pritchard, “A Hard Instrument Goes Soft: The Implications of the Convention on Biological Diversity's Current Trajectory”, *Global Environmental Change* (2011) 21 474-480; and S. Faizi, “Putting the Focus on Enforcement”, Square Brackets: CBD Newsletter for Civil Society, Issue No. 7, October 2012 at 18-19.

“parks” and Eurocentric understandings of “nature”.¹²⁶⁶ ICE takes the position that these approaches and conceptions are “no longer viable from an Indigenous rights and UNDRIP perspective.”¹²⁶⁷ Rather, Indigenous approaches must be recognized as valid,¹²⁶⁸ and more effective.¹²⁶⁹ As such, the political climate is (at least currently) more receptive to the role of IPCAs, with high-profile non-profits taking notice as well.¹²⁷⁰ Particularly relevant is Parks Canada foreseeing the layering of IPCAs and NMCARs, although what exactly that would look like remains unclear.¹²⁷¹

The structure and establishment of IPCAs varies significantly.¹²⁷² Regardless of structure, IPCAs face four main barriers: jurisdiction, financial solutions, capacity development, and cultural keystone species.¹²⁷³ As has been our focus through much of this chapter, settler colonialism has sought to choke out Indigenous jurisdiction and decision-making authority. Establishing an IPCA necessarily confronts this reality. Currently, there is no distinct national legislation for recognizing or implementing IPCAs in Canada.¹²⁷⁴ Unsurprisingly, this also

1266 “For Indigenous Peoples, the history of protected areas in Canada, while somewhat improved in recent times, has been fraught with rights violations, forcible displacement, loss of access to traditional territories and resources, and other substantial inter-generational cultural, social, economic and spiritual impacts” (ICE, *We Rise Together* at 27). “Parks” are closely linked with perceptions of “nature” – specifically, “Eurocentric notions of pristine wilderness devoid of human influence” (*ibid.* at 28.) Parks, of course, are not natural, but rather, are a certain type of property. For more, see Daisy Couture, et al., *On This Patch of Grass: City Parks on Occupied Land* (Halifax: Fernwood Publishing, 2018). In taking an in-depth look at a single park (Victoria Park in Vancouver, BC) the authors explore the ways in which “Every park in North America is performing modernity and settler colonialism on an everyday basis (*ibid.* at 2).

1267 ICE, *We Rise Together* at 19.

1268 *Ibid.* at III. ICE proposes the concept of “Ethical Space” whereby productive dialogues across worldviews and traditions can take place with mutual respect, in accordance with both the oral system and written system of the Indigenous and non-Indigenous governments. Such discussions would take place within the bounds of UNDRIP, the TRC Calls To Action and Final Report, Treaties and Agreements, and the Canadian Constitution and Jurisprudence. See *Ibid.* at 15-18 for more information. ICE notes that the concept of “Ethical Space” is not new, but was a concept drawn upon in the creation of the original treaties, in what is now Canada. For an additional source on this idea, see Bruce Morito, *An Ethic of Mutual Respect: The Covenant Chain and Aboriginal-Crown Relations* (Vancouver: UBC Press, 2012). Also see Craft, *Stone Fort Treaty*.

1269 ICE, *We Rise Together* at 6. - “IPCA’s are first and foremost designed to benefit Indigenous communities, but they have considerable potential to benefit all Canadians.”

“Evidence of such land management practices worldwide is increasingly being documented and pointing to better results in conservation outcomes for areas under Indigenous tenure when compared with government-managed protected areas” (*ibid.* at 33).

1270 David Suzuki Foundation, *Tribal Parks and Indigenous Protected and Conserved Areas: Lessons Learned From B.C. Examples* (August 2018) (available online at <https://david Suzuki.org/wp-content/uploads/2018/08/tribal-parks-indigenous-protected-conserved-areas-lessons-b-c-examples.pdf>) [Suzuki Foundation, *Tribal Parks*].

1271 A review of the entire scope of potential protected areas is beyond my scope. Within Canada alone, currently 55 pieces of legislation exist for creating 77 different types of protected areas within Canada (Environment and Climate Change Canada, *Canadian Protected Areas Status Report 2012-2015* (2016)). In addition to government initiatives, “third-party forest certification systems like the Forest Stewardship Council (FSC) have set the stage for increased recognition of Indigenous-led conservation efforts by requiring certificate holders (forest companies) to recognize and uphold the legal and customary rights of Indigenous Peoples” (ICE, *We Rise Together* at 34). I am not aware of any examples, but it would be interesting to explore whether a similar third-party certification could exist for harvesting within the marine environment.

1272 Indigenous communities, as well as their objectives, all vary greatly, as do “the legal and historical context of the area, and the degree of support and partnership of non-Indigenous governments” (*ibid.* at 34).

1273 ICE call these the “four moose in the room” (*ibid.* at 11).

1274 *Ibid.* at 34. Some provinces have legislation that create land designations that some may regard as IPCAs. For example, in British Columbia the *Park Act*, RSBC 1996, c. 344 allows for the creation of “conservancies”, which not only protect biological diversity and natural environments, but also provide “for the preservation and maintenance of social, ceremonial and cultural uses of first nations” (*ibid.* at s. 5 (3.1)). NAP, *Canada’s Conservation Vision* at 6 also calls on Canada to develop “new legal and policy mechanisms for Indigenous protected areas.”

means accessing stable and substantial funding for new IPCAs is a challenge.¹²⁷⁵ While some government and third party funding is available,¹²⁷⁶ ICE also suggests the development of Indigenous “conservation economies” as one way of meeting funding needs.¹²⁷⁷ The Thaidene Nënë National Park Reserve and Territorial Protected Area,¹²⁷⁸ with its creation of the Thaidene Nënë Trust¹²⁷⁹ to fund the Łutsël K’ë Dene First Nation’s operation of the conservation area, is an interesting model to note. In addition to funding, Indigenous Nations also face challenges with

1275 Both ICE, *We Rise Together* and NAP, *Canada’s Conservation Vision* recommend government led sustainable funding for the creation and management of IPCAs. NAP, *Canada’s Conservation Vision* recommends \$120 million annually for the planning, establishment, and management, of new protected areas (to be fully funded for Indigenous governments), and \$200 million per years for capacity building for IPCAs (NAP, *Canada’s Conservation Vision* at Recommendation 33(5) and (6) at 7. ICE, *We Rise Together* recommends facilitating “secure multi-year funding for the planning, development and management of IPCAs” (ICE, *We Rise Together* at Recommendation 26 at 66).

1276 With respect to government funding, the 2018 federal budget included \$1.35 billion for Canada’s Nature Legacy initiative (for more see Government of Canada, “Canada’s Nature Legacy: Protecting our nature” website at <https://www.canada.ca/en/services/environment/conservation/nature-legacy.html>). \$175 million of that went to supporting Pathway to Canada Target 1 Challenge, of which the first 67 Challenge projects were announced in August of 2019. Of those 67 projects, up to 27 included the establishment of new IPCAs. For example, the Tehltan Central Government, Tla-o-qui-aht First Nation, Tl’ich’o First Nation, and Ktunaxa Nations have received funding through these initiatives. The Tehltan Central Government received just shy of \$4 million for their project: *Establishing Tehltan Indigenous Protected and Conserved Areas Through the Tahltan Nation Land Use Planning Process* (see news release Tehltan Central Government, “Tahltan Central Government Awarded up to \$3,998,760 Million For Establishing Protected and Conserved Areas”(19 August 2019) (available online at <https://tahtlan.org/wp-content/uploads/2019/08/Tahltan-Central-Government-awarded-up-to-3998760-million-for-establishing-protected-and-conserved-areas-August-19-2019.pdf>). The Tla-o-qui-aht First Nation received \$100 million in funding through Canada’s Natural Heritage Program, created as part of the Nature Legacy initiative, to help protect old-growth forests in Clayquot Sound. Through the Canada Nature Fund Canada provided \$2 million for conservation of 22,000 square kilometers between Great Slave Lake and Great Bear Lake. Canada notes that the \$2 million will help in “continuing to promote and protect Tl’ich’o culture and way of life, supporting the establishment of conserved areas, contributing significantly to the Government of Canada’s biodiversity conservation targets through Indigenous-led conservation efforts, supporting research into climate change” (see Environment and Climate Change Canada, “Government of Canada partners with Tl’ich’o First Nation to protect culturally important land in Northwest Territories”, News Release, 6 March 2020 (available online at <https://www.canada.ca/en/environment-climate-change/news/2020/03/government-of-canada-partners-with-tlcho-first-nation-to-protect-culturally-important-land-in-the-northwest-territories.html>).

1277 “The term conservation economy refers to the pursuit of social and economic benefits through the conservation of ecosystems within an area, or variety of economic arrangements that have been redesigned to restore, rather than deplete, natural and social capital, based on the premise that life comes from nature and depends on its capacity to maintain healthy ecosystems” (ICE, *We Rise Together* at 39). Suzuki Foundation, *Tribal Parks* at 40 states that “Examples of sustainable economic initiatives that are being developed or explored within B.C.’s IPCAs include run-of-the-river hydro, tourism, carbon offsets and small-scale logging.” Some of these may be more or less relevant, or appropriate, and might also include cultural tourism, visitor fees, permitting fees, etc. The Ktunaxa received \$16.1 million through the Canada Nature Fund, and \$5 million from a collection of other foundations (see Ktunaxa Nation, “Jumbo Valley to remain wild through permanent retirement of development rights: Clears path for creation of Indigenous Protected and Conserved Area in the Central Purcell Mountains” Media Release, 18 January 2020 (available online at <https://ourtrust.org/wp-content/uploads/downloads/Jumbo-Qatmuk-IPCA-MR-January-20-2020-final.pdf>). The funding foundations supporting the Ktunaxa Nation IPCA were Wyss Foundation, Wilburforce Foundation, Patagonia, the Columbia Basin Trust and Donner Canadian Foundation. The creation of the Qat’muk IPCA involved purchasing privately held interests and tenures through these funds. The Qat’muk IPCA spans approximately 70,000 hectares, with boundary and stewardship negotiations to come underway.

1278 The Thaidene Nënë National Park Reserve and Territorial Protected Area protects approximately 33,000 square kilometers of Łutsël K’ë Dene First Nation (LKDFN) territory within the Northwest Territories. A summary of the Establishment Agreements with Parks Canada and the Government of the Northwest Territories (GNWT), which created Thaidene Nënë, can be found at Łutsël K’ë Dene First Nation, *Thaidene Nënë Establishment Agreements Summary* (available online at <http://www.landoftheancestors.ca/uploads/1/3/0/0/130087934/lkdfn-overview.pdf>). The agreements are contractual, as opposed to land claims or modern treaty settlements, meaning that the issue of title is still undetermined. The agreements represent a co-governance model where the Thaidene Nënë Management Board (TNMB) is operated by consensus and has equal representation of LKDFN, Canada, and GNWT representatives. In the case of clear and final disagreement the issue in question is put into abeyance. Within the TNMB, the LKDFN has the capacity to participate in all decisions for all of Thaidene Nënë, whereas Parks Canada members may only participate on issues relating to the National Park Reserve, and the GNWT members may only participate on issues relating to territorial matters.

1279 The LKDFN raised \$15 million in private funding, particularly in partnership with Nature United to contribute to the Thaidene Nënë Trust (for more on Nature United and their dedication to supporting Indigenous-led conservation, see the Nature United website at <https://www.natureunited.ca/>. For an overview of Nature United’s approach to Indigenous conservation partnerships see Nature United, “Overview: Our Approach to Working in Partnership With Indigenous Peoples (available online at <https://www.natureunited.ca/content/dam/tnc/nature/en/documents/canada/Overview-Approach-to-Working-with-Indigenous-Partners.pdf>). The Government of Canada matched the contribution from private funding, resulting in a \$30 million trust. The \$30 million is protected (not to be spent), with the interest and investment income of the trust going to the LKDFN in providing for management and operational responsibilities in Thaidene Nënë.

building the capacity to operate IPCAs, be it through Guardian programs or otherwise.¹²⁸⁰ Some government funding for guardian programs is possible.¹²⁸¹ Ultimately, while Canada has considered IPCAs principally in relation to the Aichi Targets, Indigenous groups are more concerned with exercising jurisdiction in relation to land, watersheds, and cultural keystone species, as opposed to rigid boundaries or specific targets not of our making.¹²⁸² Additionally, IPCAs do also tend to have a stronger focus on restoration initiatives, as compared to the NMCAR framework, for example.¹²⁸³

IPCAs also centre Indigenous jurisdictions. “Indigenous governments are responsible for setting the conservation standards for IPCAs. As such, they must have full scope to design their IPCAs to meet their individual and diverse needs.”¹²⁸⁴ ICE suggests that “Indigenous governments have the primary role in determining the objectives, boundaries, management plans and governance structures for IPCAs as part of their exercise of self-determination.”¹²⁸⁵ As such, even if W̱SÁNEĆ adopts an NMCAR, we need not be constrained by Canadian law, and an IPCA declaring a broader boundary may be set. The Tsilhqot’in Nation and establishment of the Dasiquox Tribal Park (or Nexwagwezʔan), which reaches beyond their Aboriginal title lands, is a great example of refusing to be confined by rigid boundaries.¹²⁸⁶ Similarly, an IPCA can also refuse to be bound by pre-existing parks and conservation areas previously established without Indigenous consent. Rather, an IPCA can lay a “blanket” over these existing structures, thereby

1280 Nature Unlimited has developed a helpful toolkit for learning about and establishing Indigenous guardianship programs (Nature Unlimited, “The Indigenous Guardians Toolkit” (available online at <https://www.indigenousguardianstoolkit.ca/>). A map containing all guardianship activities throughout Canada (that have agreed to be included in this source), including their monitoring objectives and approaches, is also available at *ibid*

1281 In terms of funding, the 2017 federal budget devoted \$25 million over four years to support Indigenous Guardians Pilot Programs, helping fund 61 different pilot programs across Canada over the first two years. See Environment and Climate Change Canada, “Indigenous Guardian” website at <https://www.canada.ca/en/environment-climate-change/services/environmental-funding/indigenous-guardians.html> for more, including a map and description of each of the pilot programs.

1282 ICE, *We Rise Together* at 41 notes that “IPCAs are part of the landscape and are based on landscape features, such as watersheds.” As such, “the land and the water will dictate the IPCA.”

1283 Suzuki Foundation, *Tribal Parks* at 6 indicates that “IPCAs are generally in areas that face impacts from a variety of sources (e.g., industrial activity, forest fires, road-building, motorized vehicle use), and Indigenous peoples often place a high priority on healing or restoring the land and people, together.”

1284 ICE, *We Rise Together* at 6. ICE does indicate that IPCAs “generally share three essential elements: They are Indigenous-led; They represent a long-term commitment to conservation; [and] They elevate Indigenous rights and responsibilities” (*ibid.* at 5). In expanding upon these three broad themes, ICE also provides several guiding recommendations for IPCAs. Specifically, ICE suggests that “IPCAs should: promote respect for Indigenous knowledge systems; respect protocols and ceremony; support the revitalization of Indigenous languages; seed conservation economies if possible; conserve cultural keystone species and protect food security, and adopt integrated, holistic approaches to governance and planning” (*ibid.* at 6).

1285 *Ibid.* at 36.

