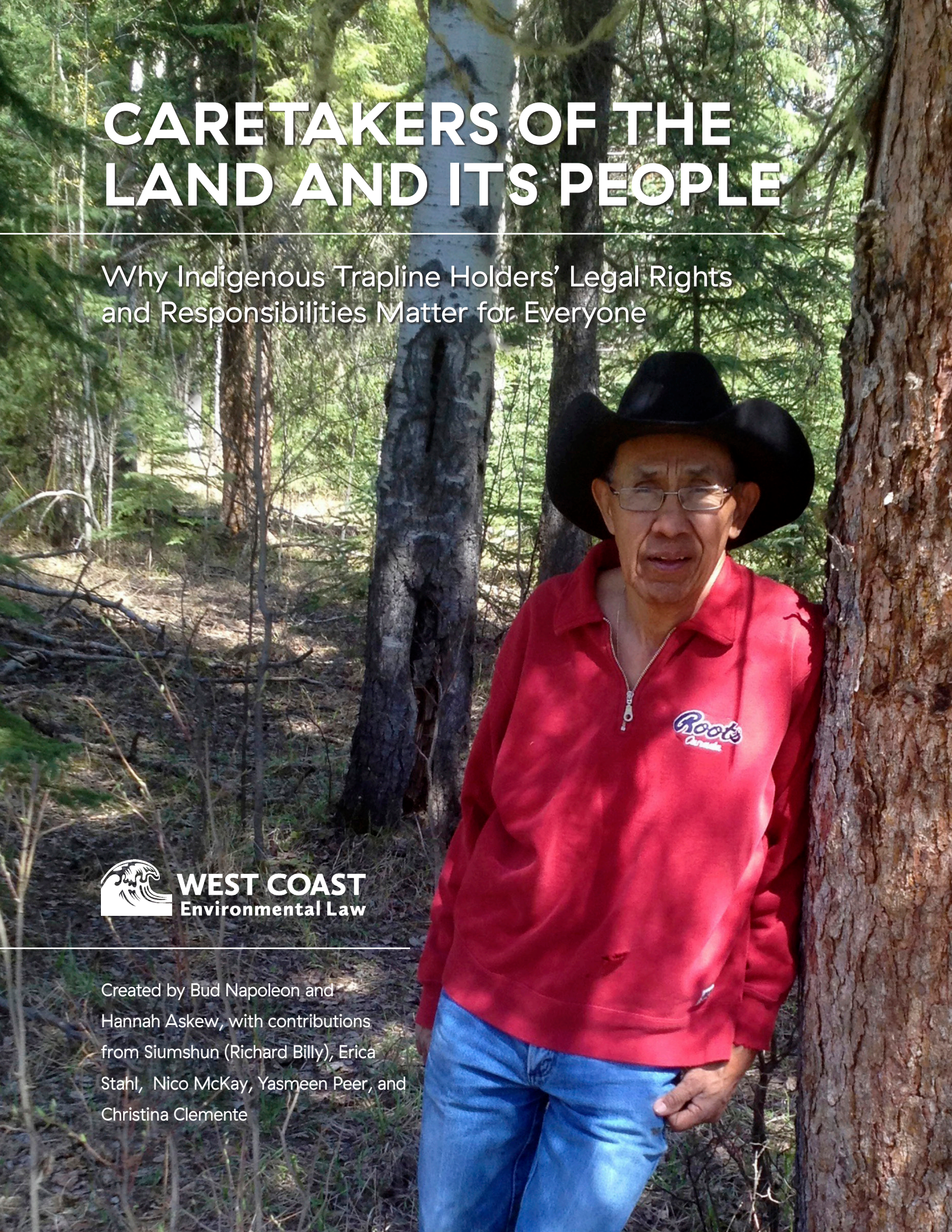
CARETAKERS OF THE LAND AND ITS PEOPLE

Why Indigenous Trapline Holders' Legal Rights and Responsibilities Matter for Everyone



WEST COAST
Environmental Law

Created by Bud Napoleon and Hannah Askew, with contributions from Siumshun (Richard Billy), Erica Stahl, Nico McKay, Yasmeen Peer, and Christina Clemente

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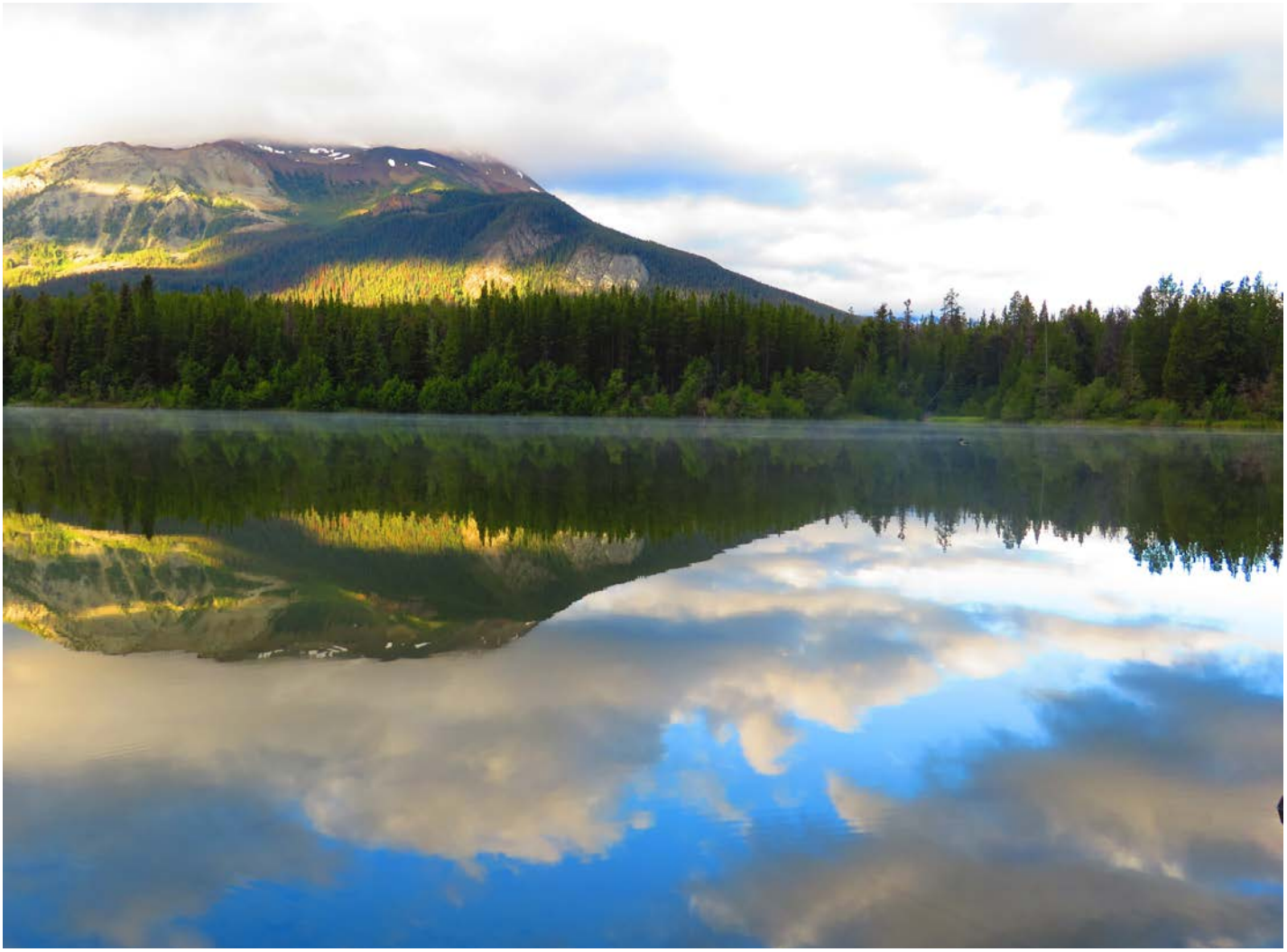
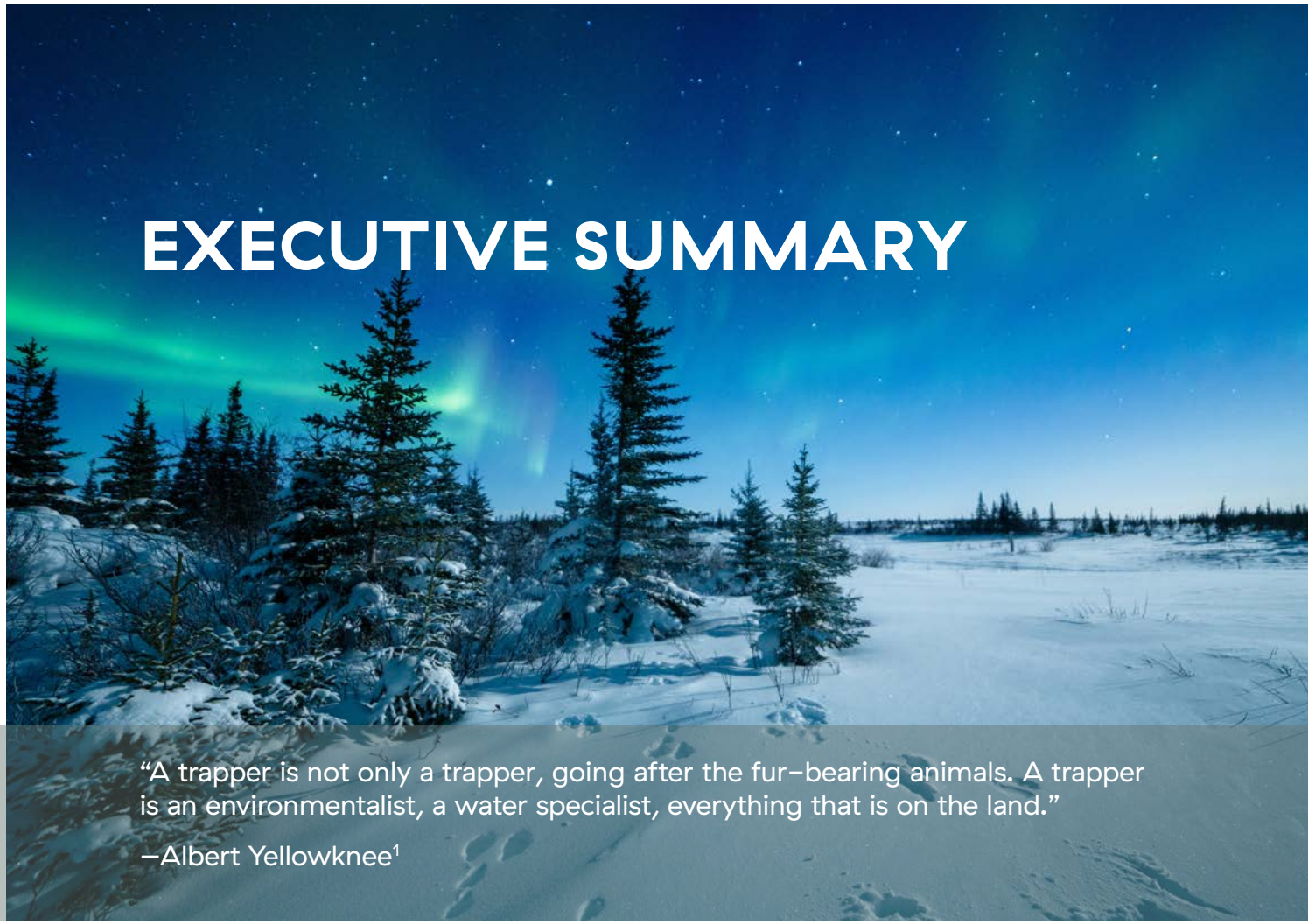


Lake reflections in Tsilhqot'in terrritory.

Photo: Lindsay Borrows

DISCLAIMER:

It is important to note that this report should not be relied on for legal advice. The purpose is to provide legal information in a general context only. For legal questions pertaining to a particular trapline issue or other circumstance, a lawyer should be consulted.



EXECUTIVE SUMMARY

"A trapper is not only a trapper, going after the fur-bearing animals. A trapper is an environmentalist, a water specialist, everything that is on the land."

–Albert Yellowknee[1]

Snowshoe hare tracks and the aurora borealis.

Photo: David Marx

This report was written in response to a number of inquiries received by lawyers at West Coast Environmental Law from Indigenous trapline holders in BC seeking to protect their hereditary and registered traplines from the cumulative impacts of various industrial projects including logging, mining, hydroelectric damming, and oil and gas development. In conducting legal research on behalf of these clients, we found that the law on traplines was complex to navigate and that there were relatively few existing secondary resources available.

The trappers and hunters we spoke with expressed an obligation under their own Indigenous laws to uphold the wellbeing of their trapline territories, both for the sake of their families and future generations, as well as for the sake of the land. They wanted to find out what Canadian legal tools might exist to help them fulfill these obligations to the land and to their families. This report is our response to their request.

What is a trapline?

Under the *Wildlife Act*, the BC government defines a "trapline" as "an area for which registration is granted to one or more licensed trappers for the trapping of fur-bearing animals."[2] These geographic areas may span hundreds of square kilometres, and they may be registered by Indigenous and non-Indigenous people alike.

From an Indigenous law perspective, traplines are territories that have traditionally been passed down through hereditary lines and come with a variety of rights and responsibilities related to stewardship of the land. The specifics of these legal rights and responsibilities – including who has decision-making responsibility over trapline territories, and the laws that guide interactions with the land, water, and living beings that exist within the area – depend on the specific Indigenous people and legal tradition involved.

For many of the Indigenous trapline holders we spoke with, using their traplines was the way that they exercised a wide range of Aboriginal and treaty rights, including hunting, fishing, trapping, gathering wild foods, engaging in spiritual practices, and passing down cultural knowledge to future generations. They also expressed strong governance responsibilities over their traplines, based on their own legal traditions, to ensure the health of all the different species depending on the well-being of the land as well as their families, relatives, ancestors and future generations. In contrast, Canadian law envisions a much narrower understanding of trapline holder rights and responsibilities that are devoid of governance responsibilities.

The Anishinaabe scholar Hayden King, in a podcast, reflects on his experience of the tension that is created by the clash of governance systems in relation to deer hunting in the following way:

> *I have to say, I think about hunting every single day. I think most often about deer hunting. And since a particularly affecting experience that I had last fall my thoughts have drifted to the more legal aspects of hunting. And I'm not talking about deer tags or wildlife management units. I mean Indigenous law. And the underlying question, that nags at me, is about breaking the law. What happens when we violate the norms and values that guide us on the land? How do we act on Indigenous law, when it's overlaid by imposed settler-colonial legal arrangements and logic?*[3]

An active trapline in Northern Ontario.

Photo: Amelia Martin

Interior logging.

Photo: TJ Flex

As our lawyers began to research the provincial regulatory framework for traplines in British Columbia, it became clear that statutes like the *Wildlife Act*[4] and its regulations were not intended to meet the trappers' land protection goals, and in many cases, have demonstrably failed to do so. Constitutionally protected Aboriginal and treaty rights offered more promise for legal action, but the high cost of litigating these cases frequently makes them an unviable option. As well, individuals and extended family groups who are responsible for trapline territories have had difficulties persuading judges that they are the relevant rights-holding groups.[5]

This report explores the question of governance over traplines, both from the Canadian provincial regulatory standpoint and from the point of view of Aboriginal and treaty rights under s. 35 of the *Constitution*, as well as from the perspective of Indigenous legal orders. The report makes a number of recommendations to better recognize Indigenous laws, knowledge and decision-making processes around trapline governance. Although the analysis and information contained in this report is applicable in jurisdictions across the province, particular attention is paid to Treaty 8 territory in northeastern British Columbia, where the impact of cumulative effects on traplines is particularly intense.

While the original catalyst for this project was to provide legal information for Indigenous trapline holders and their advocates, and they are the primary intended audience for this report, another important goal that emerged was to facilitate learning for Crown employees and other non-Indigenous Canadians about Indigenous law and governance over traplines. From the outset of our work, it was clear that Indigenous trapline holders understand the meaning of a trapline very differently than most non-Indigenous Canadians (see side bar opposite).

It is our hope that the report may help catalyze concrete shifts that will improve the situation for trappers and for the land.

Based on our analysis, we make the following recommendations:

Recommendations

Photo: Spencer Watson

1. Recognize Indigenous laws and perspectives regarding trapline territories

a) Federal, provincial and Indigenous governments, and proponents, should recognize and uphold the rights and responsibilities of Indigenous trappers, as understood within specific Indigenous legal traditions, when considering any action with the potential to impact trapline territories.

2. Undertake proactive "big picture" assessment and planning to understand and manage impacts to trapline territories

Cumulative Effects

a) The provincial and federal governments should make funding available for Indigenous peoples to generate and record information, stories, and analysis about the cumulative impacts of industrial development on Indigenous trapline territories, and the effects of these impacts on constitutionally-protected treaty and Aboriginal rights. In order to fully understand the cumulative impacts at each line, the information recorded should include band, treaty, and land histories, as well as family stories.

b) Indigenous-led or co-governed regional assessment and land use planning processes should be undertaken to evaluate different scenarios for protection and development and set future land use direction, in order to maintain or restore the integrity of trapline territories and to manage cumulative effects within ecological limits.

3. Implement the United Nations Declaration on the Rights of Indigenous Peoples

a) UNDRIP must be fully implemented and upheld, including the articles requiring "free, prior and informed consent."[6] This process should be attentive to Indigenous law and governance, and respect the jurisdictional authority of hereditary trapline holders according to these laws.

Co-Governance

b) Land use decision-making should be rooted in nation-to-nation relationships, and recognize Indigenous rights of self-determination. Co-governance approaches should be based on mutual equality and respect for the laws, governance processes, and underlying values and belief systems of the parties involved. This should be done in accordance with all provisions of UNDRIP.

Consultation

c) In implementing the UNDRIP requirement to consult and cooperate with Indigenous peoples to obtain their "free, prior and informed consent" before approving development:

i. The provincial and federal governments should provide notification to Indigenous trapline holders of proposed development, as well as short and long-range plans for resource extraction that will affect their traplines at the earliest possible time.

ii. Funding should be made available to trapline holders who need to take time off work to travel to parts of their traplines slated to be impacted by proposed development, in order to provide feedback on the proposal. This includes costs of travel and involves keeping records of each band trapper's daily wages and compensating accordingly for daily wages lost.

iii. The provincial and federal governments should provide funding to Indigenous nations to help facilitate the inclusion of hereditary trapline holders into nations' formal consultation process at the earliest possible stage, in a manner according with a nation's own laws and governance processes.

iv. The provincial and federal governments should try to develop a "meaningful" relationship with trapline holders and "level the playing field" by providing enough funds for trapline holders to hire experts and lawyers of their choosing. Consultation should occur at every stage, including the mitigation stage so that Indigenous trapline holders may be involved in overseeing mitigation methods and even hire individuals of their own choosing carry out the work.

v. Consultation with trapline holders should be required on decisions regarding herbicide spraying, as it affects the entire food chain, and plant life including important medicinal plants. Research and notification should be given on invasive species in order to warn trapline holders about certain impacts on animals and plants.

vi. Consultation should take place so that trapline holders are involved in decisions regarding cleanup or burning of brush. When necessary to do clean up or burning of brush, trapline holders should be able to hire people of their own choosing to carry out the burning and cleaning. Consultation is also required along waterways, where logging and cutting will impact the region's water flow.

4. Invest in healing and learning

Education

a) The provincial education requirement for hunting and trapping licences should involve a component of knowledge about the specific territory and its Indigenous laws. This curriculum could be designed and taught by Indigenous trapline holders and users from the respective territories.

b) The importance of the traplines for Indigenous peoples to transfer knowledge and law must be recognized and respected. Young Indigenous people also need to learn about their treaty and Aboriginal rights and responsibilities in relation to the trapline. This is important so that Indigenous youth, who will become the future leaders of their communities and nations, will know their rights and be able to protect their traplines for their families and for future generations.

Gender Equality in Relation to Trapline Governance

c) The federal and provincial governments should recognize the gender discrimination caused by the imposition of patrilineal property registration and inheritance laws. The federal and provincial governments should provide funding and resources to allow Indigenous nations to learn about and recover their traditional trapline governance systems, and disentangle the federal, provincial and traditional trapline registration systems to ensure gender equality.

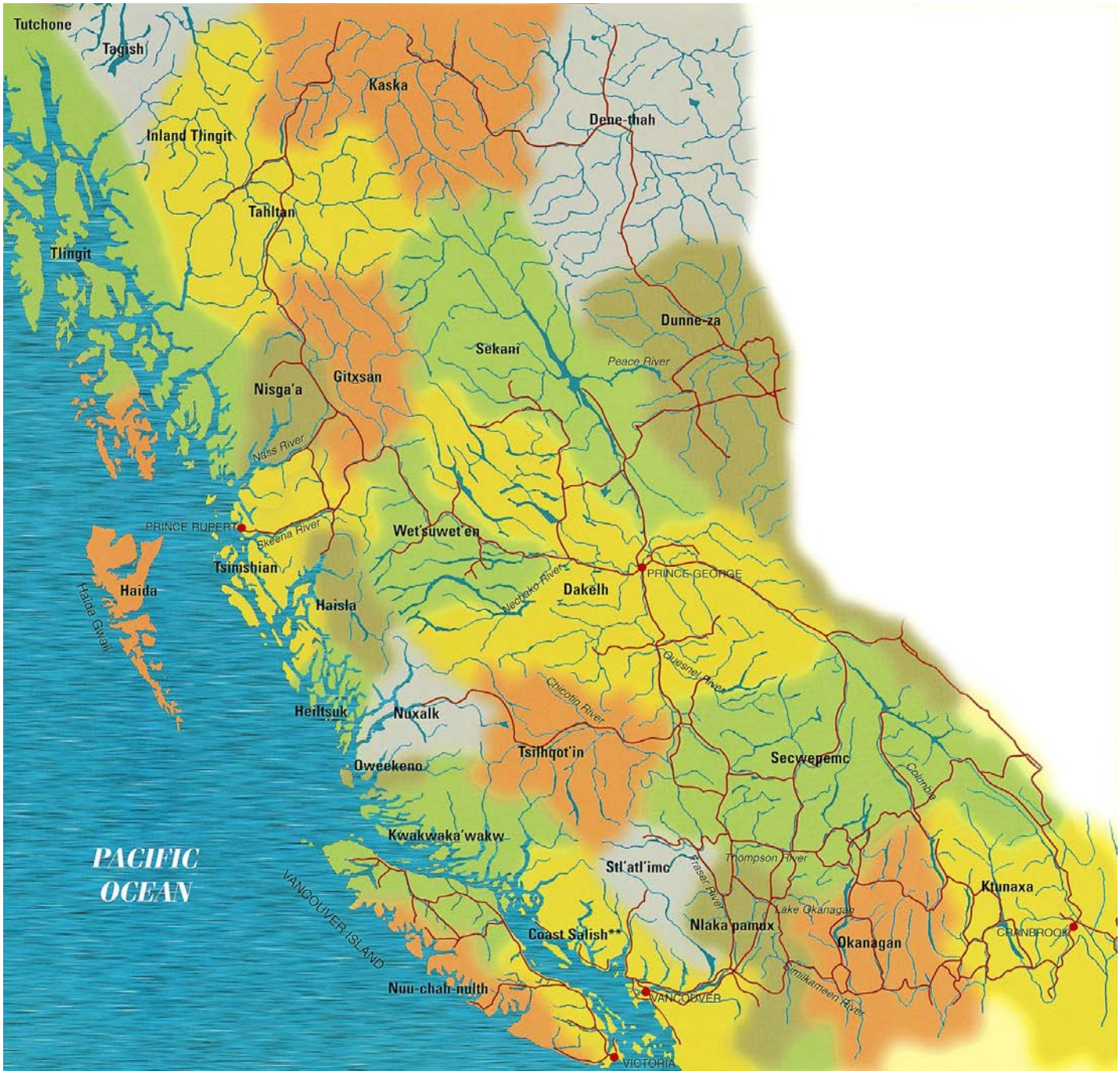
5. Strengthen and renew treaty promises

a) Ensure that in treaty territories, Indigenous and non–Indigenous people are educated about the meaning of the treaties from both the Indigenous and Crown perspectives, which should each be weighted equally, and give effect to this understanding in all decisions affecting treatied lands. This would promote understanding of the importance of the commitment to continued rights to hunt, fish, and trap for Indigenous peoples under the treaties, and the role of Indigenous laws and decision–making to ensure the health of the land and water to sustain these rights.

6. An organization to represent the collective interests of Indigenous trappers

a) An Indigenous trapper–led organization should be created to represent the collective interests of Indigenous trapline holders and trapline users in British Columbia.

