WSÁNEĆ LEGAL THEORY AND THE FUEL SPILL AT SELEKTEL (GOLDSTREAM RIVER)

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SELEKTEL (Goldstream River), on Coast Salish territory on Southern Vancouver Island in British Columbia, is an important salmon spawning river and fishing location for the WSÁNEĆ (Saanich) people. On April 16, 2011, it was also the site of a diesel and gasoline spill.

In this article, I explore the processes of revitalizing WSÁNEĆ law and how we might think about the revitalization of WSÁNEĆ law in the context of this fuel spill. While I do not present a definitive statement of the application of WSÁNEĆ law, I explore what is needed in order to understand WSÁNEĆ law on its own terms. I turn to WSÁNEĆ stories to ground my understanding of WSÁNEĆ law in a different cosmological and ontological framework, and begin to explore the implications this different framework has for understanding the fuel spill and a WSÁNEĆ approach to "law". I argue that this framework requires a greater attribution of "being" and "agency" to land, with an emphasis on repairing and maintaining relationships in an encompassing way. In exploring the implications of this shift in framework, I problematize the notions of "jurisdiction" and "remedy". Specifically, rather than approaching the relationship to land through the idea of jurisdictional authority over it, I argue that WSÁNEĆ law develops a perspective centred on our mutual responsibilities with and to land. I also argue that the notion of jurisdiction can compartmentalize and limit WSÁNEĆ law's attention to the encompassing nature of our relationships to land. Similarly, as opposed to engaging WSÁNEĆ law only to find a remedy, we must step back and consider how the harm of the fuel spill would be characterized within the distinctive framework of WSÁNEĆ law.

SELEKTEL (rivière Goldstream), qui se situe sur le territoire des Salishes de la côte au sud de l'île de Vancouver en Colombie-Britannique, est une rivière hôtesse de la fraie de saumon ainsi qu'un lieu de pêche pour le peuple WSÁNEĆ (Saanich). Le 16 avril 2011, elle était également le lieu d'un déversement d'essence et de diesel.

Dans cet article, j'explore le processus de revitalisation du droit WSÁNEĆ ainsi que la façon dont nous pouvons songer à la revitalisation du droit WSÁNEĆ dans le contexte de ce déversement. Bien que je ne présente pas une proposition définitive de l'application du droit WSÁNEĆ, j'explore ce qui est requis afin de comprendre le droit WSÁNEĆ selon ses propres termes. Je me tourne vers des récits WSÁNEĆ afin de fonder ma compréhension du droit WSÁNEĆ dans un cadre cosmologique et ontologique différent et j'entame une exploration des implications que ce différent cadre a sur la compréhension du déversement et sur une approche WSÁNEĆ du « droit ». J'argumente que ce cadre requiert une plus grande attribution aux concepts d'« être » (*being*) et de « volonté » (*agency*) en lien avec la terre, en mettant l'accent sur la réparation et le maintien des relations d'une manière globale. En explorant les implications du changement de cadre, je problématise les notions de « compétence » et de « réparation ». Précisément, plutôt que d'aborder la relation à la terre par l'entremise de la compétence à son égard, j'argumente que le droit WSÁNEĆ offre une perspective centrée sur nos responsabilités mutuelles avec et envers la terre. J'argumente également que le concept de compétence peut compartimenter et limiter l'attention qu'accorde le droit WSÁNEĆ à la nature globale de nos relations à la terre. De même, plutôt que d'engager avec le droit WSÁNEĆ seulement afin de trouver une réparation, nous devons prendre du recul et examiner comment le tort causé par le déversement d'essence serait caractérisé dans le cadre distinctif du droit WSÁNEĆ.

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Introduction: NES ĆSE LÁ,ES (Myself, Where I Come From)[1]

On April 16, 2011, a Columbia Fuels truck crashed on the Malahat Highway, near Victoria, British Columbia, spilling 42,000 litres of gasoline and 600 litres of diesel. The contents of the spill flowed through a culvert and into SELEKTEL (also known as Goldstream River) and through the river "into the estuary and Saanich Inlet."[2] While the Langford Fire Department and Columbia Fuels' Emergency Responder took immediate remedial action, the spill clearly damaged the ecosystem, and cleanup and monitoring activities continue to date.[3]

Hearing that a fuel spill had occurred at this location was troubling to me both personally and as a WSÁNEĆ person. The WSÁNEĆ rely heavily on marine resources, which are integral to the WSÁNEĆ way of life. Salmon are of particular importance to the WSÁNEĆ culture. During ĆENQOLEW (the moon during which the dog salmon return to the Earth) the WSÁNEĆ people fish QOLEW (the dog or chum salmon).[4] This fishing is done at SELEKTEL and the salmon harvested there are dried or smoked and then stored away. SELEKTEL is thus an important location for the WSÁNEĆ people.

As a young boy, I grew up fishing on the ocean and in the river. I can still recall the first time I went to SELEKTEL to watch my uncle and older cousin gaff salmon (one of our traditional fishing techniques).[5] While

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1 It is proper to introduce yourself and the context in which you speak in WSÁNEĆ culture and many Indigenous cultures. In academic scholarship and Indigenous methodologies, this practice also aids in reflexivity—taking account of how we situate ourselves within our research and the effect this reflection has on our research. Indigenous scholar Margaret Kovach writes that, in terms of Indigenous methodologies, "[i]t is not only the questions we ask and how we go about asking them, but who we are in the asking" (Margaret Kovach, *Indigenous Methodologies: Characteristics, Conversations, and Contexts* (Toronto: University of Toronto Press, 2009) at 111). Such an introduction has importance for "self-location, purpose, and cultural grounding" (*ibid* at 109) and avoids any perpetuation of "pan-Indianism" (*ibid* at 110). Kovach indicates 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" (*ibid*).

2 Columbia Fuels, "Columbia Fuels Goldstream River FAQs" [on file with author].

3 See *ibid*; Rob Shaw, "Chum Salmon 'Wiped Out' by 2011 Fuel Spill in Goldstream River", *Times Colonist* (12 November 2013), online: <www.timescolonist.com/news/local/chum-salmon-wiped-out-by-2011-fuel-spill-in-goldstream-river-1.694559>.

4 The WSÁNEĆ calendar is divided into thirteen moons that relate to the season and cultural practices carried out during that time of year. See Earl Claxton & John Elliott, *The Saanich Year* (Brentwood Bay, BC: Saanich Indian School Board, 1993) for an illustrated description of the WSÁNEĆ calendar.

5 In this fishing technique, a long pole with a sharp hook on the end is used while you wade through the river or stand on its shore. The gaff is used to hook the fish and lift it onto the shore.

too young to fish myself, it is a moment I will never forget. Not many years later, that same uncle taught my younger cousin and me how to gaff salmon. Equipped with that teaching, my cousin and I have gone almost every year in the fall, during ĆENQOLEW̱, to gaff and smoke salmon to store for the remainder of the year. When my cousin and I would return to Tsawout (my community) with the salmon, my grandma, grandpa, great-grandma, uncles, aunts, and the rest of the family would gather outside to clean the fish and hang them in the smoker. These same fish are distributed among the extended family and later find their spot on the table at all our large gatherings. In short, SELEKTEL will always be tied to my family and to my identity as a W̱SÁNEĆ person.

The driver of the Columbia Fuels truck that crashed was intoxicated and has since been charged and pleaded guilty to two counts—one under the *Criminal Code*[6] and the other under the *Fisheries Act*.[7] On the criminal count, the driver pleaded guilty to the dangerous operation of a motor vehicle[8] and received a conditional sentence of three months, plus nine months probation. He also pleaded guilty to a charge under the *Fisheries Act* for depositing gasoline and diesel into "water frequented by fish"[9] for which he received 200 hours of community service in the area of conservation of fish and fish management. Given these guilty pleas, the Crown dropped the impaired driving charges.[10]

In response to the situation, primary stakeholders affected by the spill formed a roundtable working group consisting of Columbia Fuels, First Nations representatives, the BC Ministry of Environment, the Department of Fisheries and Oceans, Goldstream Hatchery, and third party environmental consultants. While I was not formally involved in this process, I was able to attend one of these meetings as an observer. Discussion at this meeting circled around the determination of fish numbers, conducting scientific inquiries into impact and remediation efforts, and determining financial allocation to remediation efforts.[11] The point of this article is not, however, to analyze the roundtable process. Rather, attending this meeting led me to wonder how we might conceive of and act upon

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6 RSC 1985, c C-46.

7 RSC 1985, c F-14.

8 See *Criminal Code*, *supra* note 6, s 249.

9 *Fisheries Act*, *supra* note 7, s 36(3). See generally *ibid*, ss 34–43.

10 See Kyle Wells, "Fuel Truck Driver Sentenced", *Goldstream News Gazette* (26 September 2012), online: <www.goldstreamgazette.com/news/171423401.html>.

11 This description is my own interpretation and summary of what the roundtable working group set out to accomplish based on my limited involvement, as opposed to a specific and comprehensive mandate.

the problems posed by the spill on WSÁNEĆ law's own terms.[12] What expectations regarding "law" itself would this approach require us to revisit and unpack? One such expectation is that we are easily able to jump to the identification of concrete remedies that can then be put into conversation with those of Canadian law. I will argue that there is much more to consider.

This article does not present a neatly packaged answer for how WSÁNEĆ law would apply to the fuel spill at SELEKTEL. There are several reasons for this choice. First, a WSÁNEĆ legal response to the fuel spill has not occurred at the community level. Consequently, I am not in a position to research and analyze the processes followed, the decisions made, and the solutions implemented by the community. WSÁNEĆ law has been suppressed for far too long by the operation of colonialism (which is not to say it has been extinguished). We must, therefore, work to build and revitalize the practices and conceptual structures that allow for the healthy functioning of the legal tradition. More importantly, and beyond that, the nature and authority structure of WSÁNEĆ law also differs from Canadian law. The WSÁNEĆ tradition is decentralized and its driving impetus is to repair and maintain relationships in an encompassing way. Since relationships between people and the ecosystem are dynamic and fluid, there is less emphasis on fixed and highly specific rules from the outset.[13] Additionally, in working to repair relationships in WSÁNEĆ law, both between humans and with the land and animals, many people (including Elders, knowledge holders, chiefs, and community members) have a say. Although it is one of the objectives of my current scholarly work, at this point I am not in a position to reflect what this multiplicity of author-

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12 Significant work has already been done in arguing for the importance of revitalizing Indigenous law (see particularly John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010). There are several different avenues one might take in justifying Indigenous law as law. The work of John Borrows and Val Napoleon are excellent starting points (see *ibid*; Valerie Ruth Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (PhD Dissertation, University of Victoria Faculty of Law, 2009) [unpublished]). Readers may also find the literature on legal pluralism helpful in this regard. A great deal of literature exists on the topic of legal pluralism. One piece I have found helpful is Jeremy Webber, "Legal Pluralism and Human Agency" (2006) 44:1 Osgoode Hall LJ 167. Readers desiring more direct engagement with the question of whether the revitalization of Indigenous law is important or in justifying Indigenous law as law may find these sources useful.