1286 The Tsilhqot’in Nation were the first to establish Aboriginal title under Canadian law. See *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44. The decision did not grant Aboriginal title to the full Tsilhqot’in territory, and the Xeni Gwet’in and Yunesit’in governments (two of six communities within the Tsilhqot’in Nation) decided to implement the Dasiquox Tribal Park (or Nexwagwezʔan) *separate and beyond* their Aboriginal title lands (but within the area where Tsilhqot’in have proven Aboriginal rights). The Dasiquox Tribal Park is approximately 300,000 hectares, and borders Aboriginal title lands and other protected areas. See ICE, *We Rise Together* at 38 for discussion. For a summary of the Dasiquox Tribal Park, including its guiding principles and goals, see The Firelight Group & Dasiquox Tribal Park Staff, *Nexwagwezʔan: Community Vision and Management Goals for Dasiquox Tribal Park Summary* (April 2018) (available online at https://dasiqox.org/wp-content/uploads/2018/04/DTP_VisionSummary-April-2018-web.pdf).

creating a “connective tissue” that links together an interconnected network of protected and conserved areas.¹²⁸⁷ Such an approach may be particularly advantageous in areas such as W̱SÁNEĆ, where a variety of parks and protected areas already exist,¹²⁸⁸ and where there is impetus to re-declare W̱SÁNEĆ jurisdiction over those existing structures.¹²⁸⁹ From this perspective, the proposed NMCAR would simply be one layer underneath this blanket. In that regard, a W̱SÁNEĆ IPCA would extend beyond the NMCAR boundary, and include all areas excluded within the NMCAR boundary.¹²⁹⁰ The W̱SÁNEĆ IPCA would also span both terrestrial and marine components of the territory.¹²⁹¹ I will return to this possibility in more detail in the concluding section of this chapter.

Ultimately, IPCAs may be undertaken cooperatively with government, through unilateral declaration,¹²⁹² or a combination of both.¹²⁹³ While unilateral declarations of Tribal Parks support strong self-determination, they are not necessarily recognized by Canada and may experience additional challenges regarding enforcement and implementation. Where not recognized by Canadian law or the state, IPCAs remain valid assertions and reclamation of Indigenous jurisdiction. In such a context an IPCA takes initiative in implementing and enforcing Indigenous laws and jurisdiction, leaving the onus on the state to intervene where any enforcement disputes arise. Limiting ourselves to working within state processes has meant that the creation of full Indigenous governance within Canada remains rare.¹²⁹⁴ In fact, even co-

1287 Eli Enns says, “We realize government staff also understand that everything is interconnected, but must adhere to legislation and policies that distinguish between terrestrial and marine conservation. In contrast, Indigenous governments and Peoples can lay a ‘blanket’ over the terrestrial and marine areas to create jurisdictional connective tissue that supports coordinated efforts between the two halves of the Pathway” (ICE, *We Rise Together* at 24). The Dasiqox Tribal Park takes a similar approach (see *ibid.* at 42 for discussion). As another example, in Haida Gwaii protected areas include “seven older parks and ecological reserves (established prior to modern agreements and with little Indigenous involvement or consultation) and 11 newer sites (established through government-to-government agreements)” (*ibid.* at 35).

1288 See Ruru, *Settling Indigenous Place* for a far more in-depth discussion on utilizing parks as a starting point in reconciliation and Indigenous law revitalization.

1289 As Eli Enns notes, “Where you have parks and protected areas that do not yet involve Indigenous Peoples in a proper way, there is an opportunity to bring those cultures back in and enclose those protected areas to get them working better again” (*ibid.* at 25). W̱SÁNEĆ is already undertaking this step in exploring a co-management plan for the GINPR, for example.

1290 The Haida took this approach with the terrestrial component of their agreements – areas excluded under their cooperative management agreement are still considered Haida Heritage Sites by the Haida.

1291 Gwaii Haanas is both an NMCAR and a Haida Heritage Site (i.e., a Tribal park or an IPCA). Additionally, the *Land-Sea-People Management Plan* is the first to approach terrestrial and marine management together in a holistic manner. This holistic approach caused some difficulties in that under Canadian law different legislation applies to terrestrial and marine areas. However, the Haida were adamant that preserving the distinction didn’t make any sense within their culture and perspectives.

1292 Tribal Parks, such as the Tla-o-qui-aht Tribal Park on Meares Island (the first Tribal Park in Canada), was unilaterally asserted in direct response to clear-cut logging in Clayoquot Sound, although the Tla-o-qui-aht do now partner with a group of allied businesses committed to the Tla-o-qui-aht vision of a conservation economy. Tla-o-qui-aht have since established three more Tribal Parks: Ha’uukmin (Kennedy Lake Watershed), Tranquil Tribal Park, and Esowista Tribal Park (see ICE, *We Rise Together* at 44 for more). Also see Tla-o-qui-aht Tribal Parks website at <https://tribalpark.com/> for more information.

1293 Haida, for example, began with a self-declaration of a Tribal park, later incorporating the NMCAR and other agreements.

1294 “Indigenous governance refers to the circumstances when protected areas authority rests solely with an Indigenous government” (ICE, *We Rise Together* at 78). There are only three examples of Indigenous governance through the modern treaty process that are recognized by the Crown in Canada, two in the Yukon and one in the Northwest Territories (*ibid.* at 79).

governance (distinct from co-management), where authority rests equally between both governing parties, represents about only 3.9% of lands and waters within Canada.¹²⁹⁵ Perhaps, then, there is some benefit to avoid thinking of the choice between NMACR and an IPCA as an either/or scenario.

7. W̱SÁNEĆ IST (Moving W̱SÁNEĆ Forward)

An NMCAR, IPCA, and legal personhood offer their own unique advantages and disadvantages. It would be a mistake to think of choosing between these options as necessarily an either/or scenario. If W̱SÁNEĆ is intent on protecting the Salish Sea and the beings who call it home, perhaps a layering of different initiatives and mechanism is most ideal, at least in the interim. Given the political nature of this decision, I can only offer one potential vision for balancing these difficult decisions.

The need to protect the marine area is clear and unavoidable, and W̱SÁNEĆ law requires it. It is also clear that conservation areas in the marine environment are most effective when they are large enough to effect change. “Small [marine protected areas (MPA)] may be vulnerable to external threats and unable to effectively protect the species or habitats they were designed to conserve. Conversely, larger MPAs have been shown to optimize conservation benefits.”¹²⁹⁶ However, simply designating a marine protected area does not necessarily mean it will meet its objectives.¹²⁹⁷ The larger the conservation area, the more funds and capacity required to implement and enforce it. Were all the funding and enforcement requirements of a large conservation area to fall upon W̱SÁNEĆ alone, it would be extremely difficult to uphold and enforce. Additionally, once significant levels of alienation have already occurred, particularly around areas of “critical infrastructure” that nation-states will diligently work to protect,¹²⁹⁸ grasping jurisdiction back becomes challenging. While jurisdiction back remains the ultimate goal, building partnerships with various bodies may help address the most immediate weaknesses in establishing an IPCA – the lack of funding and enforcement mechanisms inherent in such a declaration. However, much will come down to whether an NMCAR does enough to

¹²⁹⁵ *Ibid.* at 77.

¹²⁹⁶ Carolyn K. Robb, Karin M. Bodtker & Kim Wright, “Marine Protected Areas in the Canadian Pacific: Do They Fulfill Network Criteria?”, (2015) 43:3 *Coastal Management* 253 at 263.

¹²⁹⁷ *Ibid.* at 253.

¹²⁹⁸ Shiri Pasternak defines critical infrastructure as “a vague designation for fixed capital that forms the object of international security collaboration between states and industry to protect global supply chains” (Pasternak, *Grounded Authority* at 223).

“mitigate the destructive effects...facilitated by a dense web of federal and provincial regulatory regimes.”¹²⁹⁹

An NMCAR leaves much intact in terms of jurisdiction and harms. For example, jurisdiction of fisheries remains with DFO, even if certain zoning requirements limit commercial and /or sports fisheries. A Native fishery remains possible within an NMCAR, as does the extent to which it is currently regulated by DFO or recognized by courts. What does not occur within an NMCAR is a recognition of the W̱SÁNEĆ right to “fish as formerly” in its full jurisdictional sense, which includes not simply a method of fishery, but a right and responsibility to fully regulate fisheries themselves within these waters.¹³⁰⁰ On a similar note, an NMCAR also does not have the jurisdiction to alter tanker traffic carrying bitumen and other products directly outside its boundary. “In terms of transportation, the circulation of goods, resources, and energy through territory is the very essence of capitalism today,” and current Canadian constitutionalism means an NMCAR must leave this basically intact.¹³⁰¹ In short, the NMCAR is simply not a tool that will fully honour and reinscribe W̱SÁNEĆ jurisdiction. Such is not to say that building partnerships has no benefits, but that negotiating such a tool with government requires vigilance and can’t be seen as a final solution to jurisdictional tensions. In fact, we must remain wary of the risk that doing so reinscribes relations that end up prolonging the same struggle. Any negotiated agreement that fails to account for Indigenous governance will inevitably result in continued frictions.¹³⁰² “Land-use clashes are inevitable and widespread throughout the country precisely because Indigenous landholding systems are subject to imposed incursion, and outright denial, violating Indigenous laws and trampling on invisibilized turfs of Indigenous responsibility and belonging.”¹³⁰³

In terms of long-term goals, the IELÇIETEL Accord serves as a solid foundation for moving W̱SÁNEĆ and our Indigenous neighbours collectively forward. The IELÇEETEL Accord is a product of our own laws and protocols for allying together in the face of common necessity. Canadian law and the modern treaty apparatus has too often used notions of “overlap” to restrict the advancement of Indigenous rights and governance. Reclaiming space outside the

¹²⁹⁹ *Ibid.* at 64.

¹³⁰⁰ Claxton, “The Douglas Treaty”.

¹³⁰¹ Pasternak, *Grounded Authority* at 242.

¹³⁰² See for example, Cheri A. Ayers, Phil Dearden & Rick Rollins, “An Exploration of Hul’qumi, num Coast Salish Peoples’ attitudes towards the establishment of no-take zones within marine protected areas in the Salish Sea, Canada” (2012) 56:2 *The Canadian Geographer* 260.

¹³⁰³ Pasternak, *Grounded Authority* at 121.

Canadian legal system through revitalizing long-existing mechanisms and protocols both within and between Indigenous traditions is a clear strength, and in line with IPCA best practices.¹³⁰⁴ Continuing to assert Indigenous jurisdiction in this manner “undermines the sovereignty of the Canadian state” in a way that an NMCAR cannot.¹³⁰⁵

With the IELCELTEL Accord in place it is then possible to assert an IPCA over a broad section of our collective traditional territories. The “boundary” of this declared area should flow directly from our shared understandings of these lands, waters, and beings who call them home, as well as an understanding of what it would actually take to effect environmental stewardship of this area. In other words, the main strength of an IPCA is that it can refuse to be bound by any imposed jurisdictional limitations within Canadian law. An IPCA can flow from Indigenous jurisdiction, not Canadian.¹³⁰⁶ In fact, given the arbitrary and imposed nature of the international border dissecting the Southern Gulf Islands (Canada) and the San Juan Islands (USA), there is equal opportunity to partner with our relatives, including the Lummi, on the State side in declaring IPCAs. The movement of KELLELMECEN is not limited by this invisible boundary in the same way humans are, nor was this arbitrary line relevant to our traditional relationships and governance with our Indigenous relatives. As WSÁNEĆ, we have place-names, creation stories, and thus responsibilities, to what are now the San Juan Islands, just as much as we do to the Southern Gulf Islands. While the international border does present material implications for our way of life, we need not take it for granted. There is no reason an IPCA could not span the international border.¹³⁰⁷

The central advantage of an IPCA is the flexibility to design and structure it around our own laws, processes, and priorities, which is possible in that an IPCA need not be formally recognized by Canada. That strength, however, is also a weakness to the extent that absent a partnership agreement with Canada there is significantly less potential for funding, enforcement, capacity, and general public recognition, along with an increased potential for litigation raised

1304 ICE, *We Rise Together* at 51. “There are many situations in Canada where multiple Indigenous Peoples have connections to some of the same lands and waters. In these areas, extra attention will be needed to determine the respective “inter-national” interests. Indigenous governments must have the first opportunity to develop the appropriate protocols for reconciling management and uses between nations; the designation of an IPCA will reflect these processes” (*ibid.*).

1305 Pasternak, *Grounded Authority* at 270. Pasternak also makes the point that “Challenges to state sovereignty are considered *beyond the jurisdiction* of the court, eliding the crucial period of inauguration” (*ibid.* at 11). The same could be said of an administrative body, as was the case with the NEB and TMX pipeline rehearing, or dealing with any government body and enabling legislation.

1306 Again, such an approach falls within ICE, *We Rise Together* recommendations for IPCAs.

1307 Such an approach would be in line with recommendations from ICE, *We Rise Together*. It could also draw inspiration from the Mohawk Nation’s refusal to adhere to the international border within their traditional territories. See A. Simpson, *Mohawk Interruptus*.

against the IPCA and its enforcement. The establishment and long-term success of a large IPCA may therefore in part (particularly initially) hinge on developing relationships and utilizing other tools outside that framework. The proposed NMCAR, for example, offers the potential of a marine conservation zone that is far larger than many other mechanisms available within Canadian law. Through that framework also comes funding and enforcement mechanisms, along with the possibility to build capacity in Indigenous Guardianship programs, and the like. It also risks, however, leading to deals and unwanted compromises with industry and government, and increasingly committing W̱SÁNEĆ to a bureaucratic framework that exerts structural and subjective power.

While an NMCAR may present its own list of weaknesses and trade-offs, its conservation potential necessitates careful consideration. This consideration should include acknowledgement that our relatives, KĒLĒLMEĆEN (Orca) are calling upon us to help, which is what J35 was doing as she carried her dead calf for 17 days for all to see. We have to take that call seriously, not simply put our own interests as W̱SÁNEĆ peoples first. At the same time, how we enter into and agree to use the NMCAR framework matters, as does the need to not lose touch with the long-term goals and cultural groundings of the IPCA.

I would favour viewing an NMCAR as a tool of Canadian law, not detracting in any way from the fact that the IPCA and W̱SÁNEĆ jurisdiction exists completely *outside* and *independently* of that framework. With that said, in the spirit of relationality, we may choose to help Canada develop and implement that tool and to develop more respectful relationships with the Salish Sea and the beings who call it home. We should, however, based on past harms and injustices, and the assimilative powers of these types of agreements, choose this strategy cautiously and in limited instances, as well as on the condition that we negotiate a strong co-governance agreement based on *at least* a consensus model, similar to that of Gwaii Haanas.¹³⁰⁸ Like the Haida model, our negotiated agreement should disagree on the question of who has sovereignty, but from my perspective, it should go *farther* and also disagree on the legitimacy of the sovereignty paradigm, period. As W̱SÁNEĆ we are but one of the interdependent and interconnected beings who call these lands and waters home. In other words, while we may carve

¹³⁰⁸ As mentioned, so far the Haida have been the only Nation able to negotiate a consensus model. However, we too have strengths we can draw upon in making this push. First, we will be the only NMCAR to have an existing historical treaty in place; importantly one that recognizes the “right to fish as formerly”, which as Nick Claxton argues should include not just the practice of fishing, but the governance structure that accompanied and gave life to those methods (Claxton, “The Douglas Treaty”). Secondly, we have taken the “overlap” issue out of Canada’s hands through our own assertions and partnerships (*JELCĪTEL Accord*).

out jurisdictional space, we must not forget to have that jurisdiction informed by an “ontology of care”.¹³⁰⁹ We do not want the assimilative power of these types of agreements to displace our understandings and responsibilities of care within our own laws and jurisdiction.

In terms of a governance structure, NMCARs do require the development of a co-management agreement and management board. These types of structures do present Indigenous groups with a range of powers and authorities,¹³¹⁰ and the opportunity to bring other agencies (such as DFO) to the table, even while remaining limited and firmly rooted in a sovereignty and rights based paradigm that is problematic.¹³¹¹ Even with an overarching IPCA in place, how we conceptualize and negotiate these structures matters. The IELÇIETEL Accord has created an Indigenous management board as part of its structure. Through protocol and ceremony, the IELÇEETEL Accord sets out how the Nations will work together, and a structure through which relationships with Parks Canada, for example, will take place. The IELÇIETEL Accord incorporates a mechanism which fosters collaboration between Indigenous Nations, while also balancing the independence of those member Nations.¹³¹² My main hesitance, generally speaking, with these types of management boards and structures is *how they work*.