Indigenous Map of British Columbia



INTRODUCTION

Photo: Ben Den Engelson

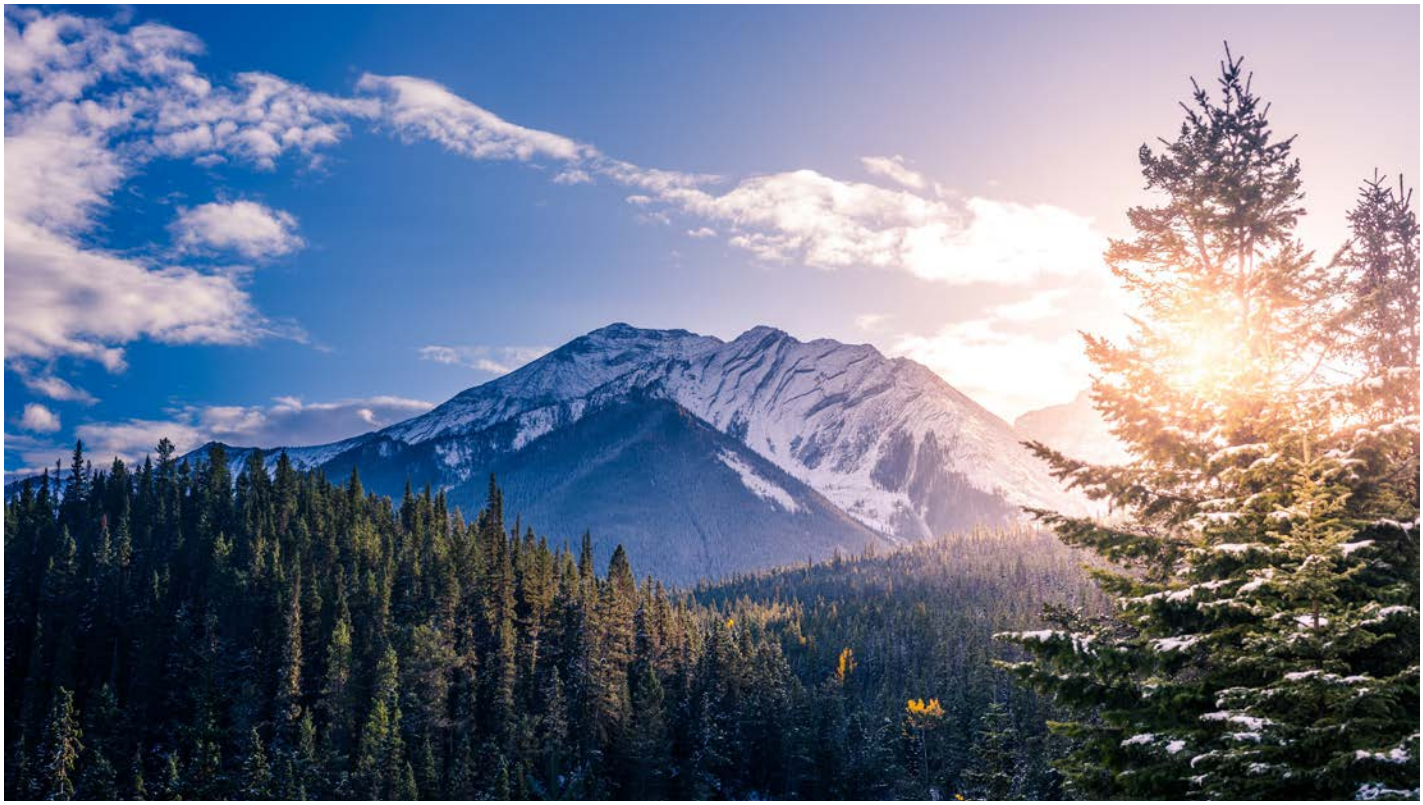
This report provides a general overview of the current state of the laws that govern traplines, and the challenges that unresolved conflicts of laws over the traplines are posing to Indigenous trapline holders and users, as well as to the land itself. The report is necessarily incomplete, as it was not possible to explore the complex and rich Indigenous legal traditions that govern traplines within distinct Indigenous nations across British Columbia. Where possible, we have tried to provide concrete examples flowing from particular legal traditions that Indigenous trapline holders shared with us and gave permission to be used in this report. It is also beyond the scope of this report to provide an in-depth analysis of the various areas of Canadian law relevant to trapline protection. Rather, this report provides a general introduction to the key issues, laws and cases relevant to trapline protection. It is intended as a starting point to generate conversation on a topic where few published resources currently exist.

A NOTE ON THE USE OF THE TERM "TRAPLINE"

The trapline holders we spoke with were seeking to uphold their governance authority under their own legal orders, along with the obligations and responsibilities attached to that governance authority. For the non-Indigenous lawyers and law students who worked on this report, understanding these obligations and responsibilities challenged us to decolonize our own understandings of law and relation to land. Much of this process was generously and patiently guided by Dunne-zah/Cree trapline holder Bud Napoleon. It is important to acknowledge that this report was drafted by West Coast Environmental Law lawyers and law students and represents a point on our journey of decolonizing our own understandings. Any gaps in understanding or mischaracterizations of the Indigenous legal orders refer to our own limitations and do not reflect on Bud Napoleon's knowledge or any of the other trapline holders who informed this work.

One question that was raised a number of times throughout the work was the question of whether the term 'trapline' was the appropriate one to use, as it is the colonial English term and the Canadian legal rights it is associated with are at odds with the Indigenous legal understandings that Indigenous trapline holders brought to their use of their term. While we sought to find a word in Cree or another Indigenous language that might capture the meaning of family or clan territories with associated governance rights, we ultimately could not collectively decide on a term that seemed appropriate for use in the report. As a result, the report uses the term 'trapline' throughout, which was the term that the trapline holders used in approaching our organization for legal support. The confusion that the use of the term itself causes in an intercultural legal context is symptomatic of the overall complexity of the situation.

Photo: Neil Rosenstech



Part I

Understanding Indigenous Legal Perspectives on the Governance of Traplines in British Columbia

A. INDIGENOUS LEGAL UNDERSTANDINGS AND GOVERNANCE OF TRAPLINES

Above: The Rockies near Jasper.

Photo: Leonardo Lunario

Opposite: Bud Napoleon.

Photo: Hannah Askew

The Indigenous trapline holders and users that we spoke with emphasized that their relationship to their traplines encompassed much more than the trapping of animals for furs. This relationship included hunting animals for food, gathering plants, berries and medicines, teaching upcoming generations about the land, engaging in spiritual practices, and spending leisure and family time. Dunne-zah/Cree trapper Bud Napoleon described it to us this way:

> *One of the first things you need to know is that trapping is more than just trapping. We do eat the muskrat, beaver and the lynx. We sell that lynx and we eat that lynx. That's food on the table both ways. We also do a little hunting. We use one part of our trapline one year and one part another way. When the populations are low, when we see that, we leave them so that the population will multiply hopefully. Picking medicinal herbs in the summer time, pickin' berries, us and our families, a lot of time we'd have our family picnic on the trapline. Just camping and being on the land, just like a leisure area. Some people they also fish too on the side.*
>
> *Sometimes it goes to the elders, ones that don't have vehicles or are too old to go out into the bush. So it gets spread around. The furs we keep to ourselves, but the food we share around. That goes with berries as well. Last year my brother Stan and I, we got a goose, we gave it to an elder from another reserve, because she wanted to eat a goose and she had no way of getting one. We heard about it and got it for her.*[7]

Bud Napoleon also described the relationship to the land, which underlies the activities undertaken on the trapline:

> *[A]s Indigenous peoples, we use everything within the land and from the animals. When killing a moose we use the meat, moose bones for tools to scrape the hide, hides for moccasins, etc...the insides, tripe, liver, kidneys, heart....even the head is not wasted, use the brain for moose hides,*

jaws, tongue, nose, everything is used....the sap from the aspen, the sap (spring time) from the birch for medicinal uses, various plants, but the non-Indigenous does not go in depth for uses as we do, I think that's where part of the confusion is, this is not to mention the spiritual uses as well.

[W]e are to think 7 generations ahead, like my dad said at the pipeline hearings, "I am not here talking for myself but for my grandchildren and great grandchildren." We are taught that we only borrow the land from our children, grandchildren, great grandchildren, etc...that we must leave the land as pure as we got it...which means conservation, or if necessary to mitigate any damages done to the land.[8]

Moose.

Photo: M.E. Giordano

Bud Napoleon's family trapline is currently under pressure from the cumulative effects of industrial development in Treaty 8 territory.

Bud Napoleon defines cumulative impacts in the following way:

Cumulative impacts means all the impacts that various industry does to the land and its flora and fauna. Especially in the forestry sector, they clearcut the logging areas, they destroy the moose habitat, there is nothing for them to eat. The rabbits, their food is gone, the fur-bearing animals lose their home, all the shelter for the animals big and small are gone. The birds can't nest up in areas where they are used to... so the animals move away. Our berry picking areas, medicinal plants are all gone. Even when we start to see regrowth, they come along and do some herbicide spraying, that affects our food chain big time. The moose can't graze on the willows because the spraying kills these willows, the food for the rabbits are hit as well, not to mention our berries and medicinal plants as well.

Now the oil and gas industry is not as bad as forestry, but they leave flare pits open, no fencing in many areas. The drilling they do, at times leaves mounds of waste that the moose lick and they tend to get white spots on their liver and heart, which is a big sign of unhealthy moose. Then again the smaller species are affected and so are the plants...and again there is usually spraying involved, not to mention that at times some of this is done close to the waters, and it eventually flows into creeks, and rives and probably the lakes...so it spreads easily.

[...] I forgot to mention all the roads that keep popping up, making it easy access for non-Indigenous use – quads, skidoos, side by side...many coming into our moose licks that we've tried so hard to protect, creating easier hunting access, encroachment. Even some of our trapline cabins are used as target practice or as wood for residential hunters. Too many bridges being opened up, and many areas become overfished and are no good anymore but hopefully in due time the fish come back. I've seen this kind of destruction first hand...when we take horses out hunting, we have to put bells on them, use bright florescent ribbon to make the horses visible and hopefully they don't get shot.

Pipeline development.

Photo: Vicki Watkins

[...] Another thing to consider with cumulative impacts is that for years the industry has sprayed the roads to keep the dust down. They used old used oil first and then later to now, they use calcium water mixture, to keep the dust down. Much of this finds its way to the watershed, streams, creeks, rivers, lakes. The question still needs to be answered: How is this affecting the fish habitat and the fur-bearing animals that live along the waters, and even the moose and other ungulates that drink from it? As far as I know, I haven't seen any studies on this and yes, it does affect our food chain.

Another part of cumulative impact is the import of plants that are not indigenous to our area in Treaty 8. Some are introduced by the big trucks hauling oil and gas machinery and other things, and some might come from logging trucks as well. Many of these are not washed from underneath the machinery or trucks and thus pick up various kinds of seeds from where they might leave from, and in many cases they are invasive plants that do damage to our lands up here. One plant in particular affects the moose in their calving and at times they do not calf.[9]

Skills and Knowledge of Indigenous Trapline Holders and Users

The range of skills and knowledge that the Indigenous trapline holders and users who contacted us possessed was humbling. The Dunne-zah/Cree hunter, chef, musician and linguist Art Napoleon describes the knowledge of hunters from his community in Treaty 8 territory this way:

> *People living the land-based lifestyle did more than randomly follow game and pluck berries; many were experts at their own style of low-impact land and wildlife stewardship. Hunters had to know their game intimately: all of the animal habits and patterns and what signs to watch for at different times of the year. They had to get into the thinking of the animal they were pursuing and try to outwit or otherwise engage with it. A good tracker could see game footprints through grass that are not visible to anyone else. Like forensic work, they could find a moose hair in a tangle of willows or a broken twig to tell the direction and time of travel. They could read a track to determine the age, sex, size and speed an animal was moving. Disrespectful or wasteful hunters were known to have bad luck hunting. A good hunter was in tune with and respectful of the animal he was after and sometimes the animal would be known to take pity and offer itself to a hunter. This concept is known as mîkawisowin 'a gifting or giving'. When I was a child there were hunters who were so tuned in they could dream the animal they were hunting and know exactly where to find them. This is also a form of mîkawisowin.*[10]

Year-round and Seasonal Uses of the Trapline

In his Cree linguistics thesis, Art Napoleon vividly describes the varying seasonal uses of his family's trapline:

> ***Spring/Summer***
>
> *In the spring, there were the annual bear and beaver hunts, setting nets for migrating fish runs, spring medicine gathering, birch tapping, and the cutting, chopping and stacking of the aspen greenwood supply. In early summer, there was mîstasowin, 'the scraping of inner cambium layer of young aspens' which was used as a tonic and killed the standing tree, which would dry and be*

ready as fuel for the smokehouse by the fall. In mid-summer there was snare fishing, moose camps, various wild berry seasons and never-ending preparation of kahkîwak, the much coveted 'drymeat' which once served as the base for pimihkan.[11]

Fall/Winter

In late summer, there was the prime bull season where mistahay-yâpiw, that fat 'king bull moose' were sought for lard & grease making. There were moose-berry, chokecherry and blueberry seasons, and grouse hunting season. In the fall there was waterfowl season, medicinal root gathering, the hauling and stacking of seasoned firewood, the hay and garden harvests, lake trout netting time, preparing the horses for the pasture where they would free range and forage for the winter, and all other winter preparations.

In the winter, the most important activity was nôcihcikîwin 'trapping' and most families ran a trapline with an outpost cabin where trappers would stay for weeks. In the generation before mine, men would stay on the traplines for months at a time. Back at our main homes it was a time for children to learn to snare rabbits and prepare furs. Some children would have their own mini-traplines to maintain throughout the winter and they would learn to prepare and sell their own pelts and get a taste of earning their own spending money. Winter was also the time for kohkom's sewing and beading where girls would learn to make quilts, moccasins and other clothing while all of the other kids were groomed on community historical narratives and âtayohkîwina, the sacred stories and legends told mostly in winter. Through the âtayohkîwina we learned more about our cosmologies, key sacred figures and key spiritual principles meant to carry us through life.[12]

Teaching Purposes of the Trapline

The Indigenous trapline holders and users we spoke with stressed the critical importance of the traplines to pass on ecological, cultural, and spiritual knowledge to upcoming generations. Dunne-zah Elder May Apsassin from the Blueberry River First Nations spoke about the impact that a gas leak from a well near her hunting cabin is having on her family. Because of the leak and the potential health risks it posed, she had been advised by authorities to minimize the time she spent at her hunting cabin. The situation was concerning to her because she needed to be able to take her grandchildren and great-grandchildren out onto the land to teach them to hunt and to skin animals, as well as to pass on stories and knowledge and spend time together. She was worried what the health impacts to herself and her family might be if they continued to spend time at the hunting cabin: "How am I supposed to enjoy myself with my grandchildren knowing that there's poison leaking out next to us?"[13]

Elder May Apsassin.

Photo: Treaty 8 Tribal Association

Art Napoleon describes his childhood experiences of learning on the trapline on Treaty 8 territory in the following way:

Moose-camps were family excursions into the backcountry at a time when there were few roads and the pack trail networks were still intact. A large base camp was set up with several smoking racks and as game was hauled to base camp, the women and children processed the goods into drymeat, hides, ropes and even tools. The men would split up and head out to track and stalk game and return with fresh kills. As kids we were expected to help with everything and observe and absorb as much as possible. These concepts are known as nâkatohkîwin 'paying absolute attention with all of our senses and intuitions' and ahkamîmowin a 'rapid focused use of the mind.' These

were well-known mantras in my childhood learning and every child was trained to keep their eyes peeled not just for danger or for spotting game and other gifts of the land but to also develop intuition and watch for spiritual signs through a concept known as môsihtâwin, 'becoming suddenly aware of something with the use of all senses' (in some ways similar to a 'gut feeling' in English.

The kids would learn all of the skills involved in maintaining a camp while learning about horse care, plant life, survival, tracking, hunting small game, fishing and berry picking. There were multiple activities and opportunities to learn and most activities were supported with related stories and teachings to enable a deeper understanding of each activity. By learning to take proper care of meat, using every part of an animal, showing gratitude and sharing the meat with community members that had no hunters, we were learning about respect and relatedness.

Teachings were centered on our values and our nîhiya tâpisinowin and every activity was set within a larger context. At the camps or in the family smokehouse, the stories seemed never ending. There were hunting stories, historic narratives and valuable family memories about the animals and lands of our peoples. All of these stories were told in nîhiyawîwin and when I heard some of these stories retold in English, they just did not have the same impact, as much meaning is lost in translation. Listening to fantastic adventures spoken in nîhiyawîwin around an evening campfire over a cup of maskîkowâpoy 'muskeg tea' is one of my favorite childhood memories and there were many nights I was transported into other worlds while laying on the ground staring at the stars. We were taught informally through these stories about our values, laws, gender roles, responsibilities and place in the world.

Photo: Al Case

> *Our identities as young nîhiyawak were being formed not just through these stories but also through nîhiyawîwin. The language itself was a doorway into a way of seeing the world and all of its objects, entities and life forms. In living off the land, there was a season for everything and within those seasons there were more sub-seasons. Every season related directly to the next so everything was interdependent and intertwined. There was also a reason for everything and a primal, built-in recognition that we humans were not alone in this world; that there were unseen forces all around us that we were taught to acknowledge and even engage in a relationship of reciprocity with, either directly or indirectly. In this way everything in our world was inter-connected as one thriving web of life. As such, learning was not seen as separate from our way of life but as part of the greater whole. Work was not seen as work but simply as part of daily life with everyone having a role. Spiritual practices were not seen as isolated or relegated just to specific times but as imbued fully in one's life, every day, all day long. There were strict rules and practices we lived by and the stories, language and lifestyle reinforced these unwritten laws.*
>
> *Through our chores, we were learning survival and life-skills by observing and then trying tasks out. It was a hands-on approach to learning and the lessons simply never ended when our childhoods did. Learning was very relational and whether it was an aunt, uncle or other community elder, there were a variety of mentors available to youth and young adults.*[14]

Bud Napoleon describes his understanding of the learning that comes from being on the land in the following way:

> *I think we, the North-East people, live more off the land than the majority of other people do, and a lot of our elders teach our young ones to carry on our way of life, and because of that we have the moose camps. I know my family has those family picnics all the time on our trapline, where all of our families are in there for a day or two at a time, and berry-picking, and sharing-stories there, and even some of the history that's been passed on. So that's my family way of keeping our way alive.*[15]

For Bud Napoleon, time spent on the land on his trapline is his primary way of exercising his constitutionally-protected treaty rights, and of fulfilling his Cree legal obligations to the land and to his family.

Relationship to Animals

The Indigenous trapline holders and users we spoke with described both a profound dependence on, as well as a responsibility for, the animals on their trapline. Over a period of decades, in numerous letters and presentations to band council, municipal council, industry and the provincial and federal governments, Squamish trapline holder Siumshun (English name Richard Billy) spoke up for the needs of the animals on his family trapline in relation to various proposed developments:

> *What we have here on our trapline, we wanna keep it green. Not only for us, for the animals that live in the forest.*[16]

Siumshun regularly informs industry and government by letter, email, telephone, and through legal counsel about how proposed projects may interfere with the habitat, food sources, and mating practices and schedules of the animals that live on his trapline. He understands himself to have a responsibility to speak for the animals, as they are unable to speak for themselves to government and industry.

Wildlife near Fort Nelson, BC.

Photo: BC Government

Siumshun's trapline.

Photo: Hannah Askew

Trapline holder Bud Napoleon expressed having a similar responsibility:

> *This is where, when they start acting, where different policies will come into place that will benefit the animals, because I always keep telling people that I am here on behalf of the animals, the moose, the rabbits, the bears, the ones who cannot defend themselves. I'm here trying to defend their territory because that is my livelihood as well. So I'm here on two bases: for myself, for my family, for the environment. Three bases I guess.*[17]

Saulteau trapline holder Derald Gauthier talked about the importance of showing respect to animals in order to be a successful hunter:

> *There's things that we do in our Native way that are sacred, the way we treat and talk about animals. ... To give you an example, the elders have said never talk bad about the bear; never say anything against a bear, because a bear will hear you and understand you and come back at you in another form some other time. Same with the moose: you cannot make fun of them and whatnot, because if you go hunting you won't find a moose. Those are the things that the white people cannot understand. That's how closely united, how we are tied, to the sacredness of nature and what it has to offer, including the plants and the animals. That's something that they'll never understand, and it's hard for us to try to explain, because they'll only think that it's just a myth.*[18]

In addition to feeling a responsibility to speak up for animals, Indigenous trapline holders and users also stressed the agency of the animals as decision-makers in a range of contexts. Art Napoleon provides this example in a Cree legal context:

> *In September, just before the moose–rutting season, it is always known to rain. People in my community understood this autumn rain to be caused by the Bull Moose in order to help them loosen the summer velvet from their antlers and prepare for battle. We understand the phrase î kimowanihkîtwâw 'they are rainmaking' to apply specifically to moose at that time of year. Common English thinking cannot grasp the concept of animals having the power to make it rain and it would typically be dismissed as coincidence or worse, superstition. But much of these nîhyaw kiskihtamowina 'Cree knowledges' stem from dreams and stories that have been handed down countless generations and based on very intimate relationships with land and animals.*[19]

Cheakamus River.

Photo: Lindsay Burrows

As Darcy Lindberg, a Nehiyah (Cree) legal scholar explains, Cree law is closely related to the relationships that people have with the land and the animals:

> *It is the view of some Cree people that "Cree law relies upon protocols" in that it holds a "foundational importance of relationship between individuals and the Creator, other humans, the land and 'nature.'*[20]

Such relationships between people and animals are rooted in a deep reciprocity, in which each relation has certain obligations to each other. As Darcy Lindberg puts it:

> *The language of our relations is also embedded in our obligations to our animal relatives. Such obligations are found in the many different ways to hunt and use a moose. There are many Cree ways to hunt a moose. There are very old ways dependent upon the repetition of footsteps through muskeg and bush, the recollection of songs and stories, and sometimes [...] upon the guidance of ceremonies. They are passed down through families and communities, required teachings learned through the patient experience of preparing to take a life. To some the hunt starts long before the bush. It is initiated through offerings and dreams as they begin to come to terms with harming a relative. All of this is entering into a relationship of reciprocity. All of this is law. Proper adherence to these laws teaches how to respect the moose's life and how to continue on with our lives in a proper way.*[21]

Indigenous Governance of the Traplines

Due to the diversity of Indigenous nations within the territory now known as British Columbia, the province contains not one but rather multiple distinctive Indigenous legal orders. Each of these Indigenous legal orders has unique and sophisticated governance structures, which encompass laws around governing and caring for the areas of land registered as traplines under the Canadian regulatory system. In many places, these laws continue to be in force at the same time as the Canadian state exerts its jurisdiction over the land.

Sometimes, Indigenous laws and Canadian laws may be in direct conflict on the trapline. This may be the case in instances where permits are issued for forestry, mining, oil and gas development, or damming, without the consent of the trapline holder and of their family. Many of the Indigenous trapline holders who approached us were looking to find out if there are legal remedies in Canadian law that may assist them to uphold their own Indigenous laws and responsibilities. In order to understand this conflict of laws situation, it is important to have a working definition of Indigenous law and to understand some of the ways in which it differs from Canadian state law.

Defining Indigenous Law

The Cree legal scholar Val Napoleon posits that the term "legal system" may be used to describe a state–centered legal system where law is managed by legal professionals in legal institutions, that are separate from other social and political organizations.[22] The province of British Columbia relies on a legal system involving judges, lawyers, courts and tribunals. Napoleon contrasts the term "legal system" with the term "legal order," which she uses to describe law that is embedded throughout social, political, economic, and spiritual institutions.[23] Similar to Napoleon's definition, Anishinaabe legal scholar John Borrows explains that "[the] underpinnings of Indigenous law are ... based on many sources including sacred teachings, naturalistic observations, positivistic proclamations, deliberative practices and local and national customs."[24] Indigenous law can be accessed from a range of sources, including elders and community knowledge keepers, published stories, oral histories and narratives, songs, ceremonies, language, dreams, the land, and art.

For people who have been trained only to recognize Canadian state law as law, it can be difficult to see Indigenous law, even when it is operating right in front of you. Hadley Louise Friedland puts it this way:

> *Indigenous law can be hard to see when we are used to seeing law as something the Canadian government or police make or do. Some people have even been taught that Indigenous people did not have law before white people came here. This is a lie. Law can be found in how groups deal with safety, how they make decisions and solve problems together, and what we expect people <should> do in certain situations (their obligations). They are often practiced and passed down through individuals, families and ceremonies. This is why many still survive, after all the government's efforts to stop them and sneer at them. Because of the presence of Canadian law, and the lies and efforts to stop Indigenous law, some Indigenous laws are sleeping. It is time to awaken them.*[25]

Kurtis McAdam describes impacts on his father's trapline in Saskatchewan:

"This is my father who inherited my grandfather's trapline. I took him to what they did. He stood there for a while, motionless and speechless for a moment. He grew up here, now it's unrecognizable. When deforestation begins we kill the spirit, when this happens we kill the animal spirits, we affect the water spirit, and we kill the spirit of the air. So many traditional laws are broken."

Photo: Kurtis McAdam

Harvesting wild potatoes

Photo: Linda R. Smith

Gender and Indigenous Trapline Governance and Use

While this report centres mainly on the experiences of male Indigenous trappers, as they were primarily the ones bringing these issues forward to our organization as individual clients representing their traplines, it is important to recognize the particular ways in which colonialism affects women's relationship, rights and obligations to traplines.[26] Although a comprehensive look into how the gendered nature of colonialism shapes Indigenous groups' governance structures today is beyond the scope of this report, more work must be done to interrogate how colonial legacies of heteropatriarchy impact women's legal relationship to traplines. This critical work must be carried out in a way that acknowledges the widely varying and distinct experiences and roles of Indigenous women and two-spirited queer people within their respective nations and legal traditions.

In some cases, hereditary governance roles of women were profoundly impacted by the imposition of colonial law. June McCue explains how the traditional system of her peoples, the Ned'u'ten, is a matriarchal and matrilineal clan system where trapping land is mostly passed down through the mother's clan.[27] It is the traditional clan system that designates the traditional territory into clan lands, and accordingly designates which clan is responsible for the use and governance of the land.[28] In 1867 the federal government enacted the *Indian Act*,[29] which imposed western and patriarchal systems of land registration and governance. Indigenous women could not vote under the *Indian Act* band election system until 1951.[30] Provincial governments also enacted legislation to regulate the mandatory registration and inheritance of traplines first under the *Game Act* (now the *Wildlife Act*)[31], which follows the western nuclear family model for passing down land rights. As a result of these combined systems, June McCue states, "They made a big mess of our land system."[32] For example, once a man has died or passed on the registration for the trapline to his wife, then it could be passed on to the children of the marriage (either women or men and often the first-born).[33] However, the children usually

Alice William of the Tsilhqot'in Nation.

Photo: Lindsay Borrows

still follow the matrilineal line for clan membership, whereas the trapline exists on the father's clan territory.[34] As a result, the mother's clan members are in effect using and governing the father's clan lands, which is a violation of the independence of the clans under the traditional clan system.[35] The Ned'ut'en now have competing rights under colonial and traditional governance systems that must be untangled and resolved.

Various sources demonstrate the ways in which Indigenous women play critical educational, spiritual, and leadership roles within their nations under different legal orders.[36] Colonial harms include practices whereby the state and church have forced western, Anglo, Christian constructs of gender within Indigenous communities.[37] In some cases, the colonial imposition of western gender roles resulted in the displacement of women in governance over traplines and traditional territory.

In spite of the violence of past and ongoing colonial policies, Indigenous women are prominent on the land and have deep connections to traplines. Bud Napoleon describes his mother Suzette, a member of the Dunne-za nation, her connection to the trapline, and the traditional knowledge that she shared with him:

> *My mom taught me so much about the land, the bush and what it can provide, right from the start. I remember her showing me how to find rabbit trails and to set snares for them, this was in the summer and then later on in the winters. She taught me how to set traps for marten, mink, fisher, and lynx. She also taught me how to set lynx snares. I remember her doing the cooking at the trapline when we had family gatherings and telling us old stories. She would set snares for squirrels and had her own trails, where she'd set snares and traps. We would use these same areas year after year, and then go to other areas to trap and leave the old area for a rest. She would use certain areas and not over-trap and told me to always think of tomorrow and not kill everything in one area, that was her way of conservation. In the summer I remember her picking berries in our trapline, and at times pick certain plants for medicinal purposes.*

> *She also taught me how to set traps for muskrats along the river, and she'd say that it's also a good place to set traps for the winter as there was a trail that followed the river banks, that way she'd set her traps there and also set traps along the river banks for muskrats...She would make her own bait for the winter traps as well.*[38]

Indigenous Self-determination and Countering the Myth of the "Ecological Indian"[39]

While this report acknowledges the special knowledge and skills that Indigenous peoples bring to the use and governance of their traplines, it does not claim that Indigenous peoples are natural environmentalists. Such claims reinforce the damaging stereotypes that romantically depict all Indigenous people as 'ecological Indians' living in perfect harmony with the earth.[40] As Anishinaabe legal scholar John Borrows writes:

> *Indigenous peoples can be as destructive as other societies on earth – we are part of humanity, not outside of it. Caring for the earth is hard work; it does not always come naturally. Humans must consume to survive. Accordingly we must strive to attenuate our impacts. It is not easy to respect all forms of life. Even in small numbers humans can place great stress on ecosystems.*
> *...*
>
> *[W]e must acknowledge that Indigenous peoples are not necessarily environmentally sound by the mere virtue of their existence. As Indigenous peoples, we are not blameless. Our lands and waters can also be spoiled even where we have small degrees of stewardship and control. It is not enough to be Indigenous and inherit an ethic of care. These teachings must be acted on by each generation. They must be continuously reproduced for Indigenous peoples to live harmoniously with the earth.*
>
> *Fortunately, Indigenous peoples possess norms and practices which flow from experience which can be activated to accomplish this goal. We must reject 'dirty Indian' images even as we discard stereotypical romantic 'ecological Indian' views. Contemporary Indigenous life is complex. For example, in contrast to the aforementioned problems many Indigenous communities effectively apply their own laws and values to sustain and protect their homelands. Their lands and lives are generally healthy, sustainable and productive. Consequently, they enjoy clean water, fertile lands and abundant wildlife.*[41]

In the current context where Indigenous law and governance are not respected by the Crown, Indigenous trapline holders are routinely forced to make difficult decisions regarding the best way to fulfill their responsibilities to their human and non-human relatives. A trapline holder may decide that the best way to uphold their responsibilities is to enter into an agreement with a company that is doing development on the land. This course of action may allow the trapline holder to have input on the way that the development is done, as well as to generate economic and labour opportunities for the trapline holder and their family. The trapline holders that contacted our environmental law organization were first and foremost seeking injunctions against certain developments proposed on their territories. However, sometimes they were also willing to consider benefit agreements with industry in exchange for the project abiding by certain conditions and/or a financial arrangement with the trapper. An approach that respects Indigenous self-determination must respect the range of decisions that different trapline holders will make with regard to the use of their trapline.

Negotiating Treaty 8

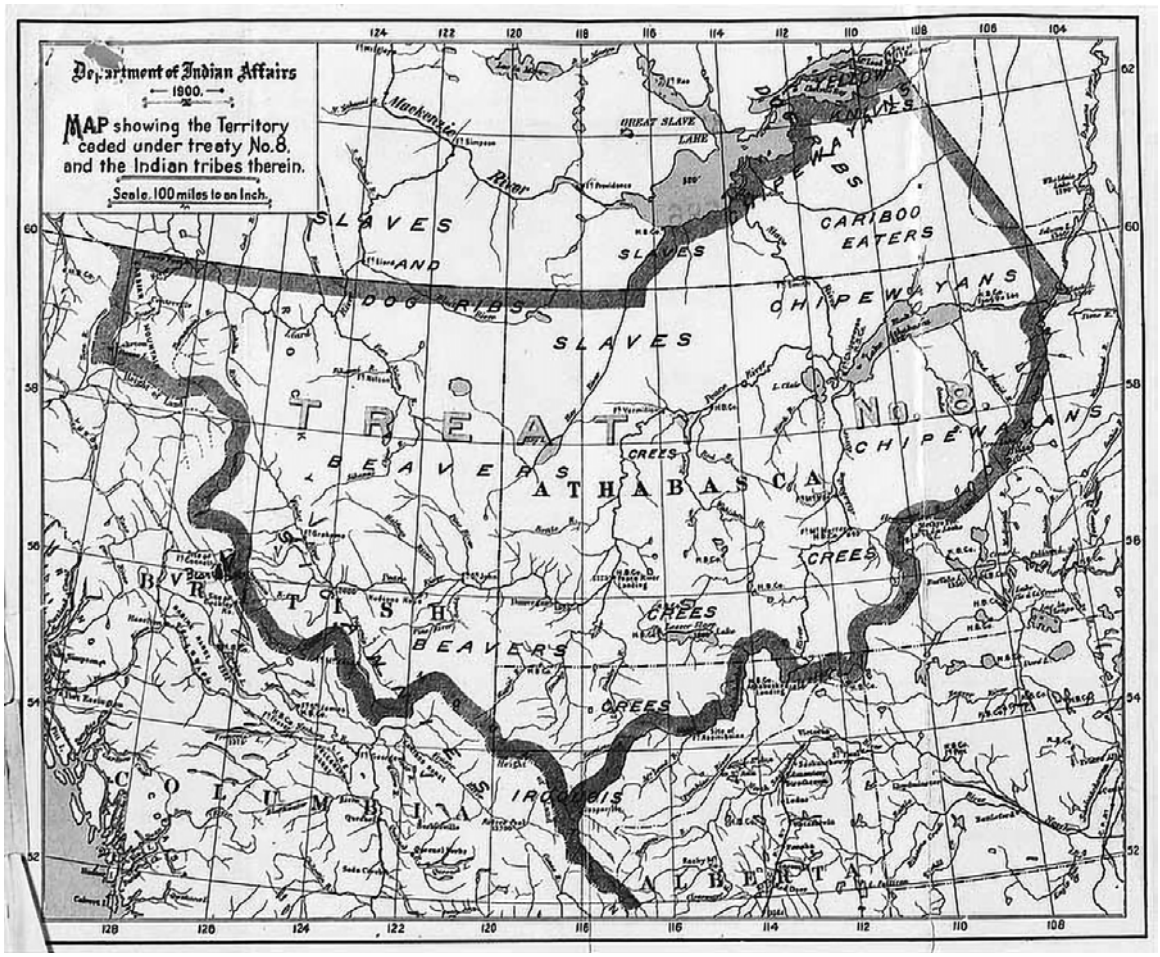
During the 1870s, the Canadian government entered into a series of treaties with Indigenous nations across Canada, from Ontario to Alberta. For settlers, the treaties were primarily to secure land and resources for themselves.[42] For Indigenous peoples, treaties were often rooted in sacred law with the Creator as witness, and treaties were negotiated to ensure they could continue to live as they had prior to European contact. In June 1898, the Canadian Department of Indian Affairs received approval to begin treaty negotiations with Indigenous nations in areas spanning portions of present–day Alberta, Saskatchewan, and the Northwest Territories.[43] Adhesions in the northeastern portion of British Columbia were subsequently added. Today, Treaty 8 covers a landmass of approximately 840,000 kilometres, is home to 39 First Nations communities, including 23 Alberta First Nations, three Saskatchewan First Nations, six Northwest Territories First Nations, and eight British Columbia First Nations.[44]

The English text of Treaty 8 states that the signing nations would:

> *[C]ede, release, surrender and yield up to the government of the Dominion of Canada, for her Majesty the Queen and Her Successors for ever, all their rights, titles and privileges whatsoever.*[45]

In return, the Treaty 8 Nations were assured:

> *[T]he right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving*



Map showing the territory ceded under Treaty No. 8, and the Indian tribes therein. Department of Indian Affairs, 1900.

Map: Archives, Dept. of Indian Affairs.

> *and excepting tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.*[46]

As with many written agreements between Indigenous and non-Indigenous peoples, there are significant differences between the written English of Treaty 8, and the understandings of Indigenous signatories.[47] Oral representations were made during treaty negotiations that were never incorporated into the written text. In his opening negotiation speech, Treaty Commissioner David Laird assured the signatories that their traditional livelihoods would be protected in perpetuity by the treaty, stating:

> *Indians have been told that if they make a treaty they will not be allowed to hunt and fish as they do now. This is not true. Indians who take treaty will be just as free to hunt and fish all over as they are now.*[48]

In a signed affidavit by James K. Cornwall, witness to the negotiations at Lesser Slave Lake, he recalled that:

> *Much stress was laid on one point by the Indians, as follows: They would not sign under any circumstances, unless their right to hunt, trap and fish was guaranteed and it must be understood that these rights they would never surrender.*[49]

Likewise a diary from Fort Chipewyan's Catholic mission recorded that:

> *The chief of the Crees spoke up and expressed the conditions on which he would accept the Government's proposals: 1) Complete freedom to fish. 2) Complete freedom to hunt. 3) Complete freedom to trap.*[50]

There are many other recordings of witnesses to Treaty 8 negotiations stating how the oral terms of the treaty were to protect the livelihood of the Indigenous nations. This promise was not upheld. For example, in 1932 after hunting female deer was prohibited in Alberta, the Headman for the East End Moberly Lake Reserve wrote a letter to the Indian Agent stating: "...when we took treaty we were promised we could kill game whenever we were hungry, their [sic] was no mention about the male and female."[51]

Erosion of Treaty 8 Promise to Hunt, Trap and Fish

As a result of unprecedented immigration into Treaty 8 territories of British Columbia, and rising prices of fur post-World War I, stocks of fur-bearing animals were quickly and significantly depleted. In 1925, the British Columbia *Game Act* was amended to implement a compulsory trapline registration system.[52] The purpose of the registry was to ease conflicts between Indigenous peoples and settlers, and introduce a Western-based conservation management structure that could be monitored by game enforcement officers.[53]

The trapline registration system greatly disadvantaged Indigenous peoples. Many Indigenous trappers felt that they should not have to register to trap in areas where they and their families had been trapping since time immemorial. For those who were willing to register, language barriers and discrimination hindered their ability to even begin the registration process.[54] Further complicating matters was that trappers were required to provide a geographical description of where the trapline they were registering was located. Indigenous people, not accustomed to European mapping methods, were sometimes unable to provide "adequate" representations.[55] This could result in traplines being registered in the incorrect area, causing overlap between

where Indigenous trappers had attempted to register their trapline and where non-Indigenous trappers successfully registered theirs.[56]

Non-Indigenous trappers did not face these difficulties. They quickly registered traplines in productive areas, including in traditional trapping territories, pushing Indigenous trappers out of these locations in the process. Provisions in the *Game Act* also favoured non-Indigenous methods of trapping. The *Game Act* required traplines to be used regularly, and lines not consistently trapped on could be taken away from the trapline holder.[57] This directly conflicted with traditional methods of rotating traplines through different areas over several seasons, allowing for the recovery of furbearer populations. Any attempts over the subsequent years to remedy this problem failed.

Though Indigenous nations opposed the trapline registration system and resisted its implementation, at least partly based on their understanding of rights guaranteed to them under Treaty 8, the provincial government continued to enact legislation affecting trapping.[58] Most legal challenges relating to restrictions of hunting and trapping rights under Treaty 8 have come from Alberta (e.g. *R v Badger*[59], *R v Horseman*[60]), and these cases support the ability of provincial governments to pass laws or make regulations to conserve wildlife, even if it infringes treaty rights.

High bush blueberries.

Photo: Linda R. Smith

Logging road.

Photo: David Stanley

Impact of Cumulative Effects on Treaty Rights in Northeastern British Columbia in Treaty 8 Territory

Trapline holders and users in Treaty 8 territory report seeing many harms on the land. Trapper Bud Napoleon states that:

> *It seems that they've disregarded our Treaty 8 rights over and over again. Especially displacing areas for feeding of moose, because all of the animals work together, and there is a food chain. When the forestry [industry] sprays pesticides to kill those obnoxious weeds they call them, which are willow, willow are a prime winter feed for the moose. So, when they're spraying there, what are they doing to the berries underneath, berries that we need to pick? How about all the small plants in there that the rabbits eat, that we use? And now, if that rabbit is infected in some way, and the lynx and marten live off the rabbit as well, so that food chain is being affected as well in both ways – on the animal side and on the native side. So, the forestry industry just sees that they are spraying the willow, and miss the entire big picture.*[61]

Derald Gauthier of Saulteau First Nation says:

> *I remember going to Sankamka Valley. There is this one lake we used to call Moonshine Lake. It's right by the Highway 29, 30 kilometres from Chetwynd. I remember we used to go and camp there. .... I remember that lake used to be a huge size. That was the lake, it was a big one, eh. It was nice and clear, you could go out, see all the fish swimming by. Now there is a golf course there, the lake shrunk to nothing, just dried right out. It's right on the trapline, they never helped his Dad even once. Right now, there are people buying [so they] went ahead and sold it all.*[62]

Siumshun's Story: Perspectives from a Coast Salish Trapper

Unlike in other Canadian provinces, the majority of land in British Columbia is not subject to signed treaties between Indigenous groups and the Canadian government. With the exception of Treaty 8 and the Douglas Treaties, the early colonial government in BC never reached formal agreements with Indigenous groups over land use and governance. Colonial laws were superimposed over existing and continuous Indigenous laws and governance structures in the territory now known as BC, most of which remains untreated today.[63] This has created legal and moral uncertainty — which has yet to be resolved — over the rightful ownership, use of land and resources, and application of laws in untreatied territory. This is partially due to the fact that the Canadian law categorizes the rights of Indigenous groups differently based on whether they have signed historic treaties with the Canadian government. As a result, Indigenous people such as Siumshun whose traplines fall on untreatied land hold somewhat different rights under Canadian law from those in treatied territory. The BC government is now engaged in comprehensive land claim and modern treaty making processes across the province. To date, four modern treaties have been signed and implemented in BC: the Nisga'a Final Agreement, the Tsawwassen First Nation Final Agreement, the Tla'amin Final Agreement, and the Maa-nulth First Nation Final Agreement.[64] The Province is in advanced stages of negotiation with 15 other First Nations.[65]

Siumshun.

Photo: Hannah Askew

Transcript of Interview with Siumshun (Richard Billy) on April 8, 2018

Well, this trapline has been in my family for a while. My late father Siumshun Moses Billy, he's the one that owned the trapline and that's why it's there. In front of you is the map of his trapline. He trapped in the early '30s and '40s, until the logging companies started coming in.

As years went by, the logging industry started taking over our trapline and the late 40's and 50's really ruined my Dad's trapline, so he was the last one to trap on that because of the logging industry.

They ruined my father's trapline and they're still ruining it. Now when he passed on in '79, 1979, and my late brother, oldest brother, Chuck; he took over the trapline and put it in his name and he took good care of it then.

When my Dad owned that trapline, it wasn't only him that used the trapline; it was our family and relatives down from the Lower Mainland. One was Chief Joseph Sun ... when he'd come up, he'd come to my Dad or my brother's house and ask if it was okay for him to go hunting on our trapline. He'd ask permission and my Dad would say, "You're our relative, you're welcome anytime to go hunting."

That's how my Dad was, our family shared. After that, my late brother passed and I took over because I wanted to keep the trapline in my name.

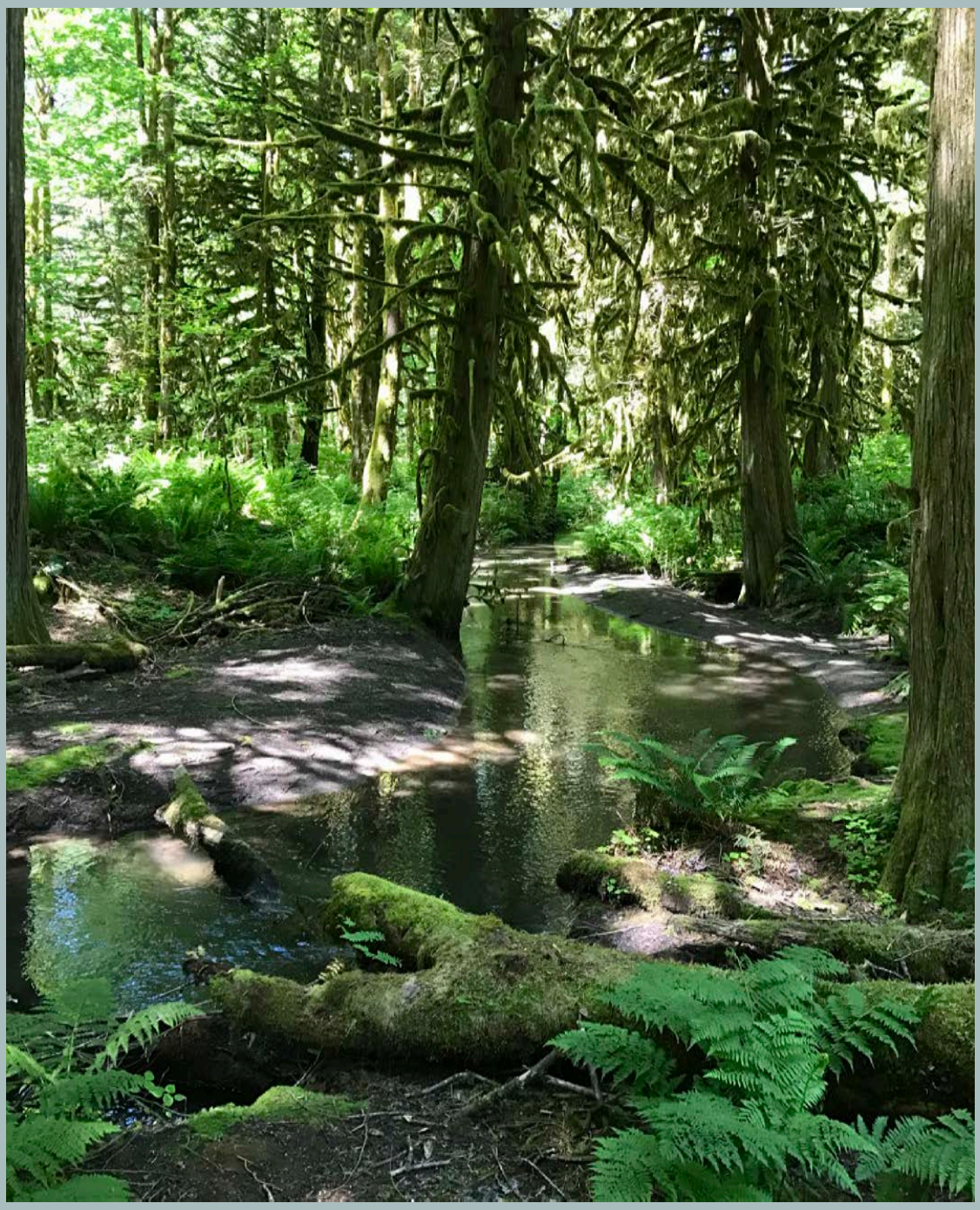
My late wife, Anna, she says to me then, "Are you gonna trap?" I said, "No, we gotta let it re-forest and the animals will come back."

"Well what do we do with it now?" she says. And I said, "I'm using it to get my Devil Club and your stuff for making your medicines here." She made a lot of medicines for her family and my son's older son, he would come too.

Also, during berry pickin' time, my wife, she'd take her daughters up and do the berry picking and stuff like that. When it was hunting season, that's where I got my meat, where I went hunting.

That's why I want to keep this trapline in our family because we still use it for family, and when I pass on, I've named all of my grandsons who are gonna take over from here.

It's not only for the Billys now, it's for our grandchildren, great-grandchildren and our future generations to come. What we have here on our trapline, we wanna keep it green. Not only for us, for the animals that live in the forest. Right now, the salmon are out and coming up to Squamish and heading up to Boom River. That's one of the last unpolluted waterways in our territory.



Siumshun's trapline.

Photo: Hannah Askew

So much development and too many things happened in our traditional territory, on our unceded lands, that they just overtook. And starting from north of our territory, Squamish here, is the worst one that is one of the biggest polluters and polluted our rivers, the Cheakamus River and the Squamish, after they finished building the dam.

That water has been polluted since Whistler started their ski resort. Before that, my late Dad and I, my late brothers and uncles, we used to fish salmon in that river and we would go camping sometimes and when we would get thirsty we could drink right out of that water.

Now, for the past 40 to 50 years, it's been so polluted that we don't drink it, and I don't fish there no more because I don't like eating from that river what Whistler ski resort has put into our rivers there. Their pollution, their sewer system and everything.

Siumshun.

Photo: Hannah Askew

Today we have the only two rivers that are unpolluted. Boom River is unpolluted, and Mamquam River is unpolluted yet and I'd like to keep those protected for future generations and for the salmon. If we lose the salmon, we're gone too because that's our medicine, the salmon.

I'm trying to preserve our trapline for our grandchildren and great-grandchildren and future generations, so I am still here talking about it. We beat the [proposed] ski resort in '98 and '99, that they can't build on there, the Squamish Nation Chief and Council used our brief.

We made a petition that we didn't want no ski resort on my trapline and that was won in court. They kept going to court after that many times and Randall Lewis, he was the one that was supposed to be an environment protector. He told me that he'd been going to them and been arguing lots and been going to court and they win and lose, win and lose. I told him, "You better come to the real owner, that belongs to the family. That belonged to not only my Dad but our ancestors before us."

Our family walked this beautiful land before all this pollution and what's happened with this so-called progress. We walked and we enjoyed this land. We lived off the land, we lived with animals, we protected each other. We didn't over take, we just took what we needed for the family and that's it. That's what I have to say for now, and while I'm still alive I'm gonna protect it. I'd like to say more about it but right now that's all I'm gonna say about it.

My other grandsons, when it's getting a good weather, I wanna take them up. One is a surveyor, and they're gonna re-survey it and make sure. We'll put on their name and that, and no trespassing in the north, south, east, west corners of our trapline. That's what we're going to do. And you have seen my map of my trapline, you have a picture of it. And that's what I want protected. Siumshun, Siumshun's family.

B. HARM FROM COLONIALISM TO INDIGENOUS GOVERNANCE AND THE WORK TO REVITALIZE INDIGENOUS LEGAL ORDERS

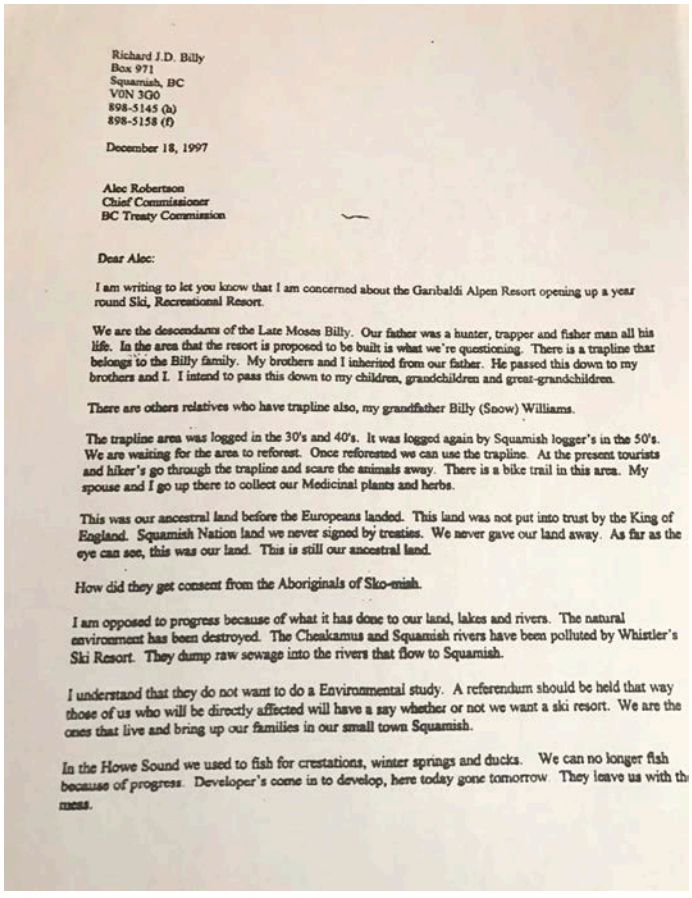
Although Indigenous law is still present and practiced, it has experienced harm from residential schools, violence to the land, and other aspects of colonialism. Many nations are in the process of revitalizing and rebuilding their Indigenous laws and governance systems in relation to various issues. Cree/Dunne-zah trapline holder Bud Napeoleon told us that:

> *For years I've been telling my people that we've got to take the bull by the horn and bring back our own Indigenous laws, because a lot of our systems that we had in place before the Europeans came were strong. They were there. We had our own social and economic systems and how we look after elders and kids and whatnot. And that included the environment. And those were unwritten laws that people understood and abided by.*[66]

For many of the Indigenous trappers who spoke with us, the work they are doing to protect their traplines is part of exercising their legal rights and responsibilities under their own Indigenous legal orders. The first time that Squamish/Coast Salish trapline holder Siumshun spoke with our lawyers, he arrived in a pick-up truck loaded with boxes that his two grandsons carried out for him. The boxes were filled with maps, photos, letters and other documents related to Siumshun's efforts to protect his trapline for the benefit of his family, as well all of the non-human species depending on it. This documentation was evidence of his efforts to uphold his legal responsibilities to protect his family's trapline and all the beings that depend on it under Coast Salish law.

Letters from Siumshun (Richard Billy) to BC government officials.

Photo: Hannah Askew



Richard J.D. Billy
Box 971
Squamish, BC
V0N 3G0
898-5145 (h)
898-5158 (f)

December 18, 1997

Alec Robertson
Chief Commissioner
BC Treaty Commission

Dear Alec:

I am writing to let you know that I am concerned about the Garibaldi Alpen Resort opening up a year round Ski, Recreational Resort.

We are the descendants of the Late Moses Billy. Our father was a hunter, trapper and fisher man all his life. In the area that the resort is proposed to be built is what we're questioning. There is a trapline that belongs to the Billy family. My brothers and I inherited from our father. He passed this down to my brothers and I. I intend to pass this down to my children, grandchildren and great-grandchildren.

There are others relatives who have trapline also, my grandfather Billy (Snow) Williams.

The trapline area was logged in the 30's and 40's. It was logged again by Squamish logger's in the 50's. We are waiting for the area to reforest. Once reforested we can use the trapline. At the present tourists and hiker's go through the trapline and scare the animals away. There is a bike trail in this area. My spouse and I go up there to collect our Medicinal plants and herbs.

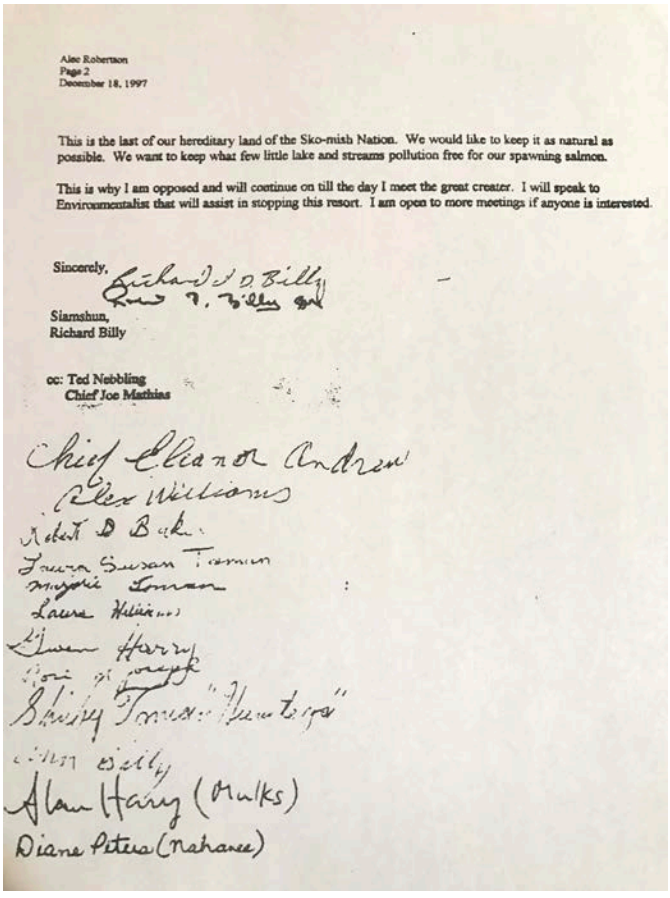
This was our ancestral land before the Europeans landed. This land was not put into trust by the King of England. Squamish Nation land we never signed by treaties. We never gave our land away. As far as the eye can see, this was our land. This is still our ancestral land.

How did they get consent from the Aboriginals of Sko-mish.

I am opposed to progress because of what it has done to our land, lakes and rivers. The natural environment has been destroyed. The Cheakamus and Squamish rivers have been polluted by Whistler's Ski Resort. They dump raw sewage into the rivers that flow to Squamish.

I understand that they do not want to do a Environmental study. A referendum should be held that way those of us who will be directly affected will have a say whether or not we want a ski resort. We are the ones that live and bring up our families in our small town Squamish.

In the Howe Sound we used to fish for crestations, winter springs and ducks. We can no longer fish because of progress. Developer's come in to develop, here today gone tomorrow. They leave us with th mess.



Alec Robertson
Page 2
December 18, 1997

This is the last of our hereditary land of the Sko-mish Nation. We would like to keep it as natural as possible. We want to keep what few little lake and streams pollution free for our spawning salmon.

This is why I am opposed and will continue on till the day I meet the great creator. I will speak to Environmentalist that will assist in stopping this resort. I am open to more meetings if anyone is interested.

Sincerely,

Siamshun,
Richard Billy

cc: Ted Nebbling
Chief Joe Mathias

Canadian Legal Definitions of the Trapline

While the Indigenous trapline holders and users that we spoke with understood their trapline rights in broad terms, and as being inseparable from their Indigenous identities as well from their Aboriginal and Treaty rights under the Canadian *Constitution*, Canadian law imagines the rights much more narrowly and in a manner that frequently conflates Indigenous and settler trapline rights. When registering their traplines, many Indigenous peoples did so hoping to protect the lands they traditionally trapped on.[67] In contrast, the Canadian government "operated under the assumption that registration provided no substantive protection against competing land uses."[68]

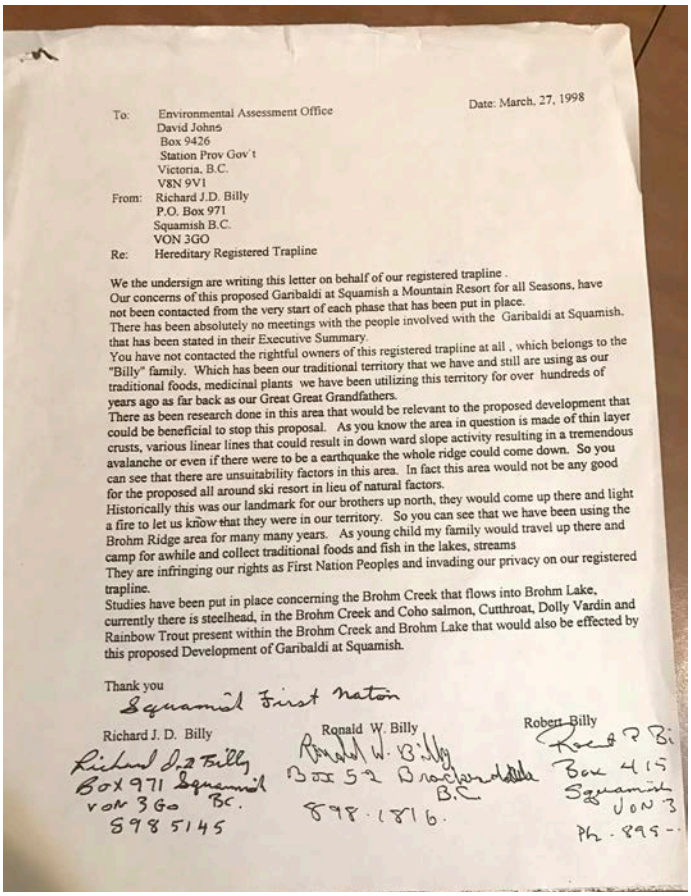
Creation of the Trapline Registration System

The Province of British Columbia introduced mandatory universal trapline registration in 1925, with Alberta following suit in 1937.[69] Under the registration framework, trappers are licensed or given permits by provincial authorities that allow the trapping of fur-bearing animals within demarcated zones.[70] Often, royalties must be paid by trappers for the animals taken from the trapline, with the money collected being directed, in part, to scientific monitoring and management of wildlife.[71] The BC government regards the licensing system and royalties as tools for providing basic statistical data for the purpose wildlife management.[72]

Left: Letter from Siumshun (Richard Billy) to BC government officials.

Right: Map of Siumshun's trapline area

Photo: Hannah Askew



To: Environmental Assessment Office
David Johns
Box 9426
Station Prov Gov't
Victoria, B.C.
V8N 9V1

Date: March, 27, 1998

From: Richard J.D. Billy
P.O. Box 971
Squamish B.C.
VON 3GO

Re: Hereditary Registered Trapline

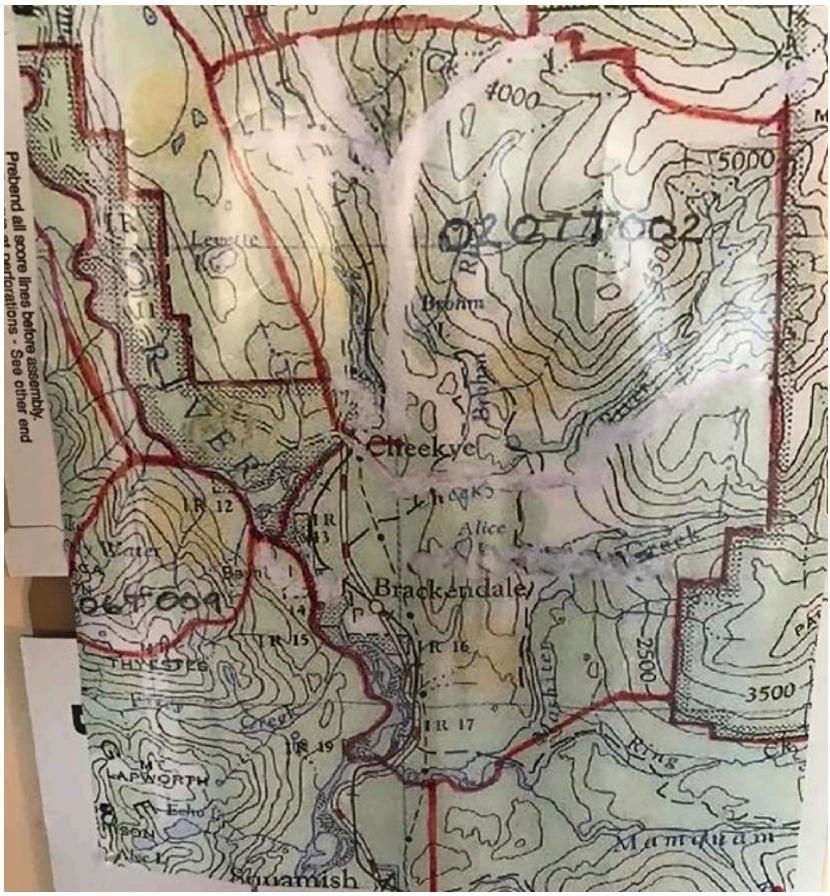
We the undersign are writing this letter on behalf of our registered trapline .
Our concerns of this proposed Garibaldi at Squamish a Mountain Resort for all Seasons, have not been contacted from the very start of each phase that has been put in place.
There has been absolutely no meetings with the people involved with the Garibaldi at Squamish, that has been stated in their Executive Summary.
You have not contacted the rightful owners of this registered trapline at all , which belongs to the "Billy" family. Which has been our traditional territory that we have and still are using as our traditional foods, medicinal plants we have been utilizing this territory for over hundreds of years ago as far back as our Great Great Grandfathers.
There as been research done in this area that would be relevant to the proposed development that could be beneficial to stop this proposal. As you know the area in question is made of thin layer crusts, various linear lines that could result in down ward slope activity resulting in a tremendous avalanche or even if there were to be a earthquake the whole ridge could come down. So you can see that there are unsuitability factors in this area. In fact this area would not be any good for the proposed all around ski resort in lieu of natural factors.
Historically this was our landmark for our brothers up north, they would come up there and light a fire to let us know that they were in our territory. So you can see that we have been using the Brohm Ridge area for many many years. As young child my family would travel up there and camp for awhile and collect traditional foods and fish in the lakes, streams
They are infringing our rights as First Nation Peoples and invading our privacy on our registered trapline.
Studies have been put in place concerning the Brohm Creek that flows into Brohm Lake, currently there is steelhead, in the Brohm Creek and Coho salmon, Cutthroat, Dolly Vardin and Rainbow Trout present within the Brohm Creek and Brohm Lake that would also be effected by this proposed Development of Garibaldi at Squamish.

Thank you
Squamish First Nation

Richard J. D. Billy
Richard J.D. Billy
Box 971 Squamish B.C.
VON 3Go
898 5145

Ronald W. Billy
Ronald W. Billy
Box 52 Brackendale B.C.
898-1816.

Robert Billy
Robert P. Billy
Box 415
Squamish B.C. VON 3
Ph. 898-



Stone sheep.

Photo: Paxson Woelber

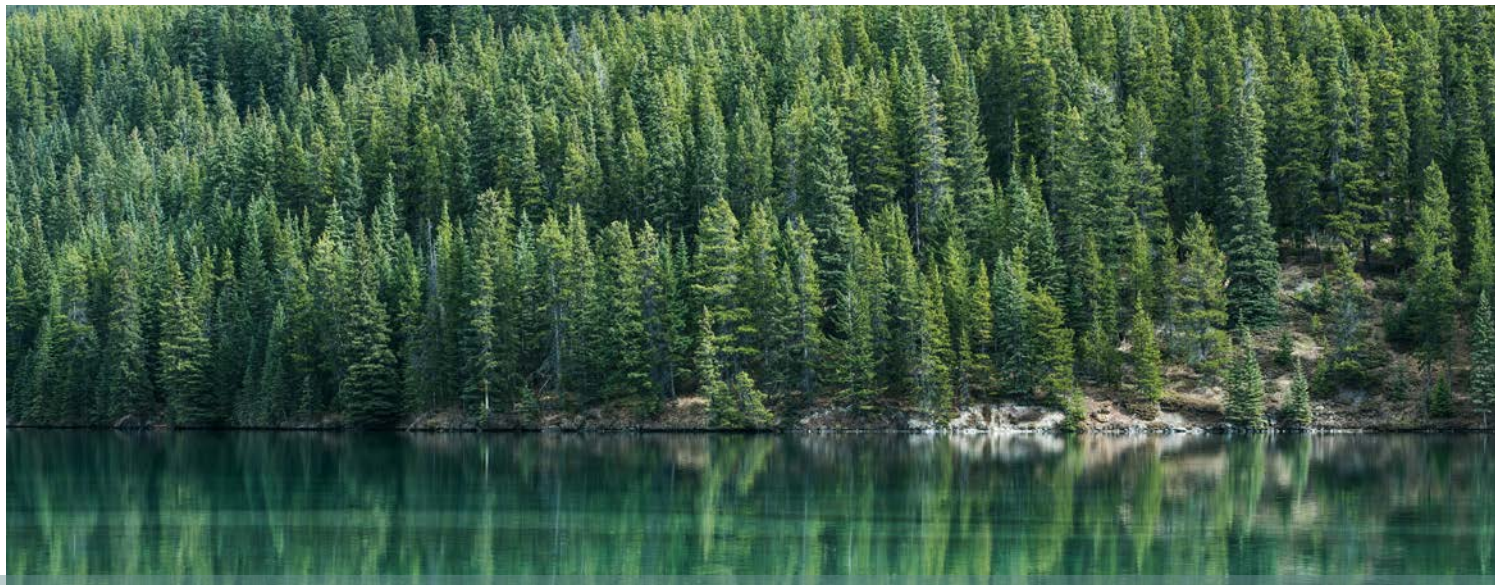
Eligibility to be a Trapline Holder Under Canadian Law

Under the BC *Wildlife Act*, anyone who is 19 years or older, is a Canadian citizen or permanent resident, completes the Trappers Education Course, and pays the applicable fees, is eligible to apply to become a registered trapline holder.[73] In the 1920s and 1930s, the majority of non-Indigenous trappers in northern BC were "itinerants," meaning that they came to the land to trap as much as possible, and left as soon as it was no longer profitable.[74] Under Canadian law, as long as these itinerant trappers had correctly registered the traplines, their actions were permissible and acceptable. This Canadian conception of a trapline holder differs significantly from a Cree perspective, where traplines are passed down along hereditary lines and come with responsibilities to care for, protect, and manage the land, animals, birds, and fish on the trapline.

Criteria to Maintain Trapline Holder Rights

Other differences in Indigenous and Canadian legal conceptions are exemplified by *Wildlife Act* regulations requiring that traplines be used regularly.[75] This directly conflicts with Indigenous methods of rotating traplines to ensure the recovery of fur-bearing populations.[76] The trapline registration system imposed by the British Columbian provincial government allows traplines to be obtained and maintained by anyone satisfying the requirements and regulations set out in the *Wildlife Act*.[77] While Canadian provincial governments view the trapline registration system as a method of engaging in wildlife management, there are fundamental differences between Canadian and Indigenous conceptions of wildlife management and environmental responsibility and stewardship.

Part II



Canadian Legal Tools for Regulating and Protecting Trapline Rights and Responsibilities

Photo (above): TJ Holowaychuk

Opposite: Drying salmon.

Photo: Zack Embree

For Indigenous trappers in BC engaging with Canadian law on their traplines, there are two distinct areas of law. The first area is regulatory law, laid out according to the provincial *Wildlife Act*, and administered by the Fish and Wildlife Branch of the Ministry of Forests, Lands and Natural Resource Operations. The second is "Aboriginal law" which relates to the ways in which the Canadian legal system recognizes and attempts to address Aboriginal and treaty rights, including under s. 35 of the *Constitution Act, 1982*, which guarantees protection for those rights.

A. CURRENT REGULATORY FRAMEWORK FOR TRAPPING IN BC

Role of the Fish and Wildlife Branch

The Fish and Wildlife Branch establishes legislation, policies and procedures for managing fishing and hunting activities, and for the allocation of fish and wildlife resources for recreational and commercial use. This is done by:

- administering the *Wildlife Act* of British Columbia (previously known as the *Game Act*),
- preparing all Fish and Wildlife Program regulations in consultation with regions and others,
- preparing the Hunting and Trapping Regulations Synopsis and the Freshwater Fishing Regulations Synopsis,
- managing the guide industry to ensure compliance and optimum use of resources,
- administering licences and permits, and
- collecting and analyzing hunter and angler harvest and effort data.[78]

Registering a Trapline in British Columbia

Under the British Columbia *Wildlife Act*, a trapline is an area registered to one or more licensed trappers for the trapping of fur-bearing animals.[79] Non-Indigenous trappers must be licensed prior to seeking trapline registration. Due to Aboriginal and treaty rights protected under s. 35 of the Canadian *Constitution*, Indigenous people may trap fur-bearing animals under Canadian law without a trapping licence and register a trapline without a trapping licence.[80]

An application to register a new trapline or to transfer a registered trapline must be completed and submitted to FrontCounter BC.[81] FrontCounter BC is a government agency that provides services to those seeking information and authorizations regarding provincial natural resource ministries and agencies.[82]

There are certain requirements for registration of a trapline on what the provincial government designates as "Crown" land.[83] The person seeking registration must be 19 years or older and be a Canadian citizen or permanent resident.[84] Furthermore, an applicant must also successfully complete the Trapper Education Program.[85] In practice, Indigenous people who have learned to trap from family members and others in their community are often exempted from the requirement.

Registration of a trapline is not guaranteed. It is important to note that even if an applicant has a real and demonstrable interest in establishing a trapline, that interest is not in itself a compelling reason for a regional manager to grant registration.[86] If an applicant meets the requirements, it is also possible to be selected for registration by the regional manager through public auction or sealed tender.[87]

Rights and Responsibilities Associated with a Registered Trapline

Under the *Wildlife Act*, having a registered trapline allows protection from other trappers using your trapline.[88] It is the responsibility of a trapper to bring a matter forward to a regional manager if there is a dispute regarding priority of trapline rights.[89] Registration does not give the holder any proprietary rights in wildlife, nor does it restrict the rights of another person to hunt or capture wildlife in the same area if authorized by the regulations or a permit.[90]

As previously discussed, one responsibility of a trapper wishing to register their trapline is to complete a Trapper Education Program. In association with the Ministry of Forests, Lands, and Natural Resources, the BC Trappers Association delivers a Trapper Education Program that is three days long. The holder of a registered trapline also has responsibilities in regard to frequency of use of the trapline. For example, in some circumstances the regional manager can cancel the registration of a trapline if a person does not carry on active trapping on their registered trapline.[91] A person is deemed to have failed to use their trapline if they do not take fur-bearing animals of a value of $200 or 50 pelts from the trapline each year.[92] Indigenous trapline holders have successfully challenged threatened cancellation of their traplines for non-use on the basis of Aboriginal and treaty rights.

Further responsibilities of trapline holders include use of humane trapping standards and checking of traps on a regular basis. For example, a holder of a trapping licence commits an offence if they fail to examine their traps every 72 hours, 24 hours, or 14 days depending on the type of trap used.[93] Furthermore, it is an offence to use certain types of traps.[94] There is also a

Cleaning fish.

Photo: Hannah Askew

responsibility in some circumstances to pay a fur royalty for a pelt or skin of a fur-bearing animal that has lawfully been taken under a trapping licence.[95]

Enforcement of Trapping Regulations

The Fish and Wildlife Branch of the Ministry of Forests, Lands and Natural Resources (the Ministry) is responsible for administering the *Wildlife Act*, licences, and permits.[96] In regard to enforcement, the *Wildlife Act* is one of the provincial statutes enforced by the Conservation Officer Service. The Ministry is also responsible for compliance and enforcement of trapline cabins, particularly ensuring the cabins are in compliance with the Trapline Cabin Policy (the Policy).[97] In any instances of non-compliance, the Ministry's Compliance and Enforcement Procedures will guide enforcement. Enforcement may occur as trapline cabins are technically in trespass under the *Land Act*.[98] However, if the cabins are in compliance with the Policy the Ministry may tolerate their construction and use.[99] Indigenous trapline users who erect cabins on their traplines may have special rights on the basis of Aboriginal and treaty rights. See the case of *R v. Sundown*, in which the Court found that an Indigenous member of Treaty 6 could build a cabin on his hunting grounds on the basis that it was "reasonably incidental" to exercising his treaty rights.[100]

The Wildlife Act and the Environmental Appeal Board

The *Wildlife Act* is an Act passed by the Province of British Columbia. This means its provisions are only applicable in BC, although similar legislation exists in Alberta and other provinces. Under the *Wildlife Act*, the regional manager or director must give written reasons for any decision that affects a licence, permit, or registration of a trapline or guiding territory certificate held by a person, or an application by a person for any of these.[101]

For the purposes of the *Wildlife Act*, the "regional manager" is the regional manager for recreational fisheries and wildlife programs in BC. The "director" refers to the director of the Fish and Wildlife Branch and, for matters relating to fish, includes a person designated by regulation of the Lieutenant Governor in Council.

A registered trapper affected by an approval or request for approval from the regional manager or director may appeal that decision to the Environmental Appeal Board (EAB).[102] The EAB is an independent agency that hears appeals from decisions made under the *Wildlife Act*.[103] Under this process only specific statutory decisions can be appealed, whereas the application of general provincial policies and procedures cannot be.[104] This means that even if a provincial official makes a decision that may raise conservation concerns or affect a trapline, if that type of decision isn't specifically mentioned in a statute, it cannot be appealed.

Where a decision by the Wildlife Branch relates directly to a trapline, the trapline holder will probably be given notice of their right to appeal that decision. However, it may also be possible to appeal other *Wildlife Act* decisions (such as allocation of hunting rights, etc.) that incidentally affect the trapline.[105]

Appeals to the EAB must be filed within 30 days of the decision being made (even if the appellant did not receive prompt notice of the decision), or the EAB will probably not consider the appeal.[106]

In order to be successful, an appeal to the EAB will need to identify errors in the government's decision, often based on a failure to follow the relevant statute. However, the EAB can also consider Aboriginal rights claims, including arguments that the Province failed to consult rights holders.[107] An EAB appeal, although generally somewhat cheaper, faster and less risky than a court challenge, can be a difficult process, and if possible a lawyer should be retained to assist.

Other Appeals to the EAB

There are a number of other provincial environmental laws that may directly or indirectly affect traplines and trapline holders and which may result in government decisions that can be appealed to the EAB. Examples of appealable government decisions include:

- approvals to use water under the *Water Sustainability Act* and/or to carry out work that alters a water body, where the trapline territory encompasses or borders that water body (which could include streams, lakes, wetlands, etc.).[108] Note that unfortunately most forestry, oil and gas, and mining activities that alter a water body do not generally require a specific government approval under the *Water Sustainability Act*, and so are not appealable to the EAB.[109]

- approvals to allow certain industrial and other processes that dispose of waste, discharge effluent or emit air pollution (under the *Environmental Management Act*) in a way that negatively affects the trapline territory or trapline holder;[110]

Until 2003 there was also a broad right of appeal for decisions related to pesticide use that negatively affected other users, but BC's current *Integrated Pest Management Act* is exceptionally limited as to what types of pesticide use require a government decision. In most cases the right of appeal to the EAB is limited to those seeking permission to use pesticides.[111]

In addition, if someone else files an appeal with the EAB on a matter that directly affects a trapper (under any of the above statutes including the *Integrated Pest Management Act*), then the trapper may apply to the EAB to be heard in that appeal as a third party.[112]

Dispute Resolution Under the Wildlife Act

The *Wildlife Act* can serve as a useful tool to resolve disputes. Occasionally, when there are multiple individuals associated with a registered trapline, disputes arise that need to be resolved. The *Wildlife Act* states that "[i]f a dispute arises as to a priority of rights respecting any trapline, the matter must, at the request of a party to the dispute, be determined by the regional manager, who may alter, eliminate or reassign part or all of a trapline."[113]

Under the *Wildlife Act*, registration of a trapline or traplines in the name of more than one person creates what is known as a tenancy in common (TIC), a form of joint ownership. Trapline rules and regulations apply to this group of registered trapline holders. An interest in the TIC cannot be diminished or lost except by death, abandonment, or through action taken by the regional manager for some breach of the law.[114]

Photo: Neil Rosentech

Supreme Court of Canada.

Photo: Asif Ali

One example of a dispute that may occur in a TIC of a trapline is if the trapline is held in the name of an individual and their "family."[115] In certain circumstances, having a trapline that is encroached on or damaged by corporations (such as oil and gas companies) can lead to monetary compensation being awarded to the registered holder of the trapline.[116] In these cases, if the TIC of the trapline is intended only to apply to immediate family, then the amount of compensation awarded can be significantly diminished if the award is given to extended family as well. Therefore, if a regional manager interprets family to include extended family, this decision can be appealed to the EAB if that was not the intention of the registered holder.

Another issue may occur when one registered trapline holder in a TIC leases out the use of the trapline to another person, without the permission of the other registered trapline holders. In this circumstance, the *Wildlife Act* does not explicitly address whether all registered trapline holders must grant written permission to this person. Therefore, it is the responsibility of a trapper to bring a matter to a regional manager if there is a dispute regarding priority of rights of a trapline.

Using the Courts

At least one case has suggested that rights associated with a registered trapline are similar to a common law concept known as a *profit à prendre* – under which a person may have a right to take a resource which would ordinarily belong to the landowner. In that case, brought before many courts had started grappling with Aboriginal rights, members of the Kitsumkalum Band relied on their registered traplines (with no mention of Aboriginal rights) to successfully seek an interim injunction to stop experimental herbicide spraying. The British Columbia Court of Appeal (BCCA) ruled that the plaintiffs' interests were a *profit à prendre* that might support a legal claim in nuisance regarding the proposed spraying.[117]

B. ABORIGINAL LAW AND THE CANADIAN CONSTITUTIONAL LAW FRAMEWORK

The Canadian common law recognizes that Indigenous peoples have rights arising from their presence on the land from "time immemorial" and their traditional use of land and resources. Since 1982, section 35 of the Canadian *Constitution Act, 1982* has guaranteed these rights, stating that: "The existing aboriginal and treaty rights of the aboriginal people in Canada are hereby recognized and affirmed."[118]

As we have seen, Indigenous understandings of traplines and the Canadian legal system do not always mesh. As such, trappers and their lawyers have often tried fitting them within a range of legal concepts recognized by the courts, usually tied to Aboriginal or treaty rights, with varying success.

This section summarizes some of the legal approaches that have been tried. They are not necessarily consistent with one another or with the way the rights and responsibilities of Indigenous trappers are understood in their nation's own laws. Each approach has its own benefits and challenges. The legal approaches discussed are:

- Aboriginal rights to hunt and trap;
- Treaty rights to hunt;
- Aboriginal title;
- Crown consultation and accommodation where a decision could impact the rights involved; and,
- The common law tort of nuisance.

We will discuss who can use these legal approaches, the potential opportunities and challenges for trappers in seeking to do so, and what the potential remedies are.

Cutting salmon.

Photo: Linda R. Smith

Introduction: Who is the rights holder? Who can defend the Aboriginal and treaty rights in court?

The question of who holds Aboriginal rights or title protected by the Constitution "is primarily a matter of fact to be determined on the whole of the evidence relating to the specific society or culture."[119] In the landmark 2014 case, *Tsilhqot'in Nation v. British Columbia*[120], for example, the courts rejected BC's argument that the band should be considered the rights holder. The trial judge, who was upheld on appeal on this point, stated:

> *I conclude that the proper rights holder, whether for Aboriginal title or Aboriginal rights, is the community of Tsilhqot'in people. Tsilhqot'in people were the historic community of people sharing language, customs, traditions, historical experience, territory and resources at the time of first contact and at sovereignty assertion. The Aboriginal rights of individual Tsilhqot'in people or any other sub-group within the Tsilhqot'in Nation are derived from the collective actions, shared language, traditions and shared historical experiences of the members of the Tsilhqot'in Nation.*[121]

As understood in Canadian law, Aboriginal title has some common characteristics. For example, it is held communally, not by individuals. As the Supreme Court of Canada noted in *Delgamuukw v. British Columbia*, "it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community."[122] However, that does not mean that the specific rights and responsibilities of trapline holders within a broader Indigenous nation are not recognized. As Professor Brian Slattery has noted:

Alice William on horseback, Tsilhqot'in territory.

Photo: Lindsay Borrows

> *Viewed externally, aboriginal title is a uniform right, which does not differ from group to group. Viewed internally, it delimits a sphere within which the customary legal system of each group continues to operate, regulating the manner in which the lands are used by group members and evolving to take account of new needs and circumstances.*[123]

This interrelationship is relevant to asserting Aboriginal and treaty rights in court. For example, while the duty to consult is "owed to the Aboriginal group that holds the s. 35 rights, which are collective in nature," nevertheless, "an Aboriginal group can authorize an individual or an organization to represent it for the purpose of asserting its s. 35 rights."[124] Furthermore, while both Aboriginal and treaty rights are collective in nature, in *Behn v. Moulton Contracting Ltd*[125] (*Behn*) the Supreme Court of Canada noted:

> *[C]ertain rights, despite being held by the Aboriginal community, are nonetheless exercised by individual members or assigned to them. These rights may therefore have both collective and individual aspects. Individual members of a community may have a vested interest in the protection of these rights. It may well be that, in appropriate circumstances, individual members can assert certain Aboriginal or treaty rights....*
>
> *[D]espite the critical importance of the collective aspect of Aboriginal and treaty rights, rights may sometimes be assigned to or exercised by individual members of Aboriginal communities, and entitlements may sometimes be created in their favour. In a broad sense, it could be said that these rights might belong to them or that they have an individual aspect regardless of their collective nature.*

In *Behn*, the court did not offer guidance about what these circumstances might be. However, the reasoning in the *Behn* decision does indicate that because of the collective nature of Aboriginal and treaty rights, a trapline holder wishing to assert section 35 rights in court should seek the support and authorization of their community/nation before doing so, and may have difficulty succeeding without this support.[126] On the facts of that case, the court held that the group holding treaty rights, that could have authorized the Behns to pursue their claim with respect to their trapline territory, was the Fort Nelson First Nation (who is a party to Treaty 8).

Aboriginal Rights to Hunt and Trap

The test for determining the existence of an Aboriginal right is laid out in the case of *Van der Peet* which states that, "in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."[127]

In *R v. Sappier*, the Court clarified that pre–contact practices that are crucial to the survival of the society can be considered as "integral" to that society.[128] In the case, Justice Bastarache pointed out that the means of sustenance could be distinctive and integral.[129] In other words, practices such as food harvesting which are essential to the survival of a group may be considered distinctive and integral when establishing an Aboriginal right.

The courts have long recognized Aboriginal hunting rights, even prior to their Constitutional protection.[130] Further, depending on the facts of the situation, resource development may constitute an "unjustifiable infringement" of constitutionally protected Aboriginal rights to hunt or trap. For example, in *Tsilhqot'in* the trial judge held that:

> *Tsilhqot'in people have an Aboriginal right to hunt and trap birds and animals throughout the Claim Area for the purposes of securing animals for work and transportation, food, clothing, shelter, mats, blankets and crafts, as well as for spiritual, ceremonial, and cultural uses. This right is inclusive of a right to capture and use horses for transportation and work.*
>
> *Tsilhqot'in people have an Aboriginal right to trade in skins and pelts as a means of securing a moderate livelihood.*
>
> *These rights have been continuous since pre–contact time which the Court determines was 1793.*
>
> *Land use planning and forestry activities have unjustifiably infringed Tsilhqot'in Aboriginal title and Tsilhqot'in Aboriginal rights.*[131]

In particular, the trial judge found that:

> *Forest harvesting activities would injuriously affect the Tsilhqot'in right to hunt and trap in the Claim Area. The repercussions with respect to wildlife diversity and destruction of habitat are an unreasonable limitation on that right. For these reasons, I conclude that forest harvesting activities are a prima facie infringement on Tsilhqot'in hunting and trapping rights and thus demand justification....*
>
> *Tsilhqot'in Aboriginal rights to hunt and trap in the Claim Area must have some meaning. A management scheme that manages solely for maximizing timber values is no longer viable where it has the potential to severely and unnecessarily impact Tsilhqot'in Aboriginal rights. To justify harvesting activities in the Claim Area, including silviculture activities, British Columbia must have sufficient credible information to allow a proper assessment of the impact on the wildlife in the area. In the absence of such information, forestry activities are an unjustified infringement of Tsilhqot'in Aboriginal rights in the Claim Area. As I mentioned earlier, the Province did engage in consultation with the Tsilhqot'in people. However, this consultation did not acknowledge Tsilhqot'in Aboriginal rights. Therefore, it could not and did not justify the infringements of those rights.* [132]

On appeal, the trial judgment was upheld on these points.[133] However, it should be noted that litigation to prove an unjustifiable infringement of rights is lengthy and expensive, and in this case, the judge relied on substantial expert evidence about the impacts of logging on wildlife in the trapline territory in reaching his conclusions.

In some cases, an interim injunction may be sought to prevent harmful activities while litigation is before the courts, but this is not guaranteed. In *Derickson v. British Columbia*, the plaintiffs, who had a registered trapline, asked the BC Supreme Court to prevent logging within the trapline, arguing that the logging would impact their Aboriginal right to trap pine marten.[134] The judge accepted that there was a good argument that Derickson had an Aboriginal right to trap pine marten and that the right would be impacted by the logging:

> *For the purposes of this application, I consider [the Plaintiff's Aboriginal] right to be one to trap a harvestable surplus of marten (that is, an ability to trap marten in the territory without risk of removing the species from the territory) which is consistent with the aboriginal, traditional use of that species before sovereignty.... Such a right to trap does not include a right to exclude other uses of the land provided the other uses are compatible with the right claimed. ...*
>
> *I find that the plaintiffs have established there is a fair question to be tried as to whether or not their aboriginal right to trap will be infringed by the logging proposed, because the logging proposed will significantly reduce the area that could be said to be unaffected by logging.*[135]

However, the court declined to issue an injunction to stop the logging based on the "balance of convenience" between the trapline holder and the timber companies. The evidence before the judge was considered insufficient to show that logging would "have a significant or long-term impact on the marten habitat" while the timber companies and their employees would suffer substantial losses. In effect the court placed greater weight on evidence of potential economic harm than harm to wildlife and trapping rights, concluding that: "The evidence does not show that the trap line is a special place that would be rendered unsuitable for traditional uses by the logging."[136]

It may be easier (with the right evidence) to convince the BC government or a judge of the existence of a right to trap and hunt in a trapline territory than achieving recognition of Aboriginal title. However, such a case is still likely to be long and expensive and will not stop harm in the interim unless an injunction is granted. An injunction to stop logging or other development from occurring requires evidence that the trapping will be significantly harmed, and even then, the focus will be on "balancing" impacts to the right to hunt against potential economic losses of other users.

Treaty Rights to Hunt, Fish and Trap

Indigenous people whose traplines fall on treaty territory may bring a claim of treaty infringement for harm to their trapline that is diminishing their Treaty rights to hunt, fish and trap. Recall that Treaty 8, covering much of northeastern BC, provides:

> *And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.*[137]

The Commissioners who negotiated Treaty 8 for the British Crown wrote:

> *[W]e had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it.*[138]

The Blueberry River First Nations ("BRFN") recently brought forward an innovative treaty infringement claim for harm from cumulative effects impacting all of their traditional territory, including their traplines. See Case Study #1 on page 50.

While the BRFN claim is important, an individual trapline holder may have more difficulty convincing the provincial government or the courts that they can assert those rights in relation to a particular trapline. As with a non-Treaty Aboriginal right, the trapline holder might need to argue that their registered trapline is evidence of the "usual vocations of trapping" protected by the Treaty.

The government might well point to the Crown's right to "take up" land as justifying some interference with an individual trapline. Ironically the BRFN claim brought in respect of all traplines and hunting grounds may fare better in this respect, since the focus is on the overall impact of development on hunting and trapping.

Case Study #1: The Use of Treaty Infringement Claim as a Legal Strategy to Protect Indigenous Traplines

In 2015, the Blueberry River First Nations (BRFN) filed a lawsuit at the BC Supreme Court, suing the Crown for breach of Treaty 8 due to the cumulative impacts of intensive industrial development on their territory.[139] BRFN argues that the adverse cumulative impacts of numerous projects operating across their lands are interfering with their constitutionally-protected treaty right to hunt, fish, and otherwise practice their traditional way of life.

Under the terms of the treaty, in exchange for opening their lands for settlement, the Crown promised BRFN that they would be able to continue to practice their existing way of life. At the time of the signing of the treaty, BRFN's ancestors hunted, trapped, and fished on their territory, and were also able to gather plants, berries, and other resources for food, medicine and other purposes. Today, it is no longer possible to engage in these activities in many parts of the territory due to environmental degradation.

Logging truck.

Photo: TruckPR

In a press release following the filing of the lawsuit, Chief Marvin Yahey stated that:

Blueberry's ancestors would not recognize our territory today. It is covered by oil and gas wells, roads, pipelines, mines, clear cuts, hydro and seismic lines, private land holdings, and waste disposal sites, amongst other things ... there are vast dark zones throughout our territory where we are no longer able to practice our treaty rights.[140]

According to BRFN, the Beatton watershed, which is in the core of the territory, has suffered the most serious impact from industrial development,[141] with over 90% of area having been disturbed. Outside of the Beatton watershed, 66% of the area is disturbed. In addition, less developed areas to the west are under increased pressure from oil and gas development, as well as the controversial Site C dam, which will flood a massive part of the southern territory.

The intensive, large-scale development occurring in BRFN's territory is being done in the absence of a "big picture" environmental assessment or a land use plan that takes into account treaty rights and cumulative impacts on those rights. In fact, the existing Land Use Plan Zones in the core of BRFN's territory are the "Enhanced Resource Development Zone" of the region, meaning it is designed to be the site of the most intense resource development. New projects are assessed independently, but without rigorous consideration of how projects may interact with one another to impact species and the ecological integrity of the land. No part of the land use authorization process considers whether this type of development is more than the area and the exercise of treaty rights within the area can withstand. As a result, BRFN's ability hunt, fish and practice their traditional way of life is in jeopardy.

Blueberry's statement of claim alleges that the Province has authorized industrial development with their territory "without regard to the potential cumulative effects and consequent adverse cumulative impacts of the Industrial Developments on the Plaintiff's continuing meaningful exercise of its Treaty Rights."[142] The action asks the court to declare that the Crown has breached its treaty obligations and order the Province to stop doing or permitting any activities that amount to a further breach. At the time of publication, the litigation has been adjourned until October 2018.

Aboriginal Title

Indigenous people used and occupied the lands on the territories now known as Canada for millennia prior to the arrival of European settlers. During that time, they had their own systems of governance and social organization. Indigenous nations who did not enter into treaty agreements with the British Crown may assert Aboriginal title over their lands under Canadian law. Aboriginal title is asserted as a collective right but may be brought by an individual on behalf of a group.

Aboriginal title claims have generally been brought in Canadian courts in respect of large areas of an Indigenous nation's territory. These cases are extremely expensive and time-consuming, often requiring decades and hundreds of thousands of dollars. Thus far, the Tsilhqot'in Nation is the only Indigenous nation in Canada that has had Aboriginal title to a portion of its traditional territory recognized at the Supreme Court of Canada.[143] The nation won a court case for Aboriginal title in 2014 after more than 20 years in court.[144] See Case Study #2 for more information.

Unlike a non-exclusive right to hunt, Aboriginal title brings with it exclusive rights to use the land and to decide how it will be used. As such, a claim of Aboriginal title could give a nation greater control over what happens on a trapline. However, because of the implications of finding Aboriginal title, and the rarity of successful title cases, establishing title may be difficult.

While most court cases asserting Aboriginal title have been massive in scope, there is no theoretical reason that a claim could not be brought in respect of a trapline, village site or other specific area. In 1984 the Ahousaht and Tla-o-qui-aht First Nations filed a title claim in respect of a single island (Meares Island) within their territories, on the basis of which they successfully opposed logging on the island.[145]

Meares Island today.

Photo: Jessica Clogg

The Supreme Court of Canada has explained:

> *In order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.*[146]

In *Tsilhqot'in Nation v. British Columbia*, the Supreme Court of Canada confirmed that Aboriginal title can be proved over large areas of land that were used nomadically or seasonally by Aboriginal groups, not just over discrete parcels of intense use and occupation such as traditional village sites.[147]

Proving title in respect of a particular trapline might well be difficult, but in the right case, with the right evidence, it may be possible. While considerably more complicated than a claim based on a right to hunt, it would be presumably be cheaper and less time consuming than the decade-long claims that have been brought over larger areas.

Case Study #2: The Use of a Title Claim as a Legal Strategy to Protect Indigenous Traplines

An action was started in 1989 claiming Aboriginal rights to the Xeni Gwet'in group trapline area in order to protect it from planned logging activities. In 1992, construction began on a bridge at Henry's Crossing in the heart of Tsilhqot'in territory. The new bridge would allow forest companies to transport the large-scale equipment they needed to undertake clear-cut commercial logging in the Brittany Triangle (Tachelach'ed), a refuge for one of Canada's only two remaining populations of wild horses. Faced with this threat, the Xeni Gwet'in called on the five other Tsilhqot'in communities to join them in a roadblock to protect the last untouched area of their traditional homelands. On the strength of a promise by then-Premier Mike Harcourt that BC would not allow logging in the Brittany Triangle without Xeni Gwet'in consent, the blockade ended. Several years of negotiations ensued between BC and the Xeni Gwet'in to develop a mutually acceptable forest management plan. The negotiations were unsuccessful and the people of Xeni Gwet'in decided to proceed to court. They asked their lawyers to file Aboriginal rights and title claims to their group traplines and Tachelach'ed under section 35 of the *Constitution Act, 1982*.[148]

Tsilhqot'in territory.

Photo: Lindsay Burrows

In the final decision, *Tsilhqot'in Nation v. British Columbia*, the Supreme Court of Canada affirmed that the Tsilhqot'in had established title to 1,750 square kilometres of land, located approximately 100 kilometres southwest of Williams Lake. The Court recognized the Tsilhqot'in Nation's Aboriginal title using a territorial approach, and affirmed that:

> *Aboriginal title confers on the group that holds it the exclusive right to decide how the land is used and the right to benefit from those uses subject to one carve-out — that the uses must be consistent with the group nature of the interest and the enjoyment of the land by future generations.*[149]
>
> *This includes the right to "proactively manage the land."*[150]

This case significantly altered the legal landscape in Canada relating to land and resource entitlements and their governance. Today, the Tsilhqot'in Nation is in the process of revitalizing its own Indigenous legal orders as it establishes governance authority over the title area.

The Duty to Consult

In two landmark 2004 cases, *Haida Nation v. BC (Minister of Forests),* and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director),* the Supreme Court of Canada confirmed that the Crown may not make unilateral decisions about the use and management of natural resources, even if Aboriginal title and/or Aboriginal rights have not been formally recognized by the Canadian courts or addressed in a treaty.[151] Instead, "depending on the circumstances ... the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim."[152] Similar duties arise when treaty land is "taken up" for non-Indigenous use (ie. for "settlement, mining, lumbering, trading or other purposes")[153] as an exception to the constitutionally protected right to "pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered" as enshrined in Treaty 8 and other numbered treaties.[154]

If the Crown fails to uphold these duties in making decisions regarding environmental assessment, tenuring or resource approvals, a variety of remedies are possible – from injunctions to damages, to setting aside a permit or approval that has been granted. However, by far the most common remedy is a declaration that the Crown failed to honourably consult and/or accommodate the nation and must do so.

What is the Duty to Consult and Accommodate?

The duty to consult and accommodate is a constitutional obligation on the federal and provincial governments to consult Aboriginal peoples when making decisions that may affect their rights, and where necessary, accommodate those rights (i.e. to change their plans as a result of consultation). Whether or not consultation is required under Canadian law, and the scope of the consultation, depend on the impacted right and the strength of the evidence provided to back up the right.

When Does the Duty Arise?

The duty to consult arises when the Crown has knowledge of the existence or potential existence of Aboriginal or treaty rights and considers action that might adversely affect those rights.[155] This test can be broken down into three parts:[156]

1. The Crown must have either real or constructive knowledge of the right.[157] This extends to rights that are not yet proven, as only proof of the existence of a claim is required.[158]
2. There must be Crown conduct or decision. This is not limited to a government action that has direct impact on land or resource but can include higher level or strategic decisions which have an impact on Aboriginal rights and title.[159]
3. The activity the Crown proposes must harmfully affect Aboriginal title, rights, or treaty rights. Past wrongs or speculative impacts will not suffice to trigger the duty; it must impact the future exercise of the right.[160]

The duty to consult is an ongoing obligation, it is required for as long as the Aboriginal or treaty right is affected and is triggered when any other subsidiary or subsequent decisions are made that could impact rights, regardless of any consultation that was concluded before.[161] Consequently it is important that trapline holders and/or their Indigenous governments assert that the traplines are associated with s. 35 rights and identify ways that Crown activities are likely to harm the rights.

Clear cut logging train.

Photo: Chris City

To Whom is the Duty Owed?

The Crown owes a duty to consult to any Aboriginal peoples whose rights may be affected by Crown conduct.[162] This includes groups that have established Aboriginal title or signed treaties as well as groups that have not yet settled their land claims or participated in a treaty process.[163] Aboriginal and treaty rights are communal rights held by the group. Thus, the legal obligation of the duty to consult does not generally extend to individual members, although in order to have meaningful consultation there must be a representation of different members' views and interests.[164] However, as noted above, trapline holders with specific rights and responsibilities within their own legal tradition may be able to seek the support and authorization of their nation to challenge resource approvals on the basis that the Crown failed to uphold its duty to consult and accommodate them.

Who Owes the Duty?

The duty to consult is owed by the Crown, meaning both federal and provincial governments.[165] This duty is an obligation that cannot be delegated. Procedural aspects of this obligation may be delegated to third parties such as private companies, but ultimately the Crown is legally responsible for consultation.[166]

The Scope of the Duty

The scope or content of the duty to consult varies depending on the circumstances. It is proportionate to the strength of the claim of the right and the infringement of the right.[167] The duty can be thought of as a spectrum.[168] At one end of the spectrum, where the evidence of rights is weak and the potential infringement is minor, the duty may just be to notify, disclose information and "discuss any issues raised." At the other end of the spectrum, where the case for title or rights is strong, the right and the potential infringement are of high significance, and the risk of non-compensable damage is high, "deep consultation, aimed at finding a satisfactory interim solution, may be required.[169]

How practical is it to bring a legal challenge based on the breach of the duty to consult?

As explained, the duty to consult as it is currently understood under Canadian law is owed to the rights holding group as a collective, not to an individual member of that group. Who is authorized to speak on behalf of the group in relation to a trapline territory will depend on the specific legal tradition, culture, and society involved, and for treatied nations, the treaty itself. In practice, if a trapper has a concern about potential impacts on their trapline, case law suggests that they should connect with the band council or other governing body of their nation to explain the situation and seek their support to advocate for the trapper in consultations with the Crown to avoid or mitigate the trapline disruption.

If the Crown approves development that would disrupt the trapline, then a case-by-case analysis would be needed to consider if a breach of the duty to consult has in fact occurred and the viability of bringing a legal challenge on this basis. As noted above, there is case law that indicates that a trapper who does not have the support and authorization of their nation may find it challenging to seek a remedy from the court.

A judicial review to challenge a decision made in the absence of constitutionally-required consultation and accommodation will typically be much shorter and less costly than a legal case to prove an infringement of Aboriginal rights or title. However, all court cases are relatively expensive, energy-intensive, and unpredictable in outcome. Despite these hurdles, Canadian courts have at times proven successful for some nations in protecting their lands and rights. As always, it is important to consult legal counsel regarding your specific situation before deciding how to move forward.

Trapper's Perspectives on How the Duty to Consult is Currently Functioning:

ISSUES OF LISTENING

The Indigenous trappers we spoke with felt that they were not being listened to by government. Bud Napoleon stated:

> *I think the politicians have to learn to listen. They have to learn about the issues. Politicians don't have enough time to learn about Indigenous issues so they can understand them, they need better understanding.*[170]

Trapline holder Derald Gauthier says that in order for consultation to be meaningful, there needs to be understanding on both sides:

> *The white people have to understand our system and our ways, as well as we have to understand theirs, so we've got to reach some kind of common ground.*
>
> *I'd like to see a dual meeting where the Fish and Wildlife, and the Forestry are sitting at the same table with the elders, the trappers, the hunters, and the Chiefs and Councils, and bring out all these issues there, and see what can come out of it. I sure hate to see a mouthful of words coming out with no meaning behind them: a mouthful of words with no follow-up. I think that we should start giving deadlines to those people like they've been giving us.*
>
> *Hearing and listening are two different things. You may hear me talk, but you may not be listening. Your thoughts might be back at home, or what's happening to your horse, or what's happening to your dog, but in the meantime, I'm still talking. I find this is the same way it goes when you meet with government, and even some industry, that listening and hearing are different things.*[171]

Bud Napoleon.

Photo: Hannah Askew

ISSUES OF LACK OF FAMILIARITY WITH THE TERRITORY FROM DECISION-MAKERS

Another concern raised with trappers we spoke with was that government decision-makers have little familiarity with the territories their decisions impact. For example, describing conversations with provincial Fish and Wildlife employees who make important decisions about Treaty 8 territory from desks in Victoria, BC, Bud Napoleon said:

> *We want you to see the destruction that forestry has done, and how you, the Fish and Wildlife [Branch], has allowed that to happen. Where is the game? Where are the fur-bearing animals? Where are the moose, where are all the ungulates? How can Fish and Wildlife make decisions over there in Victoria, [when they] know absolutely nothing about my back door? It's vital that they know about my area before they turn around and try to make decisions, and that they should meet with us regarding their plans for any changes – we should be involved in any policy decision they come up with because we have some important information that could be beneficial to both sides.*[172]

ISSUES OF TIMING

When Indigenous trapline holders are notified by industry or the provincial government about upcoming development that will be occurring on their traplines, the timelines are typically extremely short. Derald Gauthier states that:

> *What we have been fighting for, for years and years is that we need adequate time to respond because they'll say, 'you have 21 days to respond to us.' From the day that the letter is written the clocks starts ticking. A trapper or nation getting 21 days to deal with a situation is not okay.*[173]

Bud Napoleon states that:

> *If it takes six months, or seven months to reach agreements, so be it. The land is still going to be there, the resources are still going to be there. It's not going to run away. Right now it's a rush, rush, rush to get rid of the resources...*[174]

Riders in Tsilhqot'in territory.

Photo: Lindsay Borrows

Bud Napoleon also says:

> *The way [Canadian law] is structured is backwards. I think one of the elders had said that in the past, late Chief John Dokie. The industry gets permits from the Ministry, then they start doing work, then they come meet with us. He said it's backwards. He said the industry should go ask permission from the government…if the government says yes, then they come to the First Nations and say, "Ok, this is what the government said we can do, now we're asking you for your permission on your land. Is it alright if we log this area?" Then [First Nations] have a final say of yes or no to log that area. Maybe there will be certain conditions.*[175]

ISSUES OF FUNDING

When trapline holders are asked about proposed development on their traplines, they are often not provided resourcing to carry out the work involved in participating in environmental assessments or other regulatory processes, nor do they receive compensation for their time. Bud Napoleon provides the following example:

> *"We [industry] are going to go to section 23B of your trapline. What do you say about that?" But the thing is, do I have time to go look at that 23B and make a full report? I don't. I have to do that on my own time, without pay, so in the meantime I'm losing my daily wages from my work. So those guys will turn around and say that I had time, but no.*[176]

Private Nuisance Available as a Cause of Action for Trapline Disruptions

A court case grounded in "nuisance" may provide a means to challenge people who harm, or plan to harm trapline territories. This type of case may result in:

- A temporary or permanent court order (injunction) preventing a person from carrying out certain actions; and/or
- Financial compensation for harm to the trapline.

Private nuisance protects people from "substantial and unreasonable" interference with the use and enjoyment of their land. [177] The requirement that the interference with land be substantial is rooted in the idea that citizens are expected to tolerate a certain level harm, noise, odour, smoke and pollution from their neighbours.[178] Determining the reasonableness of the interference with the use and enjoyment of land involves considering a number of factors, such as where and when the interference takes place, the character of the harm, the utility and nature of the harm–causing activity, and how sensitive the plaintiff is.[179]

Machine logging.

Photo: David Stanley

Two cases suggest that claims grounded in nuisance may be available to assist trappers, however, Canadian law in this area is still evolving, and it is difficult to predict the likelihood of success of such a claim. In particular, there is uncertainty in Canadian law about what kind of interest or relationship to land is required to bring a claim in nuisance.[180]

As noted above, in *Bolton v. Forest Pest Management Institute,* the BC Court of Appeal granted an injunction to a registered trapline holder to prevent herbicide spraying, on the basis that the trapline was akin to a common law proprietary interest (*profit à prendre*) that could potentially be sufficient to ground a claim of private nuisance.[181]

More recently, in *Thomas v. Rio Tinto Alcan Inc.*[182] the courts confirmed that an Indigenous nation may bring a claim in nuisance for interference with asserted but not yet judicially recognized Aboriginal title or rights. In that case, Alcan tried to prevent Saik'uz First Nation and Stellat'en First Nation (the Nechako Nations) from proceeding with a claim in nuisance regarding harms caused by the Kenney Dam to their Aboriginal title and riparian rights. The British Columbia Court of Appeal held that the Nechako Nations' claim of private nuisance should not be struck down simply because their Aboriginal title and rights were "unproven."[183] This means that the Nechako Nations were able to continue with their legal claim for an injunction and damages, but the final outcome of the case is not yet known at the time of writing.

Frequently Asked Questions about Navigating Canadian Law Related to Traplines

We signed our treaty with the federal government. Why do provincial laws and regulations apply to us?

In 2014, the Supreme Court of Canada issued the *Keewatin* decision (*Grassy Narrows First Nation v. Ontario (Natural Resources)*.[184] In this case, trappers from the Grassy Narrows First Nation of Treaty 3 territory wanted to set aside a forestry licence issued by Ontario. Their reasoning was based on the idea that Treaty 3 was an agreement between the Anishinaabe and Canada, and as such only Canada had authority to take up lands in the Keewatin area. According to this argument, Ontario would need approval from the federal government.

To many people's disappointment, the Supreme Court held that a province under Canada's *Constitution Act, 1982* may take up lands to a numbered treaty for provincial purposes such as mining and logging. *Mikisew Cree First Nation v. Canada*[185] sets out the requirements to take up numbered treaty land. The Province must fulfill the duty to consult and accommodate, and if this duty is met, the Province can take up land.

Why is no one talking about the herbicide the forestry companies are spraying on our traplines?

Herbicide sprays greatly affect the food chain on any given trapline. This is another way that logging and associated activities negatively affect traplines. Awareness can be spread by sharing more stories related to the effects of the herbicide. Herbicide spraying is a negative impact on rights that should not occur without consultation and accommodation to address potential harm. However, under the current BC law related to pesticide use (the *Integrated Pest Management Act*[186]), most spraying is done without government sign-off, which limits opportunities for government consultation or accommodation. Rights holders may have grounds to challenge the legislation on the basis of that flaw. There is at least one case where a registered trapline holder was successful in obtaining an interim injunction to prevent spraying.

Moose are feeling the impacts of industry as their homes (land, foods, licks, etc.) are being destroyed. How can we protect the moose?

Aboriginal and treaty rights, as well as stronger provincial conservation laws, and Indigenous peoples' own laws may all help to protect moose. It will take the concerted effort of many people using a variety of strategies to change the way decisions are made that affect moose, so that industry does not impact all the land.

Section 35 Rights – What are they and how can they help?

Section 35 is a provision of the *Constitution Act, 1982* which states that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Aboriginal peoples are defined within section 35 to include Indian, Inuit and Métis peoples.

Section 35 protects both treaty rights and Aboriginal rights. These are distinct rights. Aboriginal rights are not defined in section 35, but the Supreme Court of Canada has stated that in order for an Aboriginal right to be protected by section 35, it must be an element of a practice, custom or tradition integral to the distinctive culture claiming the right.[187] Through numerous decisions from the Supreme Court of Canada, Aboriginal rights have included the right to land (also known as Aboriginal title), to fish, to hunt, to practice one's own culture, and to establish treaties. For more detail about establishing Aboriginal title see pages 51 and 52 above.

Aboriginal rights can be contrasted with treaty rights. A narrow Canadian legal interpretation of treaties is that when they are signed, the only rights that remain are those explicitly included in the treaty. However, the rule of *contra proferentem* provides that when interpreting a treaty, if the meaning of a clause is ambiguous, the interpretation should favour the party that did not write it – meaning the Indigenous peoples. It is recognized that written words may not be an accurate reflection of Indigenous understandings of the negotiations that occurred across languages and cultures.[188] Smithers–based lawyer Richard Overstall suggests that the *contra proferentem* rule might also be applied to trapline registration. Given the Indigenous trappers' understanding of the implications of registration, its application and its acceptance by the provincial Crown might also be construed as a treaty.[189]

After 1982, Aboriginal and treaty rights became part of the *Constitution Act, 1982* and are no longer open to unilateral extinguishing. The wording of section 35 is important. It recognizes and affirms Aboriginal and treaty rights. However, Aboriginal and treaty rights are not absolute, and can be limited by government action provided that the Crown can justify any infringement of Aboriginal and treaty rights.[190]

Also note that section 35 recognizes and affirms existing Aboriginal rights. This means that section *35* applies to those rights that were in existence when the *Constitution Act, 1982* came into effect.[191] An Aboriginal right could have been extinguished prior to 1982 through legislation if the Crown demonstrated a clear and plain intention to do so, such as through a treaty. Although section 35 protects "existing" rights, this does not mean that rights are "frozen" in time. The Supreme Court of Canada has recognized that "the phrase 'existing aboriginal rights' must be interpreted flexibly so as to permit their evolution over time."[192] For example, if there is a right to hunt, and traditionally this was done with a bow and arrow, the right can evolve to using a gun for hunting. In other words, the exercise of a right can develop with time.

Can individuals bring Section 35 claims?

Aboriginal and treaty rights are collective in nature. However, as noted above, the Supreme Court of Canada has stated that:

> *...certain rights, despite being held by the Aboriginal community, are nonetheless exercised by individual members or assigned to them...Individual members of a community may have a vested interest in the protection of these rights. It may well be that,* in appropriate circumstances, individual members can assert certain Aboriginal or treaty rights, as some of the interveners have proposed[193] *[emphasis added].*

The court did not elaborate on the circumstances that would allow or prevent individual claimants from bringing a claim, but did indicate that authorization from the governing body of the nation would likely be required.

How effective are Canadian legal remedies for protecting traplines?

Trappers have limited remedies under provincial law when their traplines are affected or destroyed. This is true even of trappers with registered traplines. Unregistered trappers face even more barriers because the provincial government may take the position that there is no legal obligation to consult directly with them. Legal action to protect traplines is costly and the chances of success are uncertain. However, pro bono legal help may be available, and though success is uncertain it is by no means impossible. More and more Indigenous peoples in Canada are also choosing strategies grounded in their traditional laws.

C. DISRUPTION OF TRAPLINES: REMEDIES

Trappers may have a variety of goals in considering litigation. They may wish to prevent harm to their trapline territories, to secure compensation for past losses, or to prevent harmful activities in future. In effect, the various legal approaches described above present different pathways to get into court to attempt to secure one of these outcomes, or remedies.

In terms of preventing harm, an application for judicial review may be made to ask a court to set aside permits or approvals for potentially harmful development in a trapline territory on the basis that the Crown failed to uphold its constitutional duties to consult and accommodate before granting them. Other remedies, like damages to compensate for harm done, may be granted after a full trial in which trapping rights or Aboriginal title or nuisance is proven in court.

Rather than wait for a court proceeding to finish, it is also possible to apply for an interlocutory injunction. An interlocutory injunction is an injunction that remains in effect until final determination of the case or until further order. In relation to development projects that may affect Aboriginal communities, courts have acknowledged that:

> *Interlocutory injunctions have typically been sought to stop large development projects that threaten Aboriginal communities. They are designed to provide speedy but temporary relief before a full trial of legal and factual issues is available. Interlocutory relief is especially important given both the time and money it takes to get a full trial in Aboriginal rights litigation and the nature of Aboriginal rights in relation to land and resources. Aboriginal rights can often be quickly and irreparably damaged by development such as logging, mining and hydro-electric development.*[194]

Stream in Siumshun's trapline area.

Photo: Lindsay Borrows

Obtaining an injunction is a high standard, and there must be evidence that irreparable harm will be suffered if it is not granted. Proponents may argue that there is insufficient evidence that there will be harm, or that any potential losses can be compensated later (e.g. compensation for loss of revenue resulting directly from disruption of a trapline). They may also argue that harm to the trapline territory is outweighed by losses that would be suffered by the proponent or its employees. That said, there are examples where Indigenous nations have successfully obtained injunctions to halt development on their territories, including traplines.[195]

However, a review of case law[196] involving impacts on trapline territories provides few, if any, examples where trappers have successfully been awarded damages after the fact for losses suffered due to disruption to their traplines. Even in the *Tsilhqot'in* decision, in which trapping rights and Aboriginal title over the trapline territory were judicially recognized after more than 20 years in court, and the court found that forestry and land use decisions had unjustifiably infringed these rights, damages to compensate for past harms were not awarded because of a technicality.

D. THE TRUTH AND RECONCILIATION COMMISSION RECOMMENDATIONS AND TRAPPERS RIGHTS AND RESPONSIBILITIES

The Truth and Reconciliation Commission put forward 94 recommendations to address the continuing legacy of the residential school system, promote justice for Indigenous peoples and help promote reconciliation between Indigenous peoples and non–Indigenous Canadians. A

Tsilhqot'in territory.

Photo: Lindsay Borrows

number of these recommendations concern the recognition and revitalization of Indigenous law and governance, as well as a repudiation of the racist doctrines that led to the imposition of colonial law without regard for the pre-existing structures of Indigenous governance.

> *45. We call upon the Government of Canada, on behalf of all Canadians, to jointly develop with Aboriginal peoples a Royal Proclamation of Reconciliation to be issued by the Crown. The proclamation would build on the Royal Proclamation of 1763 and the Treaty of Niagara of 1764, and reaffirm the nation-to-nation relationship between Aboriginal peoples and the Crown. The proclamation would include, but not be limited to, the following commitments:*
>
> *i. Repudiate concepts used to justify European sovereignty over Indigenous lands and peoples such as the Doctrine of Discovery and terra nullius.*
>
> *ii. Adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples as the framework for reconciliation.*
>
> *iii. Renew or establish Treaty relationships based on principles of mutual recognition, mutual respect, and shared responsibility for maintaining those relationships into the future.*
>
> *iv. Reconcile Aboriginal and Crown constitutional and legal orders to ensure that Aboriginal peoples are full partners in Confederation, including the recognition and integration of Indigenous laws and legal traditions in negotiation and implementation processes involving Treaties, land claims, and other constructive agreements.*[197]
>
> *50. In keeping with the United Nations Declaration on the Rights of Indigenous Peoples, we call upon the federal government, in collaboration with Aboriginal organizations, to fund the establishment of Indigenous law institutes for the development, use, and understanding of Indigenous laws and access to justice in accordance with the unique cultures of Aboriginal peoples in Canada.*[198]

E. THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES AND TRAPPERS' RIGHTS AND RESPONSIBILITIES

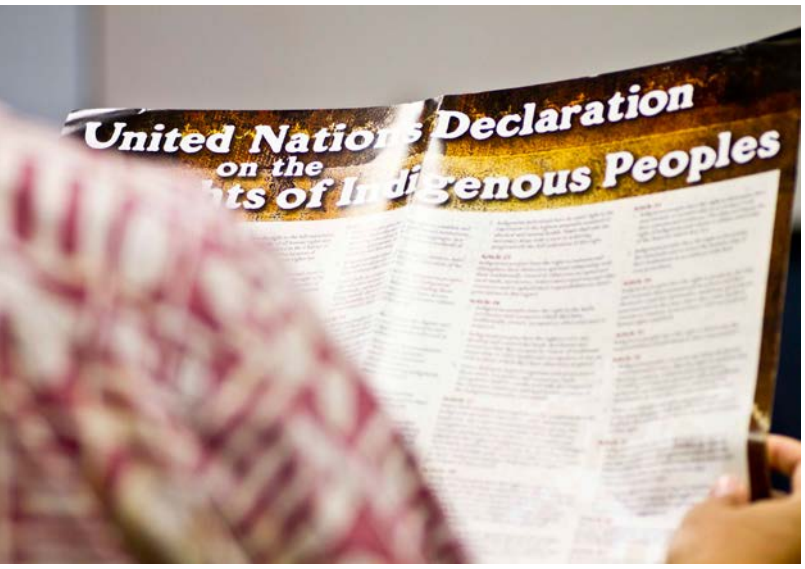
The *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*) was created by Indigenous people from around the world in an unprecedented negotiation process spanning roughly 30 years. *UNDRIP* represents the basic principles and standards that should guide states in their dealings with Indigenous peoples. The Truth and Reconciliation Commission final report considers the implementation of *UNDRIP* as one of the fundamental pillars of reconciliation with Indigenous peoples.[199] At the 15th Session of the United Nations Permanent Forum on Indigenous Issues held in New York City in 2016, Indigenous and Northern Affairs Minister Carolyn Bennett officially endorsed *UNDRIP* without qualification and committed Canada to implementation.[200]

Articles of UNDRIP of Particular Relevance to Trapper's Rights and Responsibilities

UNDRIP contains 46 articles, and each article is meant to be read within its entire context. However, articles listed below are of particular relevance to trappers' decision-making rights and responsibilities.

Article 3
Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 18
Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.



UNDRIP

Photo: Mei Yin

Article 19
States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 29
1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 37
1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.
2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

"Free, Prior and Informed Consent"

UNDRIP mandates that states have a duty to consult and cooperate in good faith with Indigenous peoples, and must obtain their free, prior and informed consent (FPIC) before adopting legislative or administrative changes that may affect them.

As one of the drafters of *UNDRIP* notes, "It is important to establish that the source of the right to free, prior and informed consent is the right to self-determination. Free, prior and informed consent is derived from this pre-existing right."[201]

One of the key challenges of FPIC implementation is identifying the appropriate decision-maker

under a particular Indigenous legal order. Indigenous nations interpret and apply FPIC according to their own distinctive legal orders. Consider the following example from Cree law as explained by Cree member of Parliament Romeo Saganash:

> *Under Cree law, we have a trapline system in Northern Quebec where there's about 310 traplines and there's one boss per trapline. He's the tallyman. He determines who comes in his territory to get what, for how long and so on and so forth. So that permission requested to the tallyman, or the chief hunter, is already incorporated in Cree law. So, I think the parallel with free, prior and informed consent is already pretty easy to make ....*
>
> *You cannot consider a new forestry regime in the territory without considering those different family hunting territories that exist. The tallyman has a central role in that new regime. He has to sign at the bottom of the forestry plan for the following year in order for the forestry company to go ahead. So it's already there. The word is not there, but the process leads to that final consent where the tallyman signs the cutting plans for next year for this company, for that company and so on and so forth. It's already there in practice for Northern Quebec.*[202]

Indigenous-Law Based Implementation of UNDRIP

Implementation of *UNDRIP* must be shaped and led by Indigenous people. As Bud Napoleon puts it:

> *I think [implementing UNDRIP] is a real positive step because I think it will go in line with what I said before about taking the bull by the horns and having our own Indigenous law...but in saying so, a lot of it has got to be said in our words, the way we believe in it. And we don't want to have words put into our mouth by the federal government, because if we listen to them too much they are going to water it down so much that it's not going to mean anything, it'll go right back to what it was before.*[203]

Some Indigenous nations are already in the process of translating *UNDRIP* into their own languages and implementing it into their own governance systems.[204] A number of leading Indigenous scholars and thinkers have also generated analysis on how to implement *UNDRIP* in a way that will genuinely promote Indigenous self-determination and decolonization of the Canadian state.[205]

Bud Napoleon says:

> *We should have the last say in every project, on how it's going to be, and when too, as well. There's certain parts of the year you should leave the land alone because that's when the moose are calving and things like that. There's certain areas that should be left alone, that we were taught to leave alone, stay away from. So, this is where the knowledge of the elders comes in. The Canadian law is backwards to me.*[206]

Part III

Moving Forward and Next Steps

This report attempts to convey the present-day realities of Indigenous trappers in British Columbia, and provide some research into possible Canadian legal remedies that can be used to protect their traplines and exercise their inherent right to govern the trapline, while also acknowledging the struggles that individual trapline holders face in accessing those legal remedies. As a result, some of our recommendations for moving forward operate within the existing Canadian legal system. However, this report acknowledges that there are pre-existing Indigenous laws and governance structures that are very different from Canadian governance structures, and strives to provide examples of those. Provincial and federal government commitments to full implementation of the United Nations Declaration on the Rights of Indigenous Peoples, and its standard of free, prior and informed consent[207] present an opportunity for reconciling these differences in a manner that recognizes and upholds the rights and responsibilities of trapline holders within their distinct legal orders. This report also seeks to acknowledge the self-determination of Indigenous laws and governance structures over traditional lands used for trapping, with the long-term goal of restitution of traditional lands.

Photo above: Kalen Emsley

Opposite: Ancient cedar, Coast Salish territory.

Photo: Lindsay Borrows

A. Recommendations

Photo: Kevin Noble

1. Recognize Indigenous laws and perspectives regarding trapline territories

a) Federal, provincial and Indigenous governments, and proponents, should recognize and uphold the rights and responsibilities of Indigenous trappers, as understood within specific Indigenous legal traditions, when considering any action with the potential to impact trapline territories.

2. Undertake proactive "big picture" assessment and planning to understand and manage impacts to trapline territories

Cumulative Effects

a) The provincial and federal governments should make funding available for Indigenous peoples to generate and record information, stories, and analysis about the cumulative impacts of industrial development on Indigenous trapline territories, and the effects of these impacts on constitutionally-protected treaty and Aboriginal rights. In order to fully understand the cumulative impacts at each line, the information recorded should include band, treaty, and land histories, as well as family stories.

b) Indigenous-led or co-governed regional assessment and land use planning processes should be undertaken to evaluate different scenarios for protection and development and set future land use direction, in order to maintain or restore the integrity of trapline territories and to manage cumulative effects within ecological limits.

3. Implement the United Nations Declaration on the Rights of Indigenous Peoples

a) UNDRIP must be fully implemented and upheld, including the articles requiring "free, prior and informed consent."[208] This process should be attentive to Indigenous law and governance, and respect the jurisdictional authority of hereditary trapline holders according to these laws.

Co-Governance

a) Land use decision-making should be rooted in nation-to-nation relationships, and recognize Indigenous rights of self-determination. Co-governance approaches should be based on mutual equality and respect for the laws, governance processes, and underlying values and belief systems of the parties involved. This should be done in accordance with all provisions of UNDRIP.

Consultation

a) In implementing the UNDRIP requirement to consult and cooperate with Indigenous peoples to obtain their "free, prior and informed consent" before approving development:

   i. The provincial and federal governments should provide notification to Indigenous trapline holders of proposed development, as well as short and long-range plans for resource extraction that will affect their traplines at the earliest possible time.

   ii. Funding should be made available to trapline holders who need to take time off work to travel to parts of their traplines slated to be impacted by proposed development, in order to provide feedback on the proposal. This includes costs of travel and involves keeping records of each band trapper's daily wages and compensating accordingly for daily wages lost.

   iii. The provincial and federal governments should provide funding to Indigenous nations to help facilitate the inclusion of hereditary trapline holders into nations' formal consultation process at the earliest possible stage, in a manner according with nation's own laws and governance processes.

   iv. The provincial and federal governments should try to develop a "meaningful" relationship with trapline holders and "level the playing field" by providing enough funds for trapline holders to hire experts and lawyers of their choosing. Consultation should occur at every stage, including the mitigation stage so that Indigenous trapline holders may be involved in overseeing mitigation methods and even hire individuals of their own choosing carry out the work.

   v. Consultation with trapline holders should be required on decisions regarding herbicide spraying, as it affects the entire food chain, and plant life including important medicinal plants. Research and notification should be given on invasive species in order to warn trapline holders about certain impacts on animals and plants.

   vi. Consultation should take place so that trapline holders are involved in decisions regarding cleanup or burning of brush. When necessary to do clean up or burning of brush, trapline holders should be able to hire people of their own choosing to carry out the burning and cleaning. Consultation is also required along waterways, where logging and cutting will impact the region's water flow.

4. Invest in healing and learning

Education

a) The provincial education requirement for hunting and trapping licenses should involve a component of knowledge about the specific territory and its Indigenous laws. This curriculum could be designed and taught by Indigenous trapline holders and users from the respective territories.

b) The importance of the traplines for Indigenous peoples to transfer knowledge and law must be recognized and respected. Young Indigenous people also need to learn about their treaty and Aboriginal rights and responsibilities in relation to the trapline. This is important so that Indigenous youth, who will become the future leaders of their communities and nations, will know their rights and be able to protect their traplines for their families and for future generations.

Gender Equality in Relation to Trapline Governance

c) The federal and provincial governments should recognize the gender discrimination caused by the imposition of patrilineal property registration and inheritance laws. The federal and provincial governments should provide funding and resources to allow Indigenous nations to learn about and recover their traditional system trapline governance systems, and disentangle the federal, provincial and traditional trapline registration systems to ensure gender equality.

5. Strengthen and renew treaty promises

a) Ensure that in treaty territories, Indigenous and non-Indigenous people are educated about the meaning of the treaties from both the Indigenous and Crown perspectives, which should each be weighted equally, and give effect to this understanding in all decisions affecting treatied lands. This would promote understanding of the importance of the commitment to continued rights to hunt, fish, and trap for Indigenous peoples under the treaties, and the role of Indigenous laws and decision-making to ensure the health of the land and water to sustain these rights.

6. An organization to represent the collective interests of Indigenous trappers

a) An Indigenous trapper-led organization should be created to represent the collective interests of Indigenous trapline holders and trapline users in British Columbia.

B. Indigenous Law–Based Approaches

Photo: Carly Tobias

Indigenous people may also wish to consider Indigenous law and shared governance approaches such as the following:

Indigenous Protected and Conserved Areas

An Indigenous circle of experts created a report on the best practices in creating Indigenous protected and conserved areas.[209] Indigenous protected areas regulate traditional trapping, hunting, fishing, and gathering practices under the laws of the nation.

Indigenous governance over territory used for trapping is inherent and exists independently of federally–recognized protected areas. As Chief Steven Nitah reflects, "in effect, because of their attachment to, and dependence on the land, Indigenous peoples have been establishing their own protected areas for millennia."[210] In the past thirty years, Indigenous nations declared their own protected areas to care for some special areas in the face of development. For example, in 1984 the Tla–o–qui–aht First Nation declared a Tribal Park on what is referred to as Meares Island, to protect the area from clear–cut logging, and has since declared several more Tribal Parks in its territory. The Haida Nation declared the Haida Heritage Site, which was later expanded in the Gwaii Haanas National Park Reserve and National Marine Conservation Area Reserve. In Treaty lands, the Doig River First Nation has declared a Tribal Park, called K'ih tsaa?dze, to protect the remainder of its territory from oil and gas development. Indigenous–declared protected areas have many names including Tribal Parks, Indigenous and Community Conserved Areas (ICCAs) and Locally Managed Marine Areas. The term 'Indigenous Protected

Areas (IPAs),' a concept adopted from Australia, was discussed by the Standing Committee on Environment and Sustainable Development. Further conversations with Indigenous peoples are required to explore the concept of IPAs, including what the concept might add to the Canadian context, and how recognition of IPAs may benefit Indigenous nations.[211]

Co-Governance

Before discussing co-governance, it is important to acknowledge that in what is now known as British Colombia, traplines exist on land over which Indigenous governance authority has not been ceded. Consequently, Canadian laws that regulate traplines are a colonial imposition that continue today. Suggesting co-governance approaches that balance the decision-making authority of Indigenous peoples *and* the Canadian government can be problematic, as it begs the question: what decision-making authority does the Canadian government have over Indigenous territory? For nations and trapline holders who for strategic reasons chose to enter into co-governance arrangements with the Crown, it is critical that steps be taken to ensure that as equal a power sharing agreement as possible is put in place. Failing to acknowledge the power imbalance that is present between Indigenous and non-Indigenous parties that come together to co-manage traplines could facilitate a re-colonizing approach and undermine the goals of self-determination.

Governance authority over the land may be "broadly understood as the exercise of authority over the environment through the processes and institutions by which decisions are made."[212] Indigenous trapline holders seeking to exercise governance authority over their traplines according to their own legal traditions may wish to encourage their leadership to enter into co-governance arrangements with the Crown that provide a greater measure of authority and respect for Indigenous governance practices over the traplines.

Co-governance refers to collaborative management approaches where Indigenous peoples have at least equal decision-making authority, decisions are based on both Indigenous knowledge and western scientific knowledge, and both Indigenous and Canadian law is upheld. The term co-governance is intended to encompass not just consensus-seeking collaborative management boards with Indigenous and Crown representation, but also parallel decision-making processes where the parties may undertake their own planning or assessment, and then negotiate to reconcile the outcomes.[213]

There are many different forms that co-governance arrangements can take. A report published by West Coast Environmental Law in 2017 entitled "Paddling Together: Co-Governance Models for Regional Cumulative Effects Management" reviews models from jurisdictions around the world and summarizes best practices and criteria for ensuring success. The report is available for download online at https://www.wcel.org/publication/paddling-together-co-governance-models-regional-cumulative-effects-management.

Indigenous Guardian Programs

Indigenous-led monitoring and enforcement initiatives, often referred to as Indigenous Guardian programs, support Indigenous land management in their territories based on a cultural responsibility for the land.[214] Indigenous people are often the first to observe both acute and incremental changes in their territory. Empowering Indigenous Guardians to undertake consistent and purposeful monitoring of their territories can ensure that relevant, up-to-date

data is available to Indigenous and Crown governments regarding the state of the land. Apart from the practical value of Indigenous Guardian initiatives, the constitutional imperative to recognize Aboriginal title and rights increasingly requires a greater role for Indigenous people in the management, conservation, and enforcement of Indigenous laws in their territories. Trapline holders and users may be ideally suited to take on these roles when they are interested.

Guardians monitor and patrol Indigenous territory to track any changes to the land, but also to act as guardians to ensure that guests and industry are following the laws of the relevant nation. For example, Heiltsuk nation enacted a ban under their own laws to prohibit the trophy hunting of bears on their territory. Guardians patrol the land educating visiting hunters about Heiltsuk law and its basis in the Heiltsuk legal tradition.[215]

Case Study #3: The Use of Contemporary Coast Salish Law to Resolve Hunting Disputes

Indigenous legal orders continue to be relevant to resolving contemporary disputes over traplines and hunting. Recent examples acknowledged in the Canadian justice system include *R v. Joseph Thomas* and *R v. Christopher Brown and Esquimalt and Ditidaht Nations.*[216] The case study below was drafted by law professor Rebecca Johnson and is reprinted here with the permission of the Indigenous Law Research Unit at the University of Victoria.

Context: Two Coast Salish men from the urban Esquimalt nation were charged under the BC *Wildlife Act* with two counts of hunting/poaching. The two men initially asserted what they believed was a treaty right to hunt on unoccupied Crown land. However, the Ditidaht[217] (in whose historic territory they had been hunting), were in favour of conservation, and the conviction of poachers. It also became clear that the two hunters had not sought permission from the Ditidaht, nor had they complied with Indigenous conventions in the manner of their hunt, breaching both Ditidaht and Esquimalt Salish legal principles, and bringing shame on the communities.

Application: The case was heard in the First Nations Court[218] by Justice Marion Buller, (now Chief Commissioner for the Missing and Murdered Indigenous Women and Girls Inquiry). With the consent of the Crown, the accused and the two concerned nations, the Court made space for the Esquimalt and Ditidaht communities to work together, using their respective laws and procedures, to resolve the case.

Nitinat Lake.

Photo: M.E. Sanserverino

The hearing, drawing on Coast Salish procedures for dispute resolution, involved a larger number of interested parties, including elders, Chiefs, Councillors and other members of the Esquimalt, Cowichan, and Ditidaht nations. The communities spoke to not only current treaty and provincial law, but also to older laws between First Nations respecting hunting. They agreed that seeking permission from the other community was a fundamental law that continued to have force. The hunters accepted responsibility for their conduct, and agreed to accept the resolution that would be determined by the nations.

A number of procedural steps were necessary, as the violation of law here imposed responsibilities on not only the two hunters, but the Esquimalt community as a whole. As a result, the hunters were required to visit each household in Esquimalt to tell them what they had done, and to invite them to a meeting, which would be held in the Esquimalt Long House and involving people from both nations. At this meeting (180 people in attendance), representatives of the Ditidaht were wrapped in blankets and presented with gifts as a way of acknowledging the harm that was done, and committing to the re-establishment of good relations. The hunters are to refrain from hunting for a year, and are required to do work for the community, doing maintenance and service at the longhouse at least twice a week for the year. This was to function not as punishment, but as an opportunity to be a model for youth, and to demonstrate the continuing obligations and operation of Coast Salish and Ditidaht law.

Significance: This case is a powerful and hopeful example of the application of Indigenous law in ways that provide a meaningful resolution to a concrete problem related to hunting (whether understood from the point of view of conservation, treaty rights, or community safety). It is also a powerful example of Indigenous legal principles and procedures providing a framework for the resolution of challenges that are inter-societal. That is, this is not simply the resolution of a hunting offence under provincial law, or the application of novel sentencing principles in the context of Indigenous offenders. It shows the power of Indigenous law and procedure to create the conditions for people from different legal traditions to come together to work through a shared problem in ways that draw in a range of appropriate decision-makers, who are positioned to better identify the challenges, and construct meaningful solutions. Note that the procedures used also supported an increase in legal literacy (increased familiarity in each community with the legal terrain of the other), and the building of community relationships (Esquimalt, Ditidaht and provincial Crown). Even more powerfully, in the process of resolving this specific hunting/poaching claim, the two communities were able to identify a bigger systemic challenge: given the pattern of land development in this territory, the Esquimalt do not have access to many areas in which to exercise hunting rights. There is thus a pressure to hunt in the other territory with potential to impact on wildlife. The result of the case has thus also been that the two First Nations have begun discussions aimed at developing protocols to govern hunting in Ditidaht territory by Esquimalt members, to support the ability of people in urban settings to have access to hunting.

In short, what could have otherwise been a conventional sentencing in a quasi-criminal hunting case has instead produced an outcome which:

1. Attends to questions of human safety (drawing on Indigenous laws and protocols governing ways, times, and places in which hunting can happen),
2. Attends to questions of conservation (drawing on Indigenous laws related to stewardship of land and animals), and
3. Attends to questions of inter-community conflict, drawing on the point of contact as an occasion to work together to collectively address a shared problem of land use.[219]

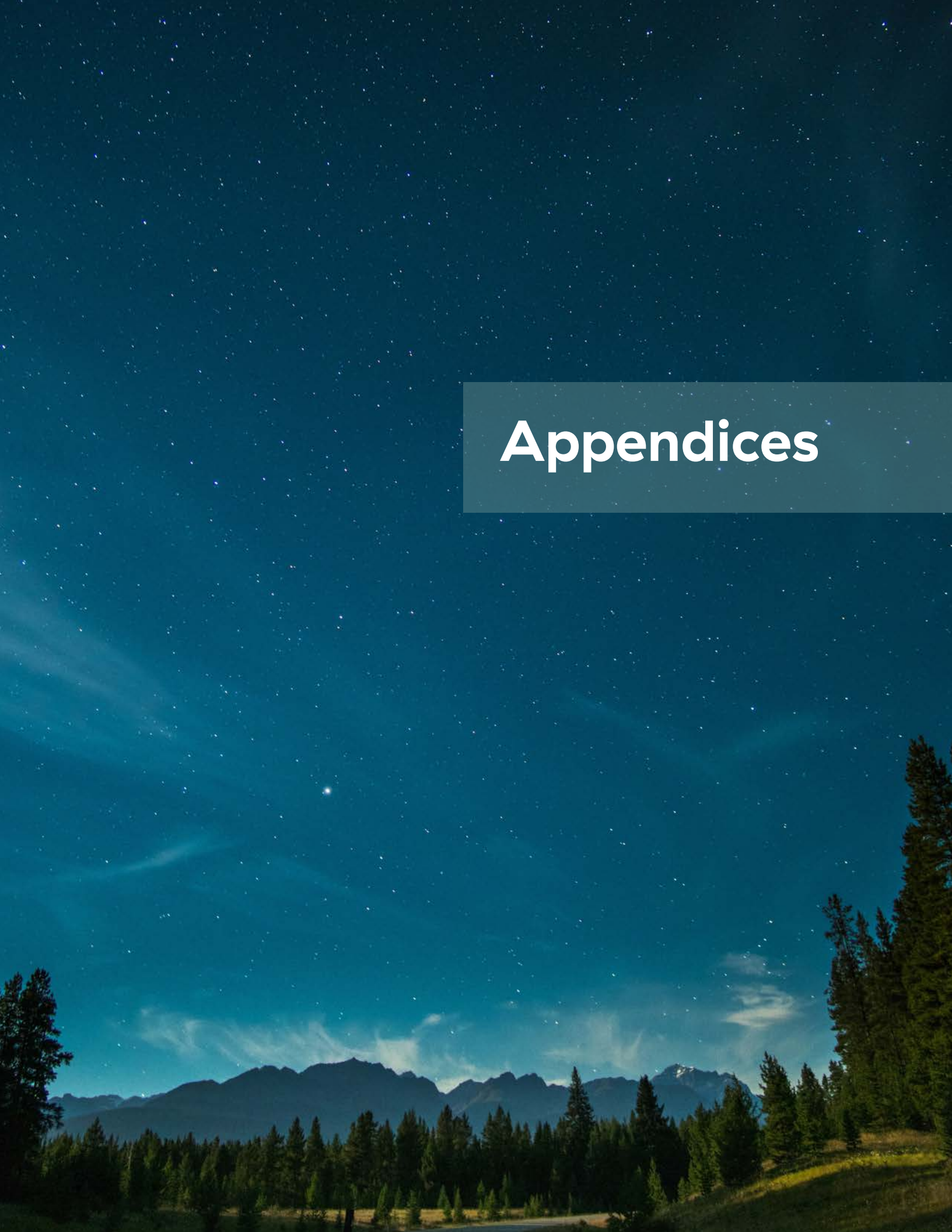
Conclusion

Photo: Bruno Soares

The lack of recognition for the authority of Indigenous law and governance systems from Crown and industry makes it extremely difficult for Indigenous trapline holders to fulfill their responsibilities to the land and people under their own Indigenous legal orders. The Indigenous trapline holders and users who contacted our organization for legal support were deeply knowledgeable about their own responsibilities under their legal order as well as about the land itself. They were frustrated in applying this knowledge in the best interests of the land and their families, ancestors and future generations due to the imposition of colonial laws on top of their own. This report is a small contribution towards articulating some of the complex problems that colonial regulation of traplines has caused. Much more work needs to be done from the perspective of individual Indigenous legal orders to understand the impact of colonial laws on the traplines and work forward towards solutions.

To reflect true self-determination, any federal or provincial laws/governance within Indigenous territory must be subject to the permission and consent of Indigenous peoples. At the heart of conflicts around the protection of Indigenous traplines are questions of decolonization and respect for Indigenous law and governance. As Doug White, lawyer and former chief of the Snuneymuxw First Nation, states:

> *"Indigenous law is the great project of Canada and it is the essential work of our time. It is not for the faint of heart, it is hard work. We need to create meaningful opportunities for Indigenous and non-Indigenous people to critically engage in this work because all of our futures depend on it".*[220]



Appendices

APPENDIX 1: RESOURCES FOR TRAPPERS

RESOURCE DOCUMENTS

Photo opposite: Kevin Cochrane

1) Free, Prior and Informed Consent Manual

Free, prior and informed consent (FPIC) is a principle grounded in international human rights standards, which state that, 'all peoples have the right to self-determination' and 'all peoples have the right to freely pursue their economic, social and cultural development.' This manual was designed as a tool for project managers and organizations carrying out projects or programs; it explains what free, prior and informed consent is and how to implement it.

Available online at: https://www.un.org/development/desa/indigenouspeoples/publications/2016/10/free-prior-and-informed-consent-an-indigenous-peoples-right-and-a-good-practice-for-local-communities-fao/

2) Understanding and Implementing the UN Declaration on the Rights of Indigenous Peoples: An Introductory Handbook

This handbook offers a basic understanding of *UNDRIP*, its broad themes of rights and protections, and how it applies in Canada. The handbook is intended to be used by Aboriginal leaders, community workers, educators, legal practitioners, and human rights organizations to offer an introductory description and analysis of what *UNDRIP* can mean for Indigenous peoples and how those rights and protections can be recognized.

Gunn, Brenda. *Understanding and Implementing the UN Declaration on the Rights Of Indigenous Peoples: An Introductory Handbook* (Winnipeg: Indigenous Bar Association, 2011), available online at: http://www.indigenousbar.ca/pdf/undrip_handbook.pdf

3) First Nation Consultation Framework: Project Report to the National Centre for First Nations Governance

This consultation framework report includes consultation practices aimed at considering the impacts of development on traplines. The report also addresses how consultation can include trappers and represent the interests of trappers.

Available online at: http://fngovernance.org/resources_docs/First_Nation_ConsultationFramework.pdf

INDIGENOUS ORGANIZATIONS

1) Communicate with the lands department of your band

Communicate with the lands department of your band council or other Indigenous governance body in your territory. The Crown may have contacted them to consult about proposed development in your trapline territory or they may have the capacity to assist you with respect to development concerns. Even if the lands department cannot assist you, it will help to show that you approached them. You can also engage with the local band council or other Indigenous governing body by asking for notification and consultation when notices of developments affecting your trapline come up, and/or by requesting trappers' representation in contemporary governance structures and decision-making structures of the nation.

2) Indigenous Law Research Unit

The Indigenous Law Research Unit is a dedicated research unit at the University of Victoria's Faculty of Law committed to the recovery and renaissance of Indigenous laws. ILRU partners with and supports work by Indigenous peoples and communities to ascertain and articulate their own legal principles and processes, in order to effectively respond to today's complex challenges. More information can be found online at: https://www.uvic.ca/law/about/indigenous/indigenouslawresearchunit/index.php

3) The RELAW Project

RELAW stands for Revitalizing Indigenous Law for Land, Air and Water. It is project of West Coast Environmental Law, supported and advised by the Indigenous Law Research Unit, which focuses on aspects of Indigenous legal orders related to environmental governance and lands and resources management. Through a RELAW project, participating Indigenous nations work with community researchers and lawyers to develop a written summary of legal principles related to environmental governance and land and resources for their nation. The project may also involve the development of a contemporary Indigenous law instrument (e.g., a plan, tribal law or policy) to address a particular environmental issue or challenge, serving as a bridge between the nation's own laws and governance systems and on-the-ground enforcement.

For more information please contact RELAW Project Lead Maxine Hayman-Matilpi, at: maxine_matilpi@wcel.org.

4) Treaty 8 Trappers Association

The Treaty 8 Trappers Association, led by president and elder Mike Beaver, is based in Alberta. The Association has recently entered into an agreement with the Province of Alberta which establishes the group as the authority for administering, managing and preserving traplines within the traditional territory of Treaty 8.[221] Mike Beaver has said that he will be reaching out to other Treaty 8 nations in Saskatchewan, Northwest Territories and British Columbia if they want to join the association.[222]

FREE ENVIRONMENTAL LAW SERVICES

1) WCEL's Summary Advice and EDRF Legal Aid Program

West Coast Environmental Law offers free legal advice to anyone who calls (604-684-7378 or 1-800-330-9235 ext. 229). WCEL also runs a small granting fund called the Environmental Dispute Resolution Fund (EDRF), which provides financial assistance to communities, First Nations, non-governmental organizations, and individuals bringing forward public interest environmental law cases in the Canadian court system. More information can be found here: https://www.wcel.org/programs/Environmental-Legal-Aid

2) Ecojustice

Ecojustice is an environmental law organization that represents community groups, non-profits, Indigenous communities, and individual Canadians fighting for environmental justice. Ecojustice uses the Canadian court system to bring major test cases designed to protect wilderness and wildlife, challenge industrial projects, and keep harmful chemicals out of the air, water, and ecosystems. More information can be found here: https://www.ecojustice.ca/contact/

3) The Environmental Law Centre

The Environmental Law Centre (ELC) at the University of Victoria offers free legal services to community organizations, conservation groups and First Nations. ELC services are provided by law students who are enrolled in the ELC Clinic program. Operating under the supervision of a senior lawyer, ELC Clinic students:

- provide legal representation and legal assistance to community/conservation groups and First Nations;
- produce citizen handbooks and other public legal education materials; and
- advocate on a wide range of environmental law reform issues.

More information can be found here: http://www.elc.uvic.ca/projects/becoming-a-client/

4) The Pacific Centre for Environmental Law and Litigation

The Pacific Centre for Environmental Law and Litigation (Pacific CELL) is partnered with law schools across Canada and represents clients in public interest environmental cases that present strong experiential learning potential for their students.

Pacific CELL does not generally provide free legal services, but it is eligible to apply for grants under WCEL's Environmental Dispute Resolution Fund. More information can be found here: https://www.pacificcell.ca/about/our-mission/

APPENDIX 2: TREATY 8 TRAPLINE QUESTIONNAIRE

Bud Napoleon created the questionnaire below. He traveled to West Moberly, Saulteau, Halfway River, and Blueberry River First Nations in Treaty 8 territory in the winter of 2017 to speak with trapline holders and users about the questions in this questionnaire. Their responses informed this report.

TREATY 8 TRAPLINE QUESTIONNAIRE SHORT VERSION

1. Treaty 8

A) What is your understanding of a treaty?

B) What does Treaty 8 mean to you?

C) How well do you know the Treaty and its relation to trapping?

D) How is trapping a treaty right and what is all involved here?

E) What other treaty rights do you believe you have?

2. Uses of your trapline.

A) What other activities do you in your trapline?

i) Berry picking

ii) Gathering medicines

iii. Wild vegetables –

1. Pick the and freeze them to use for soups later
2. Achequenae – (Dunezah) plants for eating, salads and soups

iv. Knowledge and teaching transmission

B) Do you combine your hunting & trapping together at the same time?

C) Which season(s) do you use your trapline the most – When – Who?

3. What language(s) do you speak?

5. How were you taught that (the obligation to animals) responsibility or how did you know that you had it?

6. Trapline – the differences.

A) How many types of traplines are there?

B) What are the differences between:

(i) Registered, (ii) Family, (iii) Band?

7. Rights to Protection of trapline.

A) Do you know of any rights in protecting your trapline rights?

B) How do you exercise these rights?

C) Do you think the Province should be involved, if so how?

D) Do you think that the federal government should also be involved? If so how?

E) Has the Department of Indian Affairs ever been involved in your trapline?

F) What other areas need to be protected in your trapline; ie: Cabin(s) – water – riparian area(s) – slopes – other.

8. Industrial Activities.

A) What kind(s) of activities are going on in your line?

i. Logging

ii. Oil and Gas

1. Seismic lines,
2. Rigs/ oil wells
3. Lease pits
4. Pipeline

lii. Fracking

B) What is the difference between a big activity or a small activity?

C) Do you feel any negative impacts?

D) What does cumulative impacts mean to you?

E) Who does more damage to your line, the logging industry (forestry) or the gas & oil?

F) How do you feel about encroachment? What types of encroachment are you experiencing and impacted by?

i. Oil & Gas

ii. Logging

iii. Hunters

iv. Recreation

G) Should there be a law to protect the trapline(s) ,ie: mitigation – riparian, etc...

9. Consultation.

A) What do you know about consultation?

B) How many types of consultation methods are there – phone – oral – letter.

C) Are you allowed enough time to make a proper response?

D) Has the government ever been involved in helping you on your trapline, if so how?

E) What does "Consent" mean to you?

10. Change(s).

A) Do you feel that big changes to the Wildlife Act are needed – how?

B) Do you think that the Federal government should be more involved because of infringement of your treaty rights?

C) Do you think we need to form an all Indigenous Trapline group?

D) If so, in what capacity?

E) How should we form as a group?

F) Do you think we need one main person from each band who will be the speaker from that band or one key speaker to speak and represent everyone?

11. Compensation – Mitigation.

A) What do you think about compensation or mitigation?

B) What type(s) of compensation should we push for?

C) Should loss of trapline(s) lead to a replacement of trapline(s)?

12. Next Steps.

A) What do you think we should do next?

B) Who would you like to be involved as: Head band trapline rep – second trapline rep – Other?

Endnotes

1 Albert Yellowknee cited in Shari Narine, "Confusion and concern greets MOU on Trapline Management in Treaty 8", *Windspeaker* (4 May 2018) online: <windspeaker.com>.

2 *Wildlife Act*, RSBC 1996, c 488, s 1 [*Wildlife Act*].

3 Hayden King, "Stories from the Land", *Red Man Laughing Podcasts* (2014), online: <indianandcowboy.ca/podcasts/20141022stories-from-the-land-hayden-king-on-indigenous-laws-on-the-land/>.

4 *Wildlife Act*, *supra* note 2.

5 *Behn v Moulton Contracting Ltd*, 2013 SCC 26 at para 31, [2013] 2 SCR 227 [*Behn*].

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17 Interview of Bud Napoleon (29 November 2017).

18 Interview of Derald Gauthier (3 March 2017).

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100 *R v Sundown*, [1997] 8 WWR 379, 117 CCC (3d) 140.

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102 *Ibid*, s 101.1①.

103 *British Columbia Environmental Appeal Board,* (25 May 2018), online: <http://www.eab.gov.bc.ca/index.htm>.

104 *Zeman v British Columbia (Regional Manager),* 2012 BCEAB 10, paras 28-30.

105 *Wildlife Act*, *supra note 2,* ss. 101–101.1. In *Legget v. Director, Fish and Wildlife*, 2009 BCEAB 22, the EAB confirmed that the holder of an angling license could appeal a decision to stock a lake with non–native species because of the potential impact on his use of the lake, despite the fact that the Director had not identified him as "affected" under s. 101.

106 It is preferable to file an incomplete or defective appeal than to file no appeal at all. Errors can often be corrected after the appeal is filed, but unless an appeal is filed, the Board will not hear the case. The EAB website offers many resources for those seeking to appeal a government decision at <http://www.eab.gov.bc.ca/fileAppeal/index.htm>.

107 See *Fort Nelson First Nation v BC*, 2012 BCEAB 2013(c) for an example of the EAB assessing consultation.

108 *Water Sustainability Act*, S.B.C. 2014, s. 105. The holder of a registered trapline could, depending on the facts of the appeal, bring an appeal as "a person whose land will be affected under the Act". See definition of "owner" in s 1. The EAB has held that Fort Nelson First Nations' treaty rights, including trapping rights, mean that they are persons whose land is likely to be affected: EAB No. 2012–WAT–013(a).

109 *Water Sustainability Regulation*, BC Reg 36/2016, s 39②–⑥. These industrial activities are supposed to comply with other requirements under their respective statutes. Note actual use of the water (as opposed to alteration of the watercourse) will still require approval.

110 *Environmental Management Act*, S.B.C. 53, s 101. The trapline holder must be able to show that he or she is "aggrieved" by the government decision. This will require some evidence of actual harm or increased risk associated with the approval.

111 *Integrated Pest Management Act*, S.B.C. 2003, c 58, s 14. Although in principle any person can appeal, the Act provides for relatively few points of government decision and most of the listed decisions are those which a pesticide user would wish to appeal. It is possible that a Pest Management Plan or license that allows for pesticide use on a trapline associated with Aboriginal or treaty rights could be challenged in court precisely because the Act does not provide for opportunities for consultation or accommodation.

112 "About the Board and the Appeal Process" (18 May 2017), *British Columbia Environmental Appeal Board* (web–pdf), online: <http://www.eab.gov.bc.ca/fileAppeal/about_the_board.pdf>.

113 *Wildlife Act*, *supra* note 2, s 45.

114 *Wildlife Act*, *supra* note 2, s 42③; *Capot–Blanc v BC (Regional Manager)*, 2009 BCEAB 24, at para 52 [*Capot–Blanc*].

115 *Capot–Blanc, ibid* at para 5.

116 *Ibid* at para 18.

117 *Bolton v Forest Pest Management Institute* (1985), 21 DLR (4th) 242, [1985] 6 WWR 562 (BC CA).

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

119 *Tsilhqot'in Nation v British Columbia* 2007 BCSC 1700 at para 439 [*Tsilhqot'in BCSC*].

120 *Tsilhqot'in Nation v. British Columbia,* [2014] 2 SCR 257, 2014 SCC 44 [*Tsilhqot'in SCC*].

121 *Tsilhqot'in BCSC, supra* note 119 at para 470.

122 *Delgamuukw v British Columbia,* [1997] 3 SCR 1010 at para 115, 153 D.L.R. (4th) 193 [*Delgamuukw*].

123 B. Slattery, "The Metamorphosis of Aboriginal Title", (2006) 85, Can. Bar Rev. 255 at 270.

124 *Behn, supra* note 5 at para 31.

125 *Ibid* at para 33.

126 *Ibid* at para 31.

127 *R v Van der Pee*t [1996] 2 SCR 507 at para 46, [1996] 4 CNLR 177 [*Van der Peet*]. The Van der Peet case set out 10 factors which must be considered to establish Aboriginal rights:

1. Courts must take into account the perspective of Aboriginal Peoples themselves.
2. Courts must identify precisely the nature of the claim being made in determining whether an Aboriginal claimant has demonstrated the existence of an Aboriginal rights.
3. In order to be integral a practice, custom or tradition must be of central significance to the Aboriginal society in question.
4. The practices, customs and traditions which constitute Aboriginal rights are those which have continuity with the traditions, customs and practices that existed prior to contact.
5. Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating Aboriginal claims.
6. Claims to Aboriginal rights must be adjudicated on a specific rather than general basis.
7. For a practice, tradition or custom to constitute an Aboriginal right it must be of independent significance to the Aboriginal culture in which it exists.

8 The integral to a distinctive culture test requires that a practice, custom or tradition be distinctive; it does not require that practice, custom or tradition be distinct.

9 The influences of European culture will only be relevant to the inquiry if it is demonstrated that the practice, custom or tradition is only integral because of that influence.

10 Courts must take into account both the relationship of Aboriginal peoples to the land and the distinctive societies and cultures of Aboriginal peoples.

128 *R v Sappier,* 2006 SCC 54 at para 33, [2006] 2 SCR 686.

129 *Ibid* at para 37.

130 *Hamlet of Baker Lake v. Canada (Indian Affairs and Northern Development),* [1979] 3 CNLR 17, **107 DLR** (3d) 513 (FC).

131 *Tsilhqot'in BCSC, supra* note 119, executive summary.

132 *Ibid* at paras 1288 and 1294.

133 *William v British Columbia 2012 BCCA 285* at para 322. This aspect of the judgment was not appealed to the Supreme Court of Canada

134 *Derickson v R,* 1996 CarswellBC 301, [1996] B.C.J. No. 307, [*Derickson*].

135 *Ibid* at paras 16–17, 29.

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137 *Treaty 8, supra* note 44.

138 Report of Commissioners for Treaty 8, Winnipeg, Manitoba 22 September 1899, available online at: <http://www.aadnc-aandc.gc.ca/eng/1100100028813/1100100028853#chp2>.

139 *Yahey v British Columbia,* 2017 BCSC 899 (Notice of Civil Claim, Plaintiff), online: <http://www.ratcliff.com/sites/default/files/news_articles/2015-03-03%20Notice%20of%20Civil%20Claim.PDF>.

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141 *Ibid.*

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143 David M Rosenberg & Jack Woodward, "The Tsilhqot'in case: the recognition and affirmation of aboriginal title in Canada" (2015) 48:3 UBC Law J 943.

144 *Tsilhqo'tin SCC, supra* note 120.

145 *MacMillan Bloedel Ltd. v Mullin,* [1985] 3 WWR 577, 1985 CanLII 154 (BCCA).

146 *Delgamuukw, supra* note 122 at para 143.

147 *Tsilhqot'in SCC, supra* note 120 at paras 32–44.

148 See Woodward's and Company for more background on the court case: http://www.woodwardandcompany.com/?page_id=87.

149 *Tsilhqot'in SCC, supra* note 120 at para 88.

150 *Ibid* at para 73.

151 *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73 at para 27, [2004] 3 SCR 511 [*Haida Nation*]; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director),* 2004 SCC 74, [2004] 3 SCR 550.

152 *Haida Nation, ibid* at para 27.

153 *Platinex v Kitchenuhmaykoosib Inninuwug First Nation,* [2007] 3 CNLR 181 at para 48, [2007] O.J. No. 1841 [*Platinex*].

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155 *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage),* 2005 SCC 69 at para 57, [2005] 3 SCR 388 [*Mikisew Cree*].

156 *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council,* 2010 SCC 43 at para 31, [2010] 2 SCR 650 [*Rio Tinto*].

157 *Haida Nation, supra* note 151 at para 35.

158 *Ibid* at para 37.

159 *Rio Tinto, supra* note 156 at 44.

160 *Ibid* at para 46.

161 John Olthuis, Nancy Kleer & Roger Townshend, *Aboriginal Law Handbook* 4th ed (Toronto: Carswell, 2012) at 57.

162 *Ibid* at para 56.

163 *Haida Nation, supra* note 151 at para 37.

164 *Olthuis, supra* note 161 at 56.

165 *Haida Nation, supra* note 151 at 59.

166 *Ibid* at para 53.

167 *Ibid* at para 38.

168 *Haida Nation, supra* note 151 at para 43.

169 *Ibid* at para 44.

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182 *Saik'uz First Nation, supra* note 180.

183 *Ibid* at paras 54–56, 60.

184 *Grassy Narrows First Nation v Ontario (Minister of Natural Resources),* 2014 SCC 48, [2014] 2 S.C.R. 447.

185 *Mikisew Cree, supra* note 155.

186 *Integrated Pest Management Act,* SBC 2003, c 58

187 *Van der Peet, supra* note 127 at para 55.

188 *R v Marshall,* [1999] 3 SCR 533, 4 CNLR 301.

189 Email communication with Richard Overstall, May 18th, 2018.

190 *R v Sparrow,* [1990] 1 SCR 1075 at 1091, [1990] 3 CNLR 160.

191 *Ibid*.

192 *Ibid* at 1093.

193 *Behn, supra* note 4 at para 33.

194 *Ibid* at 59; Kent Roach, "Aboriginal Peoples and the Law: Remedies for Violations of Aboriginal Rights," (1992) 21 Man. L.J. 498 at para 8.

195 See e.g., *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation (2006),* 272 DLR (4th) 727, [2006] 4 CNLR 152 *where G.P. Smith J. granted an "interim injunction" prohibiting Platinex Inc. from proceeding with its drilling program;* see also Tŝilhqot'in National Government, Media Release, "Tŝilhqot'in Nation welcomes Court Victory" (5 July 2018), online: News and Media – Media Releases < http://www.tsilhqotin.ca/>, *in July 2018, the BC Supreme Court granted an injunction to prevent drilling on Tsilhqot'in territory until the court decision regarding the validity of the permits authorizing the drilling is released.*

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205 *See*: Brenda Gunn, *Understanding and Implementing the UN Declaration on the Rights of Indigenous Peoples: An Introductory Handbook* (Winnipeg: Indigenous Bar Association, 2011) online: <http://www.indigenousbar.ca/pdf/undrip_handbook.pdf>; Special Report: online: <https://www.cigionline.org/publications/undrip-implementation-braiding-international-domestic-and-indigenous-laws>.

206 Interview of Bud Napoleon (29 November 2017).

207 *UNDRIP*, *supra* note 6, art 28 (1).

208 *UNDRIP*, *supra* note 6, arts 10–11, 19, 28, 32.

209 The Indigenous Circle of Experts Report and Recommendations, *We Rise Together: Achieving Pathway to Canada Target 1 through the creation of Indigenous Protected and Conserved Areas in the spirit and practice of reconciliation* (March 2018), online: < https://www.iccaconsortium.org> [*Indigenous Circle of Experts Report*].

210 Standing Committee on Environment and Sustainable Development, "Taking Action Today: Establishing Protected Areas for Canada's Future," at 57.

211 *Indigenous Circle of Experts Report*, *supra* note 209.

212 Ryan Plummer, Derek Armitage and Rob de Loe, "Adaptive Comanagement and its Relationship to Environmental Governance" (2013) 18 Ecology and Society 21 at 22; World Resources Institute, World Resources 2002–2004, online: <http://pdf.wri.org/wr2002_fullreport.pdf> at vii.

213 Jessica Clogg, Gavin Smith, Deborah Carlson and Hannah Askew, "Paddling Together: Co-Governance Models for Regional Cumulative Effects Management" Vancouver, BC: West Coast Environmental Law (June 2017) at 118.

214 Coastal First Nations Great Bear Initiative, "Coastal Guardian Watchmen Support" (2017), online: Coastal First Nations <http://coastalfirstnations.ca/our-environment/programs/coastal-guardian-watchmen-support/>.

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216 Rebecca Johnson from the Indigenous Law Research Unit, "In the matter of *R v. Joseph Thomas* and *R v. Christopher Brown* and Esquimalt and Ditidaht Nations", Case Comment, online: <https://www.uvic.ca/law/about/indigenous/indigenouslawresearchunit/index.php>.

217 The Ditidaht are part of the Nuu-Chah-nulh First Nations. The Ditidaht and the Pacheenaht people speak closely-related dialects of a language called Nitinaht or "Ditidaht." Ditidaht, is one of three closely related languages (Nitinaht, Makah, and Westcoast or Nuu-chah-nulh) forming the South Wakashan subgroup of the Wakashan Language Family. The Nitinaht and Makah languages are much more closely related to each other than they are to Nuu-chah-nulh, *see* <http://www.ditidaht.ca/>.

218 The Provincial Court of British Columbia now operates First Nations Courts in four B.C. communities. First Nations Court began in 2006 in New Westminster, under the leadership of Judge Marion Buller. It was followed by courts in North Vancouver (serving Whistler, Squamish and the North Shore), Kamloops, and Duncan.

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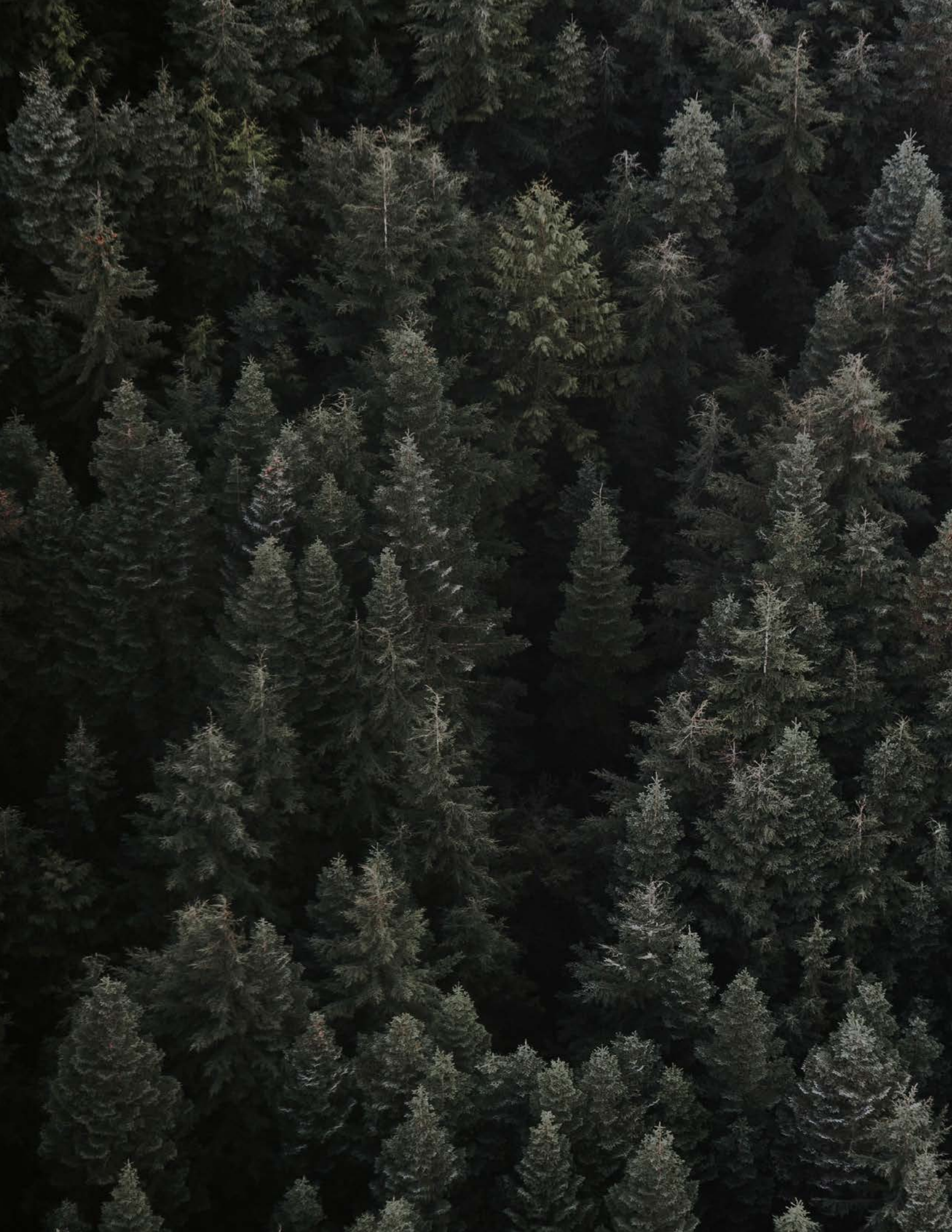

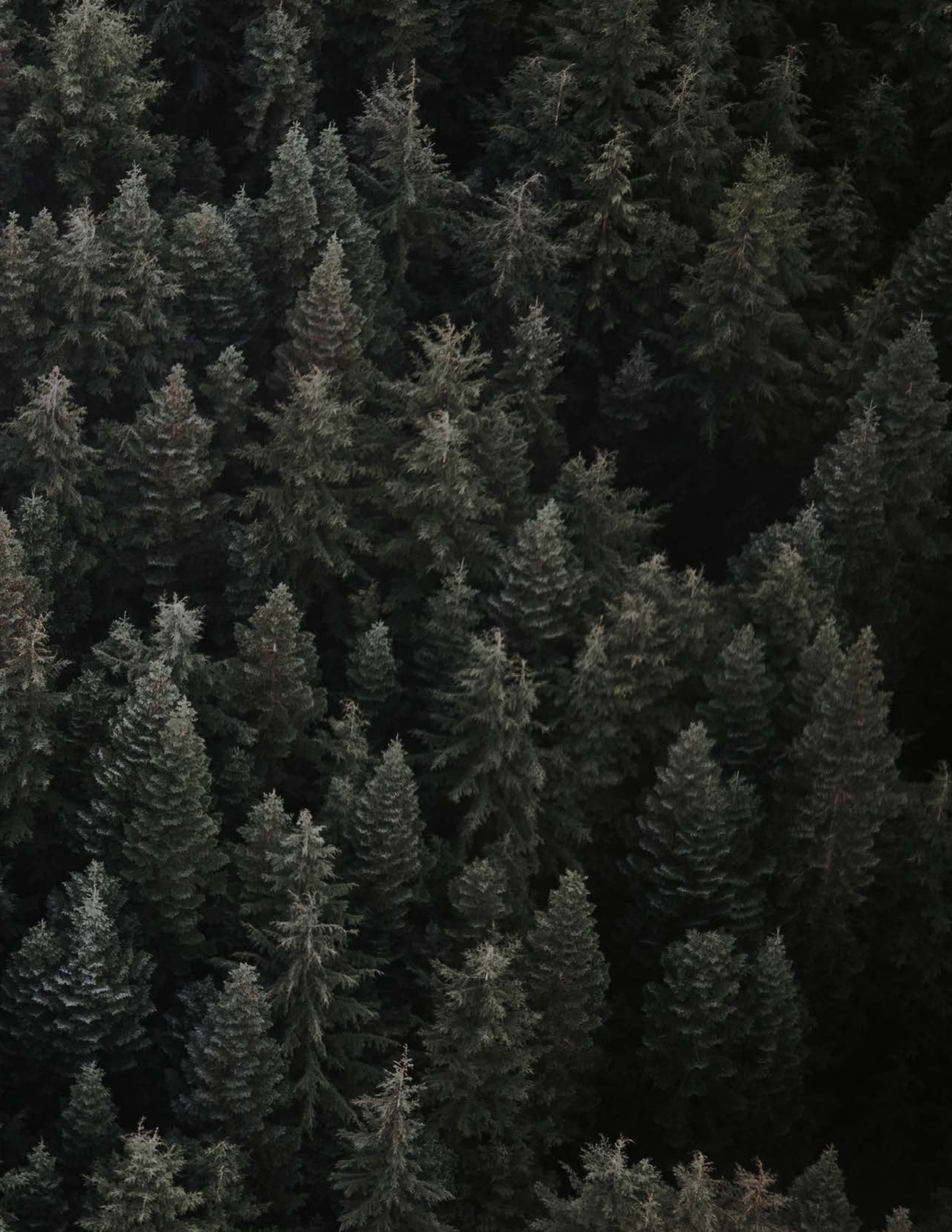

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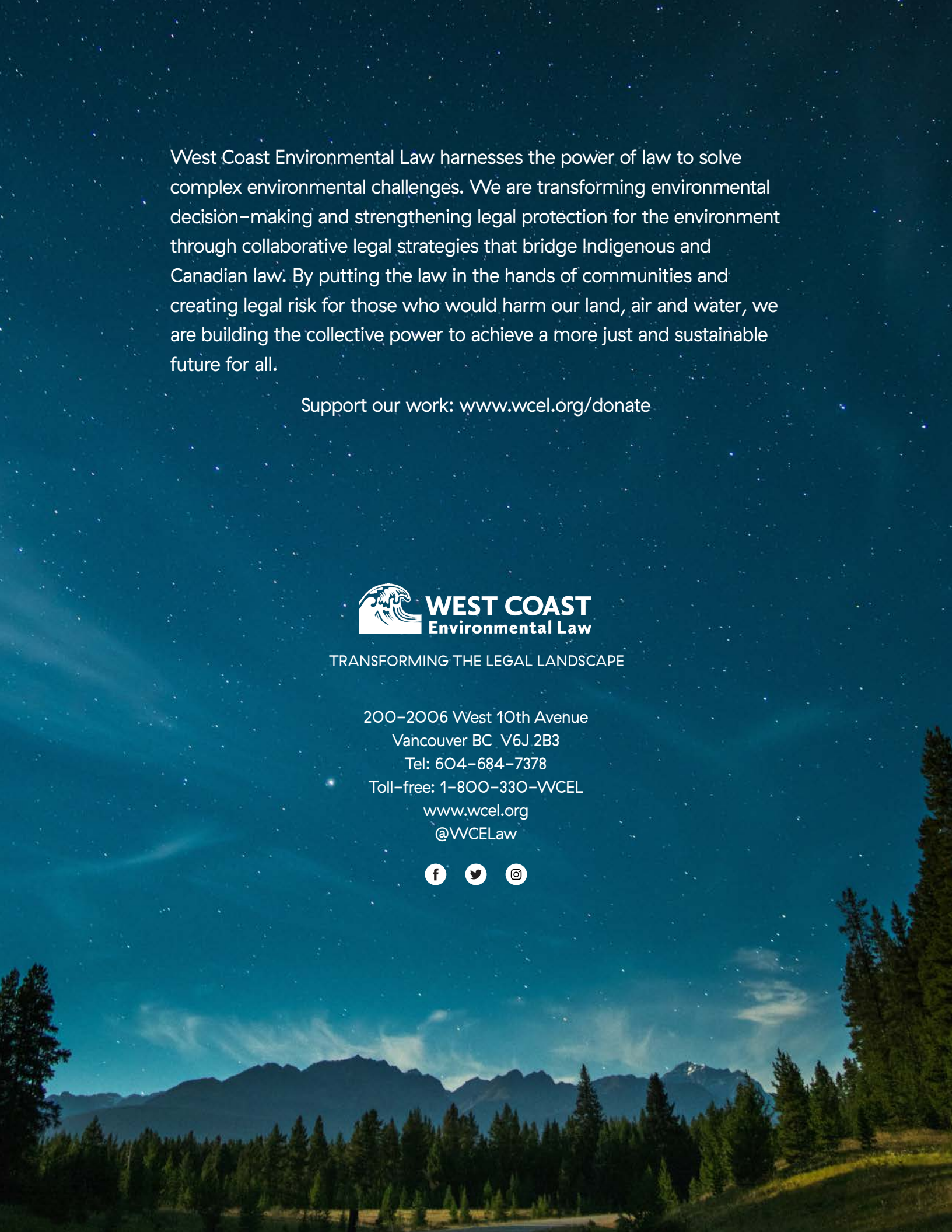

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