13 James (Sákéj) Youngblood Henderson characterizes 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 implicated order of the surrounding ecology. Because ecology and all life forms and forces are constantly in flux, Indigenous law works to adapt constantly to that flux. See James (Sákéj) Youngblood Henderson, "Postcolonial Indigenous Legal Consciousness" (2002) 1 Indigenous LJ 2002 1 at 12–13, 45.

itative voices have to say about the SELEKTEL spill or to present an analysis of this collective reasoning and problem-solving process. However, my role as a community member and aspiring scholar within our legal order—and an objective of this article—is to help illuminate the larger context in which this deliberation might take place, providing insights where I can. An important part of this context is understanding that WSÁNEĆ law is grounded in a different worldview and set of cultural assumptions than Canadian law. This article thus aims to improve understanding of that worldview and the distinctive starting point it provides for understanding "law" and analyzing the fuel spill. In other words, it tackles the question of how we can understand and strengthen WSÁNEĆ normative understandings and responsibilities (bracketing the external pressures and influence exercised by the state) with respect to our relationships to one another and to the Earth.

Much of what I have just identified requires unpacking. Part I will provide my theoretical framework for the revitalization of WSÁNEĆ law on its own terms.[14] It will give the reader a foundation for how to approach WSÁNEĆ law, teachings, and stories when we come more directly to the stories about SELEKTEL. Part II will then draw upon WSÁNEĆ teachings and stories that I argue are important in framing a different worldview, and for grounding a deliberation about a WSÁNEĆ legal response to the spill. It highlights a greater attribution of "being" and "agency" to land in WSÁNEĆ law. Finally, through engaging these stories, Part III problematizes whether our initial efforts at revitalizing WSÁNEĆ law should be grounded in notions of "jurisdiction" and with specific expectations regarding "remedy". Specifically, as opposed to approaching WSÁNEĆ law as having jurisdictional *authority over* land, I argue for a perspective regarding our *mutual responsibilities in relation to* land. I also argue that jurisdiction can compartmentalize and limit WSÁNEĆ law's attention to encompassing relationships. Similarly, as opposed to engaging WSÁNEĆ law with the narrow purpose of finding a remedy, I argue that we should first step back and consider how we would characterize the harm of such a fuel spill to begin with, given the different framework of WSÁNEĆ law. Of course, WSÁNEĆ law must face the complex task of resolving problems in order to function properly, and such solutions only arise through practice.[15] The application of WSÁNEĆ law on

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[14] Given the still emergent nature of this type of scholarship on Indigenous law, I find it productive to touch more explicitly on theory than would otherwise be the case. I also think this theoretical background gives greater clarity to some of the challenges we face in beginning to revitalize WSÁNEĆ law in relation to issues like the SELEKTEL spill.

[15] See Johnny Mack, "*Hoquotist*: Reorienting through Storied Practice" in Hester Lessard, Rebecca Johnson & Jeremy Webber, eds, *Storied Communities: Narratives of Contact*

its own terms is what I ultimately want to happen. The more modest point of this article, though, is to use the SELEKTEL spill to uncover the normative grounding of WSÁNEĆ law—and how it conflicts with the normative assumptions of Canadian law—so that we can begin to apply WSÁNEĆ law on its own terms.

I. SKÁLS (Beliefs and Laws): Theorizing WSÁNEĆ Law[16]

A. On Its Own Terms: Culture, Power, and Resurgence

My approach to law is socio-legal in nature—that is, I adopt an understanding that law and culture (or worldview) cannot be separated.[17] In many ways, it is the manner in which law and culture interact that both shapes and frames our thinking within a legal tradition.[18] This cultural grounding is as true for Canadian law as it is for Indigenous law and culture.[19] Understanding WSÁNEĆ law on its own terms therefore requires

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and Arrival in Constituting Political Community (Vancouver: UBC Press, 2011) 287 [Mack, "*Hoquotist*"] (emphasizing the importance of "practice" at 304).

16 The theoretical framework developed in this section reflects my specific deliberation on the revitalization of WSÁNEĆ law. Indigenous legal traditions are not homogenous, meaning no one theoretical framework will suffice. This heterogeneity does not mean that insights cannot be brought to bear on other traditions if the circumstances permit.

17 See generally Lawrence Rosen, *Law as Culture: An Invitation* (Princeton: Princeton University Press, 2006). In considering the connection between law and culture, Rosen urges us to think of law "as a framework for ordered relationships, an orderliness that is itself dependent on its attachment to all other realms of its adherents' lives" (*ibid* at 7).

18 Law and culture can weave together in a way that makes the connection between them seem "natural" or "immanent". As Rosen argues,

> [c]ulture—this capacity for creating the categories of our experience—has, in the view that will be central to our concerns, several crucial ingredients. As a kind of categorizing imperative, cultural concepts traverse the numerous domains of our lives—economic, kinship, political, legal—binding them to one another. Moreover, by successfully stitching together these seemingly unconnected realms, collective experience appears to the members of a given culture to be not only logical and obvious but immanent and natural (*ibid* at 4).

19 Canadian law can at times be seen as "objective" either in the sense that once enacted it is seen as existing in its own acultural domain from which it can be interpreted and applied without bias or cultural perspective, or, alternatively, in the sense that the very creation of laws is seen as being based on or justified by rationalist principles that themselves aim (or claim) to be universal as opposed to cultural. Here, I acknowledge the contribution made by Kirsten Anker in her comments as external examiner for my LLM Thesis (see Robert Clifford, *WSÁNEĆ Law and the Fuel Spill at Goldstream* (LLM Thesis, University of Victoria Faculty of Law, 2011) [unpublished] [Clifford, *WSÁNEĆ Law*]). Indigenous scholars have also identified that "Canadian law is not objective but rather grounded in Euro-Canadian cultural assumptions" that are embed-

careful attention to WSÁNEĆ culture more broadly, which is the objective of Part II of this article. This approach also situates my work within a larger discussion regarding colonialism and decolonization. I cannot fully canvass the scholarship in this area, but I seek to be mindful of the operation of power and the implications it has for the processes of revitalizing WSÁNEĆ law. Ultimately, I do not want to predetermine the parameters of WSÁNEĆ law based on the established framework of Canadian law and the state, but to strive for an equal dialogue. Achieving this goal is easier said than done.

Colonial power is not a relic of the past, but continues to operate (often) in a more subtle fashion. Our struggles to revitalize WSÁNEĆ law will therefore continue to come into contact with various dynamics of power, whether that power is social, political, economic, or legal. Glen Coulthard, particularly in his latest work, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition*, has become a prominent voice in the analysis of colonial power and the politics of recognition.[20] Central to Coulthard's analysis of colonial power is understanding colonialism as having a dual nature: structural and subjective.[21] Structurally, power functions to set the terms of recognition "by and in the interests of the master."[22] That is, the state recognizes Indigenous rights and identity

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ded within Canadian institutions of government and law, and that this background has functioned to shape and limit the ability to use "Canadian law as the mechanism to resolve Aboriginal claims" (Patricia A Monture-Angus, *Journeying Forward: Dreaming First Nations' Independence* (Halifax: Fernwood, 1999) at 49).

20 Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014) [Coulthard, *RSWM*]. Coulthard argues that in a colonial context, the politics of recognition, which he defines as "the now expansive range of recognition-based models of liberal pluralism that seek to 'reconcile' Indigenous assertions of nationhood with settler-state sovereignty via the accommodation of Indigenous identity claims in some form of renewed legal and political relationship with the Canadian state," does not in fact create mutual relationships, but rather, "promises to reproduce the very configurations" of colonial power that "Indigenous peoples' demands for recognition have historically sought to transcend" (*ibid* at 3). My summary of Coulthard's work throughout this section is informed by my fuller consideration of his work in Robert Clifford, Book Review of *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* by Glen Sean Coulthard, (2015) 30:2 CJLS 318 [Clifford, "*RSWM* Review"]. There is a great deal of literature on the topic of recognition. I do not provide Coulthard as the only perspective, but as an example of analyzing the operation of power and thinking about our responses based on those analyses. For a helpful introduction and a variety of approaches to the politics of recognition, see Avigail Eisenberg et al, eds, *Recognition versus Self-Determination: Dilemmas of Emancipatory Politics* (Vancouver: UBC Press, 2014).

21 Coulthard, *RSWM*, *supra* note 20 at 24. In this regard Coulthard draws heavily on the work of Marxist postcolonial theorist Frantz Fanon (*ibid* at 15–18).

22 *Ibid* at 26. Coulthard, in following Fanon, also expresses that in a colonial context "there is no mutual dependency in terms of a need or desire for recognition"—what the

(and by implication Indigenous law) only "insofar as this recognition does not throw into question the background legal, political, and economic framework of the colonial relationship itself."[23] Subjectively, there is a process of accepting the limited or mis-recognition granted through state structures, which eventually comes to be seen as more or less natural.[24] Through this lens, contemporary colonial power "work[s] through the *inclusion* and shaping of Indigenous peoples and perspectives by state discourses, as opposed merely to a process of *exclusion*."[25] Such observations clearly have implications if we are to consider framing our understanding of WSÁNEĆ law within the established framework of Canadian law and the state.

Coulthard's response to these observations aligns with the project of resurgence theory.[26] Generally, resurgence theory looks to move beyond

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state requires is "land, labor, and resources" (*ibid* at 40). Johnny Mack argues, in a similar vein, that the "norm of self-determination," as achieved through "institutions such as Canadian courts of law or the Treaty Commissions," can result in "limited powers of self-government" that, as Indigenous peoples, "may release us from the Indian Act so long as we are organized under constitutions and a liberal economic order that allows for the continuation of imperial penetration" (Johnny Camille Mack, *Thickening Totems and Thinning Imperialism* (LLM Thesis, University of Victoria Faculty of Law, 2009) [unpublished] at 60).

23 Coulthard, *RSWM*, *supra* note 20 at 41. For Coulthard, these background structures are the myriad of "hierarchical social relations that continue to facilitate the *dispossession* of Indigenous peoples of their lands and self-determining authority" (*ibid* at 7 [emphasis in original]). Note that this power structure does not mean that the state has not also entangled itself and Indigenous peoples within its own web of "mutual obligations and responsibilities"; indeed, the state does both (Gordon Christie, "Indigeneity and Sovereignty in Canada's Far North: The Arctic and Inuit Sovereignty" (2011) 110:2 South Atlantic Q 329 at 336).

24 See Coulthard, *RSWM*, *supra* note 20 at 16. This process involves power as a form of governmentality—that is, "the production of the specific modes of colonial thought, desire, and behaviour that implicitly or explicitly commit the colonized to the types of practices and subject positions that are required for their continued domination" (*ibid*).

25 Clifford, "*RSWM* Review", *supra* note 20 at 319 [emphasis in original]. See also Coulthard, *RSWM*, *supra* note 20 at 45–47. Chapter 2, "For the Land: The Dene Nation's Struggle for Self-Determination," of *Red Skin, White Masks* is in part a case study that exemplifies Coulthard's argument that the institutional and discursive power of the state has worked to transform the Dene Nation's struggle for self-determination from one which was informed by the land, to one ostensibly for land (*ibid* at 51–78). Similarly, Paul Nadasdy also provides an informative case study in which he details how state power, as exercised through land claims and co-management agreements in the Yukon, has actually subtly worked to shape and undermine Indigenous knowledge and ways of being through a process of discursive and institutional translation (Paul Nadasdy, *Hunters and Bureaucrats: Power, Knowledge, and Aboriginal-State Relations in the Southwest Yukon* (Vancouver: UBC Press, 2003)).

26 The notion of resurgence first came from the work of John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002)

critique and state discourses toward a focused regeneration of Indigenous culture, knowledge, philosophies, and ways of being, and to live those teachings in building a lasting alternative to colonialism.[27] For several resurgence theorists this process of decolonization begins with the self[28] and involves a significant turn away from the state.[29] In thinking about the revitalization of W̲SÁNEĆ law on its own terms I find it useful to draw (though more narrowly) upon resurgence theory.[30] I have bracketed an

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[Borrows, *Recovering Canada*]. However, resurgence is now more commonly associated with a decolonization strategy presented by other leading scholars (see e.g. Taiaiake Alfred, *Wasáse: Indigenous Pathways of Action and Freedom* (Toronto: University of Toronto Press, 2009) [Alfred, *Wasáse*]; Leanne Simpson, *Dancing on Our Turtle's Back: Stories of Nishnaabeg Re-Creation, Resurgence and a New Emergence* (Winnipeg: Arbeiter Ring, 2011)).

27 See Simpson, *supra* note 26 at 148 for a similar summary of the objectives of Indigenous resurgence. Also note that strong critiques of the state often underlie the work of Indigenous resurgence theorists. It is their critique of unequal power dynamics that prompts them to argue that Indigenous resurgence is the best means to escape those dynamics.

28 While resurgence begins with the self, this path to decolonization is meant to reverberate outward in a larger political movement. Taiaiake Alfred and Jeff Corntassel write:

> Indigenous pathways of authentic action and freedom struggle start with people transcending colonialism on an individual basis—a strength that soon reverberates outward from the self to family, clan, community and into all of the broader relationships that form an Indigenous existence. In this way, Indigenousness is reconstructed, reshaped and actively lived as resurgence against the dispossessing and demeaning processes of annihilation that are inherent to colonialism (Taiaiake Alfred & Jeff Corntassel, "Being Indigenous: Resurgences Against Contemporary Colonialism" (2005) 40:4 Government & Opposition 597 at 612).

Alfred also writes:

> I believe it is absolutely crucial to start decolonizing at the personal level: the self is the primary and absolute manifestation of injustice and recreating ourselves is the only way we will ever break the cycle of domination and self-destruction it breeds in us and in our communities. Individual decolonization means focusing on the mental, spiritual, and physical aspects of being colonized and living the effect of such a condition (Alfred, *Wasáse*, *supra* note 26 at 164).

29 The debate regarding Indigenous engagement with the state runs throughout Indigenous scholarship and takes us largely beyond the scope of this article. See Glen Coulthard, Book Review of *This Is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* by Dale Turner, (2008) 77:1 UTQ 164 for one example of the way this debate plays out.

30 One potential tension here is worth noting, which is not to say each field cannot influence the other more than they currently do. Indigenous law is necessarily a community practice. I understand that Taiaiake Alfred, a leading resurgence scholar, would argue that these types of community practices are not possible without an initial focus on cultural regeneration aimed at creating people and communities capable of supporting these types of practices. In fact, this generally characterizes a shift from his earlier "traditionalist approach" in Taiaiake Alfred, *Peace, Power, Righteousness: An Indige-*

analysis of the roundtable process not as a definitive turn away, but rather, in favour of grounding our understanding of WSÁNEĆ law with a turn toward something else. As mentioned at the outset, I want to begin by looking to understand and strengthen Indigenous peoples' own normative understandings and responsibilities (outside the external pressures from the state) with respect to how we relate to one another and to the Earth.

Indigenous peoples, cultures, and legal traditions have been entangled within and struggled against numerous power structures. Indigenous peoples continue to struggle against these power structures in various ways, including through attempts to revitalize Indigenous legal traditions. Debate regarding the operation of power and the best ways to subvert these power structures remains contested, and more than one approach is possible. The primary aim of this Part is to indicate the need to be critically aware of these power structures. If we want to understand WSÁNEĆ law on its own terms, then we must also think about how the revitalization of WSÁNEĆ law connects with the broader regeneration of an alternative way of being in the world, and the implications and challenges that revitalization raises.[31] Later sections will begin to explore this revitalization in relation to the SELEKTEL spill. First, it is helpful to turn more specifically to Indigenous legal theory in order to understand what we might look to in order to understand WSÁNEĆ law on its own terms.

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nous Manifesto, 2nd ed (Don Mills, Ont: Oxford University Press, 2009), in which he called for the revival of traditional forms of government in their full complexity, to his "resurgence approach" in *Wasáse*, in which he questions "if it makes any sense to try to bring back [traditional] forms of government and social organization without first regenerating our people so that we can support traditional government models" (Alfred, *Wasáse*, *supra* note 26 at 32). See *ibid* at 31–32 for more on this distinction. However, I would not want to undervalue the role of the community and community practices in bringing about resurgence as well. Communities can ground, support, and give strength to their members in important ways. Cultural regeneration and engaging in the work to revitalize Indigenous legal traditions and other forms of governance and community practices can happen at the same time. They can grow and build momentum together, and in many ways likely feed off one another.

31 Johnny Mack concisely makes a very similar point:

> My sense is that, by looking to our own stories and attending to the health of our connection to them, we would become a more grounded, healthier people, better equipped to identify, withstand, and/or subvert the imperial impetus of treaty processes as well as imagine more balanced modes of reconciliation that respect [Indigenous] stories (Mack, "*Hoquotist*", *supra* note 15 at 293).

B. WSÁNEĆ Legal Theory and Method (Roots and Branches)[32]

John Borrows has persuasively argued for the authority, legitimacy, and applicability of Indigenous law in a contemporary setting.[33] A key idea expressed throughout his work is that Indigenous law (like all law) is living and not static. Therefore, Indigenous law is not rooted in originalism or fixed on returning to something that once was—a central critique often levelled against Indigenous law.[34] Nor is Indigenous law essentialist.[35] Rather, as Borrows notes, Indigenous legal traditions "have ancient roots, but they are not stunted by time."[36] I take this as my starting point for WSÁNEĆ law and legal theory. That is, I take seriously the notion

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[32] Here I mean to reference and make use of the common law's metaphor of a "living tree" in thinking about WSÁNEĆ law. The branches of a living tree continue to grow and develop in order to meet contemporary application. However, I also mean to emphasize that alongside the metaphor of branches are the roots of the tree—that which anchors and stabilizes. While the branches of the tree may grow, its roots continue to run deep. The roots of the tree do not signify a fallback on essentialism—a core of Indigeneity from which change may be measured. Rather, they represent a normative universe the WSÁNEĆ have always occupied in asking and answering questions of law. While dynamic and subjected to oppressive power from the outside, this normative universe remains because the WSÁNEĆ have (through choice, struggle, and contestation) held onto it. It remains a central component of what binds us together as a distinct political, cultural, and legal community. These thoughts are summarized from, and can be found in greater detail in, Robert Clifford, "Listening to Law", 33:2 Windsor YB Access Just [forthcoming in 2016] [Clifford, "Listening to Law"]. Aaron Mills also has an excellent article in this special issue exploring the same metaphor in relation to the nature of Indigenous law (Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847).

[33] Borrows, *Canada's Indigenous Constitution*, *supra* note 12; Borrows, *Recovering Canada*, *supra* note 26; John Borrows (Kegedonce), *Drawing Out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 2010).

[34] See e.g. John Borrows, "Ab(Originalism) and Canada's Constitution" (2012) 58 SCLR (2d) 351 at 385–93.

[35] Arguments for cultural regeneration frequently run up against anti-essentialist critiques—that is, a view of culture and identity understood principally in terms of having to be fluid and open to cross-cultural influence and deliberation. The way this conversation is framed is limiting in itself. The choice is not a binary between protecting individual agency or cultural preservation and revitalization, as though one necessarily precludes the other. Recognizing and placing importance on the roots of a tradition does not negate its dynamic elements. It is a misapprehension of the revitalization of Indigenous law to think that it rests on either originalism or essentialism. Importantly, it is also a failure to recognize that this debate does not occur outside the context of colonial history and contemporary power dynamics. Attention to these dynamics is necessary to appropriately contextualizing Indigenous claims for cultural preservation and revitalization, and the corresponding critiques of originalism and essentialism. I explore these points in greater detail in Clifford, "Listening to Law", *supra* note 32. See also Coulthard, *RSWM*, *supra* note 20, ch 3 for an informative discussion of power dynamics and colonialism and its connection to anti-essentialist claims against resurgence theory.

[36] Borrows, *Canada's Indigenous Constitution*, *supra* note 12 at 244.

that WSÁNEĆ law, as a distinct legal tradition, has its own roots that we can draw upon in dynamic ways.[37]

One such source to draw upon is WSÁNEĆ cosmology. Borrows has identified several potential sources of Indigenous law: sacred law, natural law, deliberative law, positivistic law, and customary law.[38] He notes that sacred laws are often "foundational to the operation of other laws" and the belief system of the Indigenous group in general.[39] Therefore, while creation stories or cosmology can be thought of as important sources of law, they are more than that as well.[40] For instance, the dynamic connection between law and cosmology takes shape when we think of an Indigenous ontological understanding of land that assigns much more "agency" and "being" to the land than non-Indigenous worldviews (notably those that inform Canadian law) do. By being, I mean that land and the non-human world is animate. This conception of animacy does not place humans as hierarchically superior to land or the non-human world. Through this conception of animacy, land and the non-human world also have agency—that is, a capacity to act and desire. In short, the relationship between humans, the land, and the non-human world is mutual and reciprocal. It is these types of differences in ontology that create deep tensions between Indigenous and non-Indigenous societies and legal orders, and therefore, I contend, are central to understanding the WSÁNEĆ legal tradition.[41]

My point here is that cosmology provides 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."[42] That is, we can better

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37 I recognize the difficulty in creating "boundaries" around and between different legal traditions. How does WSÁNEĆ law differ from its neighbouring Indigenous legal traditions and from state law? The only way to build concrete answers to this question is a focused attention on first building a more thorough understanding of what WSÁNEĆ law entails.

38 See Borrows, *Canada's Indigenous Constitution*, *supra* note 12, ch 2 for more on each of these sources of law.

39 *Ibid* at 25.

40 I use the term cosmology (understanding the nature of the universe) broadly to signify an understanding of who we are and how we envision ourselves in relation to one another and the Earth in a physical and metaphysical sense. My broad use of cosmology is also meant to include ontological (understanding the nature of being) and epistemological (understanding the nature of knowledge) components. This attention to cosmology re-emphasizes my socio-legal approach.

41 See Wapshkaa Ma'iingan (Aaron Mills), "Aki, Anishinaabek, kaye tahsh Crown" (2010) 9:1 Indigenous LJ 107 for a helpful discussion regarding the conflicts and tensions between Indigenous and non-Indigenous legal orders and ontologies as they relate to natural resource development.

42 CF Black, *The Land Is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (New York: Routledge, 2011) at 24.

understand the "principles, ideals, values and philosophies" that inform the legal tradition.[43] A comprehensive knowledge of W̲SÁNEĆ cosmology is not necessary in order to begin constructing an understanding of the legal tradition, but we need an open mind to the effect cosmology may have on conceptions of proper relationships—whether it is with each other, the Earth, ancestors, or otherwise. This understanding is integral because law is, fundamentally, about relationships.[44]

We can look to creation stories for cosmology, but much can also exist between the lines in stories—that is, much of the worldview and many of the precepts that animate and give context to these stories can also remain implicit.[45] Language can be one way to help bridge the gap between stories and the implicit understandings that give context to them.[46] For example, in the W̲SÁNEĆ language (SENĆOŦEN) the word for islands is T̲ET̲ÁĆES, which is a conjunct of T̲EĆ (deep) and SĆÁLEĆE (relative or friend). The W̲SÁNEĆ concept of islands therefore literally translates as

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43 *Ibid* at 15. Attention to cosmology might also reveal insights into "the constitution of authority" and notions of legitimacy within a tradition (*ibid* at 24).