If a management board becomes a decontextualized and bureaucratic body, re-entrenching the cultural and legal assumptions we initially aimed to escape, then it is simply not worthwhile. As for the IELÇIETEL Accord, as Justin Fritz states, “While it remains important to make decisions on behalf of our Nations, the Indigenous Management Board was created with a recognition of our interconnectedness with each other and with all our non-human relatives—including Salmon people, TETÁĆES, SĚMEW—who call these lands home. According to our *snu’uyulh* / SKÁLs, our non-human relatives have their own rights and responsibilities to fulfill as autonomous beings. They are their own “legal persons”. While acting on behalf of, and in the name of, our homelands and those beings within it, the Indigenous Management Board will strive to honour this without prioritizing the interests of our individual Nations.”¹³¹³ The way in which Te Pou Tupua has strived to be “the human face” of Te Awa Tupa (the Whanganui River),

1309 Pasternak, *Grounded Authority*.

1310 At the time of writing this chapter a new book, Graham White, *Indigenous Empowerment Through Co-management: Land Claims Boards, Wildlife Management, and Environmental Regulation* (Vancouver: UBC Press, 2020) finds that such arrangements can offer extensive decision-making influence over matters taking place within an Indigenous territory. See also Paul Nadasdy, “Revaluating the Co-Management Success Story” (2003) 56:4 *Arctic* 367.

1311 Nadasdy, *Hunters and Bureaucrats* and Nadasdy, *Sovereignty's Entailments*.

1312 How this is done has been agreed upon internally between the Nations in an unwritten protocol agreement.

1313 Justin Fritz is the policy-analyst at the WSÁNEĆ Leadership Council and we have worked together to try and capture a descriptive orientation for the board that is rooted in WSÁNEĆ worldview.

and how Te Kawa o Te Urewera has strived to manage people for the benefit of the land, as opposed to managing the land for the benefit of people, are insightful examples. Since relationships are lived and embodied, attention to these commitments must remain at forefront in order to avoid the risk of “regulatory capture.”

Ultimately, an IPCA and an NMCAR need not be seen as incompatible. In fact, an NMCAR might be a tool to help build the capacity and efficacy of an IPCA. For example, there is nothing stopping us from taking the funding, enforcement, and capacity building (for example, a Guardian program) provided through an NMCAR and co-governance agreement and repurposing them to *apply throughout the entire IPCA area* (not just the boundaries of the NMCAR and GINPR). While Parks Canada’s jurisdiction might stop at the NMCAR boundary, or any excluded area within it, W̱SÁNEĆ jurisdiction does not. In fact, I see an IPCA as a ‘blanket’ that overlays not just an NMCAR, but all other bodies and existing protected areas. It may also serve as an impetus for creating additional protected areas, or smaller Tribal Parks, within the broader IPCA boundary.

Within W̱SÁNEĆ territory there are federal parks, BC Parks and conservancies,¹³¹⁴ municipalities, Islands Trust,¹³¹⁵ non-government conservation organizations, and any number of ecological reserves and nature sanctuaries.¹³¹⁶ By declaring an IPCA over a broad territory, we also assert that all the operations and existing bodies within the area fall within our IPCA and are

1314. The Great Bear Rainforest Agreements use the protected status of a conservancy (which provide strong environmental protection but are also inclusive of First Nations use) to protect the rainforest. Several Land Use Planning Agreements were signed in 2006 with First Nations groups in the area. In 2016 a Final Agreement was reached, protecting 85 percent of the land-based from industrial logging. The other 15 percent has “stringent legal logging regulations” (ICE, *We Rise Together* at 49). The Agreement provides for shared decision-making for British Columbia and First Nations in the area. For a general overview of the Great Bear Rainforest Agreements see British Columbia, “Great Bear Rainforest Agreements Highlights” website at <https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/great-bear-rainforest/gbr-agreement-highlights>. Also see *Great Bear Rainforest (Forest Management) Act*, RSBC 2015, c.16. and Ministry of Forests, Lands and Natural Resources Operations, “Ministerial Order, Great Bear Rainforest” (January 2016) (available online at https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/land-use-plans-and-objectives/westcoast-region/great-bear-rainforest/gbr_land_use_order.pdf). “There continues to be challenges with the Agreement such as a less-than-ideal level of Indigenous government decision-making over their territories, however it is exponentially better than the previous status quo” (ICE, *We Rise Together* at 49). For more on conservancies and their potential role in IPCAs, see *ibid.* at 86. Conservancies are not a perfect tool but do offer strong environmental protection through mechanisms available to the Province.

1315 In protecting the islands in the southern Strait of Georgia and Howe Sound, the BC Government created the Islands Trust through the *Islands Trust Act*, RSBC 1996, c.239. Islands Trust is a corporate body (*ibid.* s. 12) “The object of the trust is to preserve and protect the trust area and its unique amenities and environment for the benefit of the residents of the trust area and of British Columbia generally, in cooperation with municipalities, regional districts, improvement districts, other persons and organizations and the government of British Columbia” (*ibid.* at s. 3). Islands Trust is able to engage in land use planning (*ibid.* at s. 29). Also, the *Islands Trust Act* created the Islands Trust Conservancy, which can hold and acquire property, as well as conservation covenants and nature reserves (*ibid.* at Part 6).

1316 The Race Rocks Ecological Reserve is an example of an ecological reserve in close proximity to the city of Victoria, and within Lekwungen territory (see Race Rocks Ecological Reserve website at <https://racerocks.ca/> for general information). The creation of the Race Rocks Marine Park, established in 1998 as one of Canada’s first marine parks, was done in consultation with local Indigenous groups. While the process was consensus based, and does provide co-management opportunities with First Nations, tensions regarding no-take-zones arose after consensus recommendations were developed, and during the initial implementation of the marine park. See LeRoy, S., R. Dobell, T. Dorcsey, and J. Tamsey, “Consensus vs. Implementation: Toward the Creation of a Marine Protected Area at Race Rocks, British Columbia (2004) (available online at https://www.researchgate.net/publication/237751923_CONSENSUS_VS_IMPLEMENTATION_TOWARD_THE_CREATION_OF_A_MARINE_PROTECTED_AREA_AT_RACE_ROCKS_BRITISH_COLUMBIA).

therefore subject to our laws and jurisdiction. As such, we call on all these different levels of government and other bodies to work with us, and to help build capacity, for the greater protection, care, and responsibilities to these areas. In other words, we use the IPCA as pressure to insert W̱SÁNEĆ jurisdiction where it was previously ignored and choked out.

In terms of utilizing new tools within the ‘blanket’ of an IPCA, the legal personhood of nature is one possibility. While legislation creating legal personhood in the environment reinforces significant jurisdictional authority for the state, the Te Urewera Act, for example, does provide a dent in the “breathtaking” arrogance¹³¹⁷ to claim an almost “universal assertion of human ownership” over the entire planet.¹³¹⁸ To dent that arrogance and to manage people for the benefit of place, as the Maori have done in line with their cosmology, is an important act of Indigenous law revitalization. With respect to W̱SÁNEĆ, what benefits might flow from recognizing KEŁŁELMEĆEN (Orca) as a legal person with rights? In W̱SÁNEĆ we already see KEŁŁELMEĆEN as relatives, but might it create a shift in the broader public’s conceptions that could prove beneficial? Or, in cases where land is returned to W̱SÁNEĆ, though under the condition of being held under certain restrictive environmental covenants, such as SISĆENEM,¹³¹⁹ is there a possibility that the island owning itself presents a more suitable alternative? I suspect the answer is context dependent, but the point is that an IPCA still leaves room for incorporating such tools under its umbrella, should it be desirable.

In the end, an IPCA is an opportunity to assert and reclaim our place-names within W̱SÁNEĆ territory, to emphasize the creation stories attached to them, and the laws and relationships that follow. It is a mechanism for cultural regeneration, healing, connecting with the land, and building economies of reciprocity. It is also a mechanism to declare local, national, and global actions and structures that create harms within those lands as a direct violation of our laws in that they prevent us from upholding the responsibilities we have to our relatives within our homelands, even if our ability of enforcement is currently restricted to those available through a tool such as an NMCAR. The strategy is to reclaim and assert W̱SÁNEĆ jurisdiction, as

1317 Boyd, *Rights of Nature* at xxviii.

1318 *Ibid.* at xxvi. There are a few small exceptions – Marie Byrd Land, Bir Tawil and the high seas (which are viewed as a global commons for exploitation) – “linked to their remoteness and utter inhospitality to humans” (*ibid.*).

1319 Halibut Island, or SISĆENEM, was recently returned to W̱SÁNEĆ with similar conditions attached. See W̱SÁNEĆ Leadership Council, “TLC To transfer SISĆENEM (Halibut Island) to W̱SÁNEĆ Leadership Council”, Media Release (available online at <https://wsanec.com/tlc-to-transfer-sis%C8%BCenem-halibut-island-to-w%C8%B1sanec-leadership-council/>).

opposed to seeking permission from the state. The ultimate goal remains the same, to re-create *ŒEŒEÁT SELI* (“a life of dignity”) for all those within these lands and waters.

Part IV

Chapter Seven

WSÁNEĆ SKÁLS (Beliefs/Laws): Theorizing WSÁNEĆ Law in the (so called) ‘Anthropocene’¹³²⁰

ME: What is the purpose of ceremony?

OLD WOMAN: To lead you to yourself.

ME: How?

OLD WOMAN: By giving you an idea of who you want to be and then allowing you to create the experience of being that way.

ME: Which ceremony is the best, then?

OLD WOMAN: Life. Choose what leads you to the highest vision you can have of yourself, and then choose what allows you to express that. What you express, you experience. What you experience you are.

ME: How do I prepare?

*OLD WOMAN: Breathe...*¹³²¹

1. Introduction

All law is cultural.¹³²² Law flows through how we see the world and understand our place within it. To engage seriously with Indigenous legal orders, then, is to take seriously the lifeworlds that underlie those distinct systems of law.¹³²³ Therefore, as social justice discourses around reconciliation and Indigenous law revitalization increasingly become part of the public arena, so too must understanding and respect for what we might broadly call Indigenous spiritualities, worldviews, or lifeways.¹³²⁴ Similarly, as environmental justice discourses around sustainability and climate crisis increasingly find Indigenous lifeways and spiritual orientations to land as productive sources of inspiration, so too must we find increased respect for Indigenous laws, self-determination, and political authority. In fact, in WSÁNEĆ law, where land, water, and other more-than-human beings are addressed and understood through relational terms, such as kin, the foundational Nature/Society binary that allows us to think of social and environmental justice as somehow distinct, does not hold. As such, my focus on climate crisis, and what it

¹³²⁰ A version of this chapter will also appear in forthcoming book chapter (Robert YELKÁTTE Clifford, “SKÁLS: WSÁNEĆ Law and Spirituality in the ‘Anthropocene’” in John Borrows, et al., *Indigenous Spirituality in Canada* (Toronto: University of Toronto Press) [Forthcoming]).

¹³²¹ Richard Wagamese, *Embers: One Ojibway’s Meditations* (Madeira Park, Douglas & McIntyre, 2016) [Wagamese, *Embers*] at 29.

¹³²² Rosen, *Law as Culture*.

¹³²³ Mills, “Lifeworlds” at abstract writes, “What ultimately counts as law and as the legitimate processes of its generation, adjustment, and destruction are both empowered and constrained by the constitutional order from which they derive life. A constitutional framework, in turn, reflects unique understandings about what there is and how one can know: a lifeworld. Reflecting on his own experience, the author emphasizes how legal education harms when it fails to acknowledge and to begin to articulate the lifeworld beneath any system of law it aims to impart.”

¹³²⁴ I do not mean to suggest that these terms are indistinguishable. However, I do mean to indicate a broad use of the term spirituality.

means for our theories and methods of Indigenous law revitalization, flows not merely from W̱SÁNEĆ environmental sensibilities, as those are, in fact, also spiritual sensibilities that are central to W̱SÁNEĆ law.

The term spirituality can be understood and taken up in a variety of ways.¹³²⁵ I provide an orientation to my understanding of spirituality through the above passage by Richard Wagamese because of how it connects spirituality with the transformational power of experience, embodiment, and lived subjectivities.¹³²⁶ In other words, beyond belief, there is a very material aspect to spirituality, as I understand it.¹³²⁷ Wagamese shows us how ceremony, or spirituality, frames how we see the world and our place within it, and thereby leads us, ultimately, to how we experience and therefore live and act in the world. We do this as individuals, but dominant societal understandings of how to live and act in the world also underlie structures, ideologies, and central to this chapter, processes of colonialism and climate crisis.¹³²⁸ I have framed an approach to W̱SÁNEĆ law and theory that is grounded in W̱SÁNEĆ lifeworld, as I understand it, and which from there opens critiques of colonial, capitalist, and sovereignty-based orientations that form the backdrop against which the revitalization of W̱SÁNEĆ law plays out, and which are also entangled in propelling global climate crisis. In short, I have linked the enactment of W̱SÁNEĆ law with the development of lived alternatives to the ‘Anthropocene’ – two projects I have argued are intimately connected. In this chapter I will bring things together to more explicitly lay out what my positioning means for Indigenous legal theory and methodology. In doing so, I will give an example to introduce the types of intimate connections I see while considering W̱SÁNEĆ law and climate crisis, followed by why this matters, and then a series of implications for approaches to Indigenous law revitalization that follow.

2. Indigenous Law and Climate Crisis

The blossoming of KÁTEŁĆ (Oceanspray) once told us when the peak of the sockeye salmon run was happening, an event that triggered a variety of ceremonial and legal actions in W̱SÁNEĆ. In this way, KÁTEŁĆ is an indicator species, as are many other plants and animals in

1325 See John Borrows, et al., *Indigenous Spirituality in Canada* (Toronto: University of Toronto Press) [Forthcoming] for various approaches to taking up Indigenous spirituality.

1326 Wagamese, *Embers*. While Richard Wagamese was Ojibway, I take his observations on spirituality to be applicable more broadly. His passage also aligns with how I personally understand and experience spirituality.

1327 At the end of this chapter I will briefly touch on how a deep spirituality might have material implications for the physical makeup of our brains.

1328 That is, colonialism, as a process, does violence to Indigenous peoples through these dominant understandings of how to live and act in the world. More broadly, climate change has made clear that these same dominant understandings of how to live and act in the world also do violence to the Earth, and all those who call it home.

WSÁNEĆ territory. Traditional WSÁNEĆ life was based on the 13 Moons of the WSÁNEĆ calendar, which uses indicator species and close connection with the cycle of the seasons to guide social, economic, legal, and spiritual activities throughout the year.¹³²⁹ Close observation and relationship with WSÁNEĆ territory, or place, is therefore a direct part of WSÁNEĆ governance. The relationship with WSÁNEĆ territory of which I speak is often one of ancient relatives - the land, water, islands, wind, and animals, are all relatives to be treated with respect, and which have their own spirits.¹³³⁰ Through WSÁNEĆ law and governance (in all its facets) these reciprocal relationships are fostered. From this brief description we can begin to see why in SENĆOFEN the word SKÁLS can be interpreted to refer equally to laws and beliefs.¹³³¹

Colonialism and the effects of climate crisis have impacted this mode of governance. Colonial policies and actions sought to erase and continue to suppress these ways of being and thus the beliefs that inform them (i.e., residential schools and banning of the reef-net fishery – a fishing technology gifted to us from the Salmon People), and the synchronicity of these relationships (i.e., Oceanspray blooming, peak of sockeye run, and WSÁNEĆ fishing and ceremony) have shifted with climate crisis. While it is not the objective of those seeking the resurgence of WSÁNEĆ laws to return to something that once was - that type of linear thinking is not central to WSÁNEĆ thought – the context of colonialism and climate crisis in navigating these ongoing WSÁNEĆ relationships and legal obligations remains undeniable. In fact, it has lead me to argue that the issues of Indigenous law revitalization and climate crisis are intimately connected, and that our theory and methodology of Indigenous law revitalization, and our diagnosis and approaches to climate crisis, can, and should be, intricately entwined and mutually reflective.

My argument, then, is not just that WSÁNEĆ law is informed by a particular set of beliefs and ways of being, and that should be respected – although I do think that. I go further and claim that the challenge of climate crisis means there are reasons we *ought* to favour certain approaches to Indigenous law revitalization over other possibilities.¹³³² Specifically, we should

1329 Claxton & Elliott, *Saanich Year*.

1330 An example I have used is the SENĆOFEN word TETÁCES, which means ‘relatives of the deep’ or ‘island’. Our creation story for islands tells us that those islands were once WSÁNEĆ ancestors thrown into the water by the Creator, XÁLS, forming those lands that are there. As XÁLS created those islands the TETÁCES were instructed to look after their relatives the WSÁNEĆ people, and the WSÁNEĆ were also instructed to look after their relatives of the deep.

1331 I do not necessarily claim that laws and beliefs are entirely indistinguishable, but rather, I emphasize that the line between the two is not so clear as in a largely secular society, such as Canada.

1332 I would say John Borrows, Aaron Mills and Jim Tully offer similar orientations as they express that reconciliation between peoples will be extremely difficult (if not impossible) without a reconciliation with the Earth. Borrows, “Earth-Bound”; Tully, “Reconciliation Here on Earth”; and Mills, “Rooted Constitutionalism.”

favour approaches that critique and resist the processes and power structures that have propelled, and continue to propel, colonialism and climate crisis, while we simultaneously cultivate subjectivities and practices of lived alternatives to colonial relationships and the crisis of the ‘Anthropocene’.¹³³³ I understand that this claim (as does any process of theorizing) does function to open and close various possibilities for thought and action. Further, I understand that the ramifications of this type of opening and closing, in general, are not felt equally across populations, with racialized, gendered, impoverished, more-than-human, and otherwise oppressed and marginalized communities being impacted most. As such, deep reflexivity is important in this process. So, with a variety of potential approaches to Indigenous law revitalization, why foreground climate crisis, and what implications does that have? The remainder of this chapter addresses this question in more explicit detail. I ultimately reject reformist approaches that fail to radically alter the status quo, and I contend that my orientation does have the potential to open radical and hopeful alternatives that are much needed.

3. Context and Objectives: Why Foreground Climate Crisis?

Approaches to Indigenous law revitalization vary. In part, this is because we all come from different traditions. W̱SÁNEĆ law is different from Anishinaabe law, and so on. However, another reason approaches to Indigenous law revitalization vary is because we take (implicitly or explicitly) different stances on the context and goals of that revitalization. We might ask whether we can bracket cosmology or spirituality in our efforts to revitalize Indigenous law, or, whether (and when) it is productive to engage the state and state discourses. However, our answers tend to be relative to how we define the context and goals of our work. A more foundational question, then, is what do we consider to be the purpose of the revitalization of W̱SÁNEĆ (or Indigenous) law? In other words, what are our specific objectives in revitalizing W̱SÁNEĆ law, and the *context* in which we enact those strivings? How does the way we characterize those objectives and contexts impact how we approach Indigenous law revitalization, including the role of belief and spirituality within that revitalization?

It is clear to me that climate crisis stands as the most pressing and important issue facing all of us (human and more-than-human), although there is disagreement in terms of understanding and responding to these challenges. Beyond that, the connection between W̱SÁNEĆ law and

¹³³³ I make less distinction between approaches that do this implicitly or explicitly.

climate crisis seems inescapable. Law has material implications for people's lives, which are lived in place. Once you root W̱SÁNEĆ law in place, as opposed to abstracted out of place and the relationships that animate W̱SÁNEĆ law, you are forced to grapple with a number of complexities. It becomes clear that place is always entangled within a broader and, in fact, global web of climate crisis, including the structures and power dynamics that have created and continue to propel us toward that climate crisis. How might W̱SÁNEĆ law uphold relationships with salmon, water, or other beings within W̱SÁNEĆ territory when faced with harms originating from such diffuse (temporally and spatially) sources? We see all around us, in each place we look, remnants of this history of harm (i.e., abandoned cement factories at SNIDÇEL, the place of our first creation story and village site)¹³³⁴ and the ongoing structures (i.e., private ownership of James Island) that have enable these types of harms. Distinguishing between past and present harms carries much less weight when considering that we are experiencing impacts (and yet to experience greater impacts) from actions *already* taken. In short, climate crisis surely must affect and impact the way we think of and attempt to uphold W̱SÁNEĆ law.

Situated within this broader web of considerations, the question as to how to revitalize W̱SÁNEĆ law becomes substantially more complex, while simultaneously richer and more rewarding. As we begin to untangle that web, we also begin to notice that those barriers that function to limit and restrain meaningful revitalization of W̱SÁNEĆ law align closely with the processes and ideologies that have tended to drive climate crisis. There are clear connections between colonialism and imperialism on the one hand and climate crisis on the other. As a result, our approaches to Indigenous law revitalization must include critiques of capitalism, dispossession, extractivism, and the logics of property and sovereignty, to name a few (points I will return to) - not only because of their relationship to Indigenous law revitalization, but also because of their relationship to climate crisis. Finally, in taking this approach we necessarily begin to emphasize methods, theories, actions, and practices that continue to critique and embody resistance and alternatives to those harmful processes and logics; that is, ways of knowing and being rooted in more respectful relationships. It is here where we recall that Indigenous alternatives have always existed and continue to present an alternative, *if we take this as our aim*. In that way, climate crisis offers not only a challenge, but an opportunity. An

¹³³⁴ The specific implications for SNIDÇEL are self-evident. However, cement production and use also accounts for a stunning 6-10% of global carbon emissions.

opportunity to cultivate healthier relationships that Indigenous peoples have called for, for so long.

4. Living Radically Differently: A Theoretical Implication

What does accepting the context and priority of climate crisis in relation to our project of Indigenous law revitalization mean for our specific approaches to Indigenous law? To answer this we must first understand the extent of change that the climate crisis seems to necessitate. I have already outlined much of this in Chapter Four, though a brief recap here is helpful.

The science on climate crisis, including its existence and urgency, is unanimous. I need not cover the scientific consensus in full detail, but it is important to recall that according to the IPCC, any model in which we are able to limit global warming to 1.5°C above pre-industrial levels will require “rapid and far-reaching transitions in energy, land, urban and infrastructure (including transport and buildings), and industrial systems,” *in addition* to reliance on some form of carbon dioxide removal.¹³³⁵ This is not new news! We also know that climate crisis does not happen in a linear manner, but rather, involves tipping points at which climate crisis becomes self-perpetuating.¹³³⁶ Despite this knowledge, instead of reducing carbon emissions, we are dramatically *increasing* emission rates!¹³³⁷

There is no scenario in which drastic changes in economic, social, political, and legal structures are not required. We cannot simply “tweak” the status quo.¹³³⁸ While some hold out hope for ‘technological fixes’,¹³³⁹ geoengineering, or see promise in ‘green capitalism’, those logics seems to rest on doubling down on the very problems that have brought us here.¹³⁴⁰ We cannot continue to extract fossil fuels, expand pipelines, increase tanker traffic, structure

¹³³⁵ IPCC 2018, *Global Warming of 1.5 °C*.

¹³³⁶ For example, as temperatures rise, glaciers melt.; as glaciers melt, carbon dioxide is released into the atmosphere.; as more carbon dioxide is released into the atmosphere, temperatures rise further. The same goes for forest fires.; as temperatures rise we see longer and more intense forest fire seasons; as forests burn, carbon dioxide is released.; and so on, and so on.

¹³³⁷ For example, the Intergovernmental Panel on Climate Change (IPCC) issued their first report in 1990, serving as the foundation for the United Nations Framework Convention on Climate Change (UNFCCC), and called for cutting greenhouse gas emissions. “Yet, in 2012 global CO₂ emissions were 58 percent higher than in 1990”... “In the 1990s, the annual increase in global CO₂ emissions stood at an average 1 percent; since 2000, the figure has been 3.1 percent - a tripled growth rate, exceeding the worst-case scenarios developed by the IPCC and expressing a trend that still does not show any sign of reversal” (Malm, *Fossil Capital* at 3).

¹³³⁸ There are a number of political ecology books that make this argument. For example, see Mann & Wainwright, *Climate Leviathan*.

¹³³⁹ Note that carbon capture alone cannot address the problem. The number of carbon capture and storage facilities required to simply meet yearly CO₂ emissions would be extremely vast, and does not even account for the far greater amounts of CO₂ *already* in the atmosphere that would also need to be captured, let alone the fact that yearly CO₂ emissions levels continue to increase without significant changes being made.

¹³⁴⁰ Mann & Wainwright, *Climate Leviathan* speculate as to four potential political paths that climate change might push us toward. As we recall, *Climate Leviathan* involves exactly this doubling down on the logics of capital and sovereignty and involves a relatively small number of the human population taking global control of the climate in citing the need to maintain life on earth.

ourselves around unsustainable capitalist economies, uphold property relations that are premised on dispossession, rely on conceptions of sovereignty that are racist and inadequate to grapple with climate crisis,¹³⁴¹ and view the more-than-human world as commodities and resources. Moreover, we cannot think that all of these things are separate from Indigenous law revitalization and climate crisis. Things are far too entangled for that.

These comments seems radical, but I agree with Geoff Mann and Joel Wainwright when they argue that advanced stages of climate change will exacerbate existing tensions and “transform global political economy and alter our world’s basic political arrangements.”¹³⁴² These transformations, of course, may be either more or less just. What we need are radically different ways of being in the world, and we can draw on Indigenous knowledges and ways of being that are not “overdetermined by capital and the sovereign state” to help facilitate those alternatives.¹³⁴³ What we cannot do is limit those alternatives by continually subjecting them to colonial frameworks and ideologies that have led us to this point to begin with. As products of ground-up processes, none of these alternatives can be predetermined; they will be products of new relationships, which are always contextual and dynamic.

The first implication, then, of taking climate crisis as a primary context and goal is theory oriented. It also brings us head-on with a divide in the literature between approaches that are described either as more reconciliation oriented, or more resurgence oriented.¹³⁴⁴ It is likely clear that my own approach leans more toward the resurgence orientation in that it challenges and rejects a great deal of the social, legal, and economic structures and assumptions embedded within the settler state and society. However, taking the context of climate crisis, and the structural, ideological, and power dynamics that have brought us to this point of climate crisis, alongside the ways in which those are bound up with colonial, imperial, and ongoing state structures, allows us, I think, to make a broader claim. That is, within Indigenous legal theory our focus should be less on reconciliation, particularly if the underlying logic of reconciliation is

1341 Sovereignty is a territorial patchwork of supreme authorities and jurisdictions. Each sovereign state is capable of contributing to the calamity of climate change and no one sovereign state can solve the issue on their own, or force other states to act in particular ways. This scenario is further complicated by current and historical inequalities through which certain sovereign states have achieved significant economic benefits while contributing greatly to the harms of climate change.

1342 Mann & Wainwright, *Climate Leviathan* at x.

1343 *Ibid.* at 189.

1344 While it is more difficult to say what exactly reconciliation means, since conceptions differ greatly, it does tend to stand in contrast to resurgence, in which “resurgence is often used to refer to Indigenous peoples exercising powers of self-determination outside of state structures and paradigms” (Borrows & Tully, “Introduction” at 4). Given that definition of resurgence, in contrast, reconciliation approaches, in general, tend to be seen as taking up more reformist approaches in collaboration with the state and its structures and paradigms.

a presumption that some type of compromise with the status quo is the only acceptable solution. Rather, our starting point should be to ask what *actually needs to change* in order to meaningfully meet the challenge of climate crisis, and Indigenous self-determination? To that extent, we should emphasize the ways in which Indigenous law, and spiritual sensibilities, can challenge, transform, or outright reject even the most foundational principles of Canadian (and global) law and society in instances where that is required.¹³⁴⁵

Such an approach may be criticized as impractical, overbroad, or advancing a separatist agenda that promotes a “turning away” from *relationships*, though I would not characterize my approach in any of those ways. First, while I call for broad and radical change, doing so is neither impractical nor overbroad in that the status-quo will not alter the path of climate disaster, nor facilitate ‘reconciliation’. In my discussion of climate crisis I hope to have made clear the extent of change that will be necessary. My position is not an outright rejection of everything, but a recognition that structurally and subjectively more needs to change than not. By beginning with the question of what *actually needs to change* in order to meaningfully meet the challenge of climate crisis, and Indigenous self-determination, I consider my position to be extremely *practical*, even if that amounts to drastic and far-reaching change.

Accepting the need for foundational change leads to challenging, and even rejecting, many aspects of contemporary state and society. To the extent that some potential approaches to Indigenous law revitalization could function to uphold problematic elements of the status quo, this means that they too might be seen as problematic given the urgency and priority of climate crisis, and should be avoided. To some, this claim will seem divisive and lead to critiques that it amounts to a separatist agenda that is problematic in that it promotes turning away from relationships, interpreted by some as relationships not just with the settler state and society, but perhaps even writ large.¹³⁴⁶ To me, this critique misses the broader point and is overly focused on the rejection of a narrow category of *human* relationships. I understand that to critique and reject deep-seated structures and assumptions can trigger strong reactions, but to set firm boundaries, refuse to accept those boundaries being crossed, and rejecting those who continually

¹³⁴⁵ This is not to say that every and all aspects of our current system must necessarily change. Nor is to say that change will only flow from Indigenous law and sensibilities. I have, throughout this work, also drawn on the work of Marxist scholars as one example of creating points of collaboration and alliance.

¹³⁴⁶ Much of the debate between reconciliation and resurgence can be bluntly summarized as follows: reconciliation leaning orientations risks being assimilationist or even colonized approaches and perspectives, whereas resurgence leaning orientations risks being separatist, isolating, and ultimately unconstructive. For a survey of these orientations and the debates between them, see Asch, Borrows & Tully, *Resurgence and Reconciliation*.

cross them, is not a problematic behaviour, but an important aspect of being in *healthy relationships*. Therefore, I would not characterize my position as rejecting *relationships*. Rather, I would characterize my approach as *deeply relational*, foregrounding a *far broader* set of relationships with all the world (human and more-than-human) through a refusal to accept the unhealthy structures and dynamics that harm all those relationships. In fact, I would argue that a failure to reject and turn away from these structures and dynamics, which have and continue to do so much harm to the human and more-than-human world, is actually the far more drastic and problematic turning away from *relationality*. The ‘Anthropocene’ has consisted of far too many people ignoring, exploiting, and turning their backs on relationships with the more-than-human world, and it is time that stopped.

My principal point is that, ultimately, we need to start thinking of how to live radically differently, and of how Indigenous spiritual sensibilities toward land and other beings can provide guidance on envisioning relationships that are anti-capitalist and anti-sovereign.

5. The Usual Culprits: A Structural Critique Implication

If we accept that within the public arena we need to start thinking of how to make drastic changes, where do we start? To begin we might ask, how did we arrive within the ‘Anthropocene’, and therefore, what would most need to change to potentially mitigate or move through this climate crisis? Burning fossil fuels is an obvious example. However, I have outlined how political ecologists writing from a Marxist tradition offer deep and sustained diagnoses of climate crisis that also point to a host of other culprits. Not only do these scholars offer strong critiques of capitalism, sovereignty, property relations, and the like, some also point to Indigenous knowledge and ways of being as sources of potential inspiration for living radically differently.¹³⁴⁷ Surely there are important synergies between these diagnoses and critiques of climate crisis and what Indigenous scholars, particularly anti-colonial or resurgence scholars in Indigenous Studies, have to say regarding the role of many of these same structures and processes in colonialism. The second implication for Indigenous legal theory when given the context of climate crisis is that our approaches to Indigenous law revitalization not only need to take up the types of critiques alluded to above, but continue to deepen them.

¹³⁴⁷ See, for example, Mann & Wrainwright, *Climate Leviathan*.

To bring my claim into a clearer light it is worth recalling my earlier emphasis on the point that we did not arrive in the ‘Anthropocene’ unwittingly, by accident, or through the actions of a universalized *anthropos*.¹³⁴⁸ If the ‘Anthropocene’ presents an image of unfolding dystopia, Indigenous peoples have already been living in a dystopia since the time of contact.¹³⁴⁹ We should therefore understand climate crisis, generally speaking, as a manifestation of harms brought on by a now global web of relationships, ideologies, and actions, propelled principally through conscious choices by powerful actors and institutions throughout recent human history.¹³⁵⁰ On top of that, we can, as mentioned, point to a number of more specific culprits, several of which at their root create some type of hierarchical, racialized, and gendered distinction between Nature and Society – a problematic distinction that often thematizes Indigenous peoples as part of Nature (and thus in need of society’s civilizing influence). Before returning to the Nature/Society binary, I will first outline a few of these usual culprits and what that might mean for our theory and approaches to Indigenous law revitalization.

6. Spotting Intersections: The Anti-Capitalist, Anti-Sovereign, and Anti-Property Implication

I have devoted a fair amount of time to discussing dispossession and the processes through which that has occurred, including through the concepts and mechanisms of sovereignty, property, jurisdiction, and how each of those also ties into capitalist relations and climate crisis. In doing so I drew upon the work of political ecologists who offer nuanced critiques of capitalism and climate crisis, some going so far as to prefer the nomenclature of ‘Capitalocene’ over ‘Anthropocene’ to highlight these observed links.¹³⁵¹ I need not review that discussion here, but return to the fact that capitalism has been a central target of many political ecologist and critical Indigenous scholars. Perhaps the most explicit example is from Glen Coulthard who, as mentioned, has argued that “for Indigenous nations to live, capitalism must die.”¹³⁵² There are two implications relating to this claim that I wish to touch on – one for capitalism and another that brings us back to the concept of sovereignty. Most directly, Coulthard’s argument is aimed

1348 Bonneuil & Fressoz, *Shock of the Anthropocene*.

1349 Whyte, “Indigenous Science (fiction) for the Anthropocene”. This point also applies beyond Indigenous peoples. Yusoff, *Black Anthropocenes*.

1350 Bonneuil & Fressoz, *Shock of the Anthropocene*.

1351 Moore, *Anthropocene or Capitalocene?*

1352 Coulthard, *Red Skin, White Masks* at 170-173.

at how capitalism necessitates the continued exploitation of Indigenous lands and resources, thus fueling dispossession and subjugating Indigenous practices and understandings of relationships with land. This observation should not be a surprise given the frequent tensions we see arise in cases in which deep and meaningful engagement with Indigenous laws bump up against the economic interests and jurisdictional sovereignty of the state.¹³⁵³ In that regard, capitalism, and its troubling connections with climate crisis and Indigenous dispossession, should lead us to another implication for our approaches to Indigenous law revitalization; approaches to Indigenous law should challenge capitalism and the relationships it upholds, through both theory and practice.

The second implication of Coulthard's statement on capitalism, as mentioned, returns us to the topic of the state and sovereignty. Much of Indigenous law revialization, and Indigenous struggles more generally, have been focused on our relationships with the Canadian state. This fact is, of course, understandable. However, I want to suggest it is not enough on its own. I don't mean this only in the sense that Coulthard takes up – that we must be cautious (or even reject) engaging state power and discourses given their assimilative nature, and that a better alternative is regenerating Indigenous traditions.¹³⁵⁴ To be sure, as I explored at the outset, so long as we remain tied to state discourses, principles, and constraints that are harmful, we will make little headway in making the necessary changes many Indigenous peoples envision, or that are needed to meet the challenge of climate crisis. I also mean it in the sense that even if we reached a satisfactorily decolonized relationship with Canada, that is not enough. Canada, as a nation-state, is also entangled within and constrained by many of the same dynamics of climate crisis.¹³⁵⁵ Canada, on its own, cannot address the problem of global climate crisis. No nation can.

The very concept of sovereignty rests on supreme authority and absolute jurisdiction over distinct territorial boundaries and their polities. None of these nation-states have the capacity on their own to make global changes. They are constantly negotiating among themselves.¹³⁵⁶ The fact that there is unequal benefit and accountability, both within and between nation states, in relation to the drivers of climate crisis only makes any type of collective action more difficult. In

1353 The TransMountain Pipeline expansion project, the Uni'stoten camp at Wetsuwten, the Tiny House Warriors, and the Dakota Access Pipeline resistance are all examples.

1354 Coulthard, *Red Skin, White Masks* at 178-179 describes this in the section "Beyond the Nation State."

1355 This should in no way be interpreted as relieving Canada of its responsibilities and failures.

1356 Nadasdy, *Sovereignty's Entailments*. Nadasdy notes how sovereignty is not something you simply possess, or don't, but rather, is continually negotiated in relation with other sovereign states.

that sense, climate crisis mounts radical challenges to sovereignty as it is currently understood.¹³⁵⁷ On top of that, the potential emergence of a global sovereign exerting itself in the name of saving life on earth represents a speculative path to a dystopic future, which Mann and Wainwright call “Climate Leviathan.”¹³⁵⁸ As we know, Indigenous peoples have long critiqued the concept of sovereignty and nation-states’ assertions of sovereignty, even while often seeking to assert their own sovereignty.¹³⁵⁹ Arguably, however, our critiques of sovereignty need now to go farther. The implication seems to be that Indigenous legal theory should be open to asking and challenging whether we can, for example, really have supreme authority, or ownership, over fish (the Salmon People) or over islands (Relatives of the Deep), particularly when each is viewed as a relative, ancestor, or kin? As Gordon Christie notes, can we now look beyond sovereignty and the types of relationships it frames, and look instead to indigeneity.¹³⁶⁰ How might the world, its legal, social, and economic structures, look and function differently if that were the case?

The purpose of this section was to (all too briefly) recap how capitalism, sovereignty, and property have been central concerns for scholars envisioning decolonized futures, while at the same time making the critically important point that these structures and processes have been of equal concern to political ecologists attempting to envision collective futures in the most general sense (i.e., futures that might mitigate against at least the starkest impacts of climate crisis in some sort of just fashion). In other words, I have tried to explicitly bring together my initial claim that the two issues of climate crisis and Indigenous law revitalization are not distinct but are, in fact, intricately entwined and mutually reflective, with each requiring a foundational revisioning of relationships,¹³⁶¹ i.e., relationships that are anti-capitalist and anti-sovereign.

Having spotted a few intersections, we can now look at what underlies those synergies, and from there think about alternatives.

7. What Lies Beneath: The Nature/Society Binary

1357 See Mann & Wainwright, *Climate Leviathan* for more on this point.

1358 *Ibid.* Ultimately, whether it is a global sovereign exercising a state of exception in imposing measures for saving life on earth, or an anti-global movement withdrawing inward, responses to climate change will be intense.

1359 It appears more common to critique the assertion of Crown sovereignty, although some Indigenous scholars do also critique sovereignty as a concept, viewing it as a concept with strong European baggage and as inappropriate to Indigenous nations. See, for example, Nadasdy, *Sovereignty's Entailments* and Alfred, “Sovereignty”.

1360 Christie, “Indigeneity and Sovereignty”.

1361 Tully, “Reconciliation Here on Earth” explores the connection between reconciliation between Indigenous and non-Indigenous peoples, and between humans and the Earth.

Understanding the Nature/Society distinction in previous chapters required us to take a foray into theorizations of property, sovereignty, and their deeply colonial roots, which structure land ownership and enable the existence of capitalism, understood as “a way of organizing nature.”¹³⁶² We saw from there some of the conceptual and material expectations these theorizations create, and how they continue to manifest today, for example, in relation to the dispossession of LEL, TOS. Again, I will not duplicate that theorization here but return to it briefly to more explicitly lay out what it means for our approaches to Indigenous law revitalization.

As mentioned, Canada is founded on the *dispossession* of Indigenous peoples of their lands, laws, and self-determining governance structures.¹³⁶³ We have seen how sovereignty claims and property conceptualizations have been central to this colonial project. In earlier theorizations Thomas Hobbes and John Locke both theorized sovereignty and property in drawing upon a binary between Nature and Society,¹³⁶⁴ thus creating a distinction between “civilized” and “uncivilized”, and between land that was either “improved” or deemed a “waste”. These theorizations were racialized, as well as tied to capitalist values, which functioned as “justification” for colonial dispossession and a way of understanding and organizing Nature that aligned with emerging capitalism and the externalization of Nature as resource.¹³⁶⁵ Modern western systems and conceptualizations of property founded on these “justifications” function such that they continue to maintain and uphold dispossession and adhere to capitalist values. In short, these theorizations continue to create what Eva Mackey calls “settled expectations”.¹³⁶⁶

The more thorough review of these arguments in previous chapters emphasized how underneath these theorizations of sovereignty and property is a problematic distinction between Nature and Society. Problematic not only in that from the outset these racialized concepts were meant to justify dispossession of Indigenous peoples and the more-than-human world through deeming them inferior, but also because of the role they play in the unfolding of climate crisis. Capitalism, in particular, has understood and organized nature as external to Society, thus

¹³⁶² Moore, *Capitalism in the Web of Life*.

¹³⁶³ Treaty between early settlers and Indigenous nations offered, and may still offer, an alternative, however, those promises and mutual relationships have long been ignored and systematically undermined.

¹³⁶⁴ This binary preexisted Hobbes, finding its place in the Old Testament as well. For example, see Genesis 1:28: “And God blessed them. And God said to them, ‘Be fruitful and multiply and fill the earth and subdue it, and have dominion over the fish of the sea and over the birds of the heavens and over every living thing that moves on the earth.’”

¹³⁶⁵ We noted how definitions of improvement were tied to the understanding that land had to be made profitable in the narrow capitalist sense of creating exchange value. E.M. Wood, *The Origin of Capitalism*.

¹³⁶⁶ Mackey, *Unsettled Expectations*.

rendering it “cheap” and open for appropriation.¹³⁶⁷ Marxist political ecologists have contributed strong arguments around capitalism’s role in climate crisis and its externalization and destruction of Nature.¹³⁶⁸ Bringing things back to the local, I also highlighted how capitalist processes and values in fact clash violently with W̱SÁNEĆ law and place-based ontology, which emphasizes reciprocal and spiritual relationships with land and other more-than-human beings. In fact, as I argued, we see these points of tension arise in almost all cases where deep and meaningful engagement with Indigenous law bumps up against economic interests and the jurisdictional and sovereign intransigence of the state.¹³⁶⁹

8. The More-than-Human World: Spiritual and Embodied Implications for Indigenous Method & Theory

If we accept what has thus far been laid out – the context of climate crisis, the usual culprits in Indigenous dispossession and propelling the climate crisis, and the underlying theme of a Nature/Society binary – then what follows is one of the more central implications for Indigenous legal theory. It no longer makes sense (it never did) to theorize law, or any social relationship, as somehow hived off from the rest of this “web of life.”¹³⁷⁰ In fact, much harm rests on this distinction and we would be well advised to trouble this Nature/Society binary.

Many Indigenous peoples have long emphasized the special relationships Indigenous societies have with land and the more-than-human world. In my work I have done so in an effort to understand W̱SÁNEĆ law on its own terms.¹³⁷¹ In that regard, I have turned to W̱SÁNEĆ creation stories, the SENĆOTEN language, W̱SÁNEĆ relationships with place, and from there, have begun to forge understandings of W̱SÁNEĆ law. All of this is part of our ĊELÁNEN, our cultural ancestry or heritage. Throughout this work I have been guided by those who came before me, and from whom I have been privileged enough to learn from. I have tried to learn how to engage responsibly with W̱SÁNEĆ stories, how to think of our relationship with place in

1367 Moore, *Capitalism in the Web of Life* at 13. Moore refers to this as capitalism’s “Cheap Nature” strategy (or the Four Cheaps). Consider, using the atmosphere as a garbage dump, or the vast amount of time it takes the Earth to transform decomposing organic materials into what we call (through a capitalist lens) fossil fuels.

1368 For example, Malm, *Fossil Capital* and Moore, *Capitalism in the Web of Life*.

1369 Christie, “Crown Intransigence” and Christie, “Indigeneity and Sovereignty.” My work has explored some of these instances – a fuel spill at Goldstream river, a salmon spawning river and ceremonial bathing location for W̱SÁNEĆ (Clifford, “W̱SÁNEĆ Legal Theory”), the privatization, development, and degradation of James Island within W̱SÁNEĆ territory, and the benefits and limitations in exercising W̱SÁNEĆ law through a proposed National Marine Conservation Area Reserve within the Gulf Islands (see earlier chapters of this dissertation). Yet, so much more remains to be explored.

1370 Moore, *Capitalism in the Web of Life*.

1371 Boisselle, *Law’s Hidden Canvas*.

WSÁNEĆ law and territory, and to carry and share that as best as I am able. In fact, that is part of my responsibility.¹³⁷² If we were to summarize this, in simple terms, I place a heavy emphasis on WSÁNEĆ ways of understanding and being in the world, including with our more-than-human relatives. In many ways, we could say this approach involves an ontological or spiritual claim.

I covered my developing understandings and approach to learning and teaching WSÁNEĆ law in greater detail in Part I, and, again, I need not return fully to that conversation here. The principal points emerging from those more in-depth discussions centred around thinking through a relational ontology, non-anthropocentrically, non-hierarchically, and in a way that the more-than-human world becomes more than a mere object of politics. Doing so recognizes the fluidity and contextuality of relationships and requires that our practice and theorizations are not abstract, but grounded. My claim, then, is that in revitalizing WSÁNEĆ law we need to turn our attention to *particular* relationships. It is clear then that from this perspective, responsibly navigating right action requires intimate knowing, a point that aligns with my claim that in WSÁNEĆ law, knowledge is not abstracted from relationships, but rather, premised on those relationships.

The implications of my observations here are twofold. WSÁNEĆ stories are not just telling us about law in some abstract sense (i.e., the social) but about our place and being in the world, amongst other beings. There is therefore a cosmological, or spiritual, dimension that is a central aspect of our understanding of WSÁNEĆ stories and law. Secondly, there is a significant practical implication for our understanding of law in this context as well – our approaches to WSÁNEĆ law require experiential learning. To understand the intricacies and needs of any relationship you must spend time with the ones with whom you are in relationship. Embodying these stories and the relationships they point to must be central to our methodology. It is how we learn to see and cultivate healthier ways of being in this world. This, as Coulthard calls it, is “grounded normativity.” While I have framed this discussion in terms of WSÁNEĆ law, these observations likely relate in many ways to Indigenous law revitalization more broadly as well.

¹³⁷² As mentioned, I carry the name YELKÁTFE. That name is part of my NEHIYMET (ancestral line), which grants to me certain rights and responsibilities. My grandfather carried the name YELKÁTFE before me and committed his life to the revitalization of the SENCOTEN language. I feel a responsibility to carry on his good work, in my own way.

The *practice* of foregrounding this type of relational thinking, of constantly paying attention to and practicing care for these relationships, creates material change around and *within* us. To exemplify this point, briefly consider that neuroscience clearly identifies how devoted meditation practice, as a larger than conceptual way of knowing, creates neurological and material change within the brains of experienced meditators. From this material change these individuals react to stress in ways non-meditators do not. In regard to that stimulus/reaction relationship, meditators then have the space to see and act differently, if they *practice*. Like meditation, I understand W̱SÁNEĆ law to also be a *practice* that can create the same type of material changes in our lives. I will return to this point briefly in my conclusion of this chapter, but first, we should also consider the implications these observations and this approach have in relation to allied positions.

9. The More-Than-Human World: Implications for Allied Positions

The stakes for W̱SÁNEĆ are clear. How can we think of a place-based ontology – of upholding these laws and relationships – when place itself and the laws and relationships attached to it are threatened by global dynamics? What will we, as W̱SÁNEĆ, lose without salmon, for example? We will lose not only our relatives, but also aspects of our stories, our laws, our beliefs, and our governance structures, all of which rest on an active relationship with salmon. So much will have been taken away. We have a responsibility to care for these relatives, not just in our own actions, but to also protect them from the harmful actions of others. As such, W̱SÁNEĆ (and Indigenous) legal theory needs to grapple with how to respond to these global harms.

