

**ORAL NARRATIVES, CUSTOMARY LAWS
AND INDIGENOUS WATER RIGHTS IN CANADA**

by

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M.A., The University of British Columbia, 2008

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF

THE REQUIREMENTS FOR THE DEGREE OF

DOCTOR OF PHILOSOPHY

in

THE COLLEGE OF GRADUATE STUDIES

(Interdisciplinary Studies)

(Indigenous Studies)

THE UNIVERSITY OF BRITISH COLUMBIA

(Okanagan)

September 2013

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Abstract

Prior to the European discovery and colonization of North America the Indigenous peoples managed their natural environment through a management regime that was guided by traditional governance systems that were based within the oral tradition. Since the assertion of European authority the water rights of indigenous peoples were subsequently diminished and infringed upon by colonial policies that derived from the doctrine of discovery. In the contemporary era the Supreme Court of Canada has determined that the priority water rights of Canada's aboriginal peoples must be proven under the premise of European concepts of land ownership and entitlement. It is my intent to use the oral narratives of the *Syilx* (Okanagan) to provide evidence of the ancient customary laws and practices that guided the management practices over this natural resource. To substantiate the existence of the customary laws of indigenous peoples I use primary research gathered from *Syilx* (Okanagan) and *Secwepemc* (Shuswap) informants. Previously published and unpublished oral narratives that were recorded and transcribed during the twenty-first century will also be used in this inquiry. Prior to the arrival of Europeans a phenomenon of globalization greatly influenced the development of colonial policies and laws that in turn impacted modern day Supreme Court decisions in both the United States and Canada. An analysis of the manner in which the Supreme Court decisions infringed upon the human and aboriginal right to water will be used to determine both the weaknesses and strengths of the priority rights of water that have been held in perpetuity by aboriginal peoples within Indigenous North America.

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Abbreviations

Alberta Law Reform Institute	ALRI
American Indian Lawyer Training Program	AILTP
American Indian Movement	AIM
Boundary Waters Treaty	BWT
British Columbia	BC
British Columbia Treaty Commission	BCTC
British North America Act	BNA
Bureau of Indian Affairs (USA)	BIA
Columbia River Treaty	CRT
Colville Confederated Tribes of Washington	CCT
Committee on Western Water Management	CWWM
Department of Indian Affairs (Canada)	DIA
General Agreement on Tariffs and Trade	GATT
Hudson's Bay Company	HBC
Human Rights Council	HRC
International Bank for Reconstruction and Development	IBRD
International Indian Treaty Council	IITC
International Monetary Fund	IMF
Joint Indian Reserve Commission	JIRC
Kamloops Indian Band	KIB
Non-Governmental Organization	NGO
North America Free Trade Agreement	NAFTA

Okanagan Tribal Council.....	OTC
Overseas Development Agencies	ODAs
Penticton Indian Band.....	PIB
Structural Adjustment Programs.....	SAPs
Traditional Ecological Knowledge	TEK
Transnational Corporations.....	TNCs
Union of British Columbia Indian Chiefs.....	UBCIC
United Nations	UN
United Nations Draft Declaration of Indigenous Peoples.....	UNDRIP
United Nations Economic and Social Council.....	UNESCO
Universal Declaration of Human Rights.....	UDHR
University of British Columbia.....	UBC
University of British Columbia Okanagan	UBCO
Western Science Knowledge	WSK
World Intellectual Property Organization.....	WIPO
Working Group on Indigenous Populations	WGIP
World Bank.....	WB
World Trade Organization	WTO

Glossary

SYILX TERMS

<i>Captikxw</i>	history as legend or myth
<i>Chip-chop-tikilxwh</i>	a time of the <i>captikxw</i>
<i>En'owkinwixw</i>	consensus making dialogue
<i>Kinkanuxwha</i>	hereditary Salmon Chief
<i>Klaktw</i>	ladle or spoon
<i>Kou-Skelowh</i>	We are the People
<i>Lahompt</i>	Wenatchi Chief
<i>Laxlaxtkw</i>	sparkling rough water
<i>Lekemnalks</i>	summer weasel dress
<i>Nsyilxcen</i>	Syilx peoples language
<i>Outmasqilxw</i>	contemporary <i>Syilx</i>
<i>Quilquilsneena</i>	Red Owl
<i>Sechauki</i>	permanent trade partner
<i>Sin-pac-cheen</i>	First light of day
<i>Sneewham</i>	winter dance
<i>Sn'klip</i>	Coyote
<i>Sqilxw</i>	for Indigenous
<i>St'elsqilxw</i>	people torn from the earth
<i>Stunx</i>	Beaver
<i>Stur-ek-kin</i>	American Coot (mudhen)

Syilx..... Okanagan peoples
Timxw..... sacred life forces
Wewiilwel..... Sandpiper
Xat-ma-sqilxw original Salish people

SECWEPMC TERMS

*Tquelk Kukupi*7 Creator
Secwepemc Shuswap people
Sk'elep..... Coyote
Slexey'em handed down, experienced stories
Stseptekwele historical history, myth or legend

Acknowledgements

I am deeply grateful to my water mentor and supervisor, Dr. John Wagner, for his guidance over the course of my doctoral research. I am also deeply grateful to the other two members of my supervisory committee, Dr. Gregory Younging and attorney Ardith Walkem, for sharing with me their knowledge and perspectives on indigenous legal and political theory.

The undertaking of this doctoral research would not have been possible without the financial support of many funding agencies that provided grants and scholarships. The Higher Learning Program of the Colville Confederated Tribes of Washington provided me with grants and two Cecelia Somday Scholarships. The Ministry of Advanced Education, Innovation and Technology awarded me a Pacific Century Graduate Scholarship and the Social Sciences and Humanities Research Council awarded me a Joseph-Armand Bombardier Canada Doctoral Scholarship. The Graduate Studies Program of the University of British Columbia Okanagan provided numerous Ph.D Tuition Fee awards, Graduate Fellowships, and Special Awards over the course of my doctoral studies.

I am deeply indebted to Traditional Knowledge advisory councils of the *Syilx* and *Secwepemc* Nations for sharing their ancient and guarded knowledge. I give thanks to the Chiefs and Councils of the Penticton Indian Band and the Kamloops Indian Band for allowing me to conduct interviews with their “keepers of laws” and “guardians of the land.”

Finally, I give the utmost respect and acknowledgement to the precious resource of water, as my elders have repeatedly reminded us that without the presence of water, no life could survive.

Dedication

I dedicate this scholarly inquiry to the silenced voices and perspectives of the many frontline indigenous activists of the 1960s and 1970s who defended their human and land rights and were never acknowledged for their sacrifices. Many of those who gave the ultimate sacrifice were not prominent national figures but instead often made their homes on the streets of various large cities, and yet were the first to willingly use their bodies and spirits as shields for those who followed. I am forever grateful for the strength, wisdom, and the insight they shared as we traveled back and forth across Indigenous America during the 1970s.

Chapter One

INTRODUCTION

This study is designed to answer four primary research questions: 1) how have colonial and contemporary water management policies, legislation and legal decisions affected the ability of indigenous peoples in Canada to exercise their rights to water; 2) to what extent do indigenous oral narratives, *Syilx* narratives in particular, provide evidence of indigenous customary law in respect to water resources; 3) how might indigenous oral narratives and customary law in respect to water inform the process by which indigenous water rights can gain legal recognition in Canada; 4) how might the recognition of indigenous water rights contribute to the improvement of water management regimes for the general Canadian population?

The history surrounding the water rights of indigenous peoples of Canada from the indigenous perspective is beleaguered with political and legal interpretations that tend to favor the colonial institutions and settler rights. The history of the province of British Columbia and more specifically the watershed areas that fall within the boundaries of the traditional territory of the indigenous Okanagan (*Syilx*) peoples consistently show a pattern of treatment that hinges on violations of international human rights covenants. The ‘aboriginal rights’ issue in this modern era continues to be a concept that is legally interpreted from the western perspective that denigrates the aboriginal priority rights to water.

This investigation will serve as the basis of an inquiry model to clarify the existence of customary practices over lands and resources within the pre-contact traditional territories of aboriginal peoples and provide scholarship related to their reserved rights to water. To establish a record of continuous land use and occupation it will be necessary to provide pre-contact evidence through the *Syilx* oral tradition. The social, cultural, and political institutions of the

Syilx and other Salishan tribes were and continue to be reliant on the oral tradition. Therefore it will be an imperative to establish the existence and practice of laws related to water, as found within the oral narratives of the *Syilx* and other Salish societies.

The Supreme Courts of Canada, the United States and Australia have set legal precedents through rulings that indicate that concepts of property ownership and rights associated with customary practices existed over a long period of time prior to European contact. However, in this modern era there still remain a myriad of unanswered questions pertaining to the rights of the indigenous peoples of British Columbia. I argue that the development of rights by the dominant European settler populations of the Americas was maintained through the evolution and subsequent growth of globalization. Throughout the North American colonial period to the present, economic and military globalization has transformed and adapted to meet the needs of the settler populations. The social and political changes came at great cost to the indigenous peoples as their customary laws that governed both the human inhabitants and the natural world were ignored.

It will also be my intent to show that the oral tradition of the Okanagan (*Syilx*) hold the original or customary laws of our people and remain, in this contemporary era, as the basis of our interactions with the natural world and its bounty. I will therefore propose a method for identifying and extracting the customary laws regarding water from the oral tradition. My specific focus will be on the Okanagan valley (Canada and the United States) as the forty-ninth parallel split our Nation into two separate but equal parts.

Research interests, objectives and personal background

I want to make it very clear at the start of this examination that the determinations and opinions within this water rights related research are my perspectives and conclusions, not those of the Okanagan Nation Alliance (ONA) or Colville Confederation Tribes of Washington (CCT) or for that matter any other aboriginal tribal group.

After completing a water-related research project to meet the requirements of my Master of Art degree at UBCO, I came to the conclusion that further research on the topics of indigenous water rights and customary laws needed to be undertaken. While there has been a great deal researched and written on the subject of indigenous water rights it became apparent during my research that there was little written on the customary laws, as based within the oral tradition of indigenous peoples. In order to fill this gap concerning indigenous water rights, customary laws, and the oral tradition, I focused my doctoral research on these topics.

I am a member of the Colville Confederated Tribes of Washington and to the best of my knowledge I am of mixed aboriginal heritage. My immediate family are descendants of the Entiat, Methow, Chelan, Wenatchi, and Lakes tribes. My maternal grandfather, Felix Grunlose was a first generation descendent of the Iroquois guides that accompanied the early French fur traders into this region.

During my youth I understood and spoke the Wenatchi language but through non-use, I now have forgotten my mother tongue. Currently, I do not consider myself fluent in the Okanagan's (*Syilx*) language (*Nsyilxcen*) yet I do have command of a few hundred words and names. Therefore, I consider myself to be of a colonized, assimilated, and acculturated mind and as a result do not speak on behalf of or represent the traditional voice or viewpoint of any aboriginal group.

What I do bring to the table for my people is my personal life experience that includes front line activism, conflict resolution skills, community building, and a higher learning education. As mentioned earlier, my academic research interests revolve around the life giving resource, water. Speaking from an aboriginal and personal perspective I understand the sacred aspect of water as throughout the years I have spent many days in ceremonies which required total abstinence of water intake.

Many years ago I witnessed *Syilx* elders opening up traditional gatherings with a prayer. To my amazement, the first acknowledgment was to the water and the giving of thanks that since the beginning of time it was the basis of life and that this life as we know it might continue into the future. These elders were not educated in the western perspective and I came to the understanding that they had command of an ancient knowledge system that in my opinion surpassed any form of European introduced knowledge.

I have taken what little my colonized mind could theoretically ingest and borrowed from these *Syilx* elder's voices in my attempt to rationalize and develop a new theory and perspective on the aboriginal water rights in Canada.

Methodology

The research methods employed in this inquiry will include the collection and analysis of historical archival data, government records, review and analysis of historical ethnographic and archeological literature, interviews, and interpretations of previously published oral narratives. Therefore the analysis of secondary sources pertaining specifically to concepts of international law is critical, as this inquiry will provide an insight on the manner in which the colonial

governments and their courts base their challenges to the existence of aboriginal laws prior to European contact.

The *En'owkinwixw* is a *Syilx* epistemology which is reliant on the integration of diverse theoretical approaches and perspectives. For this study the research will be guided through this interdisciplinary transformative strategy that is dependent on a whole systems approach that encourages the exchange of diverse ideas and perspectives concerning the events that have led to the current infringement on the aboriginal water rights in Canada.

This indigenous *Syilx* analytical methodology incorporates and encourages the most opposite and diverse theories and perspectives based on data accumulated from the youth, elders, mothers and fathers to collectively arrive at the best solution to a given problem (Armstrong and Cardinal 1991:70,102). The *Enowkinwixw* approach maintains that existing life forms in the natural world have status, rights and privileges that are equal to humans and all those benefits must be recognized and protected. Therefore, the *En'owkinwixw* epistemological approach, as applied in the academic setting, is dependent on two substantial factors: firstly, the inclusion of diverse theoretical worldviews; secondly, the issuance of a challenge (to oneself or others) to implement the accepted academic theories and methods to develop an integrated systems approach that benefits the human population and the ecosystem as a whole.

Although broad and inclusive in approach, the *En'owkinwixw* methodology also requires that the perspectives of *Syilx* elders and knowledge keepers be fully and clearly represented in the study, and that the relationship of language to *Syilx* knowledge be respected. The *Syilx* language is the foundation of the traditional knowledge systems and a resurgence of a collective responsibility to the *timxw* (sacred life force of all things) has altered the consciousness of the individual, family, community and Nation.

The interview process for this research project will be designed to illuminate the existence of a *Syilx* legal theory. In this theory are water management laws that are found within the oral texts of the *Syilx*. It is of great importance for this investigation to have the ability to compare the oral narratives of other Salishan-speaking peoples to establish that the *Syilx* were not functioning in isolation, especially in regards to the management of natural resources. The interviewees were asked to share their knowledge of traditional oral narratives that are specifically related to the manner in which indigenous peoples were guided by a system of laws that governed the use of water systems within their traditional territory.

Following research protocol I approached the Chief and Councils of the Penticton Indian Band (PIB) and the Kamloops Indian Band (KIB) and clearly explained my research goals, objectives and probable outcomes of this water rights related research. After answering questions from the Chiefs and Councils of these political governing bodies I received written permission and verbal approval to conduct the interview process.

I also met separately with the Okanagan Nation's Traditional Ecological Knowledge (TEK) advisory council and the *Secwepemc* (Shuswap) "Fire Keepers" advisory council. I gave both advisory councils ample time and space to discuss the culturally sensitive aspects of the project and they were given the opportunity to revise or voice their objections to any part of the interview process. Both TEK advisory councils recommended that this project be approved and it was then sanctioned by those in attendance.

Upon receiving written and verbal approval from the Chief and Councils of the PIB, KIB, and the *Syilx* and *Secwepemc* TEK advisory councils, I submitted an application to the UBC Ethics Board for approval to conduct a set of interviews as a graduate researcher.

Three traditional knowledge keepers and active land users who are members of the Okanagan Nation were interviewed so that they might divulge in their own words the manner in which the management and governance laws of the *Syilx* are embedded within the oral tradition. I interviewed four *Secwepemc* knowledge keepers who possess a deep understanding of the manner in which the oral tradition has provided a system of laws that were intended to determine water governance and management.

It is my intent to include the brother nation of the *Syilx*, the *Secwepemc*, as not too far in the recent past (a few thousand years) these two Salish tribal groups were one people. The oral traditions of the *Secwepemc* are an important part of this inquiry based on the fact that the narratives are used in a remarkably similar manner as the *Syilx*. The *Secwepemc* stories and personal perspectives of the interviewees will be used to assert that *Sn'klip*'s laws are present within other Salish tribes.

It will be my intent to coalesce two diverse knowledge systems or ways of knowing, TEK and western scientific knowledge (WSK), into a collaborative approach that juxtaposes historical and scientific evidence with the aboriginal oral narratives (*captikxw*) that will provide evidence that the pre-European contact *Syilx* societies functioned under customary laws. The oral sources of law, history, social teachings, political instructions, prophecies and ethical responsibilities to the natural world are embedded within the *captikxw*. The need for a comparative study that revolves around Canadian and United States case law is warranted as legal determinations made in the Supreme Courts have significant impacts on aboriginal water rights.

Chapter Two

SYILX HISTORY

The *Syilx* inhabit the Interior Plateau region of the Columbia River Basin and live in near proximity to four trans-boundary rivers found within their territory - the Columbia, Okanagan, Similkameen, and Kettle Rivers. The arid environment of the Interior Plateau region of the Pacific Northwest contains numerous rivers that historically served two primary purposes for the indigenous inhabitants: firstly they provided spawning grounds for migrating salmon; secondly they provided a transportation system.

The land and environment of the Interior Plateau region is comprised of a vast array of geographical formations and climatic zones. Included within this diverse landscape are arid desert regions, grasslands, alpine mountain regions, forests, wetlands, and a major river system that was supported by numerous tributaries. In essence the environmental conditions of the traditional territory of the *Syilx* could be predominantly described as being arid and concurrently abundantly blessed with water.

A great deal of the region that became the traditional territory of the *Syilx* was covered by glacial ice prior to human habitation. The glaciation of this region came in what was described by Dan O'Neill (2004:11) as fluctuating cycles of warming trends followed by cooling periods with the last interglacial freeze beginning twenty-eight thousand years ago. The three thousand-mile-long ice sheet that covered this region was named the Cordilleran and according to O'Neill (2004:12) the ice field extended and retreated during the fluctuating cold cycles.

Archaeologist Richard Daugherty (1959:13-14) contends that as the Okanagan glacier receded it allowed new species to create a new and vibrant habitat in the region that included

yellow pine forests and abundant grasses. Following in the wake of the northward retreat of the Cordilleran glacier was a diversity of flora and fauna that provided an abundant food resource for the first human inhabitants of this region. Daugherty (1959:14) proposes that another climatic phase occurred approximately 7,000 years ago and was marked by higher temperatures and resulted in a drier climate in this region and the first emergence of a semi-desert environment. Approximately 4,500 years ago, according to Daugherty (1959:14), yet another climatic change called the Medithermal Period engulfed the Interior Plateau and this cool moist climate lasted for approximately 2,000 years.

It is the contention of historian James Baker (1990:26) and *Syilx* scholar Dr. William Cohen (1998) that the Okanagan tribes have occupied the Interior Plateau region for at least the past 10,000 years. Toni Linenberger (1998:2) and Eugene Hunn (1990:6) agree that carbon dated archeological evidence places human habitation along the Columbia River soon after the glacial retreat between 9,000 to 11,000 years ago in the Lind Coulee region.

An important part of this study will be to provide a historical documentation that supports the contention that the *Syilx* occupied and used the lands and resources well before the period when Europeans arrived. Without question the famous salmon fishery at Kettle Falls was the largest and most important gathering site on the Columbia River for the Interior Salish, especially those tribal peoples that controlled and lived at this location. As a result of an archeology study conducted at Kettle Falls, David and Jennifer Chance (1977:1) concluded that this famous fishing site was inhabited and continuously occupied for at least 9,000 years. According to Armstrong et al. (1994:1) the *Syilx* assert their presence in this region since the “beginning of people on this land.”

An earlier study (Sam 2008) revealed the radical ecological transformation of the water systems within the traditional territory of the *Syilx*. Since European contact and the eventual engulfing of *Syilx* territory into parts of the State of Washington and the Province of British Columbia, the ability of the *Syilx* to exercise and practice their ancient land use practices has been severely restricted. According to the *Syilx* the pre-contact human/land relationship underpinned the governance system that guided the social and political institutions. Changes to these social institutions were caused by the direct interference of the Europeans as they altered the ecosystems and upset dynamic equilibrium in this region.

While it is my intent to offer an indigenous/aboriginal perspective on the rights to the natural resource of water it will also serve the general public of Canada to understand the history and methodology of how their European colonizing ancestors came to power in North America. I undertake an inquiry on the history of the early formation of economic and military globalization and argue that the current phase of globalization is not only an extension of this era but entirely consistent with it. It is also my intent to be able to present the historical sequence of globalization so that indigenous/aboriginal peoples understand the reasoning behind the colonization of the Americas, so as to begin a process of internal social and cultural remediation and healing.

Water has become a global issue of great concern to most if not all economically developed or developing nation-states. Central to the modern issues surrounding the human rights to this natural resource are conceptualizations of law that are specific to the rights of ownership through the assertion of political or military dominance. Melissa Scanlan, a California public-interest attorney, is cited by Snitow et al. (2007:158) as follows:

Since the fourth century we've known, based on Roman law, that there were things people couldn't own, and water was one of those things...Water was

considered a commons, it was something that was shared by the public and couldn't be owned by any one person.

Scanlan wrote these words while working on a public trust doctrine and acting as co-counsel in a remediation process in California. The essence of the process clearly indicated that the State retained a usufructuary right that pertained to the use of water while clearly stating that California did not actually own the waters within State boundaries.

The *Syilx* argue that their identity and survival is underpinned by their long term harmonious relationship with the land and water. The ability of *Syilx* to have survived upon the land over thousands of years was based upon the principle of reciprocity. The basis of claims to the rights associated with the long-term occupation of their territory is understood by the *Syilx* to be based within the development of a harmonious and reciprocal relationship with the land and water. Up until early in the 19th century the Interior Salish tribes in the politically controlled approximately 1,000 miles of the 1,200 hundred-mile length of the Columbia River. Richard Scheuerman (1982:17) in *The Wenatchi Indians: Guardians of the Valley* cites the journals of Lewis and Clark as they documented groups of Salish people (Wenatchi) occupying lands as far south as the mouth of the Klickitat River.

At first European contact in 1811, the geographical boundaries of the traditional territory of the *Syilx* were described by North West Company fur trader Alexander Ross (1969) as being approximately 500 miles in length and 100 miles in breadth. The territory extended into the Columbia Basin area in the east to the summit of the Cascade Mountain range in the west, to the headwaters of the Columbia in the north and to the south extended a short distance beyond the confluence of the Okanagan and Columbia rivers. Within the boundary demarcations the geographic area was substantial and the ecological niches ranged from low-lying desert areas to high mountain alpine regions.

Bruce Mitchell (1968) in the article “By River, Trail and Rail” written and published in the daily newspaper *Wenatchee Daily World*, states that the area surrounding the Wenatchee River in the south to the southern portion of the province of British Columbia fall completely within the traditional territory of the Okanagan.

It should be noted that shared use and occupancy was evident in the north between the Salish speaking Shuswap and in the south with the Sahaptin speaking bands. Historian Richard Scheuerman (2005) notes that around the Wenatchee fishery the Sahaptin speakers freely intermixed with the Wenatchi and other upper Salish bands, most probably referring to the Chelan, Methow, and Moses bands.

As mentioned the *Syilx* have maintained control of this vast Interior Plateau region for thousands of years prior to the colonization of North America by Europeans. A geographer for the North West Company, David Thompson, and his party descended the Columbia River and stopped over at the famous *Syilx* fishing station at Kettle Falls in the spring of 1811. Immediately following the David Thompson expedition were explorers and fur traders that were privileged to witness the rich biodiversity present in this region. Arguably, the *Syilx* were quite possibly one of the last tribal groups in the Interior Plateau region to come into contact with Europeans and before the end of the first year of European contact were introduced to a foreign market-based economy. According to *Syilx* scholar and keeper of laws, Dr. Jeannette Armstrong (2010) argues that the ancient economy of the *Syilx* was based upon principles of reciprocity and egalitarianism. The human/land relationship was partially disrupted as the *Syilx* began to participate in market economics and unknown to them at this time were the negative consequences that eventually resulted in creating an unnatural imbalance within this region.

Dr. Armstrong (2010:1, 38) provides evidence that the *Syilx* communicated through a Salishan dialect which is called *Nsyilxcen* and argues that this language is a reflection of the wisdom embedded within nature. While it is not the primary goal of this research to argue this point, it is important to begin with the understanding that the relationships between the *Syilx* and their natural environment are a critical aspect of this inquiry. In the much broader discussion on Aboriginal water rights and basic human rights at the international level it is an imperative to understand the basis of Armstrong's position as many other aboriginal and indigenous tribal groups base their rights from this human/land premise. I argue in this inquiry that the problems confronting the *Syilx* and other indigenous peoples of North America began approximately two thousand year prior to first contact in this region.

At this time there is a great deal of discussion and controversy amongst aboriginal peoples themselves on exactly how to identify their respective tribal groups when dealing with the colonial governments of North America. According to the American Indian Lawyer Training Program (AILTP) (1999:51) "the positioning of Indian lands on most major river systems, however, has created inevitable and major conflicts with public and private water interests in the water-scarce West." While this statement irrefutably is intended to provide a historical view of water interests in the western United States it has significant impact and influence on the Okanagan (*Syilx*).

Anthropologist Kayleen Hazlehurst (1995:xvii) in the Introduction of *Legal Pluralism and the Colonial Legacy* argues that the Board of Governors in London, England instructed the chartered trade company (Hudson's Bay Company) to engage in fur trade with the Indians with the intent to "dislocate and replace aboriginal customary systems of dispute settlement and social control, and to reshape their ideas and knowledge about law and justice" through its private

justice system. It appears that the intent of the HBC was multi-layered as profiteering from the fur trade economy was its primary goal while assertion of laws and assimilation through religious conversion were secondary outcomes.

University of Manitoba professors Russell Smandych and Rick Linden (1995:1) argue that the Hudson's Bay Company was granted the exclusive right of rule and governance over most of the territory that comprises western Canada under the Charter of 1670. Smandych and Linden (1995:8) affirm that despite the stipulation that the law-making powers were to be for a term of seven years, the HBC continued to assert legal jurisdiction for almost 200 years despite challenges and legal opinions that the Charter was illegal. It is also an imperative to note that according to Smandych and Linden (1995:2) the HBC's intrusion into western Canada marked a period of economic and cultural intrusion into an aboriginal territory that had a complex system of cultural and social institutions that were governed and maintained through customary laws and traditional practices.

Historian Dr. Duane Thomson (1985:186, 188) in his study of white settlement in the Okanagan territory agrees that the *Syilx* were recognized as the chief traders amongst the plateau tribes as their networks extended beyond the territories of bordering tribal peoples (Thomson 1985:186,188). Other historians Walters (1938:74), Scheuerman (1982:18), and Brown (1961:24) concur with Thomson's findings as they note that the *Syilx* trading networks reached as far south as the Walula (Snake River confluence), to the Thompson country in the north, to the west the Pacific Coast and extended to the Plains country in the east.

The *Syilx* were not an agricultural society but instead relied on harvesting the vast amounts of seasonal flora and fauna within their traditional territories for subsistence purposes and trading extensively to disburse surplus goods. *Syilx* trade items included dried salmon, deer-

nets, skin bags, dressed moose-skin, scent, paint or red-ochre, horses, bark made into twine for snares, bone or horn beads, arrow points, roots, wild hemp and berries (Scheuerman 1982:18-19; Hudson1996:25; Mellows 1990:91). With the introduction of a new market-based trade economy the stimulus and rewards of participation led to a shift in social and cultural consciousness that had immediate negative consequences on the local environment and disrupted the human/land relationship. It is historian Carol Abernathy Mellows' (1990:99) opinion that the trapping of fur bearing animals not only had negative effects on the ecosystems but also began a process of eroding the principles of the social and cultural practices of the *Syilx* as they became accustomed to commodity trade goods that became essentials in their daily existence.

As a result of a radical shift in trade practices many formerly abundant game animals became scarce. Peter Carstens (1991:34, 37) mentions the fact that by the 1820s the fur trade in this region was in full swing and that the beaver and other animals, including deer, were being depleted, this all being a direct consequence of meeting the needs and demands of the fur trade.

Since first contact in 1811, the next seven decades reflected notable changes within the ecosystems of the Interior Plateau. Archaeologist David Chance (1986:77) mentions that according to Hudson's Bay Company recorders stationed at Fort Colville that, "by the year 1830 there were no elk in the vicinity and deer were scarce." The elk had disappeared, the beaver were nearly extirpated, and the large packs of wolves, which at one time were counted as running in packs of one hundred, were now reduced to packs of twenty during this same period. Elizabeth Dolby (1973:141) writes in an ethno historical study of the Okanagan Indians that over hunting of the once large herds of elk, moose, deer and sheep led to a severe drop in the large game animal populations as early as 1821.

The *Syilx* territory was essentially cut in half with nearly equal portions lying in the jurisdictions of Canada and the United States; the tribes have been separated into two political entities. This separation had immediate and long term effects on internal social, cultural, and political institutions of the *Syilx*. The imposition of the international boundary imposed restrictions on the accustomed movement of the *Syilx* throughout their traditional territory. It was soon after the Oregon Treaty (1846) that the Indian Wars of 1855 sent this region into being an unstable environment for both Indians and white settlers. It is important to note at this juncture that when the British and fledgling United States governments agreed in principle to divide North America at the 49th parallel with the signing of the Oregon Treaty in 1846 the *Syilx* and a number of other tribal groups were never given the opportunity to participate in these negotiations. From 1846 forward into the contemporary era, the *Syilx* have been handled, managed and dealt with by two separate political and legal systems and political unrest due to the unpredictable nature of the aboriginal peoples of the interior plateau region had significant influence on policy decision making in both the United States and Canada.

According to historian Olive Dickason (2002:303-304) and others (Armstrong et al. 1993:53; Jolly 1999:13) the Joint Indian Reserve Commission (JIRC) was formed in 1876 and remained active until 1878 to resolve a deadlock between the province of British Columbia and Ottawa concerning the land allocation for the Indians of that region.

According to Armstrong et al. (1993:54) Gilbert Malcolm Sproat became the sole Indian Reserve Commissioner in September of 1878 and during his short-lived tenure the size of the reserve allocations in the southern interior was considered to be excessive by the provincial government. Dickason (2002:304) further attests that the JIRC intermittently convened up until 1910.

In an article prepared for the 41st Report of the *Okanagan Historical Society*, Robin Fisher (1977:12, 14) argues that in the summer of 1877 the threat of military action by the Upper Thompson, Shuswap and Okanagan Indians had risen considerably due to the war efforts of the Nez Perce against the United States military. In response to the heightened threat of war in the southern interior and the rising possibility that the southern interior tribes would form a coalition of Indian warriors, the JIRC were essentially forced into making decisions that proved to be beneficial to the interior tribes.

In his 1878-1879 Indian Reserve Commission reports, G.M. Sproat (1879) clearly indicates that the Indians were priority rights holders of the soil and all the water that flowed through or touched their reserves. The commissioner also reported that the threat of war persisted in the Colville district as the United States had refused Chief Moses and his people a reservation that included their traditional lands (Sproat 1879). Within the first decade following British Columbia joining Confederation the province made no reference to aboriginal water rights yet according to Richard Bartlett (1988:45) under Article 13 of the Terms of Union it was suggested that water rights were necessary as the Dominion government was obligated with the responsibility of being a trustee and manager of lands reserved for Indians.

The aboriginal rights to the use and benefit of land (of which water is connected) according to Kelly and Teit (1919:7, 13) were set aside under Article 13 of the Terms of Union and Section 127 of the Land Act of British Columbia. Under Article 13 (1870) there is no express reference to water rights but it did suggest, in vague terms, that there was an obligation to appropriate tracts of land (which included water rights) to be held in trusteeship and management by the federal government as lands reserved for aboriginal “use and benefit.” According to Nigel Bankes (1991:225-226) the 1886 Land Act of British Columbia failed to

provide recognition of water rights of aboriginal peoples that were previously acknowledged as senior rights by the JIRC.

Richard Bartlett (1988:43) argues that BC's reluctance to recognize Indian water rights was in part due to its order of priority, which was to meet the interests of white settlers with the understanding that the province held ownership and jurisdiction over public lands and waters.

This expression of intent may have led to Sproat's mention that Indians of the Province held priority rights to both land and water within the JIRC reserve allocations in British Columbia. Despite the commission's recognition of the existence of aboriginal water rights, settler water licenses were given priority on streams that flowed through reserve lands.

In 1888 and 1889 a list of JIRC water allotments were filed with government offices throughout the Province and according to Nigel Bankes (1991:223) the assigned priority dates of these JIRC filings were later questioned and the Province remedied the situation by declaring that the JIRC and the McKenna-McBride Commission had no clear authority to make allocations of water. The McKenna-McBride Royal Commission was active from 1913-1916 and according to Kenichi Matsui (2009:42) was authorized by the federal government and provincial authorities to settle the interjurisdictional disputes surrounding the Indian land question in the Province. The McKenna-McBride Commission was authorized to create new reserves and reduce the size of existing reserves within the Province of British Columbia

It must be made clear that these reserve allocations were completed by means of an intentional non-treaty process. Derek Smith (1975:185) elaborated in *Canadian Indians and the Law: Selected Documents, 1663-1972*, that the BC reserves were not established through a negotiated treaty process and that the rights associated with land title were determined by a provision under the Indian Act. Thomas Issac (2004:75) argues that the aboriginal priority rights

to land title is embedded within Section 88 of the Indian Act and states that only the federal minister of the Department of Indian Affairs can give consent to any alterations to any treaty or provision within the Indian Act.

Prior to the establishment of the McKenna-McBride Commission the Province of British Columbia created the Board of Investigation in 1909 whose specific duties, according to Bankes (1991:226) were to review the claims of all its citizens that held records of water, or other water rights as determined by any former Act or Ordinance, with the intent to provide the most beneficial utilization of water. Bankes (1991:226) argues that deficiencies and defects in the previously mentioned 1886 Land Act prompted the formation of the Board of Investigation. Over the next ten years the Board predominantly recorded claims of white settlers while Indian Affairs submitted applications for a number of individual bands of aboriginal peoples. Many of the filings by white settlers were submitted to gain access to Indian lands for shared-use agreements or for water-storage; all acts which benefited only the white settlers. According to legal scholar Douglas Harris (2008:181), W.E. Ditchburn, chief inspector of Indian Affairs for British Columbia, and J.W. Clark, a provincial representative submitted a modified report to the province with the hope that the natives would accept the suggestion that title not be a part of the discussion. Ditchburn argued to increase the size of the reserves while Clark insisted on reductions while native leaders called for land title and guaranteed fishing rights (Harris 2008:183).

European colonization inaugurated radical transformations that altered the long-term coexistence between indigenous peoples and their natural world. Land tenure claims and the creation of new geo-political boundaries set in place processes that separated indigenous peoples from their natural world. Forced displacement and imposed restrictions that disallowed freedom

of movement to vital subsistence procurement sites inhibited the ability of indigenous peoples to continue ancient customary relationships and responsibilities with their ecosystems. A central argument by aboriginal peoples at this juncture in Canadian and United States history is that the government policies eroded and continue to abrogate the rights of indigenous tribal peoples in North America.

The overarching question of aboriginal water rights in Canada has been viewed quite differently in British Columbia based on the fact that this Province entered into a clear and distinct manner of dealing with its aboriginal peoples. The most important point that has the current government in an extreme state of anxiety has to deal with the fact that the entire province sits within unceded and non-treaty lands of aboriginal peoples. Representatives of the current federal and provincial government are only too aware of this fact and were subsequently mandated to settle the unresolved land question in British Columbia through the comprehensive treaty process and an accommodation process whose primary goals are to gain unfettered land title for the province.

Water, without question, is the most precious resource to all life on planet earth. In ancient times when humans settled in or around a source of water, use and access was never considered a right or privilege but a necessity of life. Starting a few centuries ago, the concepts of rights over this resource changed and access to water then became very complicated as it was being subjected to a conglomeration of rules, regulations, and laws. In some areas of the world, the scarcity of water has driven those who suffer from its lack of availability to engage in processes that placed into jeopardy the basic human right to water as sources became owned and controlled by foreign transnational corporations.

It is a generalized historical concept that the *Syilx* and other indigenous peoples of North America did not have theories of water rights prior to being taught foreign, civilized forms of constitutional rights. I argue that this is a fabricated European perspective that was clearly intended to relieve aboriginal/indigenous peoples of North America of ownership rights over the natural resource wealth of this bountiful land of which water is fast becoming a more important trade commodity on the global markets. Therefore, detailing the history of economic and military globalization and its impacts on the rights of aboriginal peoples of North America under rules of colonial and contemporary laws is of great importance. It will be my intent to cover the history surrounding the development of a far reaching transformation of tactics that were intended to control and dominate the peoples, land and resources under politically driven policies and laws in the New World.

Indian philosopher and environmental activist, Vandana Shiva (2002:77) in *Water Wars: Privatization, Pollution, and Profit*, argued that the first theory of water rights in the United States was based on the concept of tribal sovereignty under the 1896 Harmon doctrine wherein “states have an exclusive or sovereign authority over waters flowing through their territory.” Human rights and international law expert Siegfried Wiessner (1999:95-96) contends that this doctrine was a clear violation of the previously enacted North West Ordinance of 1787 that stipulated that the “government must act in the utmost good faith towards Indians, and that their lands and property shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress.” In essence, indigenous lands and natural resources were susceptible to transfer of ownership only through defeat, under the rules of war, with these lands being subsequently occupied by the colonizing state and its peoples.

It must be clearly understood that the congressional approved and ratified North West Ordinance of 1787 came just prior to the often-cited Cherokee Nation cases referred to as the Marshall trilogy of the early nineteenth century. As mentioned earlier, water upon these lands and the rights to this resource could then be held in trusteeship for the Indians under management of the federal government. In today's reality the settler societies continue to be granted superior political and legal status in BC as they are being described as being legitimate stakeholders of water resources that originate within the specific watershed that they occupy.

Supreme Court decisions in both the United States and Canada will be discussed in greater detail in chapter four. Of primary concern will be the manner in which these cases infringed upon the aboriginal rights to water despite the appearance of being recognized as victories for aboriginal peoples. *Winters* (1908), *Arizona v. Colorado*, *Washington v. United States*, *Calder*, *Delgamuukw*, *Walton*, will be the cases discussed that determined the different levels of legal infringements upon aboriginal water rights. The overarching impact on the rights of aboriginal peoples will be evaluated. As a result of the *Delgamuukw* decision the onus fell upon indigenous peoples of British Columbia to prove the existence of these inherent entitlements to the land and resources. Although many aboriginal groups consider the *Delgamuukw* decision as a victory, it became abundantly clear that certain entitlements and rights to lands and resources could be extinguished through a consent process.

An important part of this study will be an examination of the oral narratives of the *Syilx* with the intent to provide evidence of the prior existence of customary laws that guided the management and governance systems over the water systems within the traditional territory of the *Syilx*. As a result of the Supreme Courts in Canada allowing the oral testimony being

admitted as historical and legal evidence it will be an imperative to extrapolate the ancient laws that are embedded in the oral tradition.

Chapter Three

GLOBALIZATION¹

In this chapter I examine the historical events that led to the birth of globalization and the subsequent social and political impacts upon indigenous societies and the infringements upon the rights of indigenous peoples. This research is intended to provide evidence of the negative effects of globalization upon indigenous peoples and, in particular, on the natural resource, water. Indigenous rights to water have been severely compromised, abused and infringed upon over the centuries of European expansion and upon arrival of Europeans upon North American shores as the phenomenon of globalization grew in intensity and maliciousness.

The colonial history of North America is based in overt militarism as its governments control and influence dispossessions through military threat masked under the rubric of upholding domestic “laws” that protect trade and commerce dependent on economic benefits arising out of an antagonistic and unjust commoditization of the natural resources of the Americas. Sam and Armstrong (2013:384-385) argue that Indigenous peoples are forced into collaborative actions dependent on political relationships to curtail the unjustifiable acts that threaten their lives existing within the particular ecosystems that are their homelands. It is clear that the foundational principles of globalization impose and maintain the economic structures and its legal underpinnings that are held in place through military dominance. Sam and Armstrong (2013:385) argue that globalization, from the indigenous standpoint, can be thought of as the subsuming phenomenon of colonization engulfing indigenous peoples and their lands in domestic law as an economic order revolving around and centered on the systematic global movement of natural resources situated to benefit foreign investment interests through trade

¹ Some of the issues discussed here have also been published in Sam and Armstrong (2013).

agreement law-making designed to exclude, dispossess and disengage indigenous and local autonomies in decision-making.

The European phenomenon of globalization has had devastating effects on the social, economic, cultural and political structures of indigenous peoples wherever European societies and their culture implanted themselves. In many instances economic globalization is upheld as the primary form of this phenomenon yet there exists another form that assured the prolongation of this phenomenon. One characteristic of globalization that remains intact through the centuries is its violent nature that indubitably is associated with the ability to maintain a large military force.

Therefore, it is my determination that European-style globalization began a few centuries prior to the birth of Christ, as Empires were forming in the Mediterranean region and it is clear that the formation of these powerful dominions were enabled by their military prowess. Social anthropologist Jonathan Friedman (2003:1) contends that approximately 3,000 years ago the dynamics of globalization were based within a reoccurring historical process wherein civilizations expanded and contracted with the rise and fall of centers of accumulation.

The expansion of civilizations as expressed by Friedman (2003) impacted North American aboriginal societies since European arrival with methods of colonization that oppressed the people and began processes of resource exploitation. Since the arrival of Europeans the history of colonization methods reveal the imposition of policies that concurrently disrupted ancient social and political institutions of aboriginal societies and had negative impacts on the natural world environment of this continent.

When the Europeans arrived with their idealist notions of being a superior civilization the early settlers began to transform the aboriginal societies and the land based on European cultural

values, laws and knowledge systems. What is not told is that aboriginal societies (speaking for the *Syilx*) had known for centuries or millennia that the white man was going to make his presence in our lands. The Eurocentric perspective of history of the Americas supposedly began with the arrival of Europeans while aboriginal societies had been functioning under organized governance systems for thousands of years prior to the arrival of the white man.

A great number of aboriginal peoples of North America do not understand the political circumstances of world affairs during the period of European expansion outside of their geographic boundaries and the subsequent impacts it had on both the lands and peoples of this land. I argue that the history of colonization of the Americas by Europeans had tremendous influence in the modern era by the phenomenon of globalization. It is my perspective that the phenomenon of globalization started approximately 2,500 years ago as European societies developed inter-regional systems of trade that became dependent on political control and domination of land and resources. As will be made abundantly clear in this study other contemporary scholars have also positioned this time period as the origin or birth of this phenomenon.

Globalization may have had its origins in Southeast Asia at a much earlier time, and yes, this may be true, but I argue that it was the European version of globalization that had direct influence on the colonization of the Americas. The archaic form of globalization is the phase that I will begin with and its formation coincides with a period of European history prior to the birth of Christianity. The roots of globalization may have extended much further back into history but I believe that the history of civilization in this region provides ample evidence of its contemporary form and origins in this time period.

The ever controversial Cherokee author and scholar, Ward Churchill (2010:17) quotes Lakota (Sioux) elder, Matthew King in a conversation that took place on the Pine Ridge Reservation in 1982 when discussing the importance of history:

The reason all those things are true is because you don't know where you've been. What I'm saying is that, other than little dribs and drabs, maybe, you don't know your history. You don't really know where you're coming from. So you don't know how things were or how they got to be the way they are. That means you can't truly understand the situation you're in, not even the real nature of who and what you think you're fighting against. Since you don't really know your enemy, you can't see what must be done to defeat him or heal the pain he's caused.

The simple words of Matthew King provide incentive to begin with a history of globalization. What aboriginal peoples understand about history is that when the white man arrived many bad things occurred to our people and land as a result of their methods of colonization. It is my opinion that the phenomenon of globalization is a concept that set the stage for the colonization of aboriginal societies and lands.

The late Six Nations scholar, John C. Mohawk also gave great incentive to begin with a historical overview as it was a critical part of his methodology to begin any lecture or presentation with a historical overview of events that had direct relevance on the subject of his discussion. Therefore, it is an imperative to provide a starting date of the phenomenon of globalization since the subject has many dates accredited to its origin. There are those scholars and economic theorists who have developed perspectives on the birth of the phenomenon of globalization and there appears to be no consensus on a precise date. Yet, a central theme is that globalization was bestowed with such theories as the 'three wave theory' as presented by Pulitzer prize winning author, Thomas Friedman (2005:9) or 'trends' as A.G. Hopkins (2002:6, 7) argues and it appears that other perspectives fall under the umbrella of these two theories.

In similar fashion the definition of globalization has many different but related components that revolve around the inter-regional and global expansion of economic capitalism. It was only after interregional trade practices became firmly established in Europe that individual countries began forming international political directives that in turn, guided the development of capitalistic trading practices whose primary goals were to control and dominate peoples and resources from distant lands. It is during this era that the ideology of globalization truly became an instrument that was supported and enforced by the political directives and visions of European-based societies, and subsequently this ideology spread across the globe.

A team of reputable economists, social and political scientists, David Held and associates (1999:15) assert that globalization is a concept that implies, “a stretching of social, political and economic activities across frontiers such that events, decisions and activities in one region of the world can come to have significance for individuals and communities in distant regions of the globe” (1999:15). Held *et al.* (1999:143, 149-150) also proposes that the process of globalization is continually growing in intensity as the exchange of trade goods expands globally and the political agendas of nation-state governments are ensured through the presence of military forces. Arguably, the conceptualization of the earliest form of globalization, according to Held *et al.* reaches back to the third millennium BC in the Mesopotamia region while noting that Babylonian and Indian societies were engaged in trade practices as far back as 800 BC (1999:152).

Aboriginal historian, John C. Mohawk (2000:46) argues that the building of empires, most notably the Roman Empire, was dependent on its military conquests in the Mediterranean starting as early as the eighth century BC. The development, growth and transformation of globalization during this period were dependent on the ability of military forces to perpetrate acts

of violence in order to maintain political dominance over an occupied territory. Jonathan Friedman (2003:2) follows a similar line of thought as he contends that the expansion of European capitalism flourished with the shift of regional centers of accumulation. The expansion and transformation of globalization, according to Friedman (2003:17) fragmented and polarized former centers of accumulation through the systematic formation of transnational economic, social and cultural networks.

Mohawk (2000:48) also contends that two factors allowed the Romans to maintain and expand its domination of this region; first, great wealth from conquered lands poured into Rome; second, the treatment of conquered peoples. The periods described by Held *et al.* and Mohawk are marked by periods of militarism with the intent to control and assert authority over distant lands and their human inhabitants. German philosopher, Oswald Spengler (1924:42) asserts that the Roman Empire maintained itself through cultural imperialism, inferring that it attained and maintained its structure through military force and occupation of these recently conquered lands. According to Classical Greek historian, Michael Grant (1991:228) the cultural imperialism mentioned by Spengler was maintained through the exchanges of precious metals, ivory, and other exotic trade goods from distant lands, thus supporting the Roman Empire's vast mercantile trade network.

Roger Burbach, Orlando Nunez and Boris Kagarlitsky (1997) define globalization as, "the breakdown of national boundaries in economic and political life." Although the definition of globalization by Burbach *et al.* (1997) is obviously describing the postmodern version of globalization it is important to take into consideration the links between the archaic forms of economic globalization and its contemporary form. Globalization historian, Jan Nederveen Pieterse (1995:45) describes three separate and distinct forms of globalization: first, the world is

becoming more uniform and standardized and is linked to modernity; second, in economics, it refers to economic internationalization and the spread of capitalism; third, in international relations, the increasing of interstate relations and the development of global politics.

The views of Burbach et al. (1997) coupled with the perspective of Pieterse (1995) are indicative of globalization as being linked to various time periods, while transgressing social and political nation-state boundaries as it grew in intensity to form a global network of economic exchanges that directly impact and drive international relationships. The archaic forms of globalization as described by Burbach et al. (1997) and Hopkins (2002) were the nexus that allowed this phenomenon to develop and evolve from its original and “primitive” existence into a global encompassing occurrence that has dictated the politics of colonization.

A.G. Hopkins (2002:3-4) describes his perspective on the historical forms of globalization as being: archaic, proto, modern and postcolonial. According to Hopkins (2002:4) the archaic form preceded industrialization and the formation of the nation-state therefore it occurred at or before the fifteenth century. There is room for error in this statement by Hopkins as the formation of the nation-state has many differing attributes attached to it such as sovereignty, a national consciousness, leadership, and a political identity. Hopkins (2002:7) describes proto-globalization as occurring between 1600 and 1800 when state systems in Europe and Asia reconfigured their economic and political policies. Modern globalization began in 1800 and is linked to these key factors: the rise of the nation state and the rapid spread of industrialization, population growth, free trade, imperialism and war. Hopkins (2002:9) attributes the date of 1950 as the beginning of postcolonial globalization as this era is marked with the realignment of the global economy that he contends is driven by interindustry trade.

Hopkins (2002:19) argues that globalization has eroded the importance of territorial boundaries, which are of central importance to national sovereignty and international relations.

Hopkin's evidence and argument of archaic globalization having its roots in the pre-industrial age and linked to an era prior to the development of the nation-state is a realistic proposition based upon historical fact. Environmental policy consultant and author, Alex MacGillivray (2006:7, 15) presents archaic globalization as not being driven by the West (Europe), but instead argues that China and Islam had a much greater influence on its global spread, subsequently determining its birth in the West in the fifth century.

According to Thomas L. Friedman (2005:9) and Mohawk scholar, Taiaiake Alfred (2005:234) the discovery period of the 'New World,' coincides with the first wave of globalization. Their collective perspectives identify the establishment of trade exchanges between the Old World and New World as the process of European colonization in the newly 'discovered' lands developed. Initially, during the earliest part of the discovery era in the New World the exchange was one sided as the bountiful precious metals present in the New World were shipped to the growing capitalist centers in Europe. Renowned author and sociologist, Saskia Sassen (2006:83) provides an example, as official records of Spain provide evidence that the country received shipments of silver that amounted to 18,000 tons and 200 tons of gold, all of which came from the Americas. The 'first wave of globalization' as proposed by Thomas Friedman (2005) and Taiaiake Alfred (2005) is in alignment with the time period of Roger Burbach (2001: 21, 22) as he contends that the first epoch ran from 1492 to 1789 and is marked with the emergence of capitalism as European expansion reached the Americas.

Held *et al.* (1999:152) and John Mohawk (2000:46) contend that the earliest form of globalization began eight centuries before the birth of Christ as Babylonian and northern Indian

societies were engaged in trade exchanges of raw materials. I argue that empire building in the early European, Mediterranean and Asiatic regions had an effect on the manner in which militarism became an integral part of the phenomenon of globalization.

As early as the eighth century BC, historical documentation clearly emphasizes the use of military force to gain control and domination over populations and the territories that were inhabited by those societies. The use of military power is the fountainhead of globalization as the phenomenon spread across Europe. According to Held et al. (1999:87), as a consequence of the assertion of military power to expand the territorial possessions of states, the reverberating repercussion of globalization continues to have effect in the contemporary era.

The following describes some opinions of early empire building. Michael Grant (1991:115) notes that prior to the fall of the Roman Empire in 500 A.D. the territories under its authority extended from, “the Adriatic to Soviet Central Asia and Pakistan and India...” and in part were a result of the aggressive and wide reaching conquests of Alexander the Great.

Basing my perspective on the various sources, the founding principles of globalization are linked to systems of trade that were spread to distant corners of the world and maintained through the military dominance. I view the birth of the phenomenon of globalization as occurring when the Greeks first founded Rome, which according to Mohawk (2000:46) occurred in 753 B.C. Of course over the succeeding centuries globalization evolved with advancements in military technologies and the ability to travel to distant lands. As Burbach et al. (1997:42) explain, the culture of power originated in the fifteenth century as Western Europe expanded and implanted its monarchical rule and the contemporary forms of capitalism upon the New World. Historical social scientist, Immanuel Wallerstein (2003:46) argues that globalization has existed

for some five hundred years (1450) and is linked to the development of the capitalist world-economy.

The transfer of this cultural political value to the New World, mainly speaking of the hope of building a stable environment for the extension of monarchical domination was the purpose of these explorations. At the time of European expansion in the America, it is clear that the monarchies of Europe were intent on making capital gains from the resources found in the Americas. Therefore, economic globalization became a capitalist venture that was spearheaded by the purposeful intent of transferring the natural resource wealth from the New World to the Old World.

Thomas L. Friedman (2005:9) and Roger Burbach (2001:21) both identify the period on or about the year of 1800 as the beginning of the second phase or wave of globalization and mark its appearance with a growth in industrial capitalism that in turn came into existence as multinational companies went global. Friedman (2005:9-10) identifies the second era of globalization as beginning in 1800 and extending to the beginning of second millennium and notable influences in the development revolved around the multinational companies going global.

Friedman (2005) and Burbach (2001) argue that it was during this time period that multinational companies emerged allowing them the ability to extend their trade influence on a massive global scale. By this time large oceans of the world were being crossed with relative ease and global trade between trans-Atlantic continents allowed for the rise of industrial capitalism. It is my opinion that this period is marked by two factors that were critical both to the development of globalization and to the perpetuation of economic control and domination over aboriginal lands and resources. The technological advancements that allowed mass

production of consumer trade goods to sustain the needs of foreign export market a process that was dependent on fast and easy access to cheap raw materials. To gain access to lands and resources during the early nineteenth century it became an imperative to assert the European version of private ownership, a conceptualization that systemically instigated devolution of aboriginal tenure.

Economist, Alan Shipman (2002:111) contends that industrial capitalism allowed for the global expansion of fixed capital enterprises which quite possibly allowed for the emergence of the nation-state to become a dominating factor in the of advancement global trade exchanges between the trans-Atlantic continents. Evidence provided by Shipman is based upon the growing exchange of trade goods across the Atlantic Ocean by the beginning of the nineteenth century as the United States gained its freedom from Britain, a move that allowed for its venture into the capitalist system.

From the beginning of the nineteenth century the political landscape in the Americas, most notably the United States and Canada, were firmly establishing themselves into the global trade markets. This time period was the end of the market-based fur trade economy and other forms of natural capital were being shipped to the global markets. To meet the growing land requirements for the settler populations it became necessary for the United States government to develop and implement policies that opened up large tracts of lands for economic exploitation.

According to Thomas Friedman (2005:9-10) the year 2000 marked the beginning of the third and current phase of globalization as the world was shrunk from, “a size small to a size tiny and flattening the playing field at the same time.” The model presented by Hopkins (2002) describes the era of postcolonial globalization as starting with the year 2000 and is described as having similar qualities in regards to a realignment of the global economy. Therefore as

Friedman argues it became much easier for developing nations to become active participants in the new global economy by the levelling of the playing field. Without taking into consideration the overlapping time period in the Friedman and Hopkins models of globalization both describe a beginning wherein inter-regional trade practice, predominantly European-based exchanges, exploded and then became an international phenomenon.

‘Modern’ is the most commonly used term to describe this era of globalization and its current impact on aboriginal peoples have grown as the needs to fuel the globalization machine has become increasingly dependent on the natural resource wealth found on aboriginal lands. Executive director of the International Forum on Globalization, Jerry Mander (2003:110) asserts that modern globalization “is no accident of evolution,” noting that it was purposefully created by human beings with specific goals that value, above all others, “corporate agendas and mandates.” It is not important that Mander’s perspective is focusing on the present but on the reality of the immense social and political pressures asserted under the proposed and ongoing resource developments of domestic and international corporations. The indigenous perspective of the corporate agendas and mandates in many instances indicates that indigenous lands and resources continue to be the target of these operations.

In this era of modern globalization “Indian reservations and reserves” in North America continue to hold significant deposits of the last remaining and accessible natural resources found in the Western hemisphere. Maori scholar Makere Stewart-Harawira (2005:101) contends that nation-state government’s view the earth’s resources as a ‘standing reserve’ that exists to benefit and profit the global economy and is considered as available for exploitation and development by governments and corporations of modern industrialized nations. Indigenous environmental rights activist Winona LaDuke (1999:189) notes that this ‘standing reserve’ of natural resources

found on Native lands comprise of, “Two-thirds of the country’s uranium, one-third of all western low-sulfur coal, and vast hydroelectric, oil, and natural gas resources.”

According to Alan Shipman (2002:117), the biggest remaining natural resource deposits in the world are found primarily within indigenous territories and are considered commercially ‘useful’ by rich industrial countries. The abundance of natural resources available within indigenous territories is making these resources a target for large-scale resource developments by nation-state government’s who coincidentally have supported or initiated processes that have allowed development projects to move forward.

Ecological economist and former Senior Economist for the World Bank, Herman Daly (1996:18) argues that the current state of globalization is upheld by, “free trade, free capital mobility, and free (or at least uncontrolled) migration,” and is responsible for the erasure of national boundaries for economic purposes. What Daly proposes is that there is a massive global movement or exchange of both hard capital, natural capital, and humans that are equally interdependent on one another which have created fluidity that blotted out international political boundaries and created international free trade zones. I agree with the perspective of Daly as the global economies are so intertwined and influenced by each other that when the bells ring to open the domestic trade markets they are impacted by markets that are closing down on the other side of the world.

As noted by Mander and Daly, the institutional structures of modern corporate globalization has specific agendas and mandates that are based within politically created industrial free trade zones wherein infusion of capital allows for the extraction of natural capital resources. The participating nation-states are required to be members of the World Trade Organization (WTO) or the General Agreement on Tariffs and Trade (GATT), which offer

protectionist policies (trade, environmental) that allow them to operate undisturbed by local and national political bodies. Assertion of these economic sanctions in the form of structural adjustment programs (SAPs) is what gives these multi-national corporations the freedom and authority to extract resources from poverty stricken and lesser-developed countries.

To maintain dominance in the global economy the United States are considered as the world's poster child for engaging in abusive tactics on indigenous peoples in order to gain access to natural resource capital. Foreign direct investors are hurriedly offering proposals for cash injections into poor undeveloped Third World countries. Development loans offered by the WTO and the World Bank (WB) continue to impose severe structural adjustment programs that impact the health, education, and welfare programs of borrowing countries. There are too many instances where the health of indigenous peoples are not being considered as these corporate investors often are the perpetrators of environmental degradation within ancestral lands of indigenous peoples.

Modern economic globalization cannot be addressed without including the ideologies of corporate globalization and the manner in which these global institutions aggressively hold on to their authority through direct acts of militarism. Economic globalization is driven by a number of factors: access to cheap natural resources and products, political aggression, and through real or perceived threats of military intervention. Bolivian indigenous leader, Oscar Olivera (2004:14, 118) argues that when a foreign multinational corporation assumed control of the water systems in Cochabamba, Bolivia it led to what became widely known as the 2000 Water War. The privatization of water in this city led to protests and eventually fighting in the streets of Cochabamba between Bolivian peasants and police and military forces that were intent on protecting the rights of a foreign direct investor. This is one example of many that have taken

place in the Third World while many other stories of police and military brutality often go unnoticed despite the perpetuation of violence that far too often has deadly consequences for the indigenous resistors.

Indigenous activist and scholar Mililani Trask (2009:225) argues that in most of the territories occupied by indigenous peoples around the world, violence and militarism has impacted both the land and peoples. Trask (2009:229) also points the finger at the World Bank, International Monetary Fund (IMF), transnational corporations (TNCs), and the Overseas Development Agencies (ODA) as being responsible for massive ecological devastation to indigenous lands and violence against indigenous peoples.

Globalization in my opinion had its origins at or beyond the time period of 800 B.C as proposed by Held et al. and Mohawk. And, yes, the West's version of the phenomenon was without a doubt influenced by the East (Japan and China) yet the Eastern version did not travel across the Pacific Ocean to dominate and control the Americas. Cultural imperialism played a vital role in the development and implementation of globalization within the New World. History is littered with volumes upon volumes of written sources that provide evidence that cultural and political domination was carried out and maintained through military force as settler populations occupied indigenous lands. Many reputable scholars from various disciplines have concurred that globalization erupted with the advent of capitalism and likewise the dependence on the growth of the sixteenth century version was without a doubt propped up with precious metals that were extracted from the Americas.

It is important to establish the manner in which indigenous peoples were divested of their lands and resources through what became known as the legal doctrines of dispossession. When the first European explorers witnessed the indigenous peoples of the New World they were living

in what they described as a state of nature. Historical theorists have made numerous assumptions that were based upon European concepts of human and cultural superiority that justified the taking of Indigenous lands and resources while concurrently and wrongfully subjugating indigenous peoples to foreign-based legal and religious doctrines that were being manipulated to meet the unforeseen circumstances of colonial domination. The foreign doctrines that were subsequently implanted and militarily enforced in North America had their origins in a foreign land and based upon European systems of law.

Therefore, at this juncture of this study it will be my intent to develop scholarship on the manner in which principles were deliberately embedded within the Doctrine of Discovery to justify the taking of indigenous lands and resources in North America. The justification of the colonizing and conquering of Indigenous peoples and their territories around the globe were cloaked under two legal doctrines of dispossession; the Doctrine of Discovery and *terra nullius*.

The European nations developed the Doctrine of Discovery to alleviate the potential of inter-regional warfare amongst them as they set out to expand their colonizing efforts.

Economist, Jennifer Roback (1992:11) insists that the rights of discovery was a controversial issue amongst the European nations as they negotiated amongst themselves the spoils of discovery, which included the lands and resources of indigenous inhabitants of the North American territory. The self-serving Christian enlightenment principles of the doctrine of discovery enabled the European powers to envelop the newly 'discovered' lands and its inhabitants.

In order to justify the taking of indigenous lands and the extraction of precious metals (gold and silver), the European states already had tools of colonization that were used in Western Europe by religious crusaders as they conquered lands and peoples under directives of the

Papacy of the Roman Catholic Church. Therefore, from the outset of this inquiry on the Doctrine of Discovery, I question the Church's role of being a legal adjudicator of international law. American Indian law expert, Robert J. Miller (2010:9) argues that the Doctrine of Discovery is one of the earliest examples of international law and proposes that it was developed by European countries to control and justify their own actions and alleviate potential conflicts with other colonizing countries in non-European territories.

The development of the Doctrine of Discovery by Christian countries served to extend exploration, inter-regional trade, and the colonization of non-European countries as the Roman Christians continued its advances upon the Holy Lands. Robert J. Miller (2008:12) suggests that the Church established a global jurisdiction through the papacy with the rationale to protect the natural world rights of its followers from infidels. Miller (2008:11; 2010:9) further attests that the Discovery Doctrine, as a legal principle, was initially intended to control the political and economic interests of European nations and to avoid conflicts over non-European areas. In order to alleviate inter-regional warfare and to allow the expansion of trade it was in the best interest of Europeans sovereigns to substantiate the Church based ideological doctrine that allowed economic driven ventures to continue.

Therefore, with the discovery of the "New World," it served the best interests of the European discoverers to create an image of the indigenous inhabitants of the Americas. Michael Green (1995:13) asserts that the Europeans questioned whether or not the inhabitants of the Americas were human beings, or not, and if they were indeed human, were they capable of conversion into the Christian faith. According to international relations expert, Dr. Hendrik Spruyt (1994:35) this rationale is a reflection of the Holy Roman Empire as the emperor had claimed superiority over all other rulers under the rule of *dominus mundi* (lord of the world).

Saskia Sassen (2006:46) views the time period beginning in 1050 and extending to 1150 as marking a transformation of laws within the church as this is when the pope made claim to absolute jurisdiction and full autonomy over both ecclesiastical and secular matters. As a result of the Christian crusades to recover the Holy Lands from 1096 to 1271 A.D. the legal principles began to transform to meet Europe's political and economic needs rather than its purported ecclesiastical goals (Miller 2008:12).

The ascension of the Roman rule of law along with an assertion of ecclesiastical and secular authority extended over the European continent in the aftermath of the successful war conquests of the crusades. After centuries of using Roman laws of conquest to assume control and domination of the non-Christian lands and pagan populations, the foundation of the doctrine of discovery had been set into place. What is interesting is that through Roman conquest many of the European peoples were forcibly indoctrinated into adopting the Christian faith or feel the wrath of the Church's military power if they resisted.

After centuries of asserting its authority over a wide region of Europe and the Mediterranean the papacy and its followers had become dependent on the economic rewards of conquest. International affairs expert and native rights activist, Glenn T. Morris (1992:58) claims that as Christian sovereignty was asserted the conquered territory was "legally" extended to a "discoverer" despite being inhabited by "infidels" and was supported by European principles of conquest and possession. Co-founder and co-director of the Indigenous Law Institute, Steven Newcomb (2008:49) supports Morris's perspective as Pope Urban III bestowed his blessing upon the first Crusade and declared, "that whatever infidel lands or property the Christians managed to locate (discover) and seize (possess) would belong as spoil to the Christians who first seized it."

Governor General Award recipient (2007) and Cree/Metis legal scholar, Tracey Lindberg (2010:94) argues that the Doctrine of Discovery was built upon a racialized philosophy wherein infidels were considered as being inferior and whose human status was considered by the Church's Supreme Power to be of a lesser status.

According to award winning Navajo journalist, Valerie Taliman (1994:7) in 1452 Pope Nicholas V issued a decree to Portuguese King Alfonso "to invade, search out, capture, vanquish and subdue all Saracens and pagans...and other enemies of Christ." This decree was a forerunner of the papal bulls that were to follow and was based upon what Lindberg (2010) attests as being a racialized philosophy this decree began a colonization methodological process that was to be used to promote warfare against indigenous peoples over the next five centuries.

The papacy granted upon itself the authority to sanction the violent colonizing efforts against any and all nations that did not meet the church's racist and inhumane universal principles regarding legal status or rights. To accomplish this goal the Catholic Church asserted its authority through a series of papal bulls with the first being *Romanus Pontifex*. *Romanus Pontifex* was the first in a series of four papal bulls that were to have significant ramifications on the development of the doctrine of discovery (Newcomb (2008:83). This bull was issued in 1455 and according to aboriginal land rights advocate, S.J. Michael Stogre (1992:68) it gave the Portuguese a trade monopoly and in return committed them to oversee the building of churches and to supply provisions for clergymen. Stogre (1992:65) quotes from Nicholas V's *Romanus Pontifex* bull:

Invade, search out, capture, vanquish and subdue all Saracens and pagans whatsoever, and other enemies of Christ whatsoever placed, and the kingdoms, dukedoms, principalities, dominions, possessions, and all moveable and unmovable goods whatsoever, held and possessed by them, and to reduce their persons to perpetual slavery and to apply and appropriate to himself and his

successors the kingdoms, dukedoms, countries, principalities, dominions, possessions, and goods, and to convert them to his and their use and profit.

What is evident is that Pope Nicholas V relied on the words from the 1452 decree to Portugal's King Alfonso as the basis of thought in the 1455 papal bull *Romanus Pontifex*.

Indigenous historian John C. Mohawk (2006) in a speech presented at the Indigenous Peoples Resistance to Economic Globalization Conference held in New York City, November 18, 2006, quoted the following statement from the 15th century Papal Bull issued by Nicholas V, "undiscovered lands were destined to be owned by Christians." Mohawk's personal perspective acknowledged that, "Christians claim the rights to the earth, basing these rights by their ability to invade, conquer, and control, as they believed themselves to be a superior culture, which entitled them, as a group to do whatever it wants to other peoples."

According to Lakota scholar, Vine Deloria, Jr. and Indian law and policy expert, David E. Wilkins (1999:3) *Romanus Pontifex* was followed by the most famous bull, *Inter Cetera Divinai*, which granted to the Spanish all the lands and countries that they had already discovered or might discover in the future. This papal bull was issued soon after Columbus returned from his discovery voyage and gave detail accounts of the New Worlds inhabitants and more importantly the mineral wealth that was present. John C. Mohawk (2000:105) claims that this bull was issued by Pope Alexander VI and granted Spain sovereignty over lands discovered by Columbus.

Inter Cetera Divinai, signed on May 3 and 5, 1493 and became famously or infamously known as the "Alexandrine Bulls" and according to Native American activist and scholar, Glen Morris (1992:59) created immediate tensions between competing European sovereigns over ownership rights to the new territories and brought into question the inhumane treatment of indigenous peoples of the Americas. The inhabitants of the New World were at no point given

any consideration within this papal bull as they were identified as being non-Christian “infidels” “heathens” and “pagans” (Miller 2008:13). These papal bulls also became known as the “bulls of donation” and the “bulls of demarcation” as Alexander specifically and intentionally excluded Portugal from the field of discoveries (Stogre 1992:70). According to Cree legal scholar, Sharon Venne (1998:4) *Inter Cetera Divinai* specifically outlined that non-Christian peoples could not own land that was claimed under this declaration, therefore legitimizing the authority of Christian sovereigns to continue colonization of the Americas.

Constitutional law expert and Native rights defender, Thomas R. Berger (1991:17) asserts that the lands of the New World were divided between Spain and Portugal in 1494 and that it was the Christian pope who granted original title along with an unlimited grant of sovereignty over these lands. It appears that an assumption was made that the infidel and pagan occupiers did not possess any human rights based on this Christian categorization that obviously was used to assert the rights of the Christian sovereigns. Christopher Columbus acting as a representative of the Christian sovereigns, in this case, Spain, had made claim through symbolic acts that granted these sovereigns the rights of absentee ownership based upon the papal bulls issued by the Christian pope.

Historian Daniel Boorstin (1985:174), points out the fact that Columbus’ discovery immediately caused an intense rivalry amongst other European leaders, primarily King John II of Portugal, over the governance of newly discovered lands that resulted in the 1494 Treaty of Tordesillas. The 1494 Treaty in essence was a policy that demarcated a meridian line that made lands east of the line, property of Portugal and lands to west, property belonging to Spain (Wallbank and Taylor 1954:574). The 1494 Treaty also defined a period wherein European countries propagated the ideology of ownership over newly discovered territories, thus

establishing a newfound limited form of tenure over distant indigenous lands. Distinguished maritime historian J.H. Parry (1965:51) argues that the 1494 Treaty of Tordesillas was viewed as a diplomatic triumph by Portugal because the demarcation included the lands of Brazil, which at the time was known as the land of Antilla.

According to John Mohawk (2006) Nicholas V's fifteenth century papal bull asserted that the rights to the earth were based on their ability to invade, conquer, and control any territory because they considered themselves to be a superior culture. This perspective is the justification of Christians to own undiscovered lands and it was the basis of thought that allowed the greatest historical mass human genocide to occur as European Christians physically asserted military control over the Americas. The natural rights of man were violated when gold and silver was discovered in the Americas and the discoverers then became the owner of these mineral riches and were then protected from other colonizing powers through its military strength and prowess.

In 1537 Pope Paul III issued another Papal Bull entitled *Sublimus deus sic dilexit*, that was intended to acknowledge that indigenous peoples of the Americas were considered to be human beings and according to Hall (2005:304) and Hanke (1959:19):

they were not to be treated, as dumb brutes created for our service...[but] as true men...capable of understanding the Catholic faith...[and] are by no means to be deprived of their liberty or the possession of their property (Hall 2005:304; Hanke 1959:19).

Historian Lewis Hanke (1959:19) further attests that Paul III ordered that the Indians, "in any way be enslaved" or "by no means to be deprived of their liberty or the possession of their property." According to Hanke (1959:84) the pontiff Charles V did not concur with Paul III and viewed *Sublimus deus* as a contravention of his authority in the Indies.

The indigenous peoples of the New World were now considered by the Church to have the capacity to be converted into the Catholic faith and it is this rise in status that allowed them

to be considered and treated as human beings. Historian Michael Green (1995:13) views the question asked and answered by the Church revolved specifically on the indigenous peoples ability to rationalize conversion into the Christian faith as being the primary determinant of the pope to make such a controversial declaration. It is evident that this papal declaration within *Sublimus Deus* had little influence on the violence perpetuated against indigenous peoples of the Americas.

David E. Stannard (1992:95) argues that by the mid-sixteenth century epidemic plagues and European generated physical genocide had reduced the indigenous populations in the Americas by 60,000,000 to 80,000,000. Stannard (1992:267) bases his argument on population estimates generated by Henry F. Dobyns analysis whose pre-European contact numbers place indigenous populations in the Americas as being between 90,000,000 to 112,000,000. Despite the indigenous peoples being declared as having the qualities of human beings the mass physical genocide in the Americas continued unabated, therefore nullifying the Christian church's leader in his declaration embedded within *Sublimus Deus*.

The pre-contact indigenous populations in North America is still a contentious issue and whether or not a firm number has been established is not an important point in this inquiry although the significance of the depopulation did have a direct effect on the manner in which European colonization took place in North America. Even more so, in the discussion of the effects of the rapid depopulation within the Okanagan territory has a significant role in determining the presence of a governance system over the management of the water systems along with the natural subsistence resources.

James Tully (1995:117-118) estimates that North America had approximately five hundred sovereign aboriginal nations that were governing themselves by their own institutions

and authoritative traditions for at least the past twenty thousand years prior to the arrival of Europeans. According to Jared Diamond (1999:375) the North American native populations were reduced by 95 percent after first European contact in 1492. Jerome Reich (1998:25) estimate of 1 million inhabitants for the entire North American continent is small in comparison to Daniel Boorstin and Brooks Mather Kelley's estimate of 4 million inhabitants of what is now the United States and Canada (1986:10).

Russell Thornton (2004:69) basing his estimates on his 'continuous use' theory provides a conservative estimation of 5 million indigenous occupants for what is now considered the continental United States (excluding Alaska and Hawaii). United States senator, representing the state of Hawaii, Daniel K. Inouye (1992), offers his perspective on the pre-contact indigenous population estimates in the conterminous United States at a minimum of 10 million and possibly as high as 50 million. Senator Inouye (1992) presents a disturbing fact, that at the end of the Indian wars era in the United States that there were only 250,000 survivors. James Teit and Franz Boas (1973:211-212) estimated the Okanagan's population prior to contact at 10,000, these numbers were based on Teit's 1903 census count of 2,579 and on Syilx oral narratives proposing that their numbers were formerly at least four times greater. Teit and Boas' estimate might be considered a conservative figure, while James Baker (1990:35-36) contends that the North American indigenous populations were depopulated at a ratio of 20 to 1 in some areas.

I argue that early census compilations in the Okanagan territory were grossly inaccurate based on the fact that when the military observers, explorers, fur traders, and government officials conducted their reports many Okanagan people were either at the root digging grounds or fishing stations. While Diamond's percentages may be inflated it is without a doubt a horrific fact that the depopulation of North America was a deliberate action that pales in comparison the

human loss of life as a result of the twenty first century genocide perpetuated against Jewish and gypsy populations in Europe.

The smallpox pandemic swept through the Interior Plateau region of the Pacific Northwest in the 1770s and according to Robert Boyd (1994:7, 34) the first Europeans to come into contact with the Syilx witnessed the first generation survivors of this deleterious disease. According to Lizzie Lindley (1980:3) and William Cronon (2003:85-86) entire village populations were wiped out with the kill rate approaching and exceeding 80-90 percent. The second wave of smallpox occurred between the years of 1800-1801 and further reduced the surviving populations by an estimated 45 percent (Vibert 1995:206).

Historians Jurgen Osterhammel and Nieis P. Petersson (2005:44) argue that despite the rise in status of indigenous peoples the assertion of colonization by a superior European military during the discovery period forced the first inhabitants into the wilderness. And despite the change of status in *Sublimus Deus* the indigenous peoples continued to be described as being 'souless pagans' during the early Discovery period conceptualization that promoted the justification of European colonization.

In order to justify the Doctrine of Dsccovery it became necessary to create an acceptable characterization of indigenous peoples of the Americas. To accomplish these goals the Europeans sovereigns, with the sanctioning of the Church, began to promote a racist belief system that identified indigenous tribal peoples of the Americas as being "heathens" and "infidels" and incapable of rationalizing the legal conceptualizations of legal rights associated with title and ownership of property (Williams 1990:326). Lyle N. McAlister (1987:53-54) in his study of Latin American history concurs with Williams as he argues that European Christian

states were instituting racial identifications based upon physical and cultural characteristics in order to justify the colonization of non-European peoples and lands.

Sharon Venne (1998:4) argues that the first concept of guardianship over indigenous peoples was embedded within *Inter Cetera Divinai* and at no point was the indigenous peoples consulted or given the opportunity to consent to any of its content prior to its deliverance. Therefore, under the guise of a legitimate claim of discovery the Christian explorers began to extract and export back to Europe the rich and bountiful mineral resources present in the Americas. Colonization of the Americas under the various European nation-state flags established ownership under the Doctrine of Discovery, yet opportunities for resource extraction meant finding a justifiable means to do so within the church's sanctioned authority, upon which the doctrine of discovery was reliant.

Robert William, Jr. (1990:17) credits the crusade efforts of Europe as carrying forward onto the shores of the New World while preserving the intents and purposes of its violent form to subsume the indigenous inhabitants. What is evident is the assertion of secular and political control by the Church as it has set firmly into place, despite objections from differing participants, the method of sanctioned colonization of the New World. The Church and European state governments engaged in a collaboration that became dependent on at least two primary determinants: first, that the Church institute bold and decisive policies that sanctioned colonization of indigenous peoples and their lands; secondly, control and domination through military force to enact and maintain the Church's secular directives. Steve Newcomb (1992:18) recognizes that Christian nations such as Spain, Portugal, England, France, and Holland asserted a divine right to lay claim to absolute title and authority over 'discovered' and uninhabited lands.

As mentioned previously by Miller (2010:9) the Doctrine of Discovery is considered to be the first case of international law, while Lindberg (2010:107) argues that the symbolic acts of possession and actual physical occupation were carried out under the principle of *terra nullius* might be considered as a violation of international customary law. Therefore, the principles of both the Doctrine of Discovery and *terra nullius* were important aspects of European colonization in North America that deserves critical thought and examination.

It was one matter to make claims over territories through designated principles as granted by the Church that the Spanish included in a legal document, the *Requerimiento*. Vine Deloria, Jr. and David Wilkins (1999:4) argue that the upon its initial recitation before indigenous groups of the New World upon first contact, it was then assumed that these groups were subject to the authority of Spanish monarchs and the Pope. John Mohawk (2000:105) concurs with the position of Deloria and Wilkins (1999) as he argues that the papal bulls issued by Pope Alexander VI accomplished the claim and assertion of Spanish sovereignty over the peoples and lands of the New World.

After the 1537 declaration in the papal bull *Sublimus Deus* the European colonizers of the Americas were still dealing with an uncertain situation in dealing with the indigenous peoples. The process of dispossession in the Americas under the Doctrine of Discovery once again needed the Church's sanctioning to continue the process of asserting European hegemony in the New World. Professor Ward Churchill (1992:35) argues that the Church's declaration that the lands of the New World were '*territorium nullius*' allowed for the justification of European nations to colonize and own the lands in this territory through rights of discovery. In short this term simply means 'uninhabited.' The development of the principle of *terra nullius*, according Churchill

(1993:35), gave to the Christian discoverer an outright ownership “only when the land discovered proved to be uninhabited.”

American historian, Charles W. Eliot (1969:23) Christopher Columbus provided King Ferdinand and Queen Isabella a visual impression of his first encounters with the indigenous peoples of the Americas, wherein he described them as having “no religion, nor idolatry, except that they all believe power and goodness to be in heaven...They are however, far from being ignorant.” Eliot (1969:22) provides a 1493 correspondence between Christopher Columbus and Luis Sant Angel wherein Columbus describes an island (Hispanolia) that was inhabited by “countless small communities.”

The European “empty lands” theory is far from being a justifiable cause for asserting an “outright ownership” claim as described by Churchill (1993). Therefore, as early as 1493 this correspondence clearly exhibited that indigenous peoples densely populated the lands discovered by Columbus. This acknowledgement of occupation by a large population necessitated the need for such territories to be deemed *terra nullius* to support claims of sovereignty by European discoverers.

Glen Morris (1992:58) mentions an important point when examining the rights afforded to a Christian sovereign over lands inhabited by infidels as under the *Territorium (res) nullius* which laid the foundation upon which the Doctrine of Discovery was based. In her discussion on customary international law, Rosalie Schaffer (1988:23) argues that *res nullius* was a concept of Roman private law that indicated that an act of physical occupation on property ‘not owned by any person’ along with the ‘intent to assert ownership’ could change the property into the state of individual ownership. The ownership factor as embedded within *res nullius* was needed to

establish any meaningful claim to title of a property and it was important for the European sovereign to implant and utilize this Roman law as they “occupied” the New World.

Regardless, the doctrine of *terra nullius* became a legal construction that according to aboriginal rights activist and scholar, Dr. Alexandra Xanthaki (2007:243) legitimized both the act of colonization and the dispossession of indigenous peoples from their lands. Ward Churchill (1999:25) argues that the principles of *terra nullius* allowed the New World to be claimed outright by whoever first found these lands.

The dependencies on the concepts of Roman private law were developed in a period much earlier and according to Barbara Hocking (1988:7) *Vae victis* was the old Roman law of conquest presumed that prior laws continued to exist until abrogated or altered by the British Crown. Within this legal construction the indigenous peoples were considered uncivilized thus, according to the old Roman laws of conquest were not privileged to be owners of land much less afforded rights granted to other human beings. Therefore, a series of laws that had their origins in Roman property law had been integrated into the principles within the Doctrine of Discovery.

With the lands of the New World being categorized as not-belonging-to-any-person it gave the colonizing sovereigns the right to claim ownership of these lands through symbolic acts and physical occupation. The New World occupation was accomplished by the representatives of absentee European sovereigns that were interdependent on Roman law and papal decrees issued by the Roman Catholic Church.

According to legal historian, A.R. Buck and property rights expert, Nancy E. Wright (2008:211) the sequential development of the principles of *terra nullius* had far reaching effects in other areas of the world during the colonization efforts in the early nineteenth century, in particular in Australia. The colonial governments, whether in the Americas or the southern

hemisphere on the other side of the globe were hastily instituting the concept of *terra nullius* as the basis for their claims of ownership of indigenous lands and resources. It appears that the colonial governments were depending on the concept of *terra nullius* to garner the sole and indisputable right to claim and subsequently determine the manner in which lands and resources were to not only be divided but utilized. The development and implementation of colonial policies that directly infringed upon the land rights of aboriginal peoples moved forward as during this period there was an ongoing debate on whether or not aboriginal peoples should be recognized by the Church as being human.

The *terra nullius* concept was primarily used to underpin the overarching principles of the doctrine of discovery and as noted earlier inquiries and questions arising over its legality and its morality became an issue of concern. Sharon Venne (1998:19) argued that the challenges brought forth by Spanish theologian Francisco de Vitoria and Spanish human rights advocate Bartholeme las Casas during the Council of the Indies (1550) are the examples of the blatant presumptions of land and resource ownership that Europeans had asserted by making claims upon ‘the empty lands that belonged to no person.’ The legal and moral virtue of the Doctrine of Discovery was being scrutinized during the mid-sixteenth century onward and before it could be eliminated as a justifiable legal position to separate indigenous peoples from their ancestral lands the colonizing sovereign states had to validate their claims of ownership.

Historians Olive P. Dickason and L.C. Green (1989:40) cite Francisco de Vitoria:

...the barbarians in question [the Indians] cannot be barred from being true owners...at the time of the Spaniards’ first voyages to America they took with them no right to occupy the lands of the indigenous populations.

Title by discovery in an empty landscape that is devoid of any ‘Christian population’ is therefore open for occupation and domination by civilized European societies. This

inappropriate theory of acquisition was the basis of thought as Europeans claimed ownership of indigenous America through the Doctrine of Discovery. The development of international laws during this period were founded and based within concepts that were indelibly connected to the Church and its highest authority.

Henderson et al. (2000:4-5) argue that the basis structures of British land law are embedded in ideologies of the legal principle of *nulle terre sans seigneur* (no land without a lord) which implies that all land in Britain is “held” by the Crown, but not actually “owned” by the Crown and despite its aura of authority the concepts of land ownership is not a “distinct legal category in British, but a socio-political concept.”

Under this legal principle within British law the authority and jurisdiction of the Crown regarding land tenure is limited to interests in the land, which according to Henderson et al. is “held” by the King. This legal principle very well may be the basis of the development of the principles held within *terra nullius* and it appears the concepts were broadened to accommodate the tactical needs for colonization of the New World.

The history of the colonization of the Americas provides substantial evidence that the European monarchies of the fifteen century were dependent on creating and adapting principles that allowed for broad-brush tactics that included gaining political control of foreign lands and resources. Robert Williams (1990:102) quotes from a 1493 letter by Christopher Columbus wherein Indians of the New World were described as lacking any conception of private property: “I have not been able to learn if they hold private property, it seems to me that all took a share in whatever anyone had, especially eatable things.”

Despite the arguments of the Spanish legal theorist Francisco de Vitoria and champion of human rights in the Americas, Bartholeme de las Casas, the rights of discovery as interpreted and

applied in the New World moved ahead and opened up these lands for economic exploitation. As mentioned previously, the timing of colonization in the Americas coincided with the monumental need or injection of precious metals, primarily gold and silver in order to maintain the growth and stability of the European trading networks. According to political scientist, Peter Russell (2005:39) the imperial European states became dependent on the legal Doctrine of Discovery to regulate the relations between their respective countries. Of secondary concern was the irrefutable fact that these countries were substantiating their claims upon the papal grants and the interpretations of the early forms of international laws that allowed for the instilling and maintenance of principles of discovery.

Russell (2005:39) notes that the right of discovery was used as a legal doctrine to regulate the relations between the European states and was intended to act as a method of establishing priority of land claims through possession acts that were symbolic in nature. The performance of symbolic acts by explorers, who conducted these acts as representatives on behalf of the nation-states that sponsored the exploration, supposedly gave the nation-states possession over aboriginal lands. For instance, the nation-states gained possession by their representatives muttering a set of prescribed words as they sailed by these aboriginal occupied lands or stopping and planting flags in the soil. Therefore, in my opinion these symbolic acts of flag raising or muttering of words did not constitute any legal form of possession and were meaningless acts in any civilized or uncivilized system of law. The European acts of possession are ludicrous and in no manner constituted a legal cessation act that ended land entitlement for aboriginal peoples in North America.

On the heels of *terra nullius* and the doctrine of discovery was the Doctrine of Adverse Possession which essentially allowed for the extinguishment of aboriginal title simply by

declaring another use or interest in the lands and resources in question. According to water and natural resource law expert, Carol Rose (1985:79) adverse possession deals specifically with the interpretation of the statutes of limitation to recover interests in real property, an act that is based within the common law concept of first possession. Rose asserts (1985:82) that under this doctrine, communication (act of speaking) is an imperative in asserting a claim to property and this act must be completed in a language that is comprehensible while being beneficial to the speaker of the text. The acts embedded within adverse possession are ever so familiar with the symbolic acts of possession that gave Europeans a claim to aboriginal lands under the Doctrine of Discovery.

Under Article 13 of the Terms of Confederation, Armstrong et al (1993:40, 41) argue that the uses of lands and resources by the Province of British Columbia could only be accomplished if the province followed federal guidelines that adhered to its responsibilities and obligations to the Crown. It could be argued that the Terms of Confederation met the legal conditions of the doctrine of adverse possession, yet it is clear that the discovery doctrine was used as a legal tool to justify the claim ownership rights to aboriginal lands within the province of British Columbia.

For adverse possession to be a legal tool to gain control over lands and resources within unceded British Columbia the province must be able to prove that the aboriginal peoples understood exactly what was taking place at the time of British Columbia entering Confederation. Furthermore, the legal weakness of adverse possession as British Columbia makes claim of ownership of lands and resources deals specifically and simply with the legal interpretation of “first possession.”

Henry Ballantine (1919:135) views adverse possession as a reward system for those who use the land in a manner that is beneficial to the community. The premise of settlers right to

claim aboriginal lands for homesteading primarily revolves around the idea that the lands and resources are unused therefore not beneficial to society. British Columbia Treaty Commission (BCTC) advisor, Paul Tennant (1992:34) in his discussion on the Indian land question in British Columbia, argues that the settlers' ability to farm vacant and unowned lands was an aspect that encouraged white settlement in this province. The beneficial use to a community arguably could be the occupation and use of lands and water resources to grow crops.

According to the Alberta Law Reform Institute (ALRI) (2003:10) the common law as practiced in British Columbia, and quite possibly elsewhere, indicates that if an owner of lands loses title to another, there is a prescribed limitation period for the owner to bring a claim forward before the adverse possession owner gains quiet title in his or her own name. What is disturbing is that British Columbia has applied this doctrine to assume large tracts of unceded aboriginal territory and without ever making their intentions known to the rightful and first owners of the lands in question. Of course the prescribed time limitation has more than likely passed, thereby eliminating any remote possibility for aboriginal Nations of this province to meet the time requirements of this doctrine.

Adverse possession leads into the argument that aboriginal title has died with the passage of time, which infers that it does not exist in the modern era because it is no longer a valid concept. This line of argument has met its demise as the decisions in *Calder* and *Delgamuukw* have acknowledged the existence of aboriginal social, cultural, political, and yes, legal institutions prior to European contact and their assertion of sovereignty in the Province of British Columbia and the Dominion of Canada. Therefore, the argument of the passage of time wherein aboriginal title is declared to be invalid is no longer a basis for the assertion of absolute title by European settler societies in British Columbia.

Yet, for aboriginal peoples of British Columbia the common law regarding notions of title remain firmly entrenched within what land law experts, Kevin Gray and Susan Gray (2009:171) describe as, “the notion of title by first occupancy,” which in turn infers that the “first-in-time” principle validates the possession of land. Gray and Gray (2009:153) also contend that according to the British common law that adverse possession can be maintained by physical control of the lands, even maintaining possession without being in occupation of it at all. If the Province of British Columbia is making title claims to the lands of British Columbia through adverse possession then physical control is the primary argument that they can assert. Yet this physical control is politically maintained through various levels of government agencies that assert an assumed dictatorial rule.

According to Anthony Hall (2005:49) the aboriginal people of British Columbia were deliberately excluded and not represented when the Hudson’s Bay Company sold its vast holdings to the Dominion of Canada. This land exchange was based on the premise that the Hudson’s Bay Company maintained physical and political control of aboriginal lands in British Columbia. According to National Science Foundation (NSF) advisor Fae Korsmo (1999:122) when British Columbia was accepted into confederation its newly formed government maintained that aboriginal title did not exist, which essentially was a refusal to accept federal intrusion into provincial matters.

What is an important point to focus on as a result of this provincial mandate is that the British Columbia did not allow the federal government to continue signing treaties within its political boundaries. In hindsight the significance of the role that the Hudson’s Bay Company maintained in British Columbia during this era could possibly be credited with as contributing to the strength of the aboriginal land claims at the present. By this I mean that a vast majority of

the lands in British Columbia were not ceded to either the Province of British Columbia or the federal government of Canada through a treaty process. The political and social repercussions of the treaty processes are quite evident in aboriginal lands and territories east of the Rocky Mountains. It is not a primary consideration in this study but the fact of being a non-treaty province does have significant political implications, especially when dealing with the aboriginal rights and title issues that are currently ongoing in this province.

According to the arguments presented above the acts of possession are connected to the direct action of occupancy and the intent to occupy. Doctrines of dispossession are then argued as perspectives that originate and derive from the European property law systems. European acts of tenure are not based upon absolute title to these lands but from a perspective of rule or dominium over these lands, which is vastly different from true ownership. It has been argued by the European colonizers that indigenous/aboriginal peoples were not civilized and therefore could not possess any concepts of land ownership. Being a European Christian during the discovery era had its benefits, as the Church and Monarchical rulers of Europe were then able to collaborate and spread their ecclesiastical authority over any lands and peoples that were not Christian.

Kevin Gray (1993:285) describes the difference between prescriptive acquisition and adverse possession; according to English land law the fiction of grant in respect of long used rights to land are prescription, while adverse possession operates by extinguishing prior titles. I argue that the fiction of grant implies that the creation or shaping of a grant (in this argument the HBC's royal land grant) would eliminate prescriptive acquisition claims by Canada over aboriginal lands and resources. I argue that when the HBC received its land grant in 1670 it

could not have claimed any long used rights and clearly they were operating as guests within this western region.

The doctrines of dispossession were clearly intended to strip and extinguish any claims to aboriginal title in the newly discovered lands in the Western hemisphere. It is true that when the Europeans landed and asserted their authority and control over Indigenous America that the original occupiers did not comprehend the foreign legal concept of land ownership. It served the best interests of the European settler societies to declare that the indigenous societies of the Americas were nothing more than pagans with no comprehension of civilized forms of political and social institutions. The concept of civilization and theory of religious dominance were absolute and was totally encapsulated within ideologies that originated from the Church as during this era the Papacy was issuing papal grants that were dividing the known world and these actions were recognized as being a divine right.

As mentioned previously, Vitoria and de las Casas, presented arguments on behalf of the indigenous peoples of the New World that asserted that the indigenous peoples had in their possession certain rights that were bestowed upon human beings. These arguments in the Council of the Indies (1550) created a small opening for a continuance of the discussions at a later date. What was made clear is that the aboriginal peoples did in fact have a certain level of rights, which then determined as being held within legal rights of French and English law. Louis Knafla (2005:7) argues that when the British Crown acquired a new territory that the existing rights of the inhabitants were automatically terminated, thus allowing the Christian monarchs to assert its legal jurisdiction and authority. This is known as the Doctrine of Radical Discontinuity and within it doesn't deny that people already had rights only that the act of possession by means of written documents by the British sovereign ended these rights. Kent McNeil (1989:80-83)

argues that this doctrine originated prior to the Norman conquest of the British Isles and with the assertion of common law authority the rights were then endowed to the Crown.

It is abundantly clear that the Europeans brought with them a system of laws, which were subsequently administered by the courts. During the early colonial period in North America the British Crown had a great influence on determining the manner in which the courts arrived at legal decisions that determined the extent of aboriginal rights to lands and resources. Despite the non-recognition of the pre-existing rights of aboriginal peoples during the colonial period the fact that aboriginal rights had been given due thought and consideration by British common law.

The Doctrine of Continuity is based within an assumption that the rights of aboriginal peoples did exist prior to the establishment of European sovereignty and continues to exist in some form despite the assertion of British sovereignty. The pre-existing rights of aboriginal peoples in British Columbia were acknowledged in *Calder* and *Delgamuukw* as it was made very clear that when the British first arrived the Indians were here. It is difficult for the British Crown and the Province of British Columbia to make counter arguments as this fact is an undisputable historical fact. Kent McNeil (2009:261) suggests that the Doctrine of Continuity implies ownership through pre-existing aboriginal law systems, and that aboriginal title to lands is not based solely on physical and exclusive occupation prior to the Crown's assertion of sovereignty.

According to aboriginal rights expert and constitutional theorist, Brian Slattery (1987:737, 782) the Doctrine of Aboriginal Rights originates in colonial law and forms a body of basic common law principles that then were able to be overridden by legislation. In his analysis of *Delgamuukw v. British Columbia*, Brian Burke (2000:4-5) determined that Lamer C.J.C. ruled that aboriginal rights were recognized and affirmed by section 35(1) of the *Constitution Act*, 1982, while agreeing that there was a degree of interrelated connection between the aboriginal

peoples and the land. The Doctrine of Aboriginal Rights were clearly recognized and affirmed (by the courts) as existing within s. 35(1) of Canada's Constitution and according to Henderson et al. (2000:87) both the international and national legal systems had influence on the limitations of power that European sovereigns could exercise over aboriginal peoples and their lands and resources.

Aboriginal rights for thousands of years were entrenched within the oral narratives and were much older than any other source of law, most assuredly the European systems of law that had made its way across the Atlantic Ocean to North America. Legal historian and theorist, Mark Walters (2009:44) argues that the common law doctrine of aboriginal rights, as recognized within existing legal orders, were derived from pre-existing legal orders that could best be described as distinctively intersocietal. Arguably, the recognition of aboriginal rights within European systems of law established that the aboriginal peoples did in fact have a legal system that predated the Europeans arrival in North America.

Chapter Four

MARSHALL TRILOGY, CASE LAW AND CONSTITUTIONAL LAW

The *Mohegan Indians v. Connecticut* (1705-1773) court case is considered by the controversial aboriginal rights attorney, Bruce Clark (1990:45) to be precedent setting and binding upon Canadian courts as it was determined that the Mohegan Indians remained self-governing as they were prior to the introduction of the colonial government systems. Whether or not others of the Canadian legal system share this argument by Clark is not important, but what is important is that the question has been raised that aboriginal societies did in fact have a system of laws in place prior to the arrival of Europeans. The existence of laws allowed for the continued ancient self-governing practices to be recognized within an Order in Council (Great Britain) in the year 1704 (Clark 1999:92). This case is important because it allowed later courts, especially those presided over by Chief Justice John Marshall, to have a point of reference that determined that Indian societies relied upon their own systems of law and governance.

Historian Harold Syrett (1967:158) maintains that Chief Justice Marshall ruled in *Fletcher v. Peck* (1810) that the state of Georgia's reformