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Indigenous Legal Traditions and the Future of Environmental Governance in Canada

Jessica Clogg, Hannah Askew, Eugene Kung, Gavin Smith<sup>a1</sup>

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*This paper provides an introduction to sources of Indigenous law and the theoretical underpinnings of Indigenous law-based approaches to contemporary environmental management in Canada. It then explores three case studies of Indigenous peoples that have used approaches grounded in their ancestral legal traditions to confront contemporary threats to their lands and waters. These case studies highlight how the Gitanyow Hereditary Chiefs, the Tseil-Waututh Nation and the Yinka Dene Alliance have effectively drawn on and enforced their own laws in order to address challenges to the integrity of their respective territories from resource development. Finally, the paper comments on the significance of this revitalization of Indigenous legal traditions and their application to contemporary environmental problems in light of federal environmental deregulation. It posits that the current revitalization of Indigenous legal traditions should be of interest to anyone concerned with the question of environmental governance in Canada today.*

*Dans cet article, les auteurs retracent les sources du droit autochtone et les bases théoriques des approches fondées sur le droit autochtone de la gestion environnementale contemporaine au Canada. Ils explorent ensuite trois situations où des peuples autochtones ont eu recours à des approches reposant sur leurs traditions juridiques ancestrales pour confronter des menaces contemporaines à leurs terres et eaux. Ces situations soulignent la manière dont les chefs héréditaires Gitanyow, la Nation Tseil-Waututh et l'Alliance Yinka Dene se sont effectivement inspirés de leurs propres lois et les ont appliquées afin de répondre aux menaces que représentait le développement des ressources à l'intégrité de leur territoire respectif. Enfin, les auteurs commentent l'importance de la résurgence des traditions juridiques autochtones et leur application à des problèmes environnementaux contemporains dans le contexte de la déréglementation fédérale en matière environnementale. Les auteurs font valoir que la résurgence actuelle des traditions juridiques autochtones devrait susciter l'intérêt de quiconque s'intéresse à la question de la gouvernance environnementale au Canada aujourd'hui.*

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### I. INTRODUCTION

“[A]boriginal rights, and in particular a right to self-government akin to a legislative power to make laws, survived as one of the unwritten ‘underlying values’ of the Constitution outside of the powers distributed to Parliament and the legislatures in 1867. The federal-provincial division of powers in 1867 was aimed at a different issue and was a division internal’ to the Crown.”<sup>1</sup>

“First Nations legal traditions are strong and dynamic and can be interpreted flexibly to deal with the real issues in contemporary Canadian law ...”.<sup>2</sup>

\*229 2012 saw a sea-change in Canadian federal environmental law, as most environmental statutes were repealed or substantially rewritten.<sup>3</sup> Canadian government documents disclosed through Access to Information requests<sup>4</sup> and public statements by federal officials,<sup>5</sup> suggest that changes were, at least in part, motivated by a desire to smooth the approval process for major oil and gas projects.

While provincial experience varies, in provinces such as British Columbia, federal deregulation in the natural resource sector followed on massive provincial deregulation approximately a decade earlier<sup>6</sup> --legislated environmental safeguards that have never been rebuilt even as progress is made through ‘oneoff’ negotiated outcomes in some areas of the province.<sup>7</sup>

However, this challenging legislative environment has an important counterpoint in the dynamic revitalization process that Indigenous law is undergoing in Canada today.

When Europeans arrived in what is today Canada, they settled in lands governed by Indigenous nations according to their own legal traditions, land tenure systems, and governance structures. The Supreme Court of Canada has recognized that

for long before Europeans arrived in Canada, Indigenous peoples occupied the land in “organized, distinctive societies with their own social and political structures.”<sup>8</sup> In the words of United States Chief Justice Marshall, cited by Hall J. in *Calder v. Attorney General of British Columbia*:

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each \*230 other and of the rest of the world, *having institutions of their own, and governing themselves by their own laws* [emphasis in original].<sup>9</sup>

It is now well understood that North America was not uninhabited *terra nullius*,<sup>10</sup> but rather an actively managed environment in which historical ecological conditions were shaped by Indigenous management of land and resources.<sup>11</sup> For millennia, management according to norms established through Indigenous legal traditions helped shape the range in historic ecosystem conditions that sustained all life forms.<sup>12</sup>

The colonial imposition of federal and provincial laws permitted the allocation and exploitation of the wealth of the land without regard to the inherent title and authority of these nations. It has been argued that the degradation of many nations' territories today can be linked to the suppression, and in some cases outright prohibition,<sup>13</sup> of Indigenous governance systems and Indigenous law.<sup>14</sup> However, in the decades since the 1982 protection of existing Aboriginal and Treaty rights in the Canadian constitution,<sup>15</sup> new political and legal space has been opened up for the recognition and exercise of Indigenous governance and environmental management rights.<sup>16</sup>

\*231 This paper provides an introduction to sources of Indigenous law and the theoretical underpinnings of Indigenous law-based approaches to contemporary environmental management. It then explores three case studies of Indigenous peoples that have used approaches grounded in their ancestral legal traditions to confront contemporary threats to their lands and waters. Finally, it comments on the significance of this revitalization of Indigenous legal traditions and their application to contemporary environmental problems in light of federal environmental deregulation in Canada.

## II. DEFINING AND ACCESSING INDIGENOUS LEGAL TRADITIONS

Following the scholarship of Cree/Gitksan legal scholar Val Napoleon, we use the term “Indigenous legal traditions” throughout this paper to broadly encompass various Indigenous legal orders (structure and organization of laws) and Indigenous laws within those orders. As Napoleon explains, the term “legal system” may be used to describe a state-centred legal system where law is managed by legal professionals in legal institutions that are separate from other social and political organizations. In contrast, the term “legal order” may be used to describe law that is embedded throughout social, political, economic and spiritual institutions. The Canadian state may be said to use a legal system, while Coast Salish people, for example, have traditionally relied upon a legal order.<sup>17</sup>

Due to the diversity of First Nations peoples across Canada, there is no one Indigenous legal order.<sup>18</sup> According to Anishinaabe legal scholar John Borrows:

[The] underpinnings of Indigenous law are entwined with the social, political, biological, economic and spiritual circumstances of each group. They are based on many sources including sacred teachings, naturalistic observations, positivistic proclamations, deliberative practices and local and natural customs.<sup>19</sup>

Some examples of sources that may be accessed when researching Indigenous laws include Elders and Indigenous knowledge keepers, published stories, oral histories and narratives, songs, ceremonies, language, dreams, the land, art, petroglyphs, scrolls, and published anthropological and historical research.<sup>20</sup>

\*232 The legal scholar James (Sáké j) Youngblood Henderson has suggested that Indigenous legal traditions are best accessed in the context of an Indigenous people's language, stories, methods of communication, and styles of performance and discourse because these are mediums that frame understanding and encode values.<sup>21</sup> These are the mediums used to communicate Indigenous law to the family and to the community, by conceptualizing values and good relationships. In the process of transmitting and negotiating Indigenous law, Elders (particularly those that are fluent in an Indigenous language) and other particularly knowledgeable community members will be the primary authorities for interpreting Indigenous jurisprudence.<sup>22</sup>

Henderson also posits that Indigenous jurisprudence exists not as a rigid set of rules, but rather as a set of interlocking and overlapping processes (including storytelling, perceptions, sensations, and a variety of activities) that collectively make up teachings, customs and agreements. He compares these overlapping processes to the synesthetic tradition of early Greek and Hebrew societies, noting that Indigenous jurisprudence and law are communicated through a broad range of media that encompass “the entire sensory spectrum”, using sound, touch, sight, taste and smell to communicate and reinforce legal meanings.<sup>23</sup>

Indigenous legal traditions manifest themselves through social experiences that involve people communicating with one another about how to best conduct relationships and resolve disputes.<sup>24</sup> The practice of Indigenous law involves an ongoing process of negotiation, discussion and compromise. Underlying principles and shared understandings provide the framework in which these negotiations occur. As theorist Robert Cover explains:

A legal tradition [ ... ] includes not only a *corpus juris* but also a language and a mythos--narratives in which the *corpus juris* is located by those whose wills act upon it. These myths establish a repertoire of moves--a lexicon of normative action--that may be combined into meaningful patterns culled from meaningful patterns of the past.<sup>25</sup>

The language and mythos that underlie particular Indigenous legal orders form the framework in which deliberation occurs. This framework provides the basis for the choices and strategies that individuals and groups may draw upon when faced with challenge or conflict.

### \*233 III. RECOGNITION OF INDIGENOUS LEGAL TRADITIONS BY CANADIAN COURTS

Although there are many unresolved questions about the Canadian legal system's recognition of the scope and authority of Indigenous legal traditions, it is clear that the Canadian common law recognizes the existence and exercise of Indigenous laws. In the words of Canada's current Supreme Court Chief Justice Beverly McLachlin in *R. v. Van der Peet* (in dissent but on another point):

The history of the interface of Europeans and the common law with aboriginal peoples is a long one. As might be expected of such a long history, the principles by which the interface has been governed have not always been consistently applied. Yet running through this history, from its earliest beginnings to the present time is a golden thread: the recognition by the common law of the ancestral laws and customs [of] the aboriginal peoples who occupied the land prior to European settlement.<sup>26</sup>

There are different possible ways that an exercise of Indigenous law can be recognized in Canadian law. An exercise of Indigenous law may be connected to Aboriginal title, which in the words of the Supreme Court of Canada in *Tsilhqot'in Nation v. British Columbia*, includes “the right to decide how the land will be used” and “the right to pro-actively use and manage the land.”<sup>27</sup> The Supreme Court of Canada noted in *Delgamuukw v. British Columbia* that “... the source of aboriginal title appears to be grounded both in the common law and in the aboriginal perspective on land; the latter includes, but is not limited to, their systems of law.”<sup>28</sup> In discussing Aboriginal title in *R. v. Marshall*; *R. v. Bernard*, the Supreme Court quoted with approval the statement of Professor Borrows that: “Aboriginal law should not just be

received as evidence that Aboriginal peoples did something in the past on a piece of land. It is more than evidence: it is actually law.”<sup>29</sup>

The exercise of Indigenous law may also be linked with other constitutionally-protected rights of Indigenous peoples, particularly governance rights. The current law laid out by the Supreme Court of Canada in *R. v. Pamajewon* is that Canadian courts will consider Aboriginal governance rights on a subject-by-subject basis depending on the particular facts at issue, using the same test that a Court applies to the determination of other Aboriginal rights such as fishing or hunting rights.<sup>30</sup> However, it is clear that Canadian common \*234 law recognizes that Indigenous peoples continue to act according to their own laws, and that those laws emanate from a constitutionally-protected governance authority which is distinct from the authority of the federal and provincial governments. In finding that an Aboriginal right to self-government “akin to a legislative power to make laws” survived the division of powers between Parliament and the legislatures in 1867, the British Columbia Supreme Court in *Campbell* was cognizant of the pre-existing legal traditions of Indigenous peoples that continued after contact with Europeans.<sup>31</sup>

The former United Nations Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, affirmed that Aboriginal governance rights are protected by Canada's Constitution in his 2014 final report on the situation of Indigenous peoples in Canada:

Notably, Canada recognizes that the inherent right of self-government is an existing aboriginal right under the Constitution, which includes the right of indigenous peoples to govern themselves in matters that are internal to their communities or integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources.<sup>32</sup>

From these examples we can see that Indigenous peoples' exercise of their own laws can be recognized in Canadian common law, and their inherent governance authority afforded constitutional protection.

#### IV. CASE STUDIES IN THE APPLICATION OF INDIGENOUS LAW

Having set out some of the theoretical underpinnings regarding Indigenous law, including Canadian and international recognition of these laws, we offer three examples of its application to contemporary environmental issues. These case studies are not meant to be a comprehensive list of how Indigenous law is practiced. Rather, they illustrate three of the multitude of ways that these dynamic legal traditions can be interpreted and applied flexibly to deal with everyday issues.

##### \*235 V. CASE STUDY #1: UPHOLDING THE LAW, PROTECTING THE LAND, SHARING THE WEALTH: THE GITANYOW LAX'YIP LAND USE PLAN

The first case study represents an example of a proactive application of Indigenous law and governance to develop an overall strategic vision and plan for Gitanyow territories, applicable to all land and resource decisions.

###### (a) The Gitanyow

The Gitanyow are an Indigenous people whose *Lax'yip* (territories) encompass approximately 6,300 square kilometres in the middle-Nass and upper Skeena Watersheds (Kitwanga and Kispiox Rivers) of what is today British Columbia. The Gitanyow Peoples are known collectively as the Gitanyow *Huwilp* and are organized into eight matrilineal *Wilp* (Houses) from two clans, the *Lax Gibuu* and the *Lax Ganeda*.<sup>33</sup> The *Wilp* is the primary political, social, and decision-making unit of the Gitanyow.<sup>34</sup> Each *Wilp* has a *Simogyet* (chief) who is selected, validated and may be removed by the *Wilp* members in accordance with the Gitanyow *Ayookxw* (law) at the *Wilp Li'ligit* (feast).<sup>35</sup> The *Adawaak* or “true tellings” of the Gitanyow record the ancient oral record of the history and territories of each *Wilp*, which typically encompass a watershed or other defined geographic unit. The *Ayookxw* regarding ownership and management of land and resources

“are founded on knowledge, experience and practice which are thousands of years old and are recounted in the *Adawaak* and *Ayuuks*”<sup>36</sup> (ancient *Wilp* crests displayed on regalia and totem poles or *Git'mgan*).<sup>37</sup>

### (b) A History of Unsustainable Logging in the Lax'yip

In 1846 when the Crown asserted sovereignty in British Columbia through the Oregon Boundary Treaty, the “white economy and society maintained only a marginal and indirect presence”<sup>38</sup> in the Gitanyow *Lax'yip*, and Gitanyow continued to resist encroachment and settlement in its territories for decades.<sup>39</sup> In 1948 northwest BC became ground zero for industrial logging in BC with the granting of BC's first long term Forest Management Licence (later known as \*236 Tree Farm Licence 1), which provided exclusive timber harvesting rights to Columbia Cellulose Company Ltd. (later Skeena Cellulose) in portions of Gitanyow territory.<sup>40</sup> However, prior to the 1960s there was no public highway in the Gitanyow *Lax'yip* and few logging roads. In the 1960s, highway construction first provided permanent access through Gitanyow territories; the allowable annual cut from the *Lax'yip* increased dramatically and logging has continued until the present day. As a result of decades of clearcut logging: “large areas of habitats required to support plants, birds, fish, animals that Gitanyow *Huwilp* members traditionally used for sustenance and cultural purposes have been lost to Gitanyow use,”<sup>41</sup> and Gitanyow law and culture have been undermined. In the words of Madam Justice Neilson of the British Columbia Supreme Court:

Removal of resources has prevented the Hereditary Chiefs from carrying out their duties under Gitanyow *Ayookxw*, or law, to manage their *Wilp* territories and resources to ensure future sustainability. As well, they have been unable to draw on these resources to maintain their *Wilp* culture and traditional activities, and instead must use personal funds for these purposes. Gitanyow say that this has caused not only financial hardship, but pain and shame among its people.<sup>42</sup>

In 2002, against this backdrop of decades of overharvesting, compounded by licensees' failure to meet their silviculture obligations or deal with hundreds of kilometres of abandoned and unmaintained road networks, the provincial Crown consented to a change in control (and thus the transfer of timber tenures held by the now almost bankrupt Skeena Cellulose) to NWBC Timber & Pulp Ltd. In a judicial review brought by Gitanyow and other impacted nations, Tysoe J. held that the Crown had failed to adequately consult them before making its decision.<sup>43</sup> In negotiations following the successful litigation, the Gitanyow sought the development of a land use plan that provided high-level strategic direction for resource management in its territories according to its own laws.<sup>44</sup>

### (c) Strategic Land Use Planning for *Wilp* Sustainability

For Gitanyow, the process of developing the *Gitanyow Lax'yip Land Use Plan* was an application of the principle of *Gwelx ye'enst* in Gitanyow law: the ultimate responsibility of the *Simogyet* to “hold, protect and pass on the land in a \*237 sustainable manner from generation to generation”.<sup>45</sup> This legal obligation is the foundation of an integrated social, ecological, economic, legal and cultural system. The legal obligations associated with *Gwelx ye'enst* thus encompass responsibilities:

... not just to the health of land and water, but the whole system: the house, the authorities, the ranks of the house, the oral history, and the laws, tying them to the land and allowing the system to continue through time. What we inherited from our grandparents, we live today and are required to pass along to future generations; their rights and obligations flow to us, and will continue to flow like a river through time from the *Wilp* down through the generations.<sup>46</sup>

The *Hla' Am Wil* or wealth of the land, air and waters of the *Lax'yip* must be stewarded to pass on to future generations in order to uphold the *Ayookxw* relating to land ownership, which requires, for example, distribution of wealth in the

*L'ligit* and the carving and raising of *Git'mgan*.<sup>47</sup> Thus, there is an inextricable relationship between healthy, functioning ecosystems that sustain these resources at the *Wilp* level and the functioning of the Gitanyow legal order.

Through the *Gitanyow Lax'yip Land Use Plan* the Gitanyow Hereditary Chiefs also sought to give effect to a series of legal rights and responsibilities associated with *Daxgyet*, or *Wilp* authority and power arising from “the fundamental relationship between the House and the land.”<sup>48</sup> Each *Wilp* “has the legal and political responsibility to maintain its power relationship, its *daxgyet*. There is no higher political or legal authority than the House”, although “there are ongoing consultative processes that work horizontally between House groups.”<sup>49</sup>

Each lineage has an ancient ancestor that encountered and acknowledged the life of the land, and this is the source of the chief's *daxgyet*. The system of chiefly names and Houses connects to this *daxgyet* to create obligations that the chiefs must maintain through the generations. Acquisition of House territories and other forms of intellectual property (e.g., crests, songs, spiritual powers, etc.) are recorded in the House's *adaawk*. This broad web of names, relationships, and oral \*238 histories is the basis of the Gitksan system of governance and the Gitksan legal order.<sup>50</sup>

Gitanyow *Ayookxw* does not permit the *Huwilp* to alienate or relinquish *Wilp* territories, and unauthorized use of *Wilp* territories or resources is prohibited.<sup>51</sup> Permission must be sought from the *Simogyet* before *Wilp* territories or resources are used,<sup>52</sup> and a share of what is harvested or its value must be paid back to the *Wilp Simogyet* as a condition of the consent granted.<sup>53</sup>

#### (d) The Gitanyow Lax'yip Land Use Plan

A planning team consisting of Hereditary Chiefs and technical experts worked for close to a decade to develop the *Gitanyow Lax'yip Land Use Plan*. The plan reflects the outcome of a deliberative process in which authoritative decision-makers within Gitanyow's legal order and governance structure applied legal principles flowing from their traditional narratives (*Adawaak* and *antamahlaswx*) to develop an overall strategic plan for the *Lax'yip* of the *Huwilp*. In this manner the resulting plan both gives effect to and forms part of Gitanyow law.

The cornerstone of the *Gitanyow Lax'yip Land Use Plan* is an interconnected network of conservation areas that will be maintained predominantly in natural condition (i.e., conditions similar to those under exclusive Gitanyow management prior to European colonization). These include both new and existing protected areas<sup>54</sup> where industrial resource extraction is prohibited, and the following legally designated management zones with detailed management objectives:

- *En'hlu4ik Sim'aks* (Water Management Units)
- *En'sii'wineex* (Ecosystem Networks)
- *Old Growth Management Areas*
- *En'jokhl'liki'insxw* (Grizzly Bear Habitat Complexes and Grizzly Bear Specified Areas).
- *En'jokhl'metx'* (Mountain Goat Winter Range).
- *En'si'linisxw* (Special Habitats for General Wildlife)
- *En'sii'wil jokxw* (Gitanyow Cultural Sites).<sup>55</sup>

\*239 The *Gitanyow Lax'yip Land Use Plan* uses the *Simalgyax* term *Ha'nii tokxw*,<sup>56</sup> literally “our food table” to refer to this interconnected conservation area, which is “intended to maintain and enhance the availability of Gitanyow foods and protect the water that is the lifeblood of the Gitanyow *Lax'yip*.”<sup>57</sup> The plan seeks to maintain

the integrity of the *Lax'yip* “including lands, waters, land forms and life forms within the boundaries of a specific Wilp Lax Yip including plants, animals, birds, and fish resources which make the Wilp Lax Yip home permanently or periodically.”<sup>58</sup>

A fundamental goal of the *Gitanyow Lax'yip Land Use Plan* and related planning initiatives is to maintain *Wilp* sustainability, consistent with the Gitanyow legal principles related to *Daxgyet* and *Gwelx ye'enst*. This means that in addition to maintaining ecological conditions to meet biodiversity objectives at a regional scale or throughout Gitanyow territory, sufficient old growth forest and other resources must be maintained at the *Wilp* level in order to maintain low risk to ecological functioning at that scale.<sup>59</sup>

In March 2012 the Province of British Columbia and the Gitanyow Hereditary Chiefs (the “Parties”) concluded the *Gitanyow Huwilp Recognition and Reconciliation Agreement*, which includes the *Gitanyow Lax'yip Land Use Plan*. It commits the Parties to collaborative implementation of the plan “according to the Parties' respective laws, policies customs traditions and decision-making processes.”<sup>60</sup>

Although the original catalyst of the planning process was Gitanyow concerns about logging, in the *Recognition and Reconciliation Agreement* the Parties agree that the *Recognition and Reconciliation Agreement* applies to all Land and Resource Decisions in the *Lax'yip*.<sup>61</sup> The *Recognition and Reconciliation Agreement* establishes a “shared decision-making” process for this purpose, including a consensus-seeking technical Joint Resources Council and a political Joint Resources Governance Forum made up of half Gitanyow and half provincial representatives, as well as dispute resolution mechanisms.<sup>62</sup>

#### **\*240 (e) The role of the federal Crown**

In the context of the Canadian constitutional division of powers some decisions about the environment and natural resource development are presently made by the federal government (e.g., *Fisheries Act* authorizations, National Energy Board certificates for interprovincial pipelines). However, from the perspective of Gitanyow *Ayookw*, the *Gitanyow Lax'yip Land Use Plan* applies to all uses and activities in the *Lax'yip* regardless of how Canada and the provinces divide matters between themselves. The Gitanyow Hereditary Chiefs have taken steps to enforce the land use plan with both levels of government. For example, when the route of the Northwest Transmission line was proposed to pass through the Hanna Tintina watershed, the Gitanyow Hereditary Chiefs commenced litigation against the federal Crown,<sup>63</sup> and were ultimately able to negotiate a change in route with the relevant parties to avoid this sensitive area.

In 2009 guidance from the Canadian Council of Environment Ministers acknowledged that a project-by-project approach to assessing impacts of resource development was not working in Canada today and that a more regional, strategic approach was required: “an approach that addresses cumulative environmental effects of human development actions and provides direction for planning and development decision making beyond that which is possible in project-based impact assessment”.<sup>64</sup> The application of the Gitanyow *Ayookw* to assess the impact of various development scenarios in the *Lax'yip* on *Wilp* sustainability, and to formalize legal management objectives in the *Gitanyow Lax'yip Land Use Plan* demonstrates the potential of Indigenous law-based approaches to help fill this gap.

## **VI. CASE STUDY #2: THE YINKA DENE ALLIANCE AND ENBRIDGE NORTHERN GATEWAY**

Another prominent example of First Nations applying their legal traditions in a dynamic way to deal with new issues can be seen in the approach of the Yinka Dene Alliance (“YDA”) to the Enbridge Northern Gateway pipelines and tankers proposal (“Northern Gateway”).<sup>65</sup>

#### **\*241 (a) The Yinka Dene Alliance**

YDA is a coalition of First Nations that includes Nak'azdli, Nadleh Whut'en, Saik'uz, Takla Lake, Tl'azt'en and Wet'suwet'en First Nations, which formed to address Northern Gateway.<sup>66</sup> YDA First Nations are part of the Yinka Dene or Dakelh people. Yinka Dene translates in English to “people of the earth” or “people for the land” and Dakelh translates to “travelers on water.”<sup>67</sup> The Yinka Dene or Dakelh people have also been known by the name Carrier, and each YDA First Nation is a member of the Carrier Sekani Tribal Council.<sup>68</sup> The territories of YDA First Nations are located in the central interior of British Columbia, comprising approximately twenty-five percent of the land base through which Northern Gateway's proposed pipelines would travel.<sup>69</sup>

### (b) The Northern Gateway Proposal

The Northern Gateway proposal consists of twin pipelines along a common 1,178 kilometre right of way from Bruderheim, Alberta, to Kitimat, British Columbia. One of the twin pipelines is proposed to transport an average of 525,000 barrels per day of heavy oil from Alberta's oil sands to a tank farm and marine terminal in Kitimat, from which tankers would ship the oil through BC's coastal waters out to international markets. The second pipeline is proposed to transport an average of 193,000 barrels per day of condensate, received via tanker shipments to Kitimat, eastward to Alberta where it would be used to dilute oil sands bitumen for transport.<sup>70</sup> Two YDA First Nations, Nak'azdli and Nadleh Whut'en, are currently pursuing a judicial review of Canada's approval of Northern Gateway in the Federal Court of Appeal, and much of the information below is drawn from documents in that proceeding.

### (c) Applying Yinka Dene Law

YDA First Nations, initially through the Carrier Sekani Tribal Council (“CSTC”), quickly took on a key role regarding Northern Gateway that emphasized the application of their own legal traditions and governance systems. Following the filing of Northern Gateway's Preliminary Information Package in 2005, CSTC released a detailed *Aboriginal Interest and Use Study on the Enbridge Gateway Pipeline* (“nvirAboriginal Interest and Use Study”) in May 2006, which, \*242 *inter alia*, recommended the completion of a First-Nations led review process for Northern Gateway with other First Nations along the corridor, and concluded that meaningful involvement of CSTC First Nations in the decision-making processes regarding Northern Gateway was required. These conclusions were based in part upon the governance systems of CSTC First Nations, summarized in the Aboriginal Interest and Use Study as follows:

The Carrier Sekani have been self-governing and self-reliant for thousands of years. The health and wellbeing of both the people and the land was ensured through the *Keyoh* and *Bahlats* system. The *Keyoh* is the system of land ownership and management which delineates use and access by clan membership. The clans of the Carrier Sekani are matrilineal entities that are maintained through exogamy (i.e. marriages allowed only with members of other clans). Each clan has a distinct *Keyoh* or traditional territory that it owns and controls. The boundaries of the *Keyoh* are often mountains, rivers, creeks, lakes and other natural landmarks. The *Bahlats* is the central institution through which the *Keyoh* are managed, owned and protected. *Bahlats* has come to be known as a potlatch to non-Native people ...

Clan membership and hereditary names are the structure through which the *Bahlats* operates. People are seated according to their clan, and strict protocol is followed in terms of the host and guest clans. Clan Elders and Hereditary Chiefs are central figures in maintaining the information base that allows a clan to validate the boundaries of the *Keyoh* and the resource use within them.<sup>71</sup>

A steering committee with representation from CSTC and other First Nations was established to develop a review process, and CSTC tabled a proposal with the federal government for parallel, harmonized federal and First Nations review of Northern Gateway.<sup>72</sup> The proposal, however, was rejected by the federal government.<sup>73</sup>

\*243 After the proponent filed a formal application for Northern Gateway, YDA organized a gathering of impacted First Nations that together created and signed the Save the Fraser Declaration (the “Declaration”) in 2010.<sup>74</sup> The

Declaration has been described as an instrument through which the signatory First Nations affirm that, pursuant to their laws, they have refused permission for Northern Gateway to cross their ancestral lands and waters.<sup>75</sup> The Declaration reads in part:

We are united to exercise our inherent Rights, Title and responsibility to ourselves, our ancestors, our descendants and to the people of the world, to defend these lands and waters. Our laws require that we do this.

Therefore, in upholding our ancestral laws, Title, Rights and responsibilities, we declare:

We will not allow the proposed Enbridge Northern Gateway Pipelines, or similar Tar Sands projects, to cross our lands, territories and watersheds, or the ocean migration routes of Fraser River salmon.<sup>76</sup>

The Declaration was formally served on the corporate offices of Enbridge Inc., and in subsequent years YDA First Nations continued to emphasize the application of their laws, including by travelling to Enbridge Annual General Meetings in Calgary and Toronto.<sup>77</sup> YDA also emphasized to the federal government that the Crown's constitutional duty to consult and accommodate YDA First Nations includes consultation and accommodation regarding the application of, and impacts upon, their laws and governance system in the context of Northern Gateway.<sup>78</sup>

Following the federal Joint Review Panel's recommendation that Cabinet approve Northern Gateway, YDA convened an All Clans Gathering attended by hundreds of Yinka Dene including hereditary leaders, *keyoh* representatives, Elders, elected leaders, and other clan members.<sup>79</sup> YDA also invited several federal Ministers to the All Clans Gathering, who did not attend; however, a panel of federal delegates attended.<sup>80</sup> Speakers at the All Clans Gathering set out the reasons for their rejection of Northern Gateway, and emphasized that the Crown needs to “work to understand our laws” on a government-to-government basis in order to “make room” for both Canadian and Yinka Dene laws and \*244 governance.<sup>81</sup> Attendees at the All Clans Gathering were seated according to protocol and made contributions, pursuant to their laws, that were gathered as a payment to “hire” the federal delegates to carry their message back to Cabinet.<sup>82</sup> Hereditary Chief Tsodih, of Nak'azdli, concluded the following in an address to the panel of federal delegates:

According to our laws, we go to the people, and the people direct us on the ways of governance. We went to the people and we explained this project to them, and it was explained to them over and over again, just the enormity of it, and overall the people have said absolutely no. We don't have one person in our nation whose *keyoh* that crosses who has said okay to the disturbance that's proposed. So, through all the meetings and through all the lessons learned and all the history gathered from the *keyohs*, that was requested, the message that was passed down, being delivered today, and the reason you're here today and we're seated in this manner--this is the traditional way that we sit, we've got the clans seated in the proper orders--and the reason for that is: this is official notice to the federal government that under no circumstances is any heavy oil pipeline, including Enbridge, going to be allowed in Dakelh territory.<sup>83</sup>

It is beyond the scope of this paper to explore in any depth the laws of the Yinka Dene which, as noted in the written argument in Nak'azdli and Nadleh Whut'en First Nations' judicial review, are intertwined with a system of governance that is complex and multi-faceted, requiring work to understand and appreciate.<sup>84</sup> However, it is evident from Chief Tsodih's words, and from the evidence filed by Nak'azdli and Nadleh Whut'en First Nations in their judicial review, that the application of the laws of the Yinka Dene in the context of Northern Gateway required extensive deliberation, including: numerous meetings of hereditary leaders, elected leaders, *keyoh* representatives and others; interviews with elders and *keyoh* representatives; engagement of consultants, academic scholars, scientists and First Nations' staff and community members to conduct research; review of evidence filed with the Northern Gateway Joint Review Panel; production of studies; and numerous community meetings.<sup>85</sup>

The Yinka Dene have also expressed some of the substantive principles that informed the application of their laws, such as a stewardship obligation for present and future generations. For example, the Aboriginal Interest and Use **\*245** Study observes that it is not possible to guarantee against a spill from Northern Gateway, and that such a spill would damage the very identity of the Yinka Dene, quoting the teachings of Bernadette Rosetti and other Nak'azdli elders as told by Marlene Erickson:

Originally the Beaver Clan members were stewards of the Stuart River. Their responsibility was to care for the river and anything affecting its health. It was their responsibility to ensure that there were resources for their generation and the many generations to follow. When traplines were introduced to the Nak'azdli territory, Chief Louie Billy and Leon Cho Prince were allocated traplines along the Stuart River. They considered themselves as the caretakers of the entire river. Leon Cho was especially mindful of his duties: sometimes people said "That Leon Cho thinks he owns the river". As such there are still Nak'azdli members who take the stewardship of the river seriously. Should a disaster occur, their reputation and identity as good stewards of the land would be diminished. This responsibility is something that is ingrained in the minds and hearts of the Nak'azdli people. <sup>86</sup>

Although the federal government has approved Northern Gateway, consolidated judicial reviews of that approval brought by thirteen different Applicants (eight of which are First Nations) are proceeding in the Federal Court of Appeal and Northern Gateway has been unable to demonstrate to the National Energy Board any firm transportation service agreements with shippers, which are required before any construction on Northern Gateway is authorized under the federal approval. <sup>87</sup> It is difficult to dismiss the conclusion that Northern Gateway's failure to move the project forward despite its federal approval is due in large part to the rejection of the proposal by many First Nations, including YDA First Nations, in accordance with the application of their laws and their demonstrated willingness to enforce their legal decision in the courts, in the boardroom, and on the land. <sup>88</sup>

### **\*246 VII. CASE STUDY #3: TSLEIL-WAUTUTH NATION AND THE KINDER MORGAN TRANS MOUNTAIN EXPANSION PROJECT**

A third example of a contemporary application of Indigenous law comes from the Tsleil-Waututh Nation's application of its own laws to the proposed Kinder Morgan Trans Mountain Pipeline Expansion Project (TMEX).

#### **(a) Tsleil-Waututh Nation**

The Tsleil-Waututh Nation ("TWN"), <sup>89</sup> the "People of the Inlet", are a distinct Coast Salish nation, whose territory includes Burrard Inlet and the waters that connect to it in the Metro Vancouver region. <sup>90</sup> Historically, Tsleil-Waututh spoke a distinct dialect of Downriver Halkomelem. <sup>91</sup> Tsleil-Waututh's population was once several thousand people <sup>92</sup> before it was decimated by flood, famine and illness including small pox. The Tsleil-Waututh have lived in villages in eastern Burrard Inlet for millennia and at least eight villages existed at the time of contact. <sup>93</sup> Today, TWN's population is around 500 and their primary community (IR3) is located on the north shore of Burrard Inlet in North Vancouver.

TWN's contemporary governance structure includes an elected chief and councilors. TWN recognizes a hereditary Chief-- Hereditary Chief Ernest Ignatius George "Sla-holt"-- "who can trace his genealogy and Tsleil-Waututh hereditary chieftainship back to the mid-1700s". TWN also has a Traditional Council comprised of family heads who meet periodically to discuss important issues. <sup>94</sup>

In 2009 TWN adopted a Stewardship Policy, which is an expression of Tsleil-Waututh jurisdiction and law. It mandates a review of any proposed development inside TWN's Consultation Area. The Tsleil-Waututh Consultation Area extends from the vicinity of Mt. Garibaldi in the north to the 49th parallel (and beyond) in the south, Gibsons in the west, and Coquitlam Lake in the east. <sup>95</sup> The Consultation Area encompasses the waters and lands **\*247** traditionally used by

Tsleil-Waututh through its extensive seasonal rounds of travel and resource harvest. It includes both areas exclusively occupied and governed by them, as well those where access is granted according to Coast Salish protocols.<sup>96</sup>

The basis of TWN legal traditions with respect to stewardship obligations are outlined in a declaration which introduces its Stewardship Policy.<sup>97</sup> It states:

We are the Tsleil-Waututh First Nation, the People of the Inlet.

We have lived in and along our Inlet since time out of mind.

We have been here since the Creator transformed the Wolf into that first Tsleil-Wautt, and made the Wolf responsible for this land.

We have always been here and we will always be here.

Our people are here to care for our land and water.

It is our obligation and birthright to be the caretakers and protectors of our Inlet

[ ... ]

Therefore, be it known far and wide that our Tsleil-Waututh Nation, the People of the Inlet, are responsible for and belong to our traditional territory. Let it be known that our Tsleil-Waututh Nation is a Nation unto itself,

Holding traditional territory for its people.

#### **(b) Kinder Morgan Trans Mountain Expansion Project**

Recently, TWN applied its Stewardship Policy to Kinder Morgan's proposed TMEX Project. The project proposes to expand the current Trans Mountain pipeline system with 987 km of new pipeline, tripling the capacity to more than 890,000 bpd. The proposal would also triple the oil storage capacity on Burnaby Mountain and expand the dock at the Westridge Marine Terminal, resulting in a seven-fold increase of Aframax oil tanker traffic through Burrard Inlet. The last 28 km of the pipeline, plus the storage facilities and marine terminal, are in the heart of TWN territory.

In 2012, after many months of deliberation, the TWN community voted unanimously to oppose the TMEX project. On the basis of that direction from its people, Chief and Council formed the Sacred Trust Initiative--an arm of their government dedicated to opposing the project. Council also directed their Treaty Lands and Resources (TLR) department to conduct its own review of the TMEX, based in TWN laws.

#### **\*248 (c) TWN Independent Assessment of the Trans Mountain Pipeline and Tanker Proposal**

On May 26, 2015, TWN publicly released the results of its independent assessment<sup>98</sup> (the "Assessment") of the TMEX proposal as an exercise of their own law. In what was perhaps the first document of its kind, TWN combined TWN legal principles, traditional knowledge and community engagement with state of the art expert evidence including expert reports related to oil spill risk, spills and cleanup, human and biophysical health impacts, anthropology and archaeology.

The Assessment sets out TWN legal principles at s. 8, grounded in Coast Salish stories and teachings. It states:

The Tsleil-Waututh Stewardship Policy rests on the foundation of our ancestral laws and is interpreted in accordance with them. The following section of the assessment provides an overview of applicable legal principles as laid out by Tsleil-Waututh teachings and other traditional and contemporary Coast Salish sources.

Just as Canadian common law consists of a body of case law developed over the centuries, Coast Salish stories express the ancestral laws of the Tsleil-Waututh. Tsleil-Waututh elders have told us that in light of substantially common legal traditions on matters of stewardship throughout the Coast Salish world, the principles contained in stories from all Coast Salish peoples are also applicable to Tsleil-Waututh. These expressions of Tsleil-Waututh law are referred to interchangeably here as *stories*, *traditional narratives*, or *teachings*.<sup>99</sup>

TWN summarizes its legal principles as follows:<sup>100</sup>

**Principle 1: Tsleil-Waututh has a sacred obligation to protect, defend, and steward the water, land, air, and resources of the territory.**

Our stewardship obligation is to act with respect for all beings, human and non-human, and for all elements of the natural and spirit worlds. This responsibility is reflected in the principle of reciprocal giving/reciprocity. If respect is shown, the, collectively, the spirits of those who came before us; the ancestors; our brethren--all creatures that live on the earth with us) will also care for and support us in return. However, if respect is not shown, negative or even disastrous consequences for the Tsleil-Waututh may be expected. [ ... ]

**Principle 2: Tsleil-Waututh's stewardship obligation includes maintaining and restoring conditions in our territory that provide the environmental, cultural, spiritual, and economic foundation for the following:**

\*249 2.1 Cultural transmission and training that will allow Tsleil-Waututh individuals to reach their full potential and for Tsleil-Waututh, as a people, to thrive [ ... ]

2.2. Spiritual preparation and power [ ... ]

2.3 Harvest and consumption of safe, abundant wild foods from Tsleil-Waututh waters and lands to feed the present community, our ancestors, and other beings [ ... ]

2.4 Control over and sharing of resources according to Tsleil-Waututh and Coast Salish protocols

**Principle 3: Failure to be “highly responsible” in one's actions toward the people, the earth, the ancestors, and all beings has serious consequences, which may include the following:**

3.1 Loss of physical sustenance [ ... ]

3.2 Loss of access to resources or social status [ ... ]

3.3 Loss of the tools and training that allow Tsleil-Waututh individuals to reach their full potential and the related social and cultural impacts of this loss

In assessing the TMEX proposal, TWN's Assessment takes a holistic approach under TWN law. It considers cultural, spiritual and economic impacts in addition to biophysical impacts, erosion, and oil spill risk, behavior and cleanup. In this regard, and because of the grounding in TWN legal principles, the scope of the Assessment goes beyond that of a typical western environmental assessment.

The TWN Assessment applies “a precautionary approach”,<sup>101</sup> incorporates climate science, and applies a cumulative effects analysis of all development in Burrard Inlet, using pre-contact conditions as baseline to conclude:

Using the health of our Tsleil-Waututh subsistence economy as a key indicator of environmental and cultural integrity, it is clear that by the time the federal government closed Burrard Inlet to bivalve harvest in 1972, Tsleil-Waututh cumulative effects thresholds had been exceeded, in violation of Tsleil-Waututh stewardship laws. Devastation of our subsistence economy signaled that Burrard Inlet's

carrying capacity had been exceeded and that the inlet could not and should not absorb any more effects from urban, commercial, or industrial development.<sup>102</sup>

The TWN Assessment concludes that the TMEX proposal has the potential to deprive past, current, and future generations of the Tsleil-Waututh community of control and benefit of the water, land, air, and resources in their territory. It recommends that Chief and Council continue to withhold Tsleil-Waututh Nation's support for the TMEX proposal.

**\*250** On the basis of the recommendations, Chief and Council passed a resolution<sup>103</sup> confirming the ban of the project under TWN law. The resolution states, *inter alia*:

Kinder Morgan Canada shall not be granted the legal authority under Tsleil-Waututh law for the TMEX Proposal to proceed in Tsleil-Waututh territory; and

The Tsleil-Waututh Nation does not consent or authorize the TMEX Proposal to proceed in Tsleil-Waututh territory.

[ ... ]

TLR is directed to take all lawful means necessary to ensure that Tsleil-Waututh's decision in relation to the TMEX Proposal is recognized, respected, and enforced.

The TWN Assessment and resolution were later filed as evidence of TWN's decision to oppose the TMEX project in the National Energy Board's review of the project.

That review, ongoing at the time of writing, is the product of the dramatic changes to Canada's environmental laws and regulatory regime in the omnibus Bills C-38 and C-45. Those bills rewrote the Canadian environmental assessment regime and resulted in the NEB acting as the sole federal regulator responsible for reviewing the TMEX project, including the conduct of the federal environmental assessment. The *Canadian Environmental Assessment Act, 2012* mandates, *inter alia*, a 15-month time limit for the review and changes the rules for participation--limiting intervenors to those who are "Directly Affected." The new "streamlined" NEB review process for the TMEX project has been subject to a litany of criticism, motions and litigation, about failing to consider climate impacts,<sup>104</sup> limiting public participation,<sup>105</sup> not allowing cross examination of the proponent,<sup>106</sup> and failing to consult First Nations.<sup>107</sup>

**\*251** High profile withdrawals have added to a loss of public confidence in the NEB process. Former BC Hydro CEO Mark Eillessen stated that the process was "fraudulent" and that the NEB was "a truly industry captured regulator."<sup>108</sup> Former Insurance Corporation of BC President Robyn Allan stated that "the NEB's integrity has been compromised" and it "has unconscionably betrayed Canadians through a restricted scope of issues, violated the rules of procedural fairness and natural justice, and biased its decision-making in favour of Kinder Morgan."<sup>109</sup>

On a municipal level, seven local mayors declared non-confidence in the NEB process, stating that: "It is no longer a credible process from either a scientific evidentiary basis, nor from a public policy and public interest perspective."<sup>110</sup> The unprecedented negative profile of the NEB prompted Chair Peter Watson to conduct a public tour to try to regain public confidence.<sup>111</sup>

The NEB treatment of the TWN Assessment and any future litigation remain uncertain at the time of writing. However, in an open letter, a group of six Canadian law professors state:<sup>112</sup>

In the landmark Supreme Court of Canada decision *Tsilhqot'in Nation v. British Columbia*, Canada's highest court affirmed that Aboriginal title encompasses a right to "proactively use and manage the land" including making land use

decisions. The Tsleil-Waututh Assessment is a pioneering example of a First Nation acting on this authority to review and decide whether a project should proceed in its territory.[ ... ]

\*252 Tsleil-Waututh's Assessment and decision create uncertainty and legal risk for the Kinder Morgan TMEX proposal both as a matter of Coast Salish and of Canadian constitutional law.

In the face of changes to federal environmental law and the controversy surrounding the NEB's review of the TMEX project, the Indigenous law approach of the TWN Assessment can be seen as a tangible example for those who seek to improve Canadian environmental assessment processes.

#### **(d) International Treaty to Protect the Salish Sea**

Tsleil-Waututh Nation was also instrumental in initiating the *International Treaty to Protect the Salish Sea*--an Indigenous law instrument signed by nine First Nations and Tribes in 2014.

As part of the Sacred Trust Initiative, TWN members and spiritual leaders Leonard George and Rueben George initiated dialogue with spiritual leaders from other Coast Salish Nations and Tribes on the question of how to protect the Salish Sea from the threat represented by TMEX.

These discussions culminated in a TWN hosted *Spiritual Leaders' Gathering* on September 22, 2014 in which a council of Coast Salish and other Indigenous spiritual leaders spent a day discussing and deliberating the duty to protect and steward the waters, and in particular the Salish Sea. The outcome of the gathering was the text of the *International Treaty to Protect the Salish Sea*-- an Indigenous legal instrument that prohibits the TMEX project as a matter Coast Salish law. The *Treaty* reads in part: <sup>113</sup>

We, the proud Coast Salish people stand united by our ancestral ties to each other and to the Salish Sea. We are obligated by our spiritual traditions and laws to ensure the integrity of the waters and lands that sustain our peoples. Now the waters of the Salish Sea and the rivers that drain into it are threatened by proposals to drastically increase shipping of oil and bitumen and the inevitable risk of oil spills. By affixing our signatures hereto, we the undersigned commit ourselves to doing everything in our lawful power to protect our territories from the Kinder Morgan Trans Mountain Expansion Project, and any other tar sands projects that would increase the transportation of tar sands oil through our territories.

#### **Article 1--Peoples of the Salish Sea**

We are the Indigenous Peoples of the Salish Sea. We are distinct peoples, each with our own territories, languages & cultures, but bound together by interlocking ties of kinship and our deep connection to the Salish Sea and the waters that flow into it. The Salish Sea has been our home, the feast bowl of our sustenance, and the place through which we \*253 connect with all our ancestral and living relations. It is the source of our stories, traditions, and ancestral privileges and prerogatives. Our ancestral laws placed upon us the sacred responsibility to protect the Salish Sea and the tributaries that feed it. The wellbeing of our intellect, emotions, spirit and bodies depend on the wellbeing of the Salish Sea.

[ ... ]

#### **Article 3--Authority and Duty to Protect**

We are the original decision-makers on our waters and lands. Whether from unceded territories or those confirmed by treaty, our ancestral laws place upon us the sacred responsibility to safeguard this abundant and beautiful place that has sustained countless generations of our peoples so that future generations can be sustained. We do so not only for our children but the children of all peoples who now make their home in our territories and their future generations.

#### **Article 4--Illegality of Harmful Projects**

We consider tar sands tanker traffic and the pipeline infrastructure that feeds it to be illegal as a matter of our ancestral laws, Canadian constitutional law, and international law on the rights of indigenous peoples and all human beings. The transport of toxic materials through our territories is incompatible with our lawful rights and responsibilities as well as our rights as indigenous peoples recognized in international and constitutional law. Therefore, any new tar sands projects that cross our lands, territories and watersheds are expressly prohibited, including specifically the Kinder Morgan Trans Mountain Expansion Project which proposes to drastically increase the volume of tar sands oil shipped through Burrard Inlet and the Salish Sea.

The treaty was signed on September 23, 2014 guided by Coast Salish protocol and ceremony, and celebrated with a feast in the TWN community, also attended by hundreds of non-Indigenous supporters of TWN.<sup>114</sup>

In a press release announcing the signing of the treaty, TWN elected Chief Maureen Thomas stated: “The spiritual leaders (Siems), are our highest authority. Their wisdom has guided our people for millennia, and this treaty is an expression of our unextinguished and constitutional protected Indigenous laws.”<sup>115</sup>

Musqueam representative Jerri Sparrow stated that the Indigenous laws expressed in the Treaty were “the highest law of the land.”<sup>116</sup>

#### \*254 (e) Current status

The TWN Assessment and *International Treaty to Protect the Salish Sea* are examples of the modern day application of Indigenous legal traditions to a major resource infrastructure project. They represent a clear and unequivocal ban on the TMEX project based in TWN's unextinguished laws. The TWN Assessment models a pathway to a more holistic approach to assessing projects in the context of a Canadian regulatory process that is facing a crisis of confidence.

In terms of Canadian law, the Assessment and Treaty make it clear that TWN will not consent to the TMEX project. The TWN Council Resolution following the Assessment states that it will take all lawful means necessary to ensure that the decision is recognized, respected, and enforced. In a post *Tsilhqot'in* world, those words have serious implications for the TMEX project.

Although it is outside of the scope of this paper, one can envision future “conflict of laws” litigation where the courts are called on to reconcile a Canadian legal decision and an Indigenous legal decision in the context of Canadian constitutional protection for Aboriginal title and rights. Such a case would have significant implications well beyond environmental issues. It is also plausible that these questions could extend beyond Canadian borders through complaint resolution mechanisms at the UN Human Rights Committee<sup>117</sup> or through the UN Special Rapporteur on the Rights of Indigenous peoples, grounded in the UN Declaration of the Rights of Indigenous Peoples (UNDRIP).<sup>118</sup> Whatever happens in future litigation, be it in the Canadian courts or beyond, it seems certain that with respect to TMEX, the federal cabinet decision anticipated in 2016 will not be the final word.

## VIII. CONCLUSION

The case studies in the paper provide a window on the transformative potential of Indigenous legal traditions to provide concrete solutions to contemporary environmental problems. Considered in the context of recent federal environmental deregulation in Canada, the current revitalization of Indigenous legal traditions taking place across the country has added significance. In the vacuum in Canadian law left by deregulation, living Indigenous laws continue to govern and protect the environment.

We prefaced our paper with a quote from Professor John Borrows stating that “First Nations legal traditions are strong and dynamic and can be interpreted flexibly to deal with the real issues in contemporary Canadian law ....”<sup>119</sup> The Gitanyow, Tsleil-Waututh and Yinka Dene Alliance nations are \*255 three examples of Indigenous peoples that

effectively applied their own laws in order to address complex, contemporary challenges to the integrity of their respective territories. While each of these nations created unique strategies based on the substantive content of their own particular legal traditions, and tailored to the specific threat(s) facing their territories, certain more broadly applicable insights may be gleaned from them.

Firstly, although Indigenous legal traditions predate the imposition of the Canadian system, and continue to exist independently of it, Indigenous peoples choosing to apply their own laws must nonetheless contend with the intrusive power of the Canadian state. The nations in the case studies explored in this paper were highly pragmatic in their engagement with the state, choosing approaches to expressing their laws that might be more readily understood and respected by it.

Secondly, each of the nations considered in our case studies engaged to varying degrees not only in application of their laws, but also simultaneously in the revitalization of them. Indigenous legal scholars Val Napoleon and Gordon Christie caution that it is crucial not to underestimate the extent to which Indigenous law has been undermined by recent colonial history. Napoleon warns that we “cannot assume that there are fully functioning Indigenous laws around us that will spring to life by mere recognition. Instead, what is required is rebuilding ...”<sup>120</sup> The Gitanyow, Tsleil-Waututh and Yinka Dene nations (like other First Nations across Canada) are grappling with issues of language and traditional knowledge loss, and how to revitalize Indigenous law in their communities.

Thirdly and we think most importantly, the powerful work done by each of these peoples in effectively applying their own Indigenous laws in order to protect their territories is a testament to the resilience, sophistication and strength of these laws, as well as to their continued relevance in today's world.

Indigenous legal traditions have a critical role to play in environmental governance in Canada. Indigenous law has governed the territory now known as Canada for millennia, and Indigenous legal traditions contain a wealth of accumulated knowledge about effective strategies for environmental governance. This knowledge has implications for both Indigenous and non-Indigenous people on the territory. For example, John Borrows asserts that Indigenous laws and legal traditions speak to both the present and future needs of *all* Canadians, providing a stronger legal foundation for Canadian law generally<sup>121</sup> but also for environmental governance more specifically.<sup>122</sup> The importance of Indigenous law in relation to environmental decision-making is only likely to grow moving forward. In our view, it has the potential to transform our understanding of what constitutes effective environmental law. However, the project of revitalization requires much work. As Doug White, lawyer and former Chief of the Snuneymuxw First Nation recently stated: “Indigenous law is the great project of Canada and it is the essential work of our time. It is not for the faint of heart, it is hard work. We need to create meaningful opportunities for Indigenous and non-Indigenous people to critically engage in this work because all of our futures depend upon it.”<sup>123</sup>

#### Footnotes

a1 The authors are members of the Aboriginal and Natural Resource Law team at West Coast Environmental Law in Vancouver, BC/Coast Salish Territory.

1 [Campbell v. British Columbia \(Attorney General\)](#), 2000 BCSC 1123, 79 B.C.L.R. (3d) 122, additional reasons 2001 CarswellBC 2163 (S.C.), [*Campbell*] at para 81.

2 John Borrows, *Canada's Indigenous Constitution* (Toronto: UTP, 2010) at 27 [Borrows, *Indigenous Constitution*].

3 *Jobs, Growth and Long-term Prosperity Act*, S.C. 2012, c. 19; *Jobs and Growth Act, 2012*, S.C. 2012, c. 31.

4 See Energy Framework Initiative (Canadian Petroleum Products Institute, Canadian Energy Pipeline Association, Canadian Association of Petroleum Producers, Canadian Gas Association) to Ministers Peter Kent and Joe Oliver (Correspondence

dated December 12, 2011, Document Released Under the *Access to Information Act*), online: < [http://www.greenpeace.org/canada/Global/canada/pr/2013/01/ATIP\\_Industry\\_letter\\_on\\_enviro\\_regs\\_to\\_Oliver\\_and\\_Kent.pdf](http://www.greenpeace.org/canada/Global/canada/pr/2013/01/ATIP_Industry_letter_on_enviro_regs_to_Oliver_and_Kent.pdf)>.

- 5 See e.g. statements from Minister Joe Oliver quoted in Max Paris, “\$9b Joslyn Oilsands Project Gets Green Light” CBC News (8 December 2011), online: < <http://www.cbc.ca/news/politics/9b-joslyn-oilsands-project-gets-green-light-1.1026988>>.
- 6 For a discussion of some of these provincial legislative changes see Jessica Clogg, “Environmental Deregulation and the Crown's Constitutional Duties to First Nations” in Diane Sachs, ed, *Environmental Law Year in Review* (Toronto: Canada Law Book, 2007) at 37-51.
- 7 See e.g. “Deal protects Canada rainforest”, BBC News (8 February 2006), online: < <http://news.bbc.co.uk/2/hi/americas/4692038.stm>>.
- 8 *Mitchell v. Minister of National Revenue*, 2001 SCC 33, (sub nom. *Mitchell v. M.N.R.*) [2001] 1 S.C.R. 911 at para 9.
- 9 *Calder v. British Columbia (Attorney General)*, [1973] S.C.R. 313, 34 D.L.R. (3d) 145 at 383 [S.C.R.], Hall J, dissenting, quoting *Worcester v. State of Georgia*, 31 U.S. 515, 6 Pet. 515, 8 L.ed. 483 (1832), Marshall CJ.
- 10 *Xeni Gwet'in First Nations v. British Columbia*, 2014 SCC 44 at para 69.
- 11 Nancy Turner, *The Earth's Blanket* (Vancouver: Douglas & McIntyre, 2005).
- 12 T Vold & DA Buffett, eds, *Ecological Concepts, Principles and Applications to Conservation* (Biodiversity BC, 2008), at 11, 19, online: < [www.biodiversitybc.org](http://www.biodiversitybc.org)>.
- 13 For example, the federal ban on the potlatch from 1884-1951: see e.g. *Indian Act*, R.S.C. 1886, c. 43, s. 114. See also Randy Kapashesit & Murray Klippenstein, “Aboriginal Group Rights and Environmental Protection” (1991) 36:3 McGill LJ 925.
- 14 For discussion of the role of First Nations legal and cultural institutions like the potlatch in sustainable environmental management and the impacts of their prohibition, see e.g., Nancy J Turner, Marianne Boelscher Ignace & Ronald Ignace, “Traditional Ecological Knowledge and Wisdom of Aboriginal Peoples in British Columbia” (2000) 10:5 Ecological Applications 1275 at 1280; Lynn Lee, *People Land and Sea: Environmental Governance in Haida Gwaii*, paper prepared for the Action Canada Northern Governance Conference (Haida Gwaii, September 2012) at 6, online: < <http://www.actioncanada.ca/wp-content/uploads/2014/04/Haida-Gwaii-Environmental-EN-Oct-2012.pdf>>.
- 15 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 35.
- 16 For example, Theresa A McClenaghan has suggested that Aboriginal peoples may wish to assert descriptions of all the territories over which they have rights to exercise Aboriginal environmental rights which may help defend against claims of non-use in any potential conflicts with the Crown (such as infringement of their rights) or to help prove continuity of environmental Aboriginal rights. “Why Should Aboriginal Peoples Exercise Governance Over Environmental Issues?” (2002) 51 *University of New Brunswick Law Journal* 211 at 217. See also Lynda Collins & Meghan Murtha, “Indigenous Environmental Rights in Canada: the right to conservation implicit in treaty and Aboriginal rights to hunt, fish, and trap” (2010) 47:4 *Alta L Rev* 959 (arguing that a constitutionalized right to environmental preservation is implicit in treaty and Aboriginal rights to harvest, as without preservation of the lands in which Aboriginal peoples hunt, fish and trap these practices could not survive).
- 17 Val Napoleon, “Thinking About Indigenous Legal Orders,” (2007), online: National Centre for First Nations Governance < [http://fngovernance.org/publications/research/thinking\\_about\\_indigenous\\_legal\\_orders](http://fngovernance.org/publications/research/thinking_about_indigenous_legal_orders)>.
- 18 *Ibid.*
- 19 *Indigenous Constitution*, *supra* note 2 at 10.
- 20 Hadley Friedland & Val Napoleon, “Indigenous Legal Traditions Core Workshop Materials” (2011).

- 21 James Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon, SK: Native Law Centre, 2006) at 48.
- 22 *Ibid.*
- 23 *Ibid.* at 166.
- 24 Borrows, *Indigenous Constitution*, *supra* note 2 at 10.
- 25 Robert Cover, “Nomos and Narrative” (1983) 97 Harv L Rev 4 at 9.
- 26 *R. v. Vanderpeet*, [1996] 2 S.C.R. 507 at para 263, reconsideration / rehearing refused (January 16, 1997), Doc. 23803 (S.C.C.).
- 27 *Supra* note 10 at para 73.
- 28 *Delgamuukw v. British Columbia* (1997), 153 D.L.R. (4th) 193, [1997] 3 S.C.R. 1010 at para 147. See also James (Sáké j) Youngblood Henderson et al, *Aboriginal Tenure in the Constitution of Canada* (Toronto: Carswell, 2000) at 8 (“*Delgamuukw* ended the legal dialectic between the familiar English system and the exoticized Aboriginal difference”).
- 29 *R. v. Marshall*; *R. v. Bernard*, 2005 SCC 43 at para 130.
- 30 *R. v. Jones*, (sub nom. *R. v. Pamajewon*) [1996] 2 S.C.R. 821 at para 24.
- 31 *Campbell*, *supra* note 1.
- 32 James Anaya, “Report of the Special Rapporteur on the rights of indigenous peoples” (July 2014), United Nations, General Assembly: Human Rights Council, 27th Session at para 9, online: < <http://unsr.jamesanaya.org/docs/countries/2014-report-canada-a-hrc-27-52-add-2-en.pdf>>; see also *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007) 4, 32.
- 33 The Gitanyow Ayookxw: *The Constitution of the Gitanyow Nation*, 2009, online: Gitanyow Hereditary Chiefs < <http://www.gitanyowchiefs.com/>> [*Gitanyow Constitution*].
- 34 *Ibid.*
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- 38 Robert Galois, “The History of the Upper Skeena Region, 1850 to 1927” (1993-94) 9:2 *Native Studies Review* 113 at 120.
- 39 Neil Sterritt et al, *Tribal Boundaries in the Nass Watershed* (Vancouver:UBCPress, 1998) at 84-85
- 40 British Columbia Ministry of Forests and Range, “History of TFL 1 and the AAC” in *Tree Farm Licence 1 Rationale Allowable Annual Cut Determination* (April 15, 2008) at 2.
- 41 *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139 at para 25 (S.C.) [*Wii'litswx*].
- 42 *Ibid.* at 26.
- 43 *Gitxsan Houses v. British Columbia (Minister of Forests)* (2002), 10 B.C.L.R. (4th) 126, 2002 BCSC 1701.
- 44 This history of negotiations leading to the development of the land use plan is described, in part, in *Wii'litswx*, *supra* note 41 at paras 42-46.

- 45 *Gitanyow Huwilp Recognition and Reconciliation Agreement*, Gitanyow Nation and Her Majesty the Queen in Right of the Province of British Columbia, 28 March 2012, s 1.1, online: Gitanyow Hereditary Chiefs < <http://www.gitanyowchiefs.com/> > [*"Gitanyow Recognition and Reconciliation Agreement"*].
- 46 Malii, personal communication, June 2010.
- 47 *Gitanyow Constitution*, *supra* note 33, s 6: "The wealth of the land encompasses good forestlands, plentiful moose, fish, berries, goats, etc."
- 48 Val Napoleon, *Ayook: Gitksan legal order, law, and legal theory* (Ph.D. Dissertation, Faculty of Law, University of Victoria, 2009) [unpublished] at 6 [Napoleon, "Ayook"]. Napoleon interviewed at least one Gitanyow informant as part of her dissertation research. While politically independent, the Gitanyow form part of the broader Gitksan people, sharing a common ancient heritage and legal order.
- 49 *Ibid.*
- 50 *Ibid.* at 298-99.
- 51 Wilson Duff, ed, *Histories, Laws and Territories of the Kitwancool* (Victoria: Royal British Columbia Museum, 1959) at 36.
- 52 *Ibid.*
- 53 *Gitanyow Constitution*, *supra* note 33, s. 8.
- 54 This includes the existing Swan Lake/Kispiox River, Meziadin Lake and Bear Glacier Provincial Parks and a new Conservancy in the area encompassing the Hanna and Tintina Creeks, where some 80 percent of the sockeye salmon in the Nass River system spawn.
- 55 *Gitanyow Recognition and Reconciliation Agreement*, *supra* note 45, Schedules A and B.
- 56 The term *Ha'nii tokxw* also refers to: "The exclusive right of Wilp members to access Wilp territories and resources to get what they need to live": *Gitanyow Constitution*, *supra* note 33, s. 7.
- 57 *Gitanyow Recognition and Reconciliation Agreement*, *supra* note 45, s. 1.1.
- 58 *Gitanyow Constitution*, *supra* note 33, s. 4.
- 59 The *Gitanyow Recognition and Reconciliation Agreement*, *supra* note 45, s 1.1, recognizes the following definition: "Wilp Sustainability" means, from a Gitanyow perspective, conditions under which ecosystem function, socio-cultural and economic well-being are maintained and risk to ecological integrity is low, thus providing the ecological foundation for the long-term socio-cultural and economic well-being of each Wilp for the purposes of this Agreement."
- 60 *Ibid.* at s. 8.1.
- 61 *Ibid.* at s. 8.4.
- 62 *Ibid.* at Schedule C.
- 63 *Watahayetsxw v Canada (Minister of Transport et al)*, Notice of Application, FC T-282-10.
- 64 Canadian Council of Environment Ministers (CCME), *Regional Strategic Environmental Assessment in Canada Principles and Guidance* (Winnipeg: CCME, 2009) at 6.
- 65 In addition to the Yinka Dene Alliance, numerous other First Nations have strongly voiced opposition to Northern Gateway. This is evident, for example, in the pleadings of the eight First Nations currently challenging Canada's approval of Northern

Gateway in the consolidated proceedings of *Gitxaala Nation et al v Canada (Attorney General) et al*, Federal Court of Appeal Lead File Number A-437-14.

- 66 Yinka Dene Alliance, *Submission to the United Nations Special Rapporteur on the Rights of Indigenous Peoples* (September 2013), online: < [http://yinkadene.ca/images/uploads/Submission\\_to\\_UN\\_Special\\_Rapporteur\\_on\\_the\\_Rights\\_of\\_Indigenous\\_Peoples.pdf](http://yinkadene.ca/images/uploads/Submission_to_UN_Special_Rapporteur_on_the_Rights_of_Indigenous_Peoples.pdf)> [“YDA, UNSR Submission”] at paras 1-2.
- 67 *Gitxaala Nation et al v Canada (Attorney General) et al*, Federal Court of Appeal Lead File Number A-437-14, Statement of Agreed Facts, Book of Major Documents, Volume 1, Tab 1 [“*Gitxaala et al*, Agreed Facts”] at para 136.
- 68 “YDA, UNSR Submission”, *supra* note 66 at para 1.
- 69 *Ibid.* at paras 1, 3.
- 70 “*Gitxaala et al*, Agreed Facts”, *supra* note 67 at paras 1-2.
- 71 Carrier Sekani Tribal Council, *Aboriginal Interest and Use Study on the Enbridge Gateway Pipeline* (May 2006), online: < <http://www.cstc.bc.ca/AIUS%20COMPLETE%20FINAL%20inc.%20maps.pdf>> [“CSTC, AIUS”] at 13.
- 72 Carrier Sekani Tribal Council, *First Nations Announce Review Process for Gateway Pipeline Project* (April 2006), online: < <http://www.carriersekani.ca/images/docs/enbridge/Press%20Release-FNRP-final.pdf>>; Carrier Sekani Tribal Council, *Proposal for a First Nations Review Process for the Enbridge Gateway Pipeline* (undated), online: < <http://www.carriersekani.ca/images/docs/enbridge/Proposal%20for%20a%20First%20Nations%20Review%20Process%20for%20the%20Enbridge%20Gateway%20Pipeline.pdf>>; *Gitxaala Nation et al v. Canada (Attorney General) et al*, Federal Court of Appeal Lead File Number A-437-14, Nak'azdli and Nadleh Whut'en Memorandum of Fact and Law, filed May 22, 2015 [“*Gitxaala et al*, Nak'azdli and Nadleh Whut'en Memorandum of Fact and Law”] at paras 13-15.
- 73 *Gitxaala Nation et al v. Canada (Attorney General) et al*, *ibid.* at paras 20, 22.
- 74 *Ibid.* at para 24.
- 75 *Ibid.*
- 76 Save the Fraser Gathering of Nations, *Save the Fraser Declaration* (undated), online: < <http://savethefraser.ca/>>.
- 77 “*Gitxaala et al*, Nak'azdli and Nadleh Whut'en Memorandum of Fact and Law,” *supra* note 72 at paras 24-25.
- 78 *Ibid.* at paras 1, 21, 26 *et seq.*
- 79 *Ibid.* at para 43; *Gitxaala et al*, Agreed Facts, *supra* note 67 at para 154.
- 80 “*Gitxaala et al*, Nak'azdli and Nadleh Whut'en Memorandum of Fact and Law,” *supra* note 72 at para 43.
- 81 *Ibid.* at paras 45-47.
- 82 *Ibid.* at para 47.
- 83 *Gitxaala Nation et al v Canada (Attorney General) et al*, Federal Court of Appeal Lead File Number A-437-14, Nak'azdli and Nadleh Whut'en Compendium of References, Volume 3, Tab 19, page 540.
- 84 “*Gitxaala et al*, Nak'azdli and Nadleh Whut'en Memorandum of Fact and Law,” *supra* note 72 at para 126.
- 85 *Ibid.* at paras 10, 19, 23-25, 43-44, 48; *Gitxaala et al*, Agreed Facts, *supra* note 67 at paras 150, 154.
- 86 “CSTC, AIUS,” *supra* note 71 at 91.

- 87 June 29, 2015 letter from Northern Gateway Pipelines to the National Energy Board, National Energy Board Filing ID A70963; Enbridge Northern Gateway Joint Review Panel, *Considerations: Report of the Joint Review Panel for the Enbridge Northern Gateway Project, Volume 2* (December 2013), Appendix 1, Conditions 20-21.
- 88 See e.g. Yinka Dene Alliance to Enbridge Inc. “Re: Cease and desist order for investigative field work activities related to Enbridge Northern Gateway pipelines” (correspondence dated June 26, 2013), online: < [http://yinkadene.ca/index.php/resources/june\\_26th\\_cease\\_and\\_desist\\_letter](http://yinkadene.ca/index.php/resources/june_26th_cease_and_desist_letter)>.
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- 91 In addition to Downriver Halkomelem there are also upriver and Island Halkomelem dialects.
- 92 Jesse Morin, *Tsleil-Waututh Nation's History, Culture and Aboriginal Interests in Eastern Burrard Inlet* (Redacted Version), (May 25, 2015) at 2, online: < <http://twnsacredtrust.ca/wp-content/uploads/2015/05/Morin-Expert-Report-PUBLIC-VERSION-sm.pdf>>.
- 93 *Ibid.*
- 94 *Ibid.* at 37.
- 95 Tsleil Waututh Nation, *Stewardship Policy* (2009), online: < [http://www.twnation.ca/en/About%20TWN/~/\\_media/Files/Stewardship%20January%202009.ashx](http://www.twnation.ca/en/About%20TWN/~/_media/Files/Stewardship%20January%202009.ashx)>; see also Map 1 in TWN Assessment, *supra* note 90 at 7.
- 96 TWN Assessment, *supra* note 90.
- 97 *Supra* note 95
- 98 TWN Assessment, *supra* note 90.
- 99 TWN Assessment, *supra* note 90 at 52.
- 100 *Ibid.* at 52-55.
- 101 *Ibid.* at 63.
- 102 *Ibid.*
- 103 Tsleil-Waututh Nation, *Resolution in respect of Tsleil-Waututh Nation's Stewardship Policy decision about the Trans Mountain Pipeline and Tanker Expansion Proposal* (TWN Band Council Resolution, 21 May 2015), online: <http://twnsacredtrust.ca/wp-content/uploads/2015/05/2015-05-21-TWN-BCR-re-TMEX.pdf>>.
- 104 The City of Vancouver brought a motion to compel the NEB to consider upstream and downstream climate effects, which the NEB denied in Ruling 25 on July 23, 2014. Vancouver appealed to the Federal Court of Appeal but was denied leave to appeal.
- 105 A number of intervenors filed a motion to expand participation in the process which the NEB denied in Ruling 34 (Filing A63200). That decision was appealed to the Federal Court of Appeal who denied leave to appeal on January 23, 2015. That decision has been appealed to the Supreme Court of Canada (File 36353) who have not ruled on leave at the time of writing.
- 106 Intervenors Robyn Allan and Elizabeth May filed separate notices of motion on 14 April 2014 and 5 May 2014 respectively calling on the NEB to include a cross-examination phase in its process. The NEB denied both motions on 7 May 2014 in Ruling 14 (Filing A60134), online: < <https://docs.neb-one.gc.ca/ll-eng/llisapi.dll?func=ll&objId=2453401&objAction=browse&viewType=1>>.

- 107 Letter from 12 First Nations Chiefs to Minister Greg Rickford (November 28, 2014), online: TWN Sacred Trust < <http://twnsacredtrust.ca/wp-content/uploads/2014/11/2014-11-28-FN-Open-Let-Rickford.pdf>>.
- 108 Letter of Withdrawal from Marc Eilessen to National Energy Board (October 30, 2014), online: < [https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449925/2451033/2543157/C118-6-1\\_-\\_Marc\\_Eliesen\\_Letter\\_of\\_Withdrawal\\_-\\_A4E1Q6.pdf?nodeid=2543843&vernum=-2](https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449925/2451033/2543157/C118-6-1_-_Marc_Eliesen_Letter_of_Withdrawal_-_A4E1Q6.pdf?nodeid=2543843&vernum=-2)>.
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- 110 “Mayors stand together against Kinder Morgan pipeline proposal” *News* (March 31, 2015), online: City of Vancouver < <http://vancouver.ca/news-calendar/mayors-stand-together-against-kinder-morgan-pipeline-proposal.aspx>>.
- 111 See, for example, Peter Watson “Opinion:NEBtakes its obligation seriously” *Vancouver Sun* (November 6, 2014), online: < <http://www.vancouversun.com/news/Opinion+takes+obligation+seriously/10360169/story.html>>; and Steve Macleod “Rethinking the Role of the National Energy Board” *Alberta Oil Magazine* (July 13, 2015), online: < <http://www.albertaoilmagazine.com/2015/07/the-new-neb-peter-watson/>>.
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- 115 “Coast Salish Nations Sign International Treaty”, *supra* note 113.
- 116 “Cross-border Indigenous Treaty”, *supra* note 114.
- 117 The Human Rights Committee is a dispute resolution body for the *International Covenant on Civil and Political Rights*, to which Canada is a signatory.
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- 119 *Indigenous Constitution*, *supra* note 2 at 27.
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