There is no mechanism currently in place to meet this global challenge; no way to hold anyone accountable; no way to address these harms and violations of W̱SÁNEĆ law. Aboriginal and treaty rights (even if they were meaningfully upheld) do nothing when it is not only Canada harming these relationships.¹³⁷³ The causes are too diffuse. What, then, is a possible response? To my mind we return to the need to trouble the Nature/Society binary. However, it is clear that this is not only about law, nor is it only about Indigenous peoples. It cannot only be Indigenous peoples making a push to reimagine relationships.¹³⁷⁴ Changes must occur on a far larger scale.

¹³⁷³ Also recall Shrubsole, *What Has No Place* and his argument that Aboriginal law in Canada may protect a broader array of Indigenous spiritual claims, but it does not (and in fact cannot) protect the necessary depth to those claims.

¹³⁷⁴ As I have argued, Colonialism has rendered Indigenous peoples poor and oppressed in our own homelands. The result is that it constantly requires us to navigate impossible choices – i.e., uphold certain understandings of law and responsibilities to land, or engage in a development initiative that compromises those laws and responsibilities but provides

The implication, then, for Indigenous law and legal theory would be an openness to engage with dialogues and perspectives we might otherwise often ignore, with the purpose to deepen this claim and movement. Such an approach opens new possibilities, though also presents hurdles.

As I outlined above, Coulthard made such a pivot when he argued that it would be a mistake for Indigenous scholars to ignore the contributions of Karl Marx.¹³⁷⁵ While Coulthard takes up the work of Marx, he does not do so unreflectively or without considering the ways in which Marxism does not fit seamlessly with Indigenous understandings and interests. In my work, I have drawn upon a somewhat similar body of scholars in that the political ecologists I reference are drawing from Marxist principles. Some of those scholars do reference Indigenous lifeways – an example would be the WSÁNEĆ cosmological and spiritual orientations to place and non-humans as relatives that I have outlined here – that can represent important and positive alternatives to the ‘Anthropocene’. However, strengthening these synergies in pursuit of climate crisis mitigation is only possible if we take that as the objective and context of the resurgence of Indigenous law, as I argue we should. Such an approach is not necessarily straightforward, for a variety of reasons. Some scholars considering these types of synergies see hope in Indigenous alternatives insofar as they are “not overdetermined by capital and sovereignty.”¹³⁷⁶ While there is truth in this observation, it would be a mistake to dismiss the complex and tension filled ways in which Indigenous peoples and governance structures have still been shaped, constrained, and entangled within the logics of capital and sovereignty. There is much to think through. While I cannot yet tackle all the potential risks involved with this move, a few are worth noting.

10. The Neoliberal Trap: Instrumentalizing and Decontextualizing Indigenous Ontology?

Having sketched out an argument that I hope draws useful connections between Indigenous law revitalization and responses to climate crisis, we may step back and ask, even if compelling, what challenges or dangers might result through so strongly emphasizing the connection between Indigenous law revitalization and climate crisis mitigation?

housing and food for our families. I would emphasize that what most needs to change is not Indigenous peoples, nor our varied responses to the structures imposed around us, but rather, the structures and ideologies that create those injustices and harms; that make these impossible choices and struggles (or tensions) part of daily life. It is also noteworthy that Indigenous peoples have been advocating for this shift for hundreds of years with minimal effect.

¹³⁷⁵ Coulthard, *Red Skin, White Masks*.

¹³⁷⁶ Mann & Wainwright, *Climate Leviathan*.

David Chandler and Julian Reid, in *Becoming Indigenous: Governing Imaginaries in the Anthropocene*,¹³⁷⁷ critique the orientation (generally speaking) that I've been laying out in this chapter – a key marker being “the assertion that the culture/nature divide, so central to the modern episteme, no longer holds in the Anthropocene” and that Indigenous lifeways represent a productive source of inspiration for an alternative.¹³⁷⁸ The authors recognize that the West has long produced certain images of indigeneity to further their own ends, with the Nature/Society binary having played a central role in these imaginaries. It appears to Chandler and Reid that the West is still producing certain images of indigeneity, but, within the ‘Anthropocene’, what appeals within these images of indigeneity is that as Indigenous peoples we have (or at least have been seen to have) always “lacked the modernist division between culture and nature.”¹³⁷⁹ In addition, Indigenous peoples dispossession, perseverance, and resilience despite colonialism is transformed into a positive light.¹³⁸⁰ This transformed emphasis on dispossession,¹³⁸¹ perseverance, and resilience, has a clear purpose in that it is exactly this absence of desire to possess and the trait of perseverance through the “end of the world” that are said to be so needed in the Anthropocene.¹³⁸² To that end, it is concerning that those most at risk must now also become teachers, and that Indigenous peoples’ very subjugation becomes appropriated.

Among other concerns, Chandler and Reid also raise the additional concern that “The injunction to ‘become indigenous’ only works on the basis of universalising indigeneity as a set of analytical skills open to all.”¹³⁸³ In fact, some theorists at which Chandler and Reid take aim premise their work on “the assumption that the Anthropocene removes the distinction between the coloniser and the colonized.”¹³⁸⁴ Once that distinction is erased, anyone can, and must,

1377 David Chandler & Julian Reid, *Becoming Indigenous: Governing Imaginaries in the Anthropocene* (Lanham: Rowman & Littlefield Publishers, 2019) [Chandler & Reid, *Becoming Indigenous*].

1378 *Ibid.* at 2. Chandler & Reid offer a complex critique that I do not have the space to fully relate or engage with here. Many of their critiques are more specific to “Western academic and policy discourses” of a particular type. Additionally, many of the scholars they reference are not people who I have read, nor am familiar with. To that extent, our audiences differ to some degree. While we have areas and concerns we agree upon, I should also note that I do not agree fully with all that they have to say, and I also found myself wondering about the level of direct engagement with Indigenous peoples, thought, and ways of knowing that they bring to their work, despite the topic matter. Importantly, it should be made clear that Chandler and Reid “are happy to learn from indigenous struggles, only that learning from is very different from the ontopolitical requirement to ‘become indigenous’ (*ibid.* at 151). With all of that said, I would likely benefit from further reflection on their work and the implications it has for my own thinking. For now, it is clear that some of their concerns deserve direct attention in the context of the arguments I am making here.

1379 *Ibid.* 47.

1380 See *ibid.*, particularly at Chapter 2 (Dispossession), Chapter 4 (Perseverance) and Chapter 6 (Resilience) for more in-depth discussion.

1381 The dispossession being referred to is not simply physical dispossession, but also a subject position that willingly foregoes the desire to be a *possessor* or to “partake in the logic of possession” at all, which stands in contrast to (and condemnation of) the Western conceit of the ability to possess, subordinate, and exploit land (*ibid.* at 25).

1382 Also see Whyte, “Indigenous Science (fiction) for the Anthropocene.”

1383 Chandler & Reid, *Becoming Indigenous* at 61.

1384 *Ibid.*

‘become indigenous’. In that regard, Chandler and Reid’s most central concerns circle around the way certain Western scholars are “falsely instrumentalising”¹³⁸⁵ Indigenous knowledges and ways of being in a manner that is essentializing and limiting, as well as in ways that “ontologise the enemy”, and as such, take the bite out of Indigenous critiques of colonialism, capitalism, and the like.

I will address my position on most of these points in the concluding section below. However, a principal point worth mentioning here is that post-extractivism and having settler peoples (and the settler state) move past extractivism, and all the assumptions that underlie it, need not be cultural appropriation or amount to a claim that everyone must ‘become indigenous’.

12. Conclusion

While a global matter, climate crisis is experienced most directly through its local manifestations, and it is clear that Indigenous, and other marginalized peoples around the globe, disproportionately suffer those negative impacts of climate crisis.¹³⁸⁶ I agree that western scholars who praise Indigenous knowledges as offering humanity a way out of the ‘Anthropocene’ while failing to embark in any meaningful engagement with those communities, and conveniently forgetting and leaving untouched the fact that many of those same peoples and communities suffer poverty, high suicide rates, murdered and missing Indigenous women, overrepresentation in the prison system, and a host of other socio-economic hardships and violence wrought by colonialism, appear disingenuous and even hypocritical.¹³⁸⁷ Supporting a “false instrumentalizing” of Indigenous peoples and knowledge in this way is not what I have in mind in making my arguments in this chapter, and in this dissertation.

Similarly, there is a concern that Indigenous knowledges have long been appropriated, in a variety of ways, and often in connection with capitalism. For example, Laurelyn Whitt uses the term “new imperial science” to indicate the “confluence of science with capitalism – a relationship mediated by a distinctively American, increasingly international, intellectual

1385 *Ibid.* at 152. The authors also write: “We claim that the indigenous play a vital role for contemporary theorists, not so much as objects of study in their own right (old-fashioned anthropology) not as a focus of political solidarity (old-fashioned politics) but rather as a vicarious stage army for critical scholars meeting the fashionable demand to develop non-modern approaches to knowledge production” (*ibid.* at 46).

1386 A premise of “Climate Leviathan”, as described in Mann & Wainwright, *Climate Leviathan*, is that a likely response to advanced stages of climate change involves the wealthy doubling down on the logics of capital and sovereignty in an effort to insulate themselves from the harshest effects of climate change. I would also note that Indigenous communities here on the coast of British Columbia, for example, are also more susceptible to sea level rise, which threatens our communities and our cultural heritage.

1387 With that said, there appears to be an irony in the fact that Chandler and Reid critique such scholars on these points while (their book at least reads as though) they too draw on various Indigenous traditions without any apparent connection or relationships with those communities either.

property system.”¹³⁸⁸ Whitt notes how this “Pursuit of knowledge of the natural world has long been politicized.”¹³⁸⁹ Such a pursuit involves appropriation of Indigenous knowledge not only through biocolonialism – for instance in service of the pharmaceutical industry – but also through “commodification of indigenous spirituality [as] a paradigmatic instance of cultural imperialism.”¹³⁹⁰

Whether peddled by white shamans, plastic medicine men and women, opportunistic academics, entrepreneurs, or enterprising New Agers, Indian spirituality – like Indian lands before it – is rapidly being reduced to the status of a commodity, seized, and sold. Sacred ceremonies and ceremonial objects can be purchased at weekend medicine conferences or via mail-order catalogs. How-to books with veritable recipes for conducting traditional rituals are written and dispensed by trade publishers. A succession of born-again medicine people have – with greater or lesser subtlety – set themselves and their services up for hire, ready to sell their spiritual knowledge and their services up for hire, ready to sell their spiritual knowledge and power to anyone willing and able to meet their price. And a literary cult of Indian identity appropriation known as white shamanism continues to be practiced. Instead of contributing to the many Native-run organizations devoted to enhancing the lives and prospects of Indian people, New Agers are regularly enticed into contributing to the continued expropriation and exploitation of Native culture by purchasing an array of items marketed as means for enhancing their knowledge of Indian spirituality.”¹³⁹¹

Along this path, “commodification of indigenous spirituality enables the dominant culture to supplant Indian people even in the area of their own spirituality. This process moves beyond ensuring their physical subordination to securing absolute ideological/conceptual subordination.”¹³⁹² Like the “false instrumentalizing” noted above, this commodification and appropriation of Indigenous spirituality is also not what I have in mind in making my arguments in this chapter, and in this dissertation.

Rather, I have critiqued the narrative of a universal *anthropos* recently awakening to the reality of climate crisis in so far as it functions to render invisible historical and ongoing power dynamics and harms. In fact, my argument has been that those dynamics need to be front and centre in *both* Indigenous legal theory and climate crisis theorizations. For example, if we want to transcend capitalism and problematize sovereignty (as I hoped to show that climate change

¹³⁸⁸ Whitt, *Science, Colonialism* at xiv.

¹³⁸⁹ *Ibid.* at xiii.

¹³⁹⁰ *Ibid.* at 6.

¹³⁹¹ *Ibid.*

¹³⁹² *Ibid.* at 10.

will require), then we need approaches to Indigenous law that have that effect. I have argued that one way to do this is to trouble the notion that humans are somehow set apart from or superior to “Nature”. W̱SÁNEĆ, and many other Indigenous spiritualities, can be instructive in this regard. While I suggest a move toward cultivating reciprocal relationships of care with the more-than-human world, the collapsing of the Nature/Society binary does not amount to a loss of responsibility on the part of humans, or more specifically, a particular segment of human society that is most to blame.

The ways of being that I have alluded to are often seen as being linked to ‘traditional’ worldviews, practices, and spiritualities. From there, critiques abound regarding essentialism, originalism, and fundamentalism. Some would go so far as to label this “nonsensical primitive morality.” What is clear from these positions is that some misunderstand these claims in predictable ways. I will spend less time on this concern since I have touched on it above, and elsewhere.¹³⁹³ But, my arguments have not been about abstracting or universalising Indigenous laws and legal theory. In fact, if we take Burkhart’s arguments about locality (laid out in detail in Chapter Five), and correspondingly the way in which I have worked to explain W̱SÁNEĆ law and stories, then the universalization or abstraction of W̱SÁNEĆ law misses the critical point of locality, in contrast to delocality. Once rooted in place W̱SÁNEĆ law cannot be homogenized, nor abstracted out of real-life contexts and relationships. W̱SÁNEĆ law is reciprocal, embodied, and rooted in relationships that are always fluid. One cannot simply ‘become Indigenous’, but one can have healthier relationships with the places and other beings with whom *they* are in relation, including Indigenous peoples.

I have also noted how these ways of being require embodiment. In many ways, the question here is less about what mode of reasoning and engagement with W̱SÁNEĆ stories is required, and more the question of what the best way is to create behaviour change (recalling our premise that climate crisis necessitates a significant change in our daily behaviours and ways of being). Since at least the period of Enlightenment, a primary assumption has been that human behaviour and action is, at least principally, a *top-down* process through which rational and beneficial objectives govern our daily actions in pursuit of those goals. Through that lens, there is a clear and straightforward correlation between what we know and value, and what we do. From that perspective, the rational mind is what is in control of all of this, and, this occurs not just at an

¹³⁹³ Clifford, “Listening to Law”.

individual level, but at the level of a collective rationality. Yet, we should ask, why then do we (individually and collectively) do so many things that are inconsistent with what we *know*, *believe*, or claim to *value*? Why is it so hard to align day to day behavior with our overarching knowledge and values?

Space prohibits me from offering a summary of behavioral and neuroscience that helps understand this contradiction.¹³⁹⁴ Suffice it to say that the rational, or planning and reasoning aspect of our brains (the pre-frontal cortex, or PFC) is only the most recent evolutionary layer of our brains.¹³⁹⁵ Reward-based learning, for example, which is context dependent and learned over time is based in older regions of our brains.¹³⁹⁶ The behaviors created through this older process of the brain are created through experience and are deeply conditioned, allowing them to be often carried out without thinking. The PFC is meant to work alongside older regions of the brain, and is a powerful tool. However, during emergency or when overwhelmed the PFC also tends to go offline.¹³⁹⁷ At that point, older parts of our brain take over and we react as we have been conditioned to do, without particular reflection on why or how. This process happens at the individual as well as the societal level.¹³⁹⁸ The neoliberal–capitalist world most of us live in has, given an understanding of these processes, in many ways been designed to “create addictive behaviours and capitalize on them.”¹³⁹⁹ The point I am making is not to deny rationality, but to recognize that many of our behaviours don’t flow directly from our PFC, and that our rational minds are a limited tool in creating significant behaviour change.¹⁴⁰⁰

As far as I can tell, we will not sit and think our way out of climate crisis, but rather, it will take action, practice, and cultivating alternative ways of being.¹⁴⁰¹ Neuroscience tells us that our

1394 I have also kept my sources limited to a few introductory level texts to increase accessibility. There is, however, more research in this area and future work could further explore the connections I am trying to make here.

1395 The pre-frontal cortex area of the brain is understood to be involved in “creativity and planning”. See Judson Brewer, *Unwinding Anxiety: New Science Shows How to Break the Cycles of Worry and Fear to Heal Your Mind* (New York: Avery Publishing, 2021) at 16.

1396 *Ibid.* at 32. Positive and negative reinforcement is central in this process, as is a neurotransmitter called dopamine.

1397 There is a lot going on in relation to this point. Basically, as uncertainty, stress, and anxiety increase, the “simulator” that is your PFC “starts spinning faster and faster” and eventually “the PFC starts to go off-line”, at which point your “fight/flight/freeze physiology” takes over (*ibid.* at 21).

1398 This happens at the level of individual, but also at the societal level, which in psychology is called “*social contagion*.” For example, during the COVI-19 pandemic we saw this manifest in the buying and hoarding of toilet paper (*ibid.* at 22-23).

1399 Many of our modern technologies, advertisements, and social media platforms are meant to take advantage of these processes and neurological understandings. For more discussion see *ibid.* at 34-36.

1400 Willpower may work well in the short-term, but on its own it is mostly inadequate in achieving long-term and fundamental change (*ibid.* at 23).

1401 In neuroscience, one of the most foundational insights is that neurons that fire together, wire together. As we continue to practice and embody alternatives, those connection become stronger.

brains are *plastic*, and we can physically change them with dedication and embodied practice.¹⁴⁰² How we might choose to be in relationship with everything around us requires intentionality and discipline. The spiritual elements of W̱SÁNEĆ stories point toward a way of being that, if nurtured properly and intentionally, manifests in material change that affects our bodies, our minds, our spirits, and our relationships. This material shift is difficult to grasp unless you become involved in it. Ultimately, to practice Indigenous law you use your whole being, and the hardwork that requires is part of reciprocity.¹⁴⁰³

I want to also emphasize that I do not mean to propose that individuals alone, working to build new habits, practices, and ways of being, will solve all of our problems. There are far too many structural challenges and power dynamics involved in moving through colonialism and climate crisis, which themselves exert significant force in shaping subjectivities and behaviours. Both structural and subjective changes will be necessary.¹⁴⁰⁴ In this section I have focused primarily on the subjective, through this dissertation I hope to have given significant attention to structural aspects as well. What both of these look like put together, both far reaching subjective and structural changes, is the hardest question, and one that needs further work and thought in terms of what that specifically looks like. For now, I offer a more general orientation, which I will return to in my concluding chapter.

I also want to note that I do not believe there to be a singular approach to Indigenous law revitalization or climate crisis, and I recognize that the process of theorizing, including my own, functions to open or to close certain possibilities, which has ramifications not felt equally across a society. I tend to reject approaches to ‘reconciliation’ that fail to account for the foundational structures of the colonial relationship, or that work to simply shore up the colonial project - moving Indigenous peoples and authority to the past, and thereby securing unfettered continued access to Indigenous lands. In the same vein, I also tend to foreclose approaches that fail to present alternatives (explicitly or implicitly) to the climate crisis. I do, however, argue that my emphasis on W̱SÁNEĆ law and spirituality can open the possibility of generating life sustaining

1402 Given the recent prevalence of meditation and mindfulness in western culture, there has been a corresponding surge in research highlighting how dedicated meditation practice changes the brain.

1403 Some western scholars may want us to hand over our laws in an accessible and simplified form. This is contrary to reciprocity. You will not have given anything of yourself to understand what is being shared. You have to go through the process of your own learning. It was in this way that Indigenous societies were deeply individualist, even while communally oriented (Umeek, *Principles of Tsawalk* at 151).

1404 Coulthard, *Red Skin White Masks*.

practices in the face of colonialism and climate crisis. In my concluding chapter I will offer a brief glimpse of how that might shape the work still to come.

Chapter Eight

Conclusion: The 13 WSÁNEĆ Moons



Figure 23: “SIS,ET – The Elder Moon” Claxton & Elliott, *The Saanich Year at 1*.

1. Overview

Grounded in my own WSÁNEĆ legal order, I have set out in this dissertation to provide a sober accounting of the context in which the resurgence of WSÁNEĆ law is occurring, and clarity regarding what we hope to accomplish with the revitalization of WSÁNEĆ (and more broadly, Indigenous) law, both locally and in response to global climate crisis. In doing so I have endeavored to bring together bodies of scholarship not typically in collaboration. My position has been that our theory and methodology of Indigenous law revitalization, and our diagnosis and approaches to the climate crisis must be intricately entwined and mutually reflective. The argument flowing from that positioning is that nothing short of a fundamental reimagining of our relationships within the world, and thus the social, legal, political, and economic structures those relational understandings condition, is required.

As opposed to pan-Indigenous abstractions, I have argued that close attention to the specificities of distinct Indigenous legal orders is necessary. At the outset I could not assume readers would have any understanding of WSÁNEĆ law, nor even that we would share the same premises about law and how it operates. As such, it has been important to ground this discussion in ways that seek to relate and understand WSÁNEĆ law, on its own terms. Part I of this

dissertation was devoted to that purpose, beginning with who I am, where I come from, how I have been taught, and what all of that means in terms of shaping the contributions I share and perspectives and groundings I bring to this work. A significant theme emerging through that discussion is the importance of *place* and the ways in which W̱SÁNEĆ law flows from a relational and place-based ontology. My theorization of W̱SÁNEĆ stories and my discussion and illustration of land and place-based pedagogy not only shed light on additional elements and applications of W̱SÁNEĆ law, but furthered my emphasis on the importance of place in W̱SÁNEĆ law and thought.

Despite my emphasis on the importance of place within the W̱SÁNEĆ legal order, I have also maintained that in foregrounding place we quickly run into the conundrum that place is always entangled in relational dynamics that expand quickly beyond the local and immediate. The principal relational dynamics that I have been concerned with in this work relate to those of settler colonialism and global climate crisis. Therefore, while writing from a position grounded in W̱SÁNEĆ law and protocol, I have invited engagement with other sources, namely critical Indigenous studies and Marxist political ecology, as a way to help understand and engage with the entanglements of W̱SÁNEĆ law revitalization with ongoing settler colonialism and climate crisis. Chapter Four, in particular, offered an in-depth theorization of these entanglements through a focused look at climate crisis and a diagnosis of what has brought us to this troubling predicament, including specific critiques of capitalism, sovereignty, property relations, and the logic of a Nature/Society binary underlying each of these concepts. These connections and critiques were given greater specificity through their application to two case studies, one around land dispossession and LEL,TOS, and the other around jurisdictional dispossession of ocean territory.

Perhaps the main implication flowing from my theorization around Indigenous law revitalization, settler colonialism, and climate crisis, is the extent of change seemingly required to meaningfully respond to these challenges. I argue that climate crisis and a sober accounting of the context in which the resurgence of W̱SÁNEĆ law is occurring prompts us to question the very foundations of Canadian constitutionalism, and indeed, our most basic ideologies and conceptualizations of our place and relationships within the world. I also argue that enactments of Indigenous law and jurisdiction that resist the dispossession created through settler colonialism can also function to create important barriers to penetration by capitalism, and thus

combat climate crisis. Combating climate crisis is vital because climate crisis is, in itself, also a form of dispossession in the sense that it is a “slow violence of losing the capacity to exercise care” for our homelands. That is, it is a “theft of the ability to act and govern when our homelands are damaged” by such diffuse (spatial and temporal) harms.

In working toward the revitalization of W̱SÁNEĆ law, much of this project has involved providing a diagnosis of the predicaments we find ourselves in while undertaking that revitalization, and a theoretical orientation for forging a path forward. I have alluded to what all of this means moving forward, including near the end of Chapter Four and Part II when I stated that: “We need to find ways in which we can have economic relations not rooted in exploitation; that don’t view nature as external; where resources are not extracted for the profit of others, from elsewhere. In creating these alternatives we can look to Indigenous laws, governance, and ways of being. It is not enough to simply insert Indigenous content into an otherwise unacceptable framework. In addition to being *anti-capitalist* we also need a healthy dose of *countersovereignty*.”¹⁴⁰⁵

The main question that remains, and admittedly the hardest to answer, is *what does this look like* on the ground and how do we get there? I recognize that there is no single answer to this question. For one, it will be a product of ground up relationships and thus not predetermined. Secondly, given the diversity of places, Indigenous legal orders, and contexts, within Canada and around the globe, there is a significant degree of difference in building this movement. In terms of W̱SÁNEĆ territory, as one example of how this might happen, I noted at the outset that this is the more specific inquiry of my next research project. I can, however, provide very preliminary indications of where inspiration may lay.

2. The 13 W̱SÁNEĆ Moons

Building on the theories and methodologies developed in this dissertation, I will look next to applying these in broader and more in-depth studies relating to W̱SÁNEĆ territory and economies. Specifically, I will examine the 13 Moons of the W̱SÁNEĆ year, and what the revitalization of that mode of governance might entail. Traditional W̱SÁNEĆ life was based around the 13 Moons, which as mentioned, uses indicator species and close connection with the

¹⁴⁰⁵ Such a claim is consistent with Mann & Wainwright, *Climate Leviathan* at 15 who say that “only a theory capable of radically examining capitalism *and* sovereignty holds any hope of orienting us today.”

cycle of seasons to guide social, economic, legal, and spiritual activities. As W̱SÁNEĆ peoples, we share these Moons with the more-than-human world. At its foundation, this system of governance does not hinge on a troubling binary between Nature and Society, but rather, on deep relationality. Examining the 13 Moons of the W̱SÁNEĆ year is not about a return to the past, but rather, is a project embarking on an inquiry into what an Indigenous, anti-colonial, and anti-capitalist economy might look like in a rapidly warming world? What lessons might the revitalization of the 13 Moons governance structure hold in envisioning decolonized futures, and futures that might mitigate against at least the starkest impacts of climate change in a just manner? Such an inquiry is relevant to W̱SÁNEĆ and other Indigenous peoples, but also to all human and more-than-human beings on Earth.

In undertaking this project I will also draw inspiration from other work on Indigenous economies, Indigenous climate action initiatives, Indigenous resurgence practices, Indigenous food systems restoration, and other types of climate justice initiatives. Taken together, I hope to give a more in-depth answer to how might we create a roadmap and call to action for the cultivation of subjectivities and the creation of deep structural change that might represent an anti-colonial and anti-capitalist alternative to the status quo?

The 13 Moons, as an analytical lens, offers simultaneously both a micro and a macro perspective. In a very tangible way, the 13 Moons are local and place-based. Following the cycle of seasons, the 13 Moons governance structure brings W̱SÁNEĆ people to certain places, to carry out certain activities, and at certain times. Understanding that our creation stories are often tied directly to particular places and place-names, what teachings are present at these places, and during these seasons? Such an inquiry gives us insight into W̱SÁNEĆ law and life. However, we must also remember that place, just like people and seasons, are dynamic and ever changing from one to the next, and from year to year. We cannot, therefore, fully conceptualize and envision the 13 Moons as a singular circle, but rather, as concentric circles. In that sense, what can we understand about the dynamism of place, and place within climate change, both now and into the future? We can use the 13 Moons to also reach out beyond the local, and to think of the macro. In fact, the 13 Moons can also offer opportunities to layer in broader philosophical and existential questions, as well.

For example, we can briefly consider one of the W̱SÁNEĆ Moons, SIS,ET (The Elder Moon). SIS,ET might be thought of as either the last, or the first, Moon of the W̱SÁNEĆ year.

After all, where does a circle start? During this time of year the days are short, the weather is cold and less predictable, and more time is spent indoors and at winter villages. At the same time, SIS,ET is the most important time of year for winter ceremonies, and spiritual and cultural activities. Stories, as a tool for teaching and relating W̱SÁNEĆ laws about the right way to live, are also told during this time by elders to children and the young. The Moon following SIS,ET is ṈṈENE (Moon of the Child). ṈṈENE is a Moon that signifies a change, or being reborn – as nature begins to be each year after the Moon of SIS,ET. More can be said, but in our context, and as a peoples, what Moon are we in? Are we the elders or the children in this description? Or, perhaps, both? Are we in our final moon, or are we able to draw wisdom and learn from climate change? Can we see what has led us here, and then grow from that? Maybe, then, we are those children who heard the lessons of our elders about how to live in a good way, and have taken them to heart? Either way, there is clearly much at stake, and both the elders and the children are central to this depiction I am offering. It is an image that represents my understanding and approach to the revitalization of W̱SÁNEĆ law, and the 13 Moons governance structure. That is, as one of my teachers has said, “the old people are the song, and we are their echo.” We are shaped by the original voice, and those who came before us, even as we reverberate back based on our own context and surroundings. Therefore, as I look back to our teachings around the 13 Moons, it should be clear that I am also looking forward to what that means today, what it will mean for my son, and for other beings yet to come.

3. Closing SDIU,I,EL (Prayer)

HÍSW̱KE NEÇE XAXE TIFEŁ SIÁM. HÍSW̱KE MEQ ÇEN SÇA ÁŁE E TIÁ TENEW̱.
HÍSW̱KE MEQ TFE SILE Ć,SE LÁ,E TFE NOS SPWELLO. TX̱INET TOLW̱ ÁŁE E TIÁ
TENEW̱. ṮINET TOLW̱ I, ÇENÁNET TOLW̱ I,TELÁT E TFE ÍY, SOŁ. IYES ŁTE MEQ
ÇENs SÇA. MEQ ÇENs LÁ,TEN E TFE TENEW̱ I, TFE Á,LENENEÇ ŁTE. MEQ TFE
XAXE TIFEŁ SNÁNET LFE: ŁÁU,WEL,NEW̱, SPÁ,ET, SNAKE, PKOL,S, W̱SÁNEĆ I,
W̱SÁ,SENEĆ I, W̱,MÍETEN I,YOS. U, MEQ LELÁNEN SW̱ HÁLE. MEQ U, NEÇILYE
SI,I,ÁÁM. I,Á,MEKT NE SDIU,I,EL LÁ,E TFE XAXE E TIÁ ÁNEÇ. QENT TFE NE
SČALEĆE, QENT MEQ TFE NE ŠWEŁOKE. MEQ OL TFE NE NENNENE I, TFE NE
STOLES I, MEQ TFE STETI,ÇEN, I TFE NE SŁA,EL I, TFE NE SNÁTWEN I, SNENÁ,EN.
HÍSW̱KE SIÁM E TFE S,JESENEÇ I, MEQ TFE TELETOFELNEW̱, I, ŠETEN ČOLEK I,
TFE ŠISEĆ I, MEQ DENO,EN TFE KO, I TFE TŁÁLSE. ČEK TFE ŠÇEN,NE I, TFE
SDÁČEN I MEQ TFE TELETÁČES. LELÁNEN SW̱ NEÇILYE SI,I,ÁÁM. MEQ I,ÇELEN, I,
QELENSEN I, TFE JESKEN. TW̱ SŁEWÁL SW̱ TFE SČÁČEL MEQ U ŁNINEŁ.
ČA,NEUEL, I ČA ÇENTOL I, ŠTENIST TOLW̱ E TFE ÍY, SOŁ E TIÁ ÁNEÇ. HELIT SW̱

XAXE TITEL SIÁM EN SÇA TTEN SHUCÍSTENs I, TTEN SOXHELI. MEQ TTE NE
ŚĆÁLEĆE (STOLČEŁ, 2004).

Thank you high respected one, sacred spirit. Thank you for everything you have made on the Earth. Thank you for grandmother and grandfather four winds. Take pity on us the ones you left on this Earth. Take pity on us and help us take a good path on Earth. We are happy for everything you made on Earth and our homeland. All of our sacred mountains: Mt. Newton, Bear Hill, Mt. Tolmie, Mt. Douglas, the whole of Saanich and the little Saanich Mountain. All of you listen, all of your respected spirits. Listen to me respected hono(u)rable ones. Bring my prayer to the Great Spirit today. Look after my relatives. Look after my brothers, sisters, my children, my partner, all my nieces and nephews. My in-laws and my brother and sister in-laws and thank you respected one for the entire showing of things. All of the animals walking in the hills in the forest, salt water, ocean, and the lakes and all islands. Listen all of my respected ones all the ones flying, Bald eagle, Golden Eagle. Let there be peace amongst us today. Work together with one another. And move us forward on a good path today. Let your sacred teachings and environment laws live. All my relations.

STOLČEŁ, 2004¹⁴⁰⁶

1406 Sampson, *Auto-ethnography*.

Appendix I

(NMCAR Zoning. Source: Parks Canada, *Discussion Paper* at 10-11)¹⁴⁰⁷

Table 2: Proposed marine activities and uses by zone category in NMCAs

	Restricted Access	General Protection	Multiple Use with Lakebed/ Seabed Protection	Multiple Use	
Activities and Uses	Zone 1	Zone 2	Zone 3	Zone 4	Limits/Permits/Exceptions
Traditional use	✓	✓	✓	✓	Access and use by Indigenous peoples of an NMCA as per their rights will not be subject to zone restrictions except for conservation, public health or public safety reasons determined in consultation with Indigenous rights holders.
Research and monitoring	▲	✓	✓	✓	A permit will be required in all zones, and only limited access will be allowed in zone 1.
Recreational activities	✗	✓	✓	✓	No permits required. Limitations may apply in cases of visitor safety and resource protection.
Commercial tourism	✗	✓	✓	✓	A permit will be required for commercial recreational activities in zones 2-4.
Commercial shipping	✗	✓	✓	✓	Conducted in accordance with Transport Canada's legislative and regulatory framework. Anchoring may be restricted to ensure bottom protection.
Permanent moorings	✗	▲	▲	✓	Permit will be required, and conditionally allowed depending on nature of proposal and its location.

	Restricted Access	General Protection	Multiple Use with Lakebed/ Seabed Protection	Multiple Use	
Activities and Uses	Zone 1	Zone 2	Zone 3	Zone 4	Limits/Permits/Exceptions
Coastal and in-water infrastructure	✗	▲	▲	✓	Permit will be required, and conditionally allowed depending on nature of proposal and its location.
Recreational fishing	✗	✗	✓	✓	Conducted in accordance with <i>Fisheries Act</i> regulations, including stated limits and licensing requirements.
Commercial fisheries/harvest: water column	✗	✗	✓	✓	Conducted in accordance with <i>Fisheries Act</i> regulations, including stated limits and licensing requirements.
Commercial fisheries/harvest: bottom contact	✗	✗	▲	▲	Conducted in accordance with <i>Fisheries Act</i> regulations, including stated limits and licensing requirements.
Limited collecting for personal or educational use	✗	✗	✓	✓	Collection of renewable resources only (e.g. berries, sea shells). The collection of archaeological and historical artifacts, including fossils or species at risk is prohibited.
Recreational hunting	✗	✗	✓	✓	Conducted in accordance with applicable regulations, including stated limits and licensing requirements.
Renewable Energy	✗	✗	✗	▲	Permit will be required, and conditionally allowed depending on nature of proposal and its location.
Aquaculture	✗	✗	✗	▲	Permit will be required, and conditionally allowed depending on nature of proposal and its location.
Commercial fisheries/harvest: Bottom trawling	✗	✗	✗	✗	Prohibition following Government of Canada decision on recommendations from the national advisory panel on MPA standards.
Oil and Gas Exploration and Exploitation	✗	✗	✗	✗	Prohibition under the <i>Canada National Marine Conservation Areas Act</i> .
Mining	✗	✗	✗	✗	Prohibition under the <i>Canada National Marine Conservation Areas Act</i> .

Key:

✓	At the national scale, activity or use is deemed to be consistent with the purpose of the zone, and must be conducted in accordance with the purpose and objectives of an NMCA
▲	Conditionally allowed if activity aligns with site-specific objectives, and will depend on nature of proposal and its location
✗	Activity is deemed to be inconsistent with the purpose of the zone or the NMCA and will not be allowed.

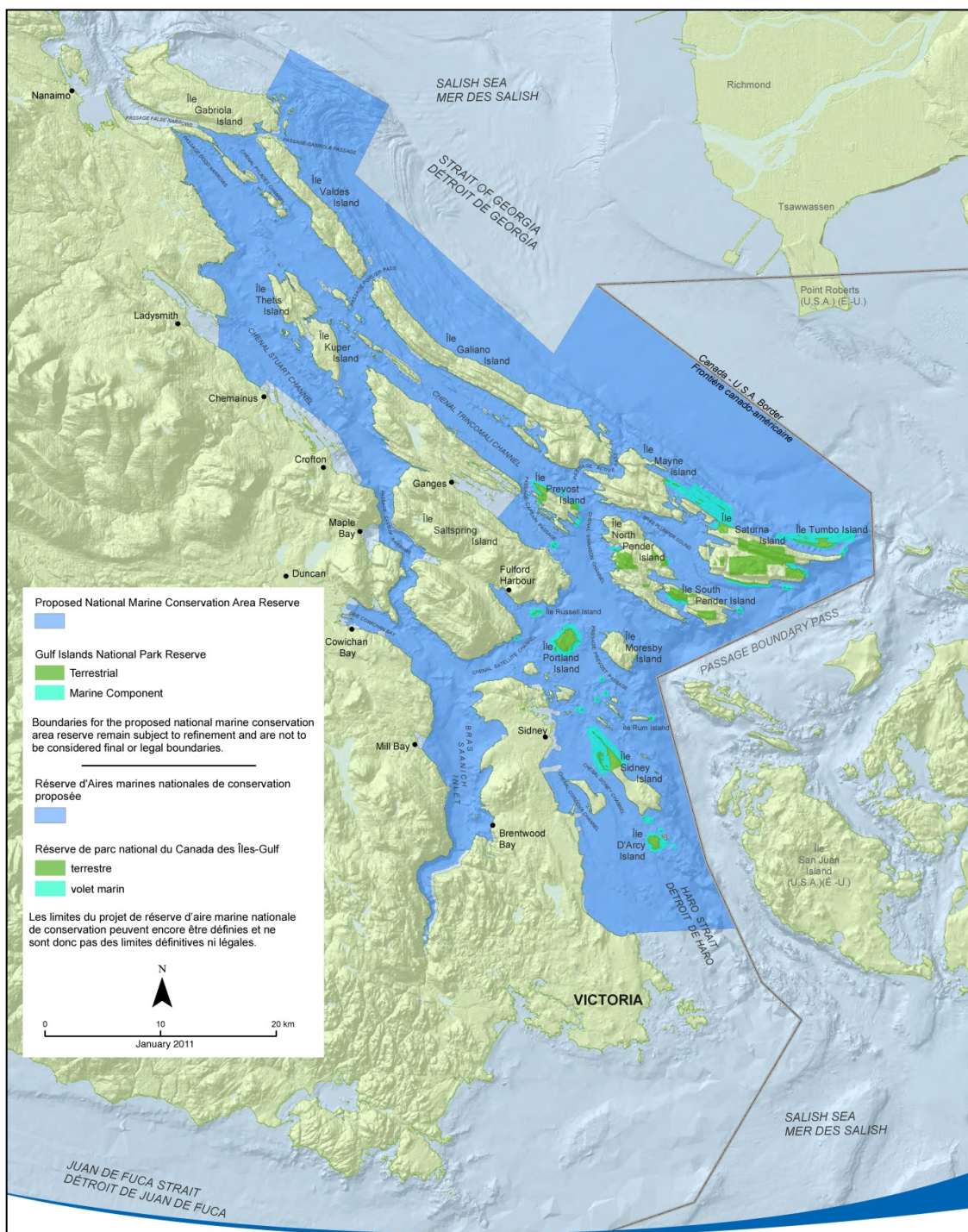
Notes:

- Note that some NMCAs may be more restrictive if that is decided upon during the collaborative management planning process.
- Activities related to search and rescue, Canadian sovereignty or security will not be restricted by NMCA zoning.
- The rights of Indigenous peoples are respected in NMCAs. Regulations or zoning restrictions do not apply to rights-based access and use of NMCAs by Indigenous peoples, except in consultation with Indigenous rights holders.

¹⁴⁰⁷ Recall that changes are proposed to Zone 3, which would create a "Habitat Protection Zone". Within that Zone, approval of most access and extractive uses would be conditional on whether or not they are consistent with broader goals of habitat protection, within specific habitats.

Appendix II

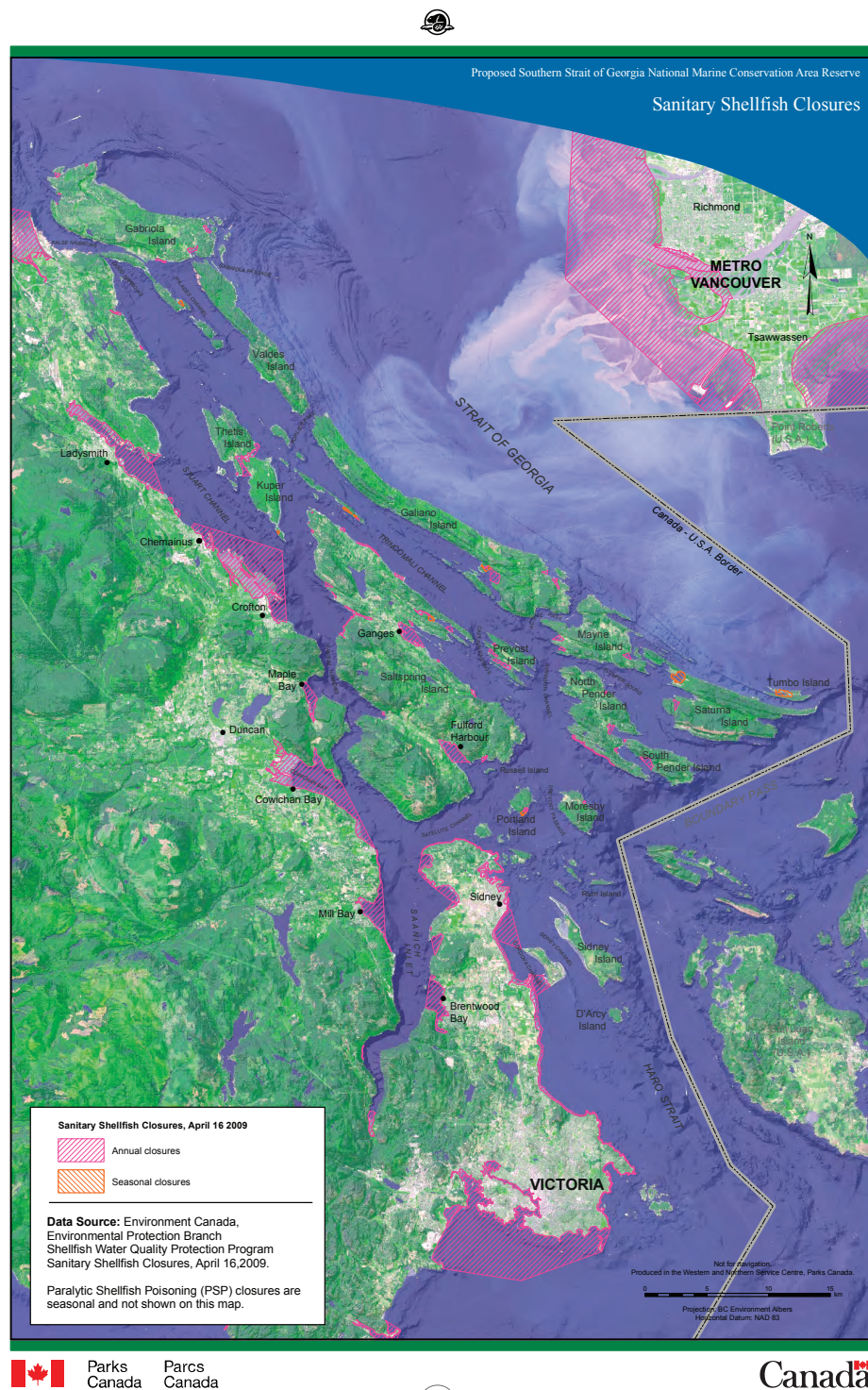
(NMCAR Proposed Boundary. Source: Parks Canada, *Study Area*)¹⁴⁰⁸



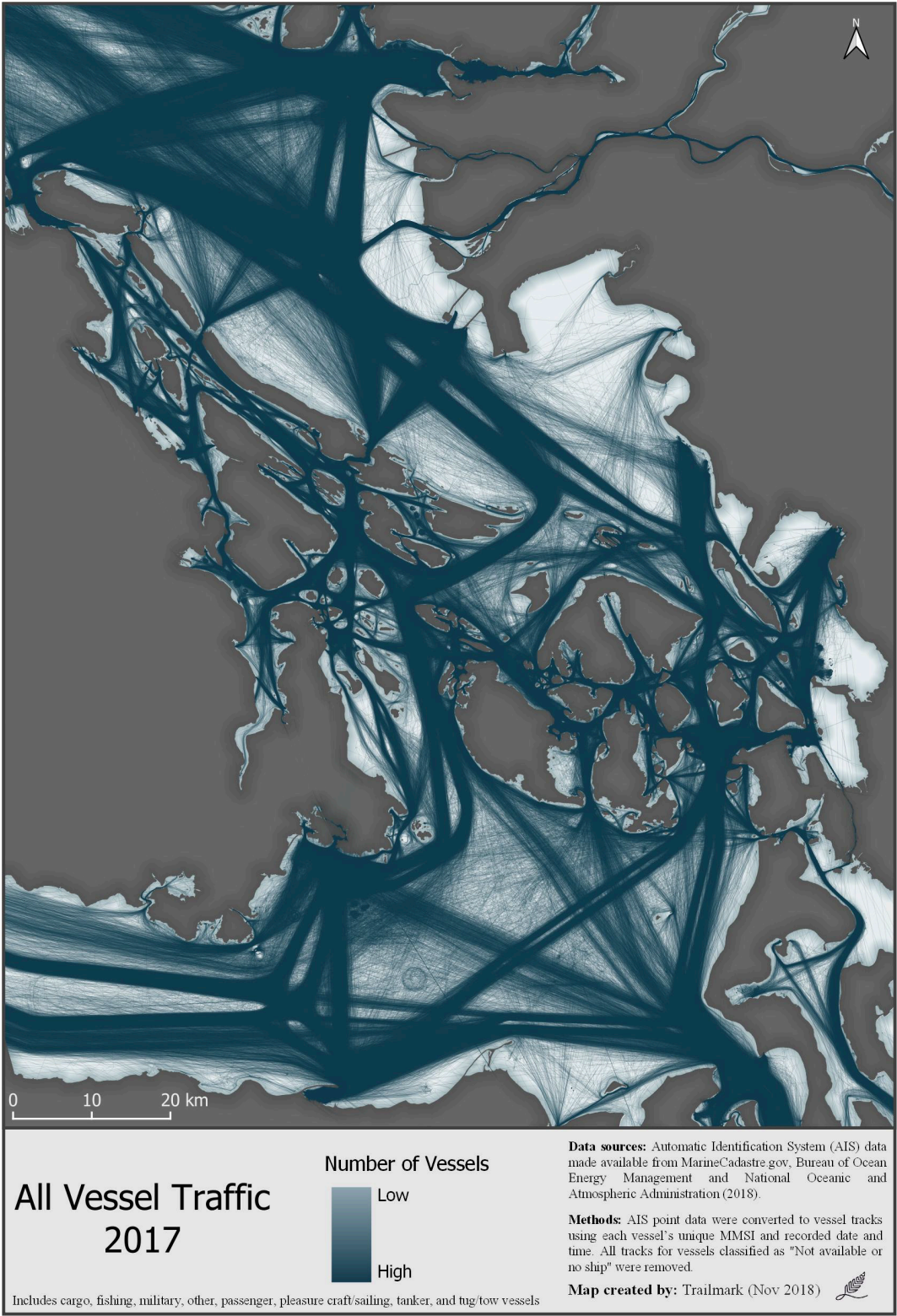
1408 Parks Canada, National Marine Conservation Areas, Study Area, available online at <https://www.pc.gc.ca/en/amnc-nmca/cnamnc-cnmmca/dgs-ssg/~media/E53B826CD158419481437C93AD0C0AD7.ashx> [Parks Canada, *Study Area*]. Note that excluded areas within the proposed boundary are not coloured.

Appendix III

(Sanitary Shellfish Closures. Source: Parks Canada, *Atlas* at 48)



Appendix IV
(Vessel Traffic in Strait of Georgia. Source: Trailmark, Nov. 2018)



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