44 Vine Deloria Jr. and Christine Black offer similar points. Deloria Jr. argues: "The task of the tribal religion, if such a religion can be said to have a task, is to determine the proper relationship that the people of the tribe must have with other living things" (Vine Deloria Jr, *God is Red: A Native View of Religion*, 3rd ed (Golden, Colo: Fulcrum, 2003) at 87). Similarly, Black refers to "a system of Law that looks to the management of relationships on all levels of being" (Black, *supra* note 42 at 180).

45 Anthropologist Julie Cruikshank notes:

> 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 communication so fraught (Julie Cruikshank, *Do Glaciers Listen?: Local Knowledge, Colonial Encounters, and Social Imagination* (Vancouver: UBC Press, 2005) at 66).

46 Leanne Simpson argues that Indigenous languages "house our teachings" and "carry rich meanings, theory and philosophies within their structures" (Simpson, *supra* note 26 at 49). Similarly, Marie Battiste and James (Sákéj) Youngblood Henderson emphasize that, "through their shared language, Indigenous people create a shared belief in how the world works and what constitutes proper action. Sharing these common ideals creates the collective cognitive experience of Indigenous societies, which is understood as Indigenous knowledge" (Marie Battiste & James (Sa'ke'j) Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Saskatoon: Purich, 2000) at 49). I also note that tribal court judge Mathew Fletcher advocates for a linguistic method aimed at the location and application of Indigenous law. He argues that language, as an integral component of thinking and knowing, can contain law. The linguistic method, therefore, requires the identification of a principle or legal concept within an Indigenous word or phrase, which can then be applied to the particular context or legal issue (Matthew LM Fletcher, "Rethinking Customary Law in Tribal Court Jurisprudence" (2007) 13:1 Mich J Race & L 57).

"Relatives of the Deep," indicating an ontological connection of the WSÁNEĆ people with the islands in their territory.[47] Such an approach to breaking down language provides both non-WSÁNEĆ and non-fluent WSÁNEĆ people with "a window through which to experience the complexities and depth of our culture."[48]

Since I will soon relate several creation stories I find relevant to the SELEKTEL spill, it is also necessary to reflect more specifically on my approach to stories in WSÁNEĆ law. Indigenous oral traditions have always used stories to teach, guide, and reinforce behaviour,[49] meaning they can be used to create a framework for understanding relationships and obligations, decision-making processes, and deviations from accepted standards.[50] In doing so we must work to understand the myriad of different stories across a tradition and how they piece together in complex and informative ways to create a larger conceptual and legal framework.[51] This process involves understanding the principles made explicit within and across those stories (i.e., the *what*), while also paying careful attention to *how* they are expressed. That is, it allows us to understand the norms encoded within the manner of speaking or relating those stories and teachings, how the stories themselves are internally organized, and how we are taught to engage with those stories as learners. The speakers or storytellers themselves may not be able to express these norms at a conscious level, but careful attention to the implicit norms governing their discursive practices may provide insights into notions of authority, con-

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47 Leanne Simpson advocates a similar approach in recognizing that "[b]reaking down words into the 'little words' they are composed of often reveals a deeper conceptual—yet widely held—meaning" (Simpson, *supra* note 26 at 49).

48 *Ibid*.

49 For an account of storytelling as a framework for Indigenous knowledge, see Julie Cruikshank, *Life Lived Like a Story: Life Stories of Three Yukon Native Elders* (Lincoln: University of Nebraska Press, 1990).

50 See Val Napoleon & Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions through Stories" 61:4 McGill LJ 725. John Borrows makes a similar point in arguing that stories can be viewed as a form of "precedent because they attempt to provide reasons for, and reinforce consensus about, broad principles and to justify or criticize certain deviations from generally accepted standards" (Borrows, *Recovering Canada*, *supra* note 26 at 14).

51 John Borrows writes that Indigenous legal orders "cannot be understood without an appreciation of how each story correlates with others. A full understanding of [Indigenous] law requires familiarity with the myriad stories of a particular culture and the surrounding interpretations given to them by their people" (Borrows, *Recovering Canada*, *supra* note 26 at 16).

ceptions of legitimacy, and different ways of being and relating that are central to the tradition.[52]

The purpose of W̲SÁNEĆ stories is not about returning to the past, but how we choose to relate to and use those stories in guiding our lives today. There is no singular way to tell, use, or interpret a story. Stories are dynamic, not static, and may even take new shapes in different contexts.[53] Stories draw on past knowledge, but there is a continual process of agency exercised in learning from and using those stories.[54] They are a framework for thinking and relating (or the "processes of knowing") more so than about transmitting "explicit rules".[55] The diversity of ways to interpret and use stories is an exciting component of Indigenous law. While these stories are less about explicit rules, they can be the framework for deliberation, the means by which we judge the application of specific legal principles, and the soil from which those principles grow.[56]

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[52] I owe my thinking here directly to a number of conversations I have had with Andrée Boisselle, my PhD supervisor at Osgoode Hall Law School.

[53] Indigenous legal traditions do "not depend on finding the 'authentic' first telling of [a story], uncorrupted by subsequent developments. In fact, the reinterpretation of tradition to meet contemporary needs is a strength of this methodology" (Borrows, *Recovering Canada*, *supra* note 26 at 14–15).

[54] Listeners and learners are as much a part of this process as Elders or storytellers (see Napoleon & Friedland, *supra* note 50).

[55] Battiste & Henderson, *supra* note 46 at 77–78. However, it may be contentious to state that sacred or creation stories are subject to flexibility and interpretation in this manner. For example, Val Napoleon distinguishes between believing laws themselves are sacred and thus outside human control, and understanding that law is founded on a particular worldview and cosmology (Val Napoleon, "Thinking About Indigenous Legal Orders" in René Provost & Colleen Sheppard, eds, *Dialogues on Human Rights and Legal Pluralism* (Dordrecht: Springer, 2012) 229 at 234). For her part, Christine Zuni Cruz understands laws contained in Indigenous creation narratives as being a constant reference that may not change (Christine Zuni Cruz, "Law of the Land: Recognition and Resurgence in Indigenous Law and Justice Systems" in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, Indigenous Peoples and the Law: Comparative and Critical Perspectives (Portland, Or: Hart, 2009) 315 at 315).

[56] For more on this point, see Raymond D Austin, *Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Governance* (Minneapolis: University of Minnesota Press, 2009). Austin identifies the three core values or legal concepts of the Navajo legal order: hózhq—glossed as peace, harmony, and balance (*ibid*, ch 3); k'é—glossed as kinship unity through positive values (*ibid*, ch 4); and k'éí—glossed as descent, clanship, and kinship (*ibid*, ch 5). Each of these doctrines is a condition generated through the operation of Navajo law, as opposed to a basic legal principle to be directly applied (*ibid* at 41). That is, the function of Bee haz' áanii (glossed as laws of every kind) is to produce or maintain these foundational principles or state of relationships. Here I see similarities with the work of Henderson, *supra* note 13 in that Austin grounds an alternative philosophy at the root of understanding the legal tradition, as well as finds a useful

To sum up, the WSÁNEĆ have creation narratives for all aspects of life and Earth, each contributing to a cosmological theme and way of relating in the world. Taking these stories seriously means paying attention to a sophisticated form of understanding and transmitting a distinctive set of values and cultural assumptions. It also involves learning to discern the legal principles flowing from those stories, values, and assumptions, and the evolving intellectual and experiential context guiding the application of those principles. All of these tools for thinking foreground relationships to the ecosystem and the non-human world, as opposed to a liberal paradigm that centres on the individual. Those relationships have an aspirational dimension, but they are not a romantic ideal any more than the notion of individual freedom and non-interference. They are what we strive for, or the conditions we seek to generate through law.[57] It is an entirely different starting point with its own implications for law.[58]

II. S,OXHELI (Sacred Teachings of Life): Telling a Different Story[59]

All WSÁNEĆ people have a ĆELÁNEN. ĆELÁNEN is a word that can equally describe our ancestry, birthright, or culture, as well as the subcomponents of each. For example, the SENĆOTEN language is part of our ĆELÁNEN. ĆELÁNEN can also be used to describe our "traditional WSÁNEĆ laws and teachings that form the basis for the governance structure."[60] Therefore, our creation stories are an important aspect of our ĆELÁNEN. Contained within our creation stories are our SKÁLS (our beliefs and laws) and our S,OXHELI (sacred teachings of life). Our S,OXHELI describe how things came to be and therefore contain im-

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way of thinking about how those philosophies or values can act as a grounding point for the legal tradition.

57 See Austin, *supra* note 56 for further discussion on this point.

58 I draw influence here from the work of Henderson, *supra* note 13. Henderson highlights how Indigenous law is founded on different values, worldviews, and cultural assumptions than Western law. He understands Indigenous law as an ecological order that works to sustain harmony and balance through interrelationships with nature. I read him as centring on ecology, harmony, and interrelationships as the foundational values and philosophies that serve as the starting point for Indigenous law.

59 While I do not take it up in this article, a gendered reading of WSÁNEĆ law and stories is important. Several stories I will relate are oriented more toward the male gender. Emily Snyder has done important work that centres on questions relating to gender in the work of Indigenous law. See generally Emily Snyder, "Indigenous Feminist Legal Theory" (2014) 26:2 CJWL 365.

60 Nicholas Xumthoult Claxton, "ISTÁ SĆIÁNEW, 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) 47 at 52.

portant lessons. Our SKÁLS and S,OXHELI are ENSXAXE (something we hold as sacred or spiritual).

The stories in W̲SÁNEĆ SYESES (our oral history) have characters that are there to remind us of our values, teachings, and our ŚX̲ENÁNS (our way of life). The following words from a W̲SÁNEĆ Elder emphasize this point in greater detail:

> XALS created Saanich and the people in Saanich to care for each other. XALS is our creator. The creation stories of the Saanich People are a journey through Saanich history and across Saanich territory. Though their main purpose can be deemed as being a preservation of Saanich ideas and values, to a Saanich Indian the stories exist as the history of our origin and as the teachings of our creator. A person's understanding of the value and meaning of these stories changes according to the person's level of maturity.
>
> In the time of creation, XALS walked on the earth. He transformed the people in Saanich into animals and into stone, and sometimes the animals too were changed. He transformed the creatures of the earth to make an example out of them. Sometimes he made a good example out of them, and sometimes he [made] a bad example. This is how XALS assured his teachings would remain in the minds of the Saanich People, he would change someone and say, "Now the people will always remember what you have done and why you have been changed."[61]

W̲SÁNEĆ culture consists of a myriad of stories in which the Creator transformed people and animals as a way of setting an example. Each story is set in a different context and contains its own unique principles. However, beyond any specific principles, these stories also give us broader insights into notions of being, agency, and relationality in W̲SÁNEĆ law.

A. Being, Agency, and Relationality

> SLEMEW, the first W̲SÁNEĆ man, was placed on the Earth in the form of rain. SLEMEW assisted XÁLS in forming the world. SLEMEW carved the mountains, the rivers, streams and formed the lakes. He makes things grow and brings life to the land.
>
> XÁLS said to SLEMEW, "You will cleanse yourself in the lakes and streams." He listened to XÁLS and purified himself in the way he was told. XÁLS gave SLEMEW a gift, a wife and family. SLEMEW taught his family to be clean of mind, body and spirit, the way XÁLS had taught him. The W̲SÁNEĆ should never forget SLEMEW. 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 W̲SÁNEĆ people. Honour

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61 Earl Claxton Sr, John Elliott & Philip Kevin Paul, *TĆÁNCIE I TIÁ: "The Way We Were and the Way We Are"* [unpublished, on file with author].

> SLEMEW by always honouring XÁLS' teachings and XÁLS' wish for the WSÁNEĆ people.[62]

A common theme in WSÁNEĆ creation stories is that many elements of nature were once people, whether it is the salmon, water, animals, or the islands. We see this in the story of SLEMEW, above, who came to the Earth in the form of rain. However, we can further exemplify this point by drawing upon concepts rooted in language. Language "is a way of thinking, or viewing the human experience in the world, as much as it is about communicating."[63] Take the example of islands, which in SENĆOŦEN are called TETÁĆES. As noted above, TETÁĆES is a conjunct of two other distinct words in SENĆOŦEN: TEĆ (meaning deep) and SĆÁLEĆE (meaning relative or friend). Therefore, TETÁĆES literally means "Relative of the Deep." To the WSÁNEĆ people, islands are our Relatives of the Deep.[64] On its own, this cosmological point indicates an attribution of much more being to non-human elements of the world, which has a bearing upon how we understand and regulate our relationship with WSÁNEĆ territory. It is, however, not only being, but also a higher level of agency in the non-human world that we must consider in understanding WSÁNEĆ law. Understanding agency in the non-human world can be further exemplified in relation to our Relatives of the Deep, specifically with reference to the creation story of LEL,TOS (James Island), an island within WSÁNEĆ territory. The creation story describes both the origin of the island and the name LEL,TOS, as well as relating how every island is an ancestor to the WSÁNEĆ:

> A long time ago, when the Creator, XÁLS, walked the Earth, there were no islands in the WSÁNEĆ territory. The islands that are there today were human beings (our ancestors). At this time XÁLS walked among the WSÁNEĆ People, showing them the proper way to live. In doing this he took a bunch of the WSÁNEĆ People and threw them out into the ocean. Each of the persons thrown into the ocean became the islands there today. Each of those islands were given a particular name that reflects the manner in which they landed, their characteristics or appearance, or the significance they have to the WSÁNEĆ People. "James Island" was named LEL,TOS, meaning "Splashed on the Face." LEL,TOS reflects the way the is-

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62 *Ibid.*

63 Janet Poth, ed, *Saltwater People: As Told by Dave Elliott Sr.*, 2nd ed (Saanich, BC: Native Education School District 63, 1990) at 19.

64 I recognize not all WSÁNEĆ people know or relate to the story of TETÁĆES in the same way. Some may or may not know the story, and some may take it more metaphorically than literally. I do, however, think it provides an important framework in thinking about the revitalization of WSÁNEĆ law. I recognize this diversity and explore its implications in greater detail in Clifford, "Listening to Law", *supra* note 32.

> land landed in the ocean. The southeast face of LEL,TOS is worn by the wind and the tide.
>
> After throwing the WSÁNEĆ People into the ocean, XÁLS turned to speak to the islands and said: "look after your relatives, the WSÁNEĆ People." XÁLS then turned to the WSÁNEĆ People and said: "you will also look after your 'Relatives of the Deep.'" This is what XÁLS asked of us in return for the care our 'Relatives of the Deep' provide for us.[65]

Islands within WSÁNEĆ territory were once our ancestors and were given to us by the Creator to maintain our way of life. With this gift came a reciprocal obligation to care for these islands. This obligation is one of our sources of laws. If we are to understand WSÁNEĆ law on its own terms, it would be a simplification and a distortion to think of them only as "islands"—that is, inanimate masses of rock surrounded by water. What are the implications of this understanding?

Canadian law does account for the environment, but these stories indicate a starting point for WSÁNEĆ law that goes much beyond that posture. Humans cannot live in this world without drawing and relying upon the world around us. This notion is directly acknowledged in the story of LEL,TOS: *XÁLS turned to speak to the islands and said: "look after your relatives, the WSÁNEĆ People."*[66] The land and ecology provides for us. However, our relationship with the external world cannot centre only on our needs as humans: *XÁLS then turned to the WSÁNEĆ People and said: "you will also look after your 'Relatives of the Deep.'"*[67] The greater attribution of being and agency to land means that our application of WSÁNEĆ law must not only be *about* land, but "deeply *informed* by the land as a system of reciprocal relations and obligations."[68] It also means that the responsibility to care for land extends beyond the actions of the WSÁNEĆ. That is, WSÁNEĆ law also provides the obligation to protect the land against the harmful actions of others. One task for the revitalization of WSÁNEĆ law is to continue to think about how our approach to law can meaningfully account for this broader understanding of being and agency, and the responsibility it entails. In a world driven by economics, this ap-

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65 A story told to me by John Elliott in a personal communication (24 September 2010) at the WSÁNEĆ School Board.

66 *Ibid.*

67 *Ibid.*

68 Coulthard, *RSWM*, *supra* note 20 at 78 [emphasis in original]. Coulthard refers to this practice as "grounded normativity": "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).

proach will require a significant and encompassing shift in perspective.[69] It is also an instance where WSÁNEĆ law encounters the structural aspects of colonialism (i.e., "the background legal, political, and economic framework of the colonial relationship"[70]). That is, the background context to the fuel truck crash is certainly the widespread extraction, transportation, and use of hydrocarbons. While we may focus on the particular circumstances of the accident, it cannot be divorced from this larger context.

These considerations set a broader context in which to consider the application of WSÁNEĆ law generally, but it is also important to have a more detailed understanding of SELEKTEL in particular.

B. SELEKTEL (Goldstream)

T'AQ'ET TONES

WEC'ET TONES

QEM QOMT TONES

SLEMEW ĆELÁNEN SIÁM[71]

There are several cosmological points to discuss in considering the spill at SELEKTEL, part of which requires more specific understanding of the names and geography of the area. There are two aspects to the river: SELEKTEL (the splitting stream) and MIOEN (the lesser stream). Immediately adjacent to and overlooking SELEKTEL is Mount Finlayson, which is known as QENELEL (looking into the groin). Mount Finlayson resembles a young man looking down into his groin, with both of the streams being his legs. There are several implications regarding this image that are worth further consideration, especially since SELEKTEL is a ceremonial bathing location. However, let us first consider the WSÁNEĆ notion of water more closely.

The opening paragraph to the previous section introduced the reader to the creation story of SLEMEW (Grandfather Rain), the first WSÁNEĆ man, who originated from rain. SLEMEW helped form the world. As rain, he also makes things grow and brings life to the land. As part of his role in creating the world, XÁLS told SLEMEW to cleanse in the water of the lakes and streams. Cleansing makes one clean of mind, body, and spirit.

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69 Here I simply mean a predominant trend toward a neoliberal ideal that prioritizes the movement of goods and resources, and generally seeks to maximize profits and efficiency.

70 Coulthard, *RSWM*, *supra* note 20 at 41.

71 This teaching translates as: "Wash me, wake me, strengthen me today, Grandfather Rain." I would like to acknowledge John Elliott for providing me with this teaching and translation.

Because he followed XÁLS teachings, SLEMEW was given the gift of family, who he too taught to cleanse. The end of the story indicates that the WSÁNEĆ owe everything to Grandfather Rain because we are all descendants of him. However, we owe everything to Grandfather Rain in a different sense as well. Without water and rain, life on Earth is not possible. Water is a precious element of life that is too often taken for granted. While I earlier related the story of SLEMEW to indicate greater being and agency in the non-human world, here I am more specifically drawing on a principle that gives priority to maintaining the integrity of water.

From the story of SLEMEW we can draw the importance of XÁLS' teachings and the sacredness of water.[72] Water originates from rain and both are closely connected. There is sacredness and a ceremonial aspect to water because of this relationality. Water is a pure spirit and thus has the ability to cleanse. The cleansing taught by XÁLS in the creation story of SLEMEW is done through the ceremony of bathing, which uses water in the lakes, streams, and ocean.

Bathing (and water) is an important part of WSÁNEĆ culture and strengthens us. When we bathe, we honour Grandfather Rain. Reference to the SENĆOTEN language further emphasizes this point. The WSÁNEĆ have distinct words for both water and rain, and how we use them reflects the importance of bathing. When we bathe ourselves during ceremony we use the word rain (SLEMEW), as opposed to water (ḰO), in order to honour our Grandfather Rain. Bathing is therefore both a ceremony and a prayer. The words that opened this subsection are one way I have been taught to honour Grandfather Rain during bathing: "wash me, wake me, strengthen me today, Grandfather Rain."[73]

Ideally, bathing is done every morning in a solitary place before the sun rises, because the day is a gift not to be wasted. Bathing is particularly important, however, during sacred parts of our life when our bodies are changing. During puberty or when our sexuality is becoming stronger, we bathe in cold water to train our minds to be strong—stronger than our bodies when necessary. For example, when a young boy is becoming a

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[72] Other principles may be drawn from this story as well. My focus here is more narrowly on the importance of water and the importance of bathing, as both relate to the SELEKTEL spill.

[73] See *supra* note 71. I do not aim make a definitive account of bathing or ceremony, but, rather, to share some of my own teachings. I also recognize that often it may not be appropriate to share ceremony in an open and analytical way. My intention is not to compromise the integrity of bathing, nor to explain the ceremony in its entirety, but, rather, to emphasize some of the teachings that have been shared with me that stress the importance of water and bathing locations. My hope in doing so is that I can help protect and strengthen these teachings and locations.

man, he bathes to learn respect for his own actions. Mount Finlayson—QENELEL (looking into the groin)—reflects this specific teaching.

I noted above that the geography of SELEKTEL and Mount Finlayson resembles a young man who is looking down into his groin, with both of the streams being his legs. The teaching is that at this location there was a young man who did not respect his own actions and was changed into the mountain commonly called Mount Finlayson (QENELEL). QENELEL (looking into the groin) is therefore there to remind us that there is a time and place for sexual life. There are other WSÁNEĆ stories that reinforce a related theme. One such story is the creation story of QOLEW (the chum salmon). This story is closely related to the story of QENELEL because the chum salmon is the primary salmon that spawns in SELEKTEL.

The story of QOLEW tells us of a young man who was changed into the chum salmon. He was sexually forcing himself on his own sister. He kept sneaking into her bed at night when it was dark and she could not see who it was. The sister used red earth on her hands to mark the person who was coming into her bed so she could identify him. When she went to look at the different boys the next morning she saw that it was her brother, and she cried. XÁLS came and changed the young man into the chum salmon and thereby made a teaching and example that there should not be rape, nor incest in the family. In speaking with Elders, I have been told that people do not often talk about this story today or ask about its real meaning, though its story and meaning should be shared with the young people where the chum are spawning.[74]

The stories of QENELEL (Mount Finlyason) and QOLEW (the chum salmon), and their corresponding teachings, both centre around the SELEKTEL area. There are also clear connections with the obvious sexuality of salmon spawning at SELEKTEL more generally. It opens the possibility to reflect on the fish's experiences in the spawning cycle and create links with these stories about appropriate sexual behaviour. Central, however, is also the story of the first WSÁNEĆ man (SLEMEW) and the corresponding teachings about water and bathing. There is a strong interrelationship between all these stories. It may be specifically because of the QENELEL and QOLEW stories that SELEKTEL is also an important bathing location for the WSÁNEĆ. The bathing ceremony honours Grandfather Rain, cleanses us, and is meant to remind us to be pure of mind, body, and spirit. As a bathing location, it is thus important that the waters at SELEKTEL remain clean and unpolluted.

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74 I would like to thank John Elliott for sharing with me the story of QOLEW.

III. EQÁTEL T̲ŦE MEQ (Our Relationships to All): Re-Framing the SELEK̲TEL̲ Spill

At the outset of this article I indicated several challenges in providing a definitive account of the application of W̲SÁNEĆ law. Beyond those issues, any attempt at a rigid solution runs counter to W̲SÁNEĆ pedagogy. If you ask a W̲SÁNEĆ Elder a question—about the fuel spill at SELEK̲TEL̲, for example—you may well hear in response a series of stories similar to those I related above. These are less about explicit rules than they are about a process of thinking and engaging. This mode of thinking and teaching proceeds from W̲SÁNEĆ cosmological and ontological assumptions. In explaining W̲SÁNEĆ legal theory, I indicated that there is a great deal of agency to be exercised by the listener or reader to inhabit, engage with, and learn from those stories. This engagement can continue to grow and expand over time. For W̲SÁNEĆ law to work, as a decentralized system of law, there must be a collective contemplation of these issues. In this Part, I will flesh out some of my own engagement and consider some of the ways in which we might begin to recast our framework for considering the fuel spill.

The former Chief Justice of the British Columbia Court of Appeal, the Honourable Lance Finch, has said in regards to Indigenous law that we must "do our utmost to recognize and to relinquish our preconceptions of what *objectively* constitutes a 'law' or a 'system of laws.'"[75] For me, these preconceptions also include assumptions about the nature and function, or the role, of law within another society or culture. Releasing these preconceptions includes the task (and benefit) of thinking through all the implications of centring a different framework. How do these stories shape us? How do we want to use them and to learn from them? What preconceptions about law do they cause us to question? A ground-up approach to the revitalization of W̲SÁNEĆ law means that many of the answers to these questions remain open-ended at the start—to be guided by the very stories and teachings we draw upon. Nonetheless, how we talk about and how we think about these issues has implications. In the following sections I will explore these implications primarily in relation to the notions of jurisdiction and remedy. In so doing, I first turn briefly to the work of Gordon Christie and the power of narrative to frame our thinking.

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75 The Honourable Chief Justice Lance SG Finch, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice" (Speech delivered at the Continuing Legal Education Society of British Columbia Conference, Vancouver, 16 November 2012).

A. Narrative Primer: A Constraint on Imagination[76]

Gordon Christie, in his article "Indigeneity and Sovereignty in Canada's Far North: The Arctic and Inuit Sovereignty",[77] explores the narrative of "sovereignty" (and its associated limitations and impacts) as it applies to the "opening up" of the Arctic. Christie proposes the term "Indigeneity" as an alternative narrative in resistance to that of sovereignty.[78] He begins by "noting that certain linguistic elements do not simply instrumentally *assist* in the formation of plans and strategies, rather, they serve to *define* a range of possible plans and strategies."[79] In application to the notion of sovereignty Christie notes:

> Quietly residing in the background, [the term sovereignty] provides a certain kind of conceptual structure to be applied to the very acts of investigation, assessment, and planning. Not only are certain parties simply assumed to be vested with the proper authority in making decisions that will affect all those who live in the Arctic, but how these parties think and act are assumed to be the only vehicles or mechanisms by which legitimate actions are first imagined and then instantiated. Here forms of language and action outcomes are linked together in a way that seems to preclude the sensibility of other ways of thinking and acting.[80]

In short, "[n]arratives function, then, to both carry along commonalities of meaning and to police meaning. They are the carriers of meaning itself—the stories we tell define who we are and how we think of the world—while they also work to control what can be thought (and so what

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[76] I note that the notion of narrative and its ability to frame our thinking can also connect back to both my emphasis on the connection between law and culture generally, as well as my attention to cosmology in thinking about WSÁNEĆ law. Each can work to "define who we are and how we think of the world" (Christie, *supra* note 23 at 338).

[77] *Ibid*.

[78] Christie defines sovereignty as follows:

> First, sovereignty is understood as denoting territorially based power, the ability to act in relation to defined lands (and not, for example, directly in relation to persons, objects, or events). A nation-state holding sovereign power does so in relation to its defined territory and enjoys under this power the highest degree of deference in relation to decisions it makes. Second, all other decision-making bodies either within or outside this territory must accede to the decisions made by this sovereign power within the scope of its territory. Finally, accession to decisions made by the sovereign applies to all within the territory, generating obligations on all to follow its commands—authority is conceived of as designating a right held by the sovereign to be obeyed by all parties (*ibid* at 333 [emphasis in original]).

[79] *Ibid* at 332 [emphasis in original].

[80] *Ibid*.

we can see as 'possible' action)."[81] It is from this backdrop that Christie contrasts an approach to resisting "the second wave of colonization by reacting *within* the web of meaning built up around this fundamental notion" of sovereignty, with one that challenges "this story [of sovereignty] *as a story*" from "up and beyond the level wherein sovereignty functions" to constrain what is possible.[82]

The sovereignty model carries with it a "legitimacy" or "rightfulness" in the sense that "the sovereign state is the legitimate source, ground, and site of decision making over territory."[83] Residing behind that legitimacy is a web of meaning and presumed ways of thinking and acting.[84] Challenging this legitimacy from within can have benefits for Indigenous peoples,[85] but it also involves a "closing off of imagination" according to Christie.[86] That is, challenges are limited to arguments such as "the nation-state in question does not enjoy jurisdiction over this piece of land," there is some reason to "temper the exercise of absolute power in relation to a particular subject matter," or there is reason to "question the standing of the decision-making authority as constituting a sovereign entity."[87] Central to Christie's argument is the idea that "all these *cognizable* challeng-

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81 *Ibid* at 338.

82 *Ibid* at 334 [emphasis in original].

83 *Ibid* at 338.

84 See *ibid* at 332.

85 Christie argues that in resistance from *within* the sovereignty model, Indigenous peoples must engage the law that "was historically constructed by (and, some would argue, almost entirely *for*) the nation-state" (*ibid* at 336 [emphasis in original]). Through "masterfully pushing and pulling all the levers available in the sovereignty model" Indigenous peoples can force "state powers to acknowledge the rule of law [and] to accept the legal trappings that they themselves are bound by" (*ibid* at 335–36). Resistance from within the sovereignty narrative can therefore improve the lives of Indigenous peoples when they are faced with resource exploitation and other threats (*ibid* at 337). However, Christie goes on to outline the important limits of action within the sovereignty paradigm (*ibid* at 335).

86 *Ibid* at 339. However, John Borrows has skilfully shown the transformative effects Indigenous law can have in conversation with Canada's legal system (Borrows, *Canada's Indigenous Constitution*, *supra* note 12). In this work Borrows tells a different story—one about Indigenous law and its resurgence—while managing to weave that story with the narrative on Aboriginal rights in Canada, thereby envisioning a truly multijuridical Canada. Borrows has also shown elsewhere that the problem is not so much section 35 of the *Constitution Act, 1982* where "Aboriginal rights are hereby recognized and affirmed"—which read broadly contains significant transformative potential—but the narrow construction the highest courts in Canada have given to its meaning (John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22:1 Am Indian L Rev 37).

87 Christie, *supra* note 23 at 339.

es are understandable only *within* the sovereignty model."[88] That is, the "conceptual universe" and "sovereign authority of nation-states is the assumed backdrop" to any successes achieved within the sovereignty narrative.[89]

The sovereignty narrative manifests all around us, in various ways. Consider the SELEKTEL spill and subsequent criminal charges and roundtable process. Acts resulting in criminal charges are considered to be offences against society, and are prosecuted directly by the Crown according to strict processes and standards that are deemed legitimate. Similarly, the roundtable process, while allowing for some flexibility, apportions liability and channels resources. It is not that the roundtable process—its assessment of fish numbers, remediation activities, and determination of financial allocations—is without benefit. In fact, from within the sovereignty model it is probably favourable to other processes. I am also not claiming that it is never worth engaging in roundtable type processes. Nonetheless, the backdrop to the roundtable process is Crown sovereignty and associated assumptions regarding what is legitimate and appropriate in terms of determining harms and remedies, as well as what processes and standards ultimately matter most. The BC Ministry of Environment and the Department of Fisheries and Oceans, for instance, are certainly present precisely because of Crown sovereignty and its staked authority over matters relating to environment and fisheries. Even the fact that the Ministry of Transportation and Infrastructure is not present says something about the assumed harms and remedies—that a provincial highway running through this location is not a problem in and of itself. In the following sections, I will indicate that the location of the highway may well constitute part of the harm within a WSÁNEĆ framework. The point I am making is that many of these assumptions run deep. I will consider this point in greater detail in relation to jurisdiction and remedy.

B. Distracted by Jurisdiction

No matter how we conceive of them, neighbouring legal traditions will inevitably have to bump up against or interact with one another in some

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88 *Ibid* [emphasis in original].

89 *Ibid* at 337. This backdrop exists at the international, domestic, and subdomestic levels. Christie exemplifies this point through pointing to the UN *Declaration on the Rights of Indigenous Peoples*, which, although protecting the right to self-determination, does so only insofar as it does not infringe "territorial integrity or political unity of sovereign and independent States" (*ibid*, citing *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007), art 46).

fashion.[90] Contemplating the operation of W̱SÁNEĆ law within a colonial state might therefore push us toward immediate efforts (and likely tensions) to stake out and defend boundaries and jurisdiction. The SELEḴTEḺ example exemplifies these problems.

Several issues are easily perceptible in relation to the SELEḴTEḺ spill. First, the incident occurred at SELEḴTEḺ, which is within W̱SÁNEĆ traditional territory but off reserve. While the Goldstream Indian Reserve, which is held in common by the Malahat, Pauquachin, Tsartlip, and Tsawout First Nations, is located in the area of Goldstream Park off Highway 1, the specific location of the crash itself was outside those lands. Second, a non-Indigenous person perpetrated the act leading to the contamination. Each of these points has several implications.

Our first question might be whether W̱SÁNEĆ law would apply to off-reserve lands but within traditional territory. Within the jurisdictional narrative, several perspectives can be imagined. One approach could be to resist the unjustifiable imposition of the common law and assert the operation of W̱SÁNEĆ systems of law across W̱SÁNEĆ traditional territory. This approach is greatly strengthened when coupled with the additional point that the site of the crash was within Douglas Treaty lands.[91] Nick Claxton has argued that the W̱SÁNEĆ right to "carry on our fisheries as formerly" under the Douglas Treaty protects not only the right to fish, but a system of laws and governance in relation to those fisheries.[92] A second approach may be grounded more directly in the notion of reconciliation, thereby involving a negotiated or bi-juridical approach to the spill. A third, narrower approach could be to limit the application of W̱SÁNEĆ law to lands already recognized as being under W̱SÁNEĆ jurisdiction (reserve land). However, Canadian constitutional law itself wrestles, at the federal-provincial division of powers level, over issues such as the one created by the SELEḴTEḺ spill, which occurred off such lands but created harm that manifested itself on those lands. What, then, is the jurisdictional solution? Even when narrowed down to three potential approaches,

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[90] Neighbouring legal traditions, whether they are Indigenous or non-Indigenous, national or international, eventually bump up against one another. The problem is when one assumes superiority or power over the other, thereby imposing or requiring conformity to its own framework.

[91] These lands are covered by the Saanich (North) Douglas Treaty of 1852. Two separate treaties were made with the WSÁNEĆ—the Saanich Tribe-North Saanich and the Saanich Tribe-South Saanich. Each treaty covers different areas of land, though are otherwise the same in content. For further details, see Aboriginal Affairs and Northern Development Canada, "Treaty Texts: Douglas Treaties", online: <www.aadnc-aandc.gc.ca/eng/1100100029052/1100100029053>; Tsawout First Nation, "The Douglas Treaty", online: <www.tsawout.com/about-tsawout/48-history-douglas-treaty>.

[92] Claxton, *supra* note 60 at 50.

staking out jurisdiction becomes complex and entangled in a larger narrative.

The same is true of a second contentious question—should WSÁNEĆ law apply to non-Indigenous peoples in instances such as the SELEKTEL spill? This consideration only becomes increasingly complicated when coupled with the earlier observation that the incident occurred off Aboriginal lands, but within traditional territory. Again, many approaches are possible. One may argue that WSÁNEĆ law should apply to non-Indigenous peoples if they pass through and act on Aboriginal lands. After all, if every individual is subject to laws of the jurisdiction they enter, why should it be any different with WSÁNEĆ law? Yet, I doubt that even such a straightforward argument as that would be met without resistance. Resistance to this argument may stem from several sources, including uncertainty regarding what WSÁNEĆ law would require.[93] In large part, this difficulty simply reflects the suppression of WSÁNEĆ laws throughout the processes of colonialism.

One final jurisdictional tension worth mentioning is that an element of the harm caused by the SELEKTEL spill relates to fish and salmon spawning grounds. Fish are migratory and are thus important to several Indigenous groups and non-Indigenous people. Thus, even if WSÁNEĆ law were presumed to apply, the legal order would bump up against the interests and legal orders of neighbouring traditions. How would these legal orders interact?[94] Second, federal fisheries law has already clearly applied in this instance. How could these two legal orders function to come to a mutual solution, without simply assuming that federal law is paramount? These are a fraction of the complex political questions that might arise. However, I would like to ask a more foundational question—is this even where we should start?

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93 See Borrows, *Canada's Indigenous Constitution*, *supra* note 12, ch 6 for further discussion of potential barriers to recognizing Indigenous legal traditions.

94 The modern treaty process is one problematic example of how this interaction operates within the sovereignty paradigm, thus privileging territorial and jurisdictional boundaries as part of that process. The process and necessity for evoking territorial boundaries of this nature becomes particularly pressing when situated within the larger context of widespread land dispossession through settler colonialism. However, through this process the state and treaty apparatus can function to eliminate or flatten the relationships and treaty making potential and processes *between* neighbouring Indigenous nations and legal traditions. An alternative to privileging this paradigm and apparatus is to draw upon the resources and processes internal to Indigenous traditions to negotiate these types of interactions outside that framework, and to think through the best way to relate to one another and the area of land in question. Such an approach could emphasize relationships and shared cooperation, as opposed to exclusive jurisdiction. These insights are inspired from reflections on important conversations with John Borrows.

My point is not to negate the importance of these questions. Each raises significant issues that require further thought and discussion. Ultimately, if WSÁNEĆ law is to gain momentum and again have increased applicability, then many of these scenarios will need to reach some form of working consent, even if subject to continued contestation.[95] My point is to illustrate the web we are entangled in through this type of inquiry into jurisdiction. More importantly, and specifically, I want to highlight that at stake in issues of jurisdiction and boundaries are conceptions of sovereignty and struggles for Indigenous governmental authority. The work of Gordon Christie raises concerns with respect to the inherent limitations of this type of thinking and dialogue.[96] If we step back from a discussion of jurisdiction to examine what the concept itself takes for granted, several issues become apparent. Jurisdiction may be exclusive, shared, or some combination thereof, but in each case reflects a notion of *authority over* a given area or issue.[97] For example, the Department of Fisheries and Oceans has jurisdiction *over* fish and oceans, even if some of that authority is checked in relation to Indigenous peoples. For Christie, this is an example of a "conceptual structure" that is "[q]uietly residing in the background" within the sovereignty narrative.[98] That is, this *thinking and acting with authority over* the environment and fish becomes assumed. Yet, if we look back to my discussion of WSÁNEĆ beliefs, this notion may be in many ways inconsistent with the WSÁNEĆ legal tradition.

Earlier in this article, I stressed a deep relationality between the WSÁNEĆ people, the Earth, and other elements of creation. Specifically, I emphasized that land is vested with much more being and agency within the WSÁNEĆ tradition. Several stories exemplified this point. For instance, the creation story of TETÁĆES, the islands within WSÁNEĆ territory, contains the following teaching:

> After throwing the WSÁNEĆ People into the ocean, XÁLS turned to speak to the islands and said: "look after your relatives, the

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95 Jeremy Webber writes about the role of human agency in law and the process of coming to a form of working consent in the face of continued contestation in the law (Webber, *supra* note 12).

96 See e.g. Christie, *supra* note 23.

97 I note that while "jurisdiction" is often used in the sense of "power over", it can also be used to literally mean "to speak the law." Here, I again acknowledge the contribution made by Kirsten Anker in her comments as external examiner for my LLM Thesis (Clifford, *WSÁNEĆ Law*, *supra* note 19). While we may work to recapture a broader understanding of jurisdiction, my narrow purpose here is to indicate the path that the term jurisdiction often leads us down within current discourse.

98 Christie, *supra* note 23 at 332.

> WSÁNEĆ People." XÁLS then turned to the WSÁNEĆ People and said: "you will also look after your 'Relatives of the Deep'."[99]

It is evident that the WSÁNEĆ do not have an *authority over* the islands within their territory; rather, they each (the WSÁNEĆ and the TETÁĆES) have a series of *mutual responsibilities in relation to one another*. This level of being and agency can be extrapolated to other examples as well. SLEMEW (Grandfather Rain), with associated connections with water, was the first ancestor of the WSÁNEĆ. Salmon were also once people, and when the WSÁNEĆ say a prayer to the chum salmon asking them to feed us, we refer to them as EN ŚWOKE (our brothers and sisters). Each of these represents an emphasis on relationships. Ultimately, the notion of jurisdiction distracts from this focus on relationships.

The reference point for WSÁNEĆ law is identifying and repairing relationships in an encompassing way. Part of this emphasis may be restoring land to its proper use. Jurisdiction can work to compartmentalize, and therefore limit, the way in which we can think about and tend to these relationships. For example, I previously mentioned that the Ministry of Transportation and Infrastructure was not involved in the roundtable process. However, the Malahat Highway runs directly over and adjacent to SELEKTEL. On its own, this has a negative impact on the practice of bathing since it is supposed to be a private ceremony. Bathing is a central way in which we honour and maintain our relationship with SLEMEW (Grandfather Rain). In this way, the problematic placement of the highway affects not only the individual doing the bathing, but also more broadly the manner in which the WSÁNEĆ tend to their relationship with SLEMEW at this location. The WSÁNEĆ do bathe elsewhere as well, but the interrelated stories of SLEMEW, SELEKTEL, QENELEL (Mount Finalyson), and QOLEW (Chum Salmon) established this particular place as an important bathing location.

It is likely that no consultation regarding the placement of the highway occurred during its initial development.[100] Aboriginal case law from the Supreme Court of Canada also seems to provide little incentive to address these types of past infringements.[101] This tendency points to a nar-

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99 Elliott communication, *supra* note 65. See above for the full creation story and further discussion.

100 This claim is only an assumption. I cannot say whether consultation did or did not occur. One may also argue, however, that the location of the highway infringes on Douglas Treaty rights which protect the right of the WSÁNEĆ to "carry on their fisheries as formerly." The Saanich (North) Douglas Treaty of 1852 includes those lands at Goldstream Park (see *supra* note 90; Claxton, *supra* note 60 at 47).

101 See *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 45, 2 SCR 650 in which the Supreme Court of Canada ruled that consultation is required

rowness that plagues the Aboriginal law paradigm more generally. The location of the highway was certainly a factor in the harms created by the fuel spill. It also has an impact on the WSÁNEĆ relationship with bathing and with salmon more broadly. It is not my point to insist upon moving this particular highway, nor that a legitimate WSÁNEĆ legal response would require it. Rather, my point is that, viewed through the sovereignty lens, a change to the highway location would be a political non-starter given that the highway is the primary means of connecting the south and north parts of Vancouver Island. Again, we can see the structural aspects of colonialism that work to prioritize the legal, political, and economic framework that exists, and which subordinates the recognition of Indigenous law to that framework. My point is to indicate the way in which jurisdiction can compartmentalize the way in which we think of broader relationships. It is also to ask if WSÁNEĆ law can ever appropriately tend to these types of relationships while we remain unwilling to depart from these background structures in any meaningful way.

The questions relating to jurisdiction that opened this section illustrate how it may be possible to step beyond the dominant narrative in some ways, yet remain constrained in others. While exploring the "jurisdiction" of WSÁNEĆ law does step beyond the narrower narrative of "law" (i.e., strictly the common law), it may fail to step beyond other commonly held assumptions that underlie the sovereignty model more generally. This is another way the sovereignty model may function to "*define* a range of possible plans and strategies."[102] That is, the jurisdiction questions above largely exemplify the limited options that are "understandable only *within* the sovereignty model."[103] Although it is possible to have a broader or narrower understanding of jurisdiction, the conceptual structures that underlie function so that "our plans and strategies can reach out only [so] far."[104]

The point I want to make is that by becoming too focused on who gets to do what, we may inadvertently lose sight of what our responsibilities under the WSÁNEĆ legal tradition actually entail (unconstrained by issues of jurisdiction). We restrict and limit the healthy functioning and the

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where there is "a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights." Therefore, continuing breaches, including past failures to consult, will not trigger the duty to consult unless the present action potentially creates a novel impact (*ibid* at para 49). The court ruled that damages are a more appropriate remedy in such circumstances (*ibid* at paras 37, 49).

102 Christie, *supra* note 23 at 332 [emphasis in original].

103 *Ibid* at 339 [emphasis in original].

104 *Ibid*.

full potential and contribution of WSÁNEĆ law. If we insist too strongly that WSÁNEĆ law be understood within the same framework as Canadian law, we also maintain an imperial stance toward WSÁNEĆ law and allow the powers of hegemony to restrict the possibility for alternative conceptions and understandings. Such an approach will hinder any meaningful reconciliation of legal traditions. I do not deny that difficult dialogues between these legal traditions will have to occur. What I am arguing is that to begin this process we need to continue the hard work of understanding and strengthening WSÁNEĆ law on its own terms. The shift in thinking from *authority over* to *responsibilities in relation to* may be subtle, but it has significant implications for our starting point. It was through careful attention to WSÁNEĆ stories that I came to question these underlying assumptions in the notion of jurisdiction. The same applies to dominant expectations regarding remedy.

C. Beyond Remedy

I have already emphasized that the decentralized nature of WSÁNEĆ law makes the process of coming to a remedy quite different from Canadian law. In this section, I wish to make a broader point about thinking only in terms of remedy. In looking to WSÁNEĆ law, we are not looking only to a separate system of rules, but a distinct way of organizing ourselves in relation to each other and to the Earth.[105] We restrict this objective, and the potential contribution of WSÁNEĆ law, if we simply look for a narrow application of remedy. By "remedy" I mean the application of a legal rule to reach a solution in a fixed instance. Granted, the concept of remedy can be broad. In Western approaches it might include restitution, specific performance, and damage for lost use among others. Perhaps there are even roughly analogous notions within WSÁNEĆ law that will be important to think through. My point, however—as made in relation to jurisdiction—is that we need to first take a step back. In taking this step back we might again ask what is the "conceptual structure" that is "[q]uietly residing in the background" with the notion of remedy?[106]

The answer is simple, though perhaps easily overlooked. A remedy is the response we choose in application to *the harm* we are seeking to address. Given the different framework for WSÁNEĆ law, what if we characterize the harm, and therefore the problems to be addressed, very differently? We can see that understanding the nature of the harm is foun-

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[105] Jeremy Webber makes a similar point, arguing 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" (Webber, *supra* note 12 at 170).

[106] Christie, *supra* note 23 at 332.

dational to any application or understanding of remedy. If we begin with a focus on remedy we are in many ways looking only at a separate system of rules, as opposed to a much broader normative framework. Again, the shift in focus may be subtle but significant. Similar to jurisdiction, it may also be easy to become distracted and lose sight of underlying assumptions regarding the harm, and instead jump to remedy.

In fact, in setting out to think about the fuel spill at SELEKTEL I assumed a series of questions about WSÁNEĆ environmental and fisheries law that could be asked and answered. What are the sources of WSÁNEĆ law as they relate to fisheries and the environment? What are the substantive and procedural elements of WSÁNEĆ fisheries and environmental law? What are the remedies and recourses for when fisheries and environmental laws are broken? Who are the decision makers relating to fisheries and environmental issues, and in what contexts? And, given the migratory nature of fish, what are the "international" elements of WSÁNEĆ law in this regard?

I do not dispute that distinct elements of WSÁNEĆ law may exist, nor that these types of inquiries are without merit. However, engaging with the stories at SELEKTEL lead me to question whether I had found the right starting point. Beginning by embracing and grounding a different set of understandings about proper relationships, and ways of maintaining those relationships, provides a very different foundation. What assumptions does this cause us to question? We need not become paralyzed by this quest, but use it as best we can to assess how those relationships have been disturbed by the issue at hand, and thereby more fully determine the nature of the harm itself. Only with an adequate understanding of the nature of the harm are we positioned to think in terms of a solution that best fulfills our responsibilities and promotes our vision of proper relationships. In short, as opposed to remedies, we should first be thinking in terms of harms and processes because those have serious implications for what solutions are ultimately most appropriate.

Stepping back to foundational understandings of harm may mean that we need to consider far-reaching remedies to address that harm properly. As began to become evident in the section on jurisdiction, WSÁNEĆ law does not always apply as narrowly to a fixed and given instance as normally expected under the common law. The common law determines relevance based on notions of causality that are informed by a particular set of broader normative understandings. Anything outside those understandings of relevance and causality need not be considered. The location of the highway was one such example. However, WSÁNEĆ law will clearly bring a different set of normative understandings, and thus interpretations of "relevance" and "causality" in a broad sense. This normative framework may result in different scopes of inquiry and appropriate action. We should not shy away from this implication. If we begin by assum-

ing that the scope of remedies (albeit potentially different remedies) in the application of WSÁNEĆ law will always (and should always) be akin to those of the common law, we will necessarily limit the functioning and potential contribution of the WSÁNEĆ legal tradition from the outset. In what follows I address what the scope of the inquiry might be according to the assumptions, principles, and categories of WSÁNEĆ law.

Several Indigenous law scholars understand a primary objective of Indigenous legal orders as seeking to maintain balance and harmony.[107] This balance and harmony relates not only between one another, but also between the physical and metaphysical (people and the cosmos) and the physical and ecological (people and the land).[108] This understanding creates a broad web of mutual and legal relationships.[109]

I have provided several different WSÁNEĆ stories about SELEKTEL which can give us a foundation to begin reconceptualizing the harm caused by the fuel spill. I have also alluded to some potential characterizations of the harm throughout, though a more focused contemplation here will be helpful. In the previous section I referred to the location of the highway itself being an issue. Since bathing is meant to be a private ceremony, one part of this harm is that it encroaches on an important bathing location where the WSÁNEĆ tend to their relationship with SLEMEW. However, the location and use of the highway causes another concern in regard to bathing. Heavy use of the highway undoubtedly causes a significant amount of gasoline and oil to accumulate on the road through regular use. When it rains, this contamination then runs off into the waters of SELEKTEL. Therefore, the regular use of the highway results in some degree of harm to the waters as well. While the location of the highway is literally cemented at this point, it does have an impact on the practice of bathing in both these ways.

The fuel spill itself, of course, has had a significant impact on the waters of SELEKTEL. This ecological damage certainly has a direct impact on bathing and Grandfather Rain. The difficulty with oil and gas spills, such as the one described at the beginning of this article, is that they durably soil Grandfather Rain (our ancestor), preventing the bathing ceremony that is intended to cleanse our mind, body, and spirit. While perhaps fewer WSÁNEĆ people use the stream today for bathing than once did, it is still a practice that is taught and a location used for that purpose. For instance, the LÁU,WELNEW tribal school takes its high school stu-

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[107] See e.g. Henderson, *supra* note 13; Battiste & Henderson, *supra* note 46; Austin, *supra* note 56; Black, *supra* note 42.

[108] See Black, *supra* note 42 at 32.

[109] See *ibid* at 107.

dents to SELEKTEL to provide them with these teachings and to learn to be respectful of their sexuality.[110] The practice of bathing also shapes and reinforces a broader relationality with WSÁNEĆ territory, water, our ancestors (Grandfather Rain), and more. Such teachings and practices put into perspective a much broader series of relationships. While addressing these harms will certainly involve remediation of the polluted water, a response will need to take the broader context of these relationships seriously as well. How can we restore the purity of the water (Grandfather Rain), beyond the physical properties of the water? That is, if a person had been raped, dishonoured, or physically or spiritually violated, it would not be enough only to clean them up or repair their bodily injury. More would be required to move toward repairing a deep harm caused to that person. Additional healing and greater consideration would be required which might include, but is not limited to, ceremonial attention. Similarly, if we take seriously the notion that we are responsible for our relationship with Grandfather Rain, what steps do we need to consider to ensure that these types of harms do not repeat and continue to come about? These are some of the deeper implications of seeing the land as a relative.

An additional harm caused by the spill at SELEKTEL relates to the ecosystem and the salmon that spawn in the river each year. An assessment of the harm done to salmon numbers was a central inquiry of the roundtable process. Primary attention seems to have been given to determining casualty numbers and replacement numbers. Addressing the harm to salmon would also be central to a WSÁNEĆ legal response. The chum salmon (QOLEW) is the most abundant salmon spawning in the river, and is the last salmon fished in the year.[111] Admittedly, the QOLEW was historically not as prized as the sockeye salmon.[112] However, this point in itself may in part relate back to the WSÁNEĆ legal order and the creation story of the chum salmon.[113] The chum salmon are not, however, the only salmon that spawns at SELEKTEL. The spring and coho salmon do as well, though in far lower numbers. Steelhead and cutthroat trout also live in the river. Today, each of these species is not fished as diligently by the WSÁNEĆ as the chum salmon. I have been told that even in the past the WSÁNEĆ did not actively fish after the spring salmon in the riv-

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[110] The LÁU,WELNEW tribal school serves the four communities that comprise the WSÁNEĆ Nation. The tribal school offers education that promotes the language, teachings, and values of the WSÁNEĆ people.

[111] This is partly due to the time of season. In addition, the chum salmon is larger in size, is easier to dry, and stays dry for a longer period of time.

[112] The chum salmon is perhaps fished more today then in the past. One reason for this increase may be a decline in the population of other species.

[113] Recall that the chum salmon was created to set the example that incest in the family was not to be tolerated.

er; they were for the most part left alone to spawn. Rather, the spring salmon were fished in the bay prior to spawning when they were more difficult to catch.[114] The reason for this fishing practice is the lower numbers of spring salmon at SELEKTEL. The WSÁNEĆ rely on salmon for our sustenance, but this reliance cannot be at the expense of the salmon. This respect of the salmon reflects a mutual relationship, similar to that explained earlier in relation to islands.

The starting point for understanding the harm done to salmon will be quite different. The salmon, like the rain and the islands, were also once people.[115] The name for the chum salmon is QOLEW. However, its prayer name, when we are asking the salmon to feed us, is EN ŚWOKE (our brothers and sisters). This understanding again discloses a relationality that does not view salmon as a resource, but as an ancestor intimately connected to WSÁNEĆ cosmology and way of life. Therefore, while ensuring that the number of salmon in the river remains at an adequate number, simply replacing the fish may not be enough. Again, how can we repair this relationship at a broader level? How can we guard against continued harms to this relationship? Do we need to limit the number or type of trucks that travel this route? Do we need to be more cautious at certain times of the year? My point is that there is a web of relationships that the WSÁNEĆ would give serious consideration to when building a framework for addressing this type of harm.

The issue is not only one between the WSÁNEĆ and other Canadians. The agency and being given to water, salmon, and other non-human beings means that we need to consider all of them *as we would our human relatives* in addressing harm they suffer. Identifying the harm resulting from the SELEKTEL spill quickly expands to broader normative understandings and conceptions of proper relationships. A WSÁNEĆ legal response (remedy) would need to reflect these larger notions of proper relationships. However, the disconnection between Indigenous and non-Indigenous understandings of the nature of the harm that occurred can create a tension in what the scope of an appropriate remedy should be. WSÁNEĆ law may need to apply more flexibly and broadly than is typical of Canadian law. It may seem that this flexibility necessarily means a lesser degree of certainty for WSÁNEĆ law. That is, the absence of clear, fixed, and hierarchical decision-making pathways, which make the application of WSÁNEĆ law more fluid and flexible, may in that sense make

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[114] John Elliott has told me a similar story about deer in a personal communication. When a deer came into the village it was not hunted. He told me that you go to hunt, not try and kill everything that wanders into the village.

[115] SĆÁNEW is the SENĆOŦEN word for all salmon. SĆÁ means working and NEW means people. There are WSÁNEĆ stories about the Salmon People.

WSÁNEĆ law seem uncertain to people trained in the common law. However, perhaps we overestimate how certain Canadian law really is. The reason Canadian law has courts that weigh arguments on both sides, and decisions that depend on a particular set of facts and scenarios, is that the application of Canadian law on the ground is often uncertain. Similarly, Canadian legal principles including "the reasonable person" or "the best interests of the child" are broad. These principles do, however, still provide a basis for Canadian tort and family law. The encompassing relationships in WSÁNEĆ law provide its own distinctive foundation.

Ultimately, tensions between these two different frameworks need not be irreconcilable, but deep and open engagement is required. Specific instances (or remedies) on their own can move us either closer or farther away from our perceptions of proper relationships. Yet, in the end, what is at stake is much more. The real challenge (and advantage) in enabling a full revitalization of WSÁNEĆ law involves negotiating the much broader relational issues involved (the different ways we choose to interact with each other and the Earth). The larger benefit is building upon WSÁNEĆ thought to create systemic change regarding how we live in this world.

D. Resurging Our Relationships

At its most fundamental, law is about maintaining and promoting proper relationships. The current relationship between WSÁNEĆ law and Canadian law is not a healthy one. As opposed to having an open dialogue between frameworks, there is a hesitancy to question underlying assumptions and promote alternative perspectives and approaches. Balancing this relationship will be difficult, given colonial history and how entrenched the current imperial relationship is. Resurging WSÁNEĆ law to the point where we turn to it naturally and it functions healthily will also require work. WSÁNEĆ law operates in a much different way than Canadian law. Thinking through the different foundation for WSÁNEĆ law is challenging, but it is an important component to moving toward its broader application. Principally, it involves rethinking our broader relationships and responsibilities, and allowing these understandings to grow and expand as we turn to and strengthen WSÁNEĆ narratives. I have, in a very preliminary way, opened the door to the narrative of WSÁNEĆ law, though there is much left to explore and to do.

Conclusion: WSÁNEĆ Laws Emerging Once Again

> In the beginning XÁLS (Our Creator) 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[ʔ] 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[ʔ] 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 trees 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 TŦE 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 LÁU,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.[116]

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[116] Earl Claxton & John Elliott, LÁUWELNEW (Brentwood Bay, BC: Saanich Indian School Board, 1993).