Research Partnership	**The State and Indigenous Legal Cultures: Law in Search of Legitimacy**
Sub-Project	**Secwépemc Laws Governing Land and Resources [Theme: Land]**
Integration Report	**Second Integration Report: What are the Interactions between Indigenous and State Legal Systems and how are Such Interactions Managed?**
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PART I: DESCRIPTION OF INTERACTIONS BETWEEN THE LEGAL SYSTEMS

The answers below are based on a synthesis of Secwepemc land and resource law based on the analysis of 30 cases directly taken from 28 Secwepemc oral narratives and interviews with 24 Secwepemc community members about our conclusions. These observations are not intended to be taken as an authoritative statement of Secwepemc law but our best understanding of the relevant legal principles that we observed within our engagement with Secwepemc law. Our analysis is not comprehensive or complete, but only provides examples of some of the observations that stood out for our analysis.

Context to Interactions between State Law and Secwepemc law

Context is important to frame the interactions between state law relating to the environment and Secwepemc land and resource law. The relationship between the two legal systems has historically been characterized by suppression and erasure through the imposition of colonial law and non-recognition of all Secwepemc law. While the conversation has changed over time, the basic belief that state law can legitimately operate within Secwepemc territory without regard to Secwepemc law underscores all formal interactions between the two systems. This is exemplified through the language of legislation in British Columbia. For example, the *Water Sustainability Act* continues to vest water in the Crown and relegates First Nations to one of the many stakeholders respecting the resources, irrespective of where that water flows.[1] Similarly, in BC's Forestry regime, lands is classified as "forest land" by the Chief Forester the greatest contribution to the social and economic welfare of the province for, and land in, British is achieved by maintaining the land in successful crops of trees or forage.[2] The province also asserts that it owns the water in the streams in British Columbia.[3]

As a result of this broader context, the majority of interactions between state law and Secwepemc law happen within the operation of state law. However, these are informal and not particularly visible. The interactions become characterized within state law as "consultation" not with Secwepemc law, but rather with Aboriginal "interests," "perspectives," or "stakeholders," depending on the legislation or the common law. For example, the *Environmental Assessment Act* underscores the importance of integrated review of a project's effects, including potential environmental, social, health, heritage, and economic impacts.[4] This includes ensuring participation from diverse stakeholders, including government agencies, First Nations, local governments, and the public.[5] It is in these spaces that we can imagine what legal pluralism

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[1] Laura Brandes & Oliver M. Brandes, "BC Floats New Water Law" (2014) 40:5 Alternatives Journal 12 at 12, online: http://www.alternativesjournal.ca/policy-and-politics/bc-floats-new-water-law. [BC Floats New Water Law].

[2] Mark Haddock, "Guide to Forest Land Use Plans," (West Coast Environmental Law, 2001), at 5-6, online: http://wcel.org/sites/default/files/publications/Guide%20to%20Forest%20Land%20Use%20Planning%20-%20Updated%202001.pdf

[3] *Water Sustainability Act*, SBC 2014, c. 15, s 5.

[4] *Environmental Assessment Act*, SBC 2002, c. 4, ss. 6, 10 [*Environmental Assessment Act*]

[5] British Columbia Environmental Assessment Office, *Environmental Assessment Office User Guide: An Overview of Environmental Assessment in British Columbia* (June 2015) at 3, available online at: http://www.eao.gov.bc.ca/pdf/EAO_User_Guide_20150629.pdf [*EAO User Guide*].

might look like, but not without first overcoming the obstacle of the underlying belief within state law that they have legal authority to act on Secwepemc territory unless state law, not Secwepemc law, directs otherwise.

This underlying question of sovereignty and jurisdictional power resulting from it has implications for Secwepemc society, including the operation of Secwepemc law. This is particularly so as that law relates to lands and resource, since the values, principles, rules and processes underlying the legal relationships, responsibilities and rights people have with the land and each other is not visible and often at odds with corresponding notions within state law. In all instances, whether it is the context of talking about legal values, principles, rules, processes, or actors, there are similar Secwepemc legal responses or "effects": there are attempts at negotiation, persuasion or collaboration; there are instances of direct resistance and confrontation; there are actions to work outside of state law and some instances of modification. We know, outside of the data we have as well, that there are instances of litigation to address the shortcomings of state law. While we discuss different interventions within each section and different effects, or responses within Secwepemc law to these interventions, they could be applied to every variable and should be read with this context in mind.

Values and Beliefs

1. **Identify and set out the interactions that take place between the legal systems as well as the formal or informal processes whereby such interactions occur (imposition, negociation, consultation, agreement, imitation and so on). Provide as many examples as possible of the interactions and processses observed with respect to specific values**

2. **Identify areas or situations in which no interaction takes place between values. Provide as many examples as possible of such areas or situations with respect to specific values.**

3. **Describe and illustrate with as many examples as possible the effects of the interactions on the Indigenous AND state legal system with respect to specific values (recognition, confirmation, reinforcement, suppression, amputation, modification, hybridisation, harmonisation, unification and so on).**

As noted in our last integration report, there are private and public values throughout Canadian legal processes, policies, and laws concerning both lands and resources. These are most obviously reflected in private property law, public parks, and through various environmental processes. As with other legal regimes, Canadian legal decisions represent points of agreement against a backdrop of disagreement, and there are inevitable ongoing tensions and contradictions between law's aspirations and its performance.[6] In all living legal traditions, statements of law are always provisional, not unchanging truths,[7] as exemplified here by Justice Hughes of the Federal Court:

> The federal law making process and associated support activities are not something that is fixed in stone, whether by legislature or jurisprudence. It is a

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

> fluid political process that is continually adapting to the particular circumstances of the moment.[8]

Furthermore, as with any large or small populations, Canadians are not homogenous and there is a broad diversity of values concerning land, nature, property, and the larger environment. Canadian law's legitimacy will determine the extent to which those diverse interests maintain and participate in Canadian legal processes and adhere to legal decisions and laws.

Within the operation of state law, there are examples of interactions between State law and Secwepemc law. Although we try to ensure that we do not create false dichotomies or are reductionist in our analysis of legal systems, it can be said that Secwepemc law has deeply held ethics of minimizing risk to the necessities of life and to their legal and social orders has values and this belief leads to more risk averse[9] decision-making. This is explicit in some of the legal principles that animate Secwepemc law that could be observed in our analysis. For example, one of the general underlying principles animating all of Secwepemc land, water and resource law is the proposition that the natural world is in constant flux, in which humans are both influenced and influential members.[10] This is carried through other legal concepts, such as *qwenqwent,* which encapsulates notions of humility and dependence between humans, non-human life and the environment.[11] Overt relational or dialogical understandings of legal relationships among people and non-human life forms grounds lawful and unlawful behaviour as well. In our analysis, this was often expressed in terms of concern about the effects of human activity:

> I am scared of what's happening up to date. What's happening with mother earth... I worry about our animals, our trees, everything you know I look around. I worry about those poor animals, where are they going to get water? What about their homes, what about the food, what are their babies going to have? What about the next generation? What's my grandchildren going to have? What's going to be left for them? You know what's going to be in place for them? What am I going to have in place for them? What am I going have ready for them?[12]

This Secwepemc orientation is the result of a cosmology that values past, present, and future generations and attaches obligations to decisions and behaviours with long-term consequences.

State law, as we have noted previously, has historically had more "risk-centric" values, sometimes sacrificing long term stability for immediate political and economic gains. For example, as critics have identified in the new *Water Sustainability Act*, the province of British Columbia has maintained the principle of "first-in-time, first-in-right" to allocate water rights,

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[8] Honourable Mr. Justice Hughes, *Courtorielle v. Canada (Governor in Council)* FC 1244 at para.30.
[9] See Val Napoleon and Richard Overstall, *Indigenous Laws: Some Issues, Considerations and Experiences* (2007) online http://www.cier.ca [Napoleon and Overstall].
[10] Jessica Asch, Simon Owen and Georgia Lloyd-Smith. *Secwepemc Lands and Resources Law Analysis*, prepared for the University of Victoria Indigenous Law Research Unit, and partner community, Shuswap Nation Tribal Council (Victoria: Indigenous Law Research Unit, 2016). On file at the University of Victoria Indigenous Law Research Unit at 20 [*Secwepemc Analysis*].
[11] *Ibid.*. at 57.
[12] *Ibid.*. at 60.

rather than using a more holistic ecosystem-based approach to water use.[13] This principle of water allocation means that older licenses (issued perhaps 100 years ago to early ranchers or industrial operations) "when environmental flows were not considered – as well as licences that will be issued for existing groundwater uses (for example to Nestle for water bottling) – will continue to trump environmental flows (as well as First Nations uses and more recent licences for drinking water, agricultural use, etc.)."[14] There are embedded values about economic growth in some legislation as well, such as the provincial government's discussions about economic growth and competition in their *Mineral Exploration and Mining Strategy*.[15] Neo-liberal economic values, including freedom of contract, economic growth and ownership over nature are explicit in BC's forestry regime, which explicitly mandates the Ministry of Forestry, Land and Natural Resource Operations to encourage maximum productivity of forest resources and a vigorous, efficient and world competitive timber industry, and assert the financial interest of the government in its forest resources.[16] Section 4(b) of the *Ministry of Forests and Range Act* states that a purpose of the ministry is to "manage, protect and conserve the forest and range resources of the government, having regard to the immediate and long term economic and social benefits they may confer on British Columbia."[17] The reference to 'long term' implies at least a limited invocation of the value of intergenerational equity. Undoubtedly, state law includes a processing of balancing a number of interests, however, the measurement of economic interests are a point of comparison for the two legal traditions because it is often the flashpoint for disagreement.[18]

Similarly, severe long term effects have resulted from pesticides, pollution, resource over-harvesting, and unsustainable fossil fuel use. State environmental laws are of a command and control type where specific harms are forbidden unless conducted according to legislation and policy. In this way, state law generally perpetuates this risk-centric ethic and it continues to be the flash point for much Indigenous and non-Indigenous resistance.[19]

In operational terms, some state law decisions relating to land and resources are unlawful pursuant to Secwepemc law. As a result, both the formal and informal interactions between the differing legal values can be characterized as state law imposing itself and not recognizing Secwepemc law and Secwepemc law reacting to those decisions. This response to this interaction, of course, takes a multitude of forms. In many instances, however, we see that

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[13] BC Floats New Water Law at 12.
[14] Andrew Gage, "The strengths and weaknesses of the new Water Sustainability Act" (14 March 2014), online: West Coast Environmental Law <http://wcel.org/resources/environmental-law-alert/strengths-and-weaknesses-new-water-sustainability-act>.
[15] British Columbia Ministry of Energy and Mines, *British Columbia's Mineral Exploration and Mining Strategy* (2012), at 5-6 online: http://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/mineral-exploration-mining/documents/permitting/miningstrategy2012.pdf.
[16] *Ministry of Forests and Range Act*, RBC 1996, c. 300, s. 4(a) [*Ministry of Forests and Range Act*] states that a purpose of the ministry is to "encourage maximum productivity of the forest and range resources in British Columbia." Another purpose is to "encourage a vigorous, efficient and world competitive timber processing industry in British Columbia."
[17] *Ministry of Forests and Range Act*, s. 4(b)
[18] For example, the *Environmental Assessment Act* outlines one of its values as ensuring participation among (presumably equal) stakeholders, including, among the public and government agencies, see *EAO User Guide* at 3-4.
[19] See generally, the Community Environmental Legal Defense Fund, online: www.celdf.org/ordinances.

people address unlawful state acts by making explicit "values" underlying Secwepemc law in their interactions with those giving effect to state law decisions. For example, one witness made the following comment in one of our interviews:

> [I]t's our responsibility to make sure those things aren't getting damaged and it's not happening. We're trying to tell these hydro people no more dams, no more logging where sensitive habitat is…You know, you're putting trees up there that aren't worth anything. Because it takes 100 years for a tree to be 100 years old, but they're putting trees in there - they are ready what in…five years, ten years even and then you cut them down again. They don't give the trees a chance to give oxygen.[20]

Here, we can see both the dialogical values underlying the transmission and operation of Secwepemc law and the articulation of the more "risk-adverse" values underpinning Secwepemc law and legal processes. However, characterizing this as a legal interaction would not necessarily be visible to us without first having done our analysis of Secwepemc legal principles.

Principles

1. **Identify and set out the interactions that take place between the legal systems as well as the formal or informal processes whereby such interactions occur (imposition, negociation, consultation, agreement, imitation and so on). Provide as many examples as possible of the interactions and processes observed with respect to specific principles.**

2. **Identify areas or situations in which no interaction takes place between values. Provide as many examples as possible of such areas or situations with respect to specific principles.**

3. **Describe and illustrate with as many examples as possible the effects of the interactions on the Indigenous AND state legal system with respect to specific principles (recognition, confirmation, reinforcement, suppression, amputation, modification, hybridisation, harmonisation, unification and so on).**

At first glance, there are a number of seemingly similar principles in Secwepemc and state law.[21] For example, the principles of respect is articulated in both the *Secwepemc Analysis* as general

[20] *Secwepemc Analysis* at 21. This is also an example of an enforcement mechanism of community pressure or embarrassment. Just not visible.

[21] There are undoubtedly a number of principles that are quite distinct in each legal tradition; most strikingly are the provisions that privilege economic growth at the expense of ensuring long-term health of land, water and the environment. Sometimes principles stated in state law are at odds with other state legislation, as well. For example, although not explicitly stated in the legislation, the mining regime in British Columbia is based on the principle of free-entry: The free-entry system provides companies with access to a large area of land, permission to access these lands for prospecting, ability to claim the land with no consultation, and the exclusive rights to conduct exploration work and to extract and sell minerals found within the claim. The principle stands in stark contrast to principles of environmental protection, relationship building with First Nations, and meaningful public participation. The free-entry system in BC allows proponents to acquire mineral rights simply by staking a claim. By staking a claim, mining companies are granted exclusive rights to the minerals in that area. This system gives mining priority over

underlying principles,[22] as well as in state law instruments such as the *Environmental Assessment Act*, especially as that Act relates to decisions affecting First Nations.[23] Transparency also emerges within both legal traditions, particularly in expressing concepts such as open consultation or public participation.[24] There are also similar commitments to relationship building articulated in both our analysis and state law. For example, the provincial government calls on mining proponents "[t]o engage with all potentially affected First Nations communities in meaningful dialogue and relationship building, to gain an understanding of the potential impacts of the project and First Nations' expectations for participation in the project."[25] These principles are visible in Secwepemc legal principles respecting the responsibility to communicate the law to outsiders,[26] teach law to community members,[27] and build relationships of mutual legal understandings with neighbouring communities.[28] Secwepemc legal processes are also highly consultative, incorporating the broader community or parts of the community in either consultation or decision-making, depending on the legal issue at hand.[29]

Notwithstanding this appearance of overlap and the potential for conversation about legal pluralism around application of similar legal concepts in Secwepemc and state law, they rarely formally interact. Instead, what we see is the operation largely of state law and its definitions of "respect," "transparency," "consultation" and "relationship" that emerge from that legal tradition alone. For example, what underlies relationships between communities is the principle of mutual recognition, understanding the laws, needs and interests of one another and respecting those.[30] This provides the basis for the Secwepemc people to develop agreements about resources with others. State law, however, has a different understanding about what the legal test for consultation is. For example, the Environmental Assessment Office's relationship with First Nations is "based on respect for the asserted and established Aboriginal rights, Aboriginal title and treaty rights of First Nations,'[31] not on mutual recognition of each other's laws, interests and needs. In other words, state law can operate, however, and fulfil its notions of what constitutes respecting a relationship, without fully understanding or recognizing Secwépemc legal

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most other land uses in BC. See Jessica Clogg, "Modernizing BC's Free Entry Mining Laws for a Vibrant Sustainable Mining Sector" (Vancouver: West Coast Environmental Law, 2013), online: http://wcel.org/resources/publication/modernizing-bc%E2%80%99s-free-entry-mining-laws-vibrant-sustainable-mining-sector; R. Hart, Mining Watch Canada, and Hoogeveen, D. Introduction to the Legal Framework for Mining in Canada (July 2012), online: http://www.miningwatch.ca/publications/introduction-legal-framework-mining-canada.

[22] *Secwepemc Analysis* at 27.

[23] British Columbia Environmental Assessment Office, *Environmental Assessment Office User Guide*, (2011), at 7, online: http://www.energy.gov/sites/prod/files/2015/06/f22/EAOUG.pdf [*EAO User Guide 2011*]

[24] *EAO User Guide*, at 3 and 6; *Mines Act*, RSBC 1996 c. 293 s. 34*; Forest and Range Practices Act*, SBC 2002, c. 69 s. 18 sets out that forest Stewardship Plans must be made available to the public for comments before being submitted for government approval; Ministry of Energy, Mines and Petroleum Resources, *Guide to Processing a Mine Project Application under the British Columbia Mines Act* (January 2009) at 6, 10, 13, available online: http://www.coalwatch.ca/sites/default/files/Guide-to-Processing-A-Mine-Project-Application-Under-The-British-Columbia-Mines-Act.pdf [*Guide to Processing a Mine Project Application*].

[25] *Ibid.* at 10.

[26] *Secwepemc Analysis* at 78-85.

[27] *Ibid.* at 99-100.

[28] *Ibid.* at 29 and 45.

[29] *Ibid.* at 40-44.

[30] *Ibid.* at 29-31.

[31] *EAO User Guide 2011* at 7.

principles. This reveals the work that needs to be done to tease out even those legal concepts that while, at first glance, seem comparable, may be false cognates in their operation.

The effect and response to state law's intrusion on basic principles is varied. In our work, we observed responses that suggest people will act outside of state law to adhere to Secwepemc legal principles through confrontation or direct action. For example, in discussion about legal responsibilities to protect the land, one community members noted:

> We can't wait for others; we need to do something today, to have something put in place. I see mother earth suffering. She needs a lot of help. And for the other races to help, [to] listen. To help us get things put into place to help us understand what we are trying to do. To understand…how to revive and to, to help…keep that life cycle going the way it used to be.[32]

In the context of British Columbia, many Nations have sought to work within state law through litigation when consultation measures have been inadequate. For example, the Coastal First Nations and the Gitga'at First Nation filed a suit against the B.C. government, challenging the province's ability to delegate assessment duties to the federal government without consulting with First Nations. They won that case in July, 2016.[33]

We see informal interactions of legal principles between the two legal traditions, although these are not visible because they arise within the operation of state law. For example, Secwepemc principles respecting transparency and relationship building are evident in this community member's discussion about her interactions with Department of Fisheries and Oceans Canada (DFO) officials:

> [O]ne of the things that I try to do here, in our community, is invite those management people to come here. You know, the ones that are up here in DFO and forestry and the RCMP and whatnot, because there is always that negative impact that people pass on to their kids. Kids should know them as friends…to come here in our community, go out on the land you know. To our first fish ceremony to see the different things that we are doing with them in the community…so that they know how we live and how we depend on the fishing resource or the forestry resource, or what have you, so that they have an understanding of where we're coming from and not just always shaking our fist at them trying to get fish back here. You know, [get them to] talk to our elders or talk to our staff and our youth so that they have that understanding.[34]

This is similar to a comment provided by another community there about the importance of expressing Secwepemc legal principles in written form, in this case in fishing and hunting guidelines:

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[32] *Secwepemc Analysis* at 60-61.
[33] "Gitga'at First Nation celebrates Federal Court of Appeal victory overturning approval of Enbridge Northern Gateway pipeline," *Vancouver Observer* (1 July 2016), online: http://www.vancouverobserver.com/news/gitgaat-first-nation-celebrates-federal-court-appeal-victory-overturning-approval-enbridge.
[34] *Secwepemc Analysis* at 79-80.

> I think [the guidelines are] more important when other nations come in to fish and hunt and stuff because…they don't know or understand what we're trying to do, right? But we've never really sent it out to them to say "here are our principles or our guidelines."[35]

As these quotes illustrates, finding ways to explain needs, interests and laws to outsiders also provides opportunities to build relationships with outsiders. In both cases, Secwepemc people are putting to effect Secwepemc legal principles, although these may not be understood as such. We can characterize these interaction as either a form of negotiation, or attempt to collaborate with outsiders and state officials to communicate Secwepemc laws, needs and interests in order to influence the operation of state law and individual actions within Secwepemc territory.

Rules

1. **Identify and set out the interactions that take place between the legal systems as well as the formal or informal processes whereby such interactions occur (imposition, negociation, consultation, agreement, imitation and so on). Provide as many examples as possible of the interactions and processses observed with respect to specific rules.**

2. **Identify areas or situations in which no interaction takes place between values. Provide as many examples as possible of such areas or situations with respect to specific rules.**

3. **Describe and illustrate with as many examples as possible the effects of the interactions on the Indigenous AND state legal system with respect to specific rules (recognition, confirmation, reinforcement, suppression, amputation, modification, hybridisation, harmonisation, unification and so on).**

Rules are an interesting space of interaction. On the one hand, some Secwepemc rules in relationship to the land operate without any interaction, negative or positive, with state law. These are, specifically, the individual actualization of Secwepemc law by Secwepemc people. For example, there are a multitude of rules that emerge as a result of legal values and principles that favour low-impact interactions with the land and resources and care for non-human life forms. For example, one community witness noted that you don't over harvest, or take more than you need. If you see berries for example, "you don't take every berry off that bush. You leave some for the bears and some for the animals that are there…you're taught which medicines and you don't over harvest.[36] The right of non-human life forms to live and reproduce is reflected in commentary of one witness, who speaks about trying to "target the males" when gaff fishing,[37] and another person's analysis of *Coyote and the Black Bears.*[38] In that story, Coyote attempts to kill a mother bear and her cubs for a robe he doesn't need. In response to our questions about whether this story was about greed, she responded "if you need it you don't kill all three…you

[35] *Ibid.*
[36] *Ibid.* at 67-68.
[37] *Ibid.* at 70.
[38] *Coyote and the Black Bears* in James Teit, "The Shuswap" in Franz Boaz, ed. *The Jesup North Pacific Expedition: Memoir of the American Museum of Natural History*, Vol II, Part VII (Leiden: EJ Brill/New York: GE Stechert, 1909) at 638.

have to make sure the cubs are going to - if you leave them - that they are going to survive".[39]

However, it is critical not to advance a romantic vision of how Secwepemc law operates in practice when not directly engaging with state late. Further, is unhelpful to suggest that these rules have operated without any intervention from colonial law or colonialism. That interaction has impacted everyday life and the operation of legal rules. For example, the needs of individuals in a community impact how people relate to each other and non-human life forms.

> Because we're witnessing a change in how we harvest… Like, for fish, even the fish, we're always supposed to only take what we need, not hoarding it, selling it, doing all those… we're doing it for all of the wrong reasons, but at the same time we're doing it because we have to survive and because we're forced to, because…we want to live this certain life…have to pay higher - pay your gas, and your phone and, you know, all that other stuff. It's like you're forced to do these things.[40]

In addition, although individual actualization of rules are sites where no intervention may occur, when they come into conflict, rules are points of extreme intervention and contestation between legal traditions. For example, right now there is focus in the Secwepemc community on protecting grizzly bears because of outside hunters' greater access to them. As one community member commented:

> Now we have the consequence of protecting the grizzly bear there because [people] come from Alberta and they take its life so they can sell its parts and everything…cause now there's road accesses into there.[41]

He goes on to talk about some of the consequences of not fulfilling this legal responsibility in the context of medicines:

> And so if we don't protect our medicines and everything that are on those sacred mountains, they will be gone, too, and exploited, like they do with the mushrooms…and because we don't have the laws to protect it. And the non-natives have no laws. So those are some of the consequences for not responding.[42]

From this comment, we can extrapolate that rules that authorize unlawful activities under Secwepemc laws would be met with a number of responses, from confrontation, to negotiation or collaboration.

Yet, it is in these spaces, where we see roads to legal pluralism. Although it is fundamentally more helpful to start from a place of total and complete mutual understanding, rules can be negotiated somewhat divorced from the task of reconciling the broad, more abstract paths to those rules. At a practical and accessible level,[43] a legal pluralist approach could begin with a river, a caribou herd, a mountain valley, or other geographic site. The Indigenous laws for that

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[39] *Ibid.* at 71.
[40] *Ibid.* at 70.
[41] *Ibid.* at 70.
[42] *Ibid.* at 70.
[43] Napoleon and Overstall, Indigenous Laws *supra* note 7 at 8.

site, river, or caribou herd must be ascertained, substantively articulated or restated. Corresponding state laws must also be identified. A plurality of law could flow from first, identifying those aspects of Indigenous law that converge with state law and could be interfaced. Second, coming to a mutual agreement to continue Indigenous law that does not require state recognition or acknowledgement for an implicit co-existence of law. Ongoing attention to the dialectic of Indigenous/state relations could ensure that both internal and external legal interactions are brought into focus by generating both a normative and functioning understanding of both state and non-state legal orders.

Actors

1. **Identify and set out the interactions that take place between the legal systems as well as the formal or informal processes whereby such interactions occur (imposition, negociation, consultation, agreement, imitation and so on). Provide as many examples as possible of the interactions and processses observed with respect to specific actors.**

2. **Identify areas or situations in which no interaction takes place between values. Provide as many examples as possible of such areas or situations with respect to specific actors.**

3. **Describe and illustrate with as many examples as possible the effects of the interactions on the Indigenous AND state legal system with respect to specific actors (recognition, confirmation, reinforcement, suppression, amputation, modification, hybridisation, harmonisation, unification and so on).**

It is critical to not to overly focus on actors that that appear to be cognates of those in state governmental regimes when rebuilding or rearticulating Indigenous law or governance forms, since the tendency is to mimic state mechanisms rather than ask serious questions about reconciling historic and contemporary institutional forms. Indigenous law, including Secwepemc law, operates through institutions of kinship and relationships. Historically, authority and decision-making was dispersed horizontally and de-centrally through these institutions, and law was not delegated to centralized professionals. We know from our research that in Secwepemc law, actors in legal processes and decision-making may include family members, elders, chiefs, or the entire community, depending on the issue involved and people involved in a dispute or problem.[44] This can be contrasted with state law, in which there are defined decision-makers within a hierarchical structure, making it easier to deduce key actors in land and resource issues. For example:

- For mining, the main decision-maker is the Chief Inspector of Mines from the Ministry of Energy and Mines.[45]
- For water, the main decision makers for issuing licences or authorizing the diversion or use of water is the comptroller or a water manager,[46] and the Minister of Environment

[44] *Secwepemc Analysis* at 40-56.
[45] *Guide to Processing a Mine Project Application* at 16.
[46] *Water Sustainability Act*, s 9.

for designating an area for the purpose of the development of a water sustainability plan.[47]

- For forests, the Minister of Forests, Land, and Natural Resource Operations and the Chief Forester are the primary decision-makers.[48]
- For environmental assessment, main decision-makers are the Executive Director of the Environmental Assessment Office and the Minister of Environment.[49]

Of course, one of the central interactions between state and Indigenous law has been the imposition of colonial governance frameworks on Indigenous communities through the *Indian Act*,[50] which conflicted with Secwepemc and other Indigenous governance systems.[51] There have been many different responses to the imposition of the Chief and Council system, including adoption, modification, and rejection of the colonial model as well as resurgence and continuation of Indigenous forms of governance, both in collaboration or in opposition to the colonial governance design.[52]

Many of the pieces of BC's legislation speak about the importance of interacting with First Nations to make appropriate decisions within state law. However, interaction with First Nations does not mean interaction or recognition with Indigenous law. For example, in mining, First Nations might be invited to take part in Regional Mine Development Review Committees, which are often involved in "sensitive" projects. The committee include representatives from other government agencies.[53] Mining proponents are also required to consult with potentially affected First Nations and include reports of this consultation in a report in support of any application. [54]Consultation might include conversations about Indigenous law, but this does not mean Indigenous law will affect final decision making on a project. Ultimately, it is the Chief Inspector who considers consultation and accommodation efforts and makes the final decision.

It is, in part, this lack of engagement that drove our partnership with the Shuswap Nation Tribal Council (SNTC) for the Secwepemc project. The leadership at SNTC were directed by their Elders' Council to develop a natural resource law regime. According to one of our liaisons at the SNTC, the purpose of partnering with the ILRU was to help the nation prepare to manage "our

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[47] *Water Sustainability Act*, s 65.
[48] *Forest Act*, RSBC 1991, c. 157, s. 8, 8.1; *Ministry of Forests and Range Act*, s. 5.
[49] *Environmental Assessment Act*, ss. 10-11, 13, 17, 18, 19.
[50] *Indian Act*, RSC 1985, c. I-5 at s. 74.
[51] Ken Coates, *The Indian Act and the Future of Aboriginal Governance in Canada: Research Paper for the National Centre for First Nations Governance* (May 2008), at 8, online at: https://portal.publicpolicy.utoronto.ca/en/ContentMap/AboriginalAffairsCanada/Aboriginal%20Policy%20and%20Governance%20Documents/Indian%20Act%20and%20Future%20of%20Aboriginal%20Governance,%20NCFNG,%202008.pdf.
[52] For example, the Nisga'a Lisim governance structure, see: http://www.nisgaanation.ca/government-structure; the Council of the Haida Nation structure, see http://www.haidanation.ca/Pages/governance/pdfs/HN%20Constitution%20Revised%20Oct%202014_official%20unsigned%20copy.pdf.
[53]British Columbia Ministry of Energy and Mines, *Proponent Guide to Coordinated Authorizations for Major Mine Projects* at 21, online: http://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/natural-resource-major-projects/major-projects-office/guidebooks/major-mines/proponent_guide_coordinated_authorizations_major_mine_projects.pdf.
[54] *Ibid.* at 19-20.

own natural resources in a way that the non-aboriginal people with understand." In other words, one of the effects of the lack of state interaction, and state law's erasure or indifference to Secwepemc law was this to work on articulating Secwepemc law. The goal was, undoubtedly, to create something that could help the nation, but also to provide a means for state law to engage with Secwepemc law and the Secwepemc people. This is a direct attempt at interaction, through a process of translation. The analysis we developed will be used to develop internal governance instruments, including a code of ethics that can be applied when state government officials engage in consultation with leadership. In this sense, we can see efforts within Secwepemc law to collaborate with the state law, but have no data at this time about the consequences of that attempt. Here, we see potential for Secwepemc law to influence the direction of state law, potentially borrowing from it or tailoring the effect of state law within Secwepemc territory by genuinely considering the operation of Secwepemc legal principles. Whether this constitutes an interaction that will result in Secwepemc law being recognized and followed by state law remains to be seen.

Processes

1. **Identify and set out the interactions that take place between the legal systems as well as the formal or informal processes whereby such interactions occur (imposition, negociation, consultation, agreement, imitation and so on). Provide as many examples as possible of the interactions and processses observed with respect to specific processes.**

2. **Identify areas or situations in which no interaction takes place between values. Provide as many examples as possible of such areas or situations with respect to specific processes.**

3. **Describe and illustrate with as many examples as possible the effects of the interactions on the Indigenous AND state legal system with respect to specific processes (recognition, confirmation, reinforcement, suppression, amputation, modification, hybridisation, harmonisation, unification and so on).**

Within the Secwepemc legal tradition, demonstrating respect for neighbouring groups is directly tied to acknowledging them as self-governing communities with authority over their own laws and practices.[55] Publicly creating agreements and fostering and respecting them,[56] and providing opportunities to consult with different people guide decision-making processes.[57] Processes move from being consultative to protective when there is a need to take a more protective stand at law. It is in this shift towards the protection of a community that interactions begin to become visible. For example, in the midst of one of our focus groups, an issue arose involving a person's ability to access resources. Specifically, the person was harvesting resources and was stopped by conservation officers. This is an everyday example of how state law continues to assert its authority and attempt to erase Secwepemc law around peoples' access and harvesting rights. At

[55] *Secwepemc Analysis* at 29.
[56] *Ibid.* at 32.
[57] *Ibid.* at 45.

that point in the focus group, the direction of the conversation changed, and one of the elders began articulating his thoughts on how to proceed on resolving this issue. In his description, we see many types of potential interventions with state law through a process that resonates with the decision-making processes we identified in our engagement with Secwepemc law:[58]

> [W]e should…have some of the tribal council, chiefs or…[the witness] and meet with the parks, top parks personnel, RCMP, even…have a two-day workshop where everybody has tables and then presents their interests: conservation officers and fisheries DFO, forestry. And [there]… we [can] put forth our…history [and] laws, in a nice two-page newsletter [that] goes out to everybody… RCMP, fisheries, elders, conservation officers, which shows where we fish, hunt and gather. Everybody stating that this is where you can [harvest], we're not in treaty. And you will not be harassed if you go to…the old…areas where there [are] fences - now there [are] "no trespass" signs. Some of them could be taken down, even those gates.[59]

We stop here to point out that this first stage in the process is an intervention of educating outsiders on Secwepemc history and laws telling them where the Secwepemc people have rights to fish, hunt and gather. The idea with this opportunity to consult, explain and collaborate is to enforce Secwepemc law. He continues:

> In the North, they started the treaty, what 25 years ago? This has slowed development in the North. And in the meantime, this has sped up development in the South, in areas historically used by Secwepemc for fishing, hunting and gathering.
> …
> In the last 15 years those gates have been blocking our people from going in there…and now we can't…teach the kids because they can't go in there. Our gathering areas are now "out of bounds" for us and it hurts our elders' hearts. We don't want to lose that - we can gain it back…. the elders will put the names, the native names to the mountains...[60]

Here, we hear the person's views on the consequences of not interacting with state law through the modern BC Treaty Process. He is reflecting that development of lands has slowed in places where the community is negotiating a treaty with state governments. By contrast, communities in the South that have not engaged in this process have seen faster and greater changes to the access to Secwepemc land. The participant is talking about reclaiming these lands by putting "the native names to the mountains." Although he is not explicit, this could mean directly confronting state law's imposition on Secwepemc law or working within the parameters of state law to gain recognition within it.

One response to the lack of engagement with Secwepemc legal processes is to engage with Secwepemc law outside of state processes in a way that might influence state processes. One

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[58] *Ibid.* at 40-50: some of these steps are consultation with community, identifying key individuals to act, identifying interests, listening to all sides, negotiating, and the intention to act to ensure long-term community survival if negotiation is not successful.
[59] *Secwepemc Analysis* at 48.
[60] *Ibid.* at 48-49.

example that was outside of our analysis, but within Secwepemc territory is the Stk'emlúpsemc te Secwépemc Nation (SNN) Indigenous Environmental Assessment Process and Plan in response to the KGHM Ajax Mining, Inc. application for an environmental certificate for the Ajax Project to the provincial and federal governments. The site of the mine, is near Jacko Lake, or Pipsell in Secwepemc language (near Kamloops, BC). Pipsell is a significant historical site for the Secwepemc people and is embedded in oral narratives outlining Secwepemc Indigenous law. The SSN created a timeline that would enable the process to occur alongside and collaboratively[61] with the federal/provincial process, and allow the SSN to release its decision to Canada prior to the end of its process. The SSN set out the purpose of the process as to "[f]acilitate informed decision making by the SSN Communities in a manner which is consistent with our laws, traditions, and customs and assesses project impacts in a way that respects our knowledge and perspectives".[62]

Some of the reasons given for the SSN Project Assessment Process include:

- the exclusion of Secwepemc law and land tenure,
- the exclusion of Indigenous resources such as oral tradition,
- the exclusion of important voices, such as youth, elder and families,[63]
- the exclusion of ceremony,[64]
- the lack of examination of historical impacts on the land and the legacy or wrongs,
- the use of western methods alone to assess solely environmental and socio-economic impacts of the mine, and no examination of the spiritual, cultural, traditional or First Nation perspectives,
- the premise that the corporation are the title holders of the Mineral claims, land claim and water claim, and
- the perpetuation of the concept that cultural practices can simply be practiced in other areas or that impacts and be justified.

The SNN process took into consideration Secwepemc laws, allowed oral and written evidence, used both western and Secwepemc methods, and had a process that examined both historical context and discussed "intangible" impacts to spirit and culture. The SSN panel had 46 members, incorporating elders, youth, families and chief and council. The SSN was constrained by the concurrent Environmental Assessment Process, so set the time period to have a decision prior to the final state law assessment.[65] At the end of June, SSN made a declaration of title on Pipsell (Jacko lake)[66] Jacko Lake and the adjacent area—lands owned by KGHM Ajax.[67] The title claim

[61] "Stk'emlupsemc t Secwepemc Nation implement its own Assessment Process for the proposed Ajax Project"(10 Sept 2015) media release available online: http://stkemlups.ca/files/2015/09/SSN-Media-Release-SSN-Project-Assessment-Process-for-Ajax-Project_Sept-10-2015.pdf.
[62] *Ibid.*.
[63] Chief Ron Ignace, "Pipsell Decision: Yiri7 re Stsq'ey's-kucw – Our Ancient Deeds to the Land," presentation delivered to the Union of BC Indian Chiefs (2 June 2016) [*Ron Ignace UBCIC Presentation*].
[64] *Ibid.*.
[65]Cam Fortems, "Chiefs to declare aboriginal title of Ajax mine site," *Kamloops this Week (*18 June 2015), online: http://www.kamloopsthisweek.com/chiefs-to-declare-aboriginal-title-of-ajax-mine-site/.
[66]Daybreak Kamloops, "Declaration of title over Jacko Lake officially signed by local First Nations" (22 June 2015), online: http://www.cbc.ca/news/canada/kamloops/declaration-of-title-over-jacko-lake-officially-signed-by-local-first-nations-1.3122750.
[67] "Kamloops at the Crossroads," BC Business (22 Sept 2016), online: http://www.bcbusiness.ca/kamloops-at-the-crossroads.

is meant to protect Pipsell and Secwepemc territory.[68] Thus, in this particular case, the second type of interaction was to use state laws to protect the land, by having a declaration of Aboriginal title placed on it to halt development.

There are spaces to engage in parallel processes, as in the SNN example, through informal exchanges to understand the values underlying decision-making, and there is formal modification to both legislation and processes that would incorporate Secwepemc legal values or genuine recognition of Secwepemc law in decision making. In this case, the SSN laid out a transparent, comprehensive, achievable process that could be easily recognized by people working with state environmental assessment processes. By doing this hard work, it revealed the places of overlap and also the places of difference between the legal traditions. This can inform future environmental processes by highlighting places for discussion, collaboration, and proper consultation, or by providing a template for how Canadian law, itself, can be amended and grow.

We have suggested elsewhere that sustainable environmental practices require place-based, participatory models.[69] Arguably, the current debates about environmental problems or crisis are actually complex systems problems and consequently, resistant to the application of simple environmental problems. Given this, adaptive co-management approaches that allow the sharing of real management (i.e., not operational) power, is necessary to create flexible, symmetrical, multi-governing systems through which Indigenous-state agreements and legal arrangements would be possible.

[68] *Ron Ignace UBCIC Presentation.*
[69] Napoleon and Overstall, supra note 7.

PART II: FURTHER ANALYSIS OF INTERACTIONS BETWEEN THE LEGAL SYSTEMS

How would you describe the current relational dynamic that characterises the relationship between the legal orders? (hierarchical, egalitarian, vertical, horizontal, etc.). Illustrate your analysis with several examples.

The relational dynamic between Secwepemc law and state law varies depending on the types of legal issues and laws at play. When there are interactions that may be likened to government-to-government talks, the relationship might best be described as horizontal. However, when there is litigation or the potential of litigation concerning land or the environment, the relationship may be better characterized as hierarchical from the state's perspective – and this is resisted by Secwepemc peoples at every instance.

How do Indigenous and state actors react to the interactions between the legal systems or to their absence? (Indifference, acceptance, resignation, adaptation, resistance, challenge and so on). Provide as many examples as possible of the reactions observed.

There are a multitude of different individual reactions to the interactions between legal systems, and most notably, the lack of interaction and non-recognition of Secwepemc law by state actors. These can be drawn from the entire analysis above, as these are the informal interactions of people with state actors and their reactions to state law. These include acceptance, adaptation, resistance and challenge for the most part. What we have not discussed as much is the personal view of the resilience of Secwepemc law in light of the historical and contemporary attempts to ignore and erase Secwepemc law. Without question, the overwhelming response was that although there are gaps in the law, the law has always existed and has always been practiced. The state's indifference to and disregard of Secwepemc law and the assertion of valid state law has created gaps in Secwepemc law that need to be rebuilt and revitalized. But the intention to erase has not had the desired effect; Secwepemc law has endured notwithstanding the colonial experience, which attempted to break down Secwepemc society and law:

> [Y]ou know, we lived according to our concepts and our law and our oral history and our culture and our experiences. Even though that we've had some interferences like…child welfare, or adoptions or residential [schools]. But we went out of our way to heal. So, you know, we didn't lose that training, we just misplaced it for while [because] we didn't practice. But now we are. We've done a lot, like we are practicing more…for our way here it's winter dancing and we are re-learning the ceremony.[70]

Similarly, this was articulated by another participant who spoke about how the Secwepemc use "white man" ways to deal with things, however, this does not mean Secwepemc ways are not used.[71] Another person, recalling the decisions of colonial governments to displace and declare

[70] Secwepemc analysis at 24.
[71] *Ibid.*.

communities non-existent, noted how the Secwepemc people always managed to accommodate each other:

> I think that's why we ended up with a lot of different reserves or people living in different places - because they managed to go somewhere and build a family there…I know the [Canadian] law and the other things like the dams that were built and everything - people moved from there to here so…that wasn't a dispute resolution, but it was a must resolution. Because they asked if they could be with you, live with you because there's no one else there or whatever. You know, they're not extinct by the way, as the government would say. They are just living among us. And so that's one thing that people have to remember: the [Canadian] government says they're extinct, but that's not true they are still living, with other bands.[72]

Throughout our interviews with community members, the existing power and use of Secwépemc law was a consistent theme. This can be interpreted as challenging or resisting the state narrative about the sole authority and operation of state law.

Do you wish to elaborate on any other aspect or issue pertaining to the interactions between the legal systems? Provide examples to illustrate your analysis or comments.

One place where we did collect data on actual, formal interaction between legal systems was in the interaction between Secwepemc and other Indigenous legal traditions or other Indigenous communities. For example, the *The Fish Lake Accord* is the "unbroken pact" from the 18th century between the Kamloops Chief Kwolila and his half-brother the Sylix Chief PElkamu'lox.[73] The oral history is an account of when Kwoli'la sought out PElkamu'lox after hearing that there had been many attacks on PElkamu'lox and his fort. Kwoli'la persuades PElkamu'lox to leave his fort and go north with him and provides PElkamu'lox and his people access to land and resource rights in Secwepemc territory to sustain themselves. The Fish Lake Accord continues to guide relations between Secwepemc and Syilx/Okanagan communities to this day.[74]

Another example of formal interactions between legal systems and processes is the negotiated memorandum of understanding between the Lower Fraser Fisheries Alliance and the Secwepemc Fisheries Commission respecting the salmon harvest. The current memorandum of understanding addresses the interests of many nations in a common resource that passes through many territories. In that case, the Secwepemc articulated their need to negotiate some form of equitable distribution of fish with the Sto'lo because people in the lower parts of the Fraser are able to catch significantly more fish than the Secwepemc by virtue of their location on it. How much the Sto'lo fish directly impacts the Secwepemc's ability to harvest.[75] The process involved demonstrating this inequity through an exchange process:

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[72] *Secwepemc Analysis* at 85.
[73] The Fish Lake Accord, researched by Bernadette Manual and Lynne Jorgesen for submission to the Chief and Councils of the Upper Nicola and Okanagan Indian Bands (August 2002, amended August 2003) at 1-2.
[74] *Secwépemc Analysis* at 32.
[75] *Ibid.* at 75

> [W]e did the exchange with Lower Fraser Fisheries Alliance. They came up here we showed them our fish and then we went down and looked at their fishery on the on the lower Fraser and…talked to one individual and said, "you know the amount of fish that you just put in your boat. That's more than our whole community got the year before. You know these fish - you have the opportunity for every fish that comes by here."[76]

The hope is that this memorandum of understanding will take into consideration the Secwepemc interests in the harvest of fish in future years.

[76] *Ibid.* at 46.

APPENDICES

I. Appendix A: Diagram of the Presentation

THEME				
REGION / CASE				
Step 2: What are the interactions between the Indigenous and state legal systems and how are such interactions managed?				
VARIABLES	**EXAMPLES OF INTERACTIONS BETWEEN THE LEGAL SYSTEMS**	**EFFECT OF INTERACTIONS ON LEGAL SYSTEMS**	**REACTIONS OF STATE-ACTORS AND ABORIGINALS TO THESE INTERACTIONS**	**COMMENTS**
Values / beliefs 	Non-recognition Erasure Imposition Within state law: attempts at persuasion; confrontation; articulation	Attempts at negotiation, persuasion or collaboration; direct resistance and confrontation; modification.	acceptance, adaptation, resistance and challenge	
Principles 	Non-recognition Erasure Imposition Within state law: attempts at persuasion and consultation; confrontation; articulation	Attempts at negotiation, persuasion or collaboration; direct resistance and confrontation; modification.	acceptance, adaptation, resistance and challenge	
Rules 	Non-recognition Erasure Imposition Within state law: attempts at persuasion and consultation; confrontation; modification; articulation	Attempts at negotiation, persuasion or collaboration; direct resistance and confrontation; modification.	acceptance, adaptation, resistance and challenge	
Actors 	Non-recognition Erasure Imposition Within state law: attempts at persuasion and consultation; confrontation; articulation.	Attempts at negotiation, persuasion or collaboration; direct resistance and confrontation; modification.	acceptance, adaptation, resistance and challenge	

Process, rituals, ceremonies 	Non-recognition Erasure Imposition Within state law: attempts at persuasion and consultation; confrontation; articulation	Attempts at negotiation, persuasion or collaboration; direct resistance and confrontation; modification.	acceptance, adaptation, resistance and challenge	
Others				

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III. Appendix C: Significant Extracts from the Collected Data (optional)

IV. Appendix D: Other Documents Deemed Relevant

Please see attached to email a summary of our analysis on Secwepemc legal principles relating to land and resources. A copy of the full analysis, plus accompanying casebook and glossary are on file with the Indigenous Law Research Unit and can be shared with permission of the Shuswap Nation Tribal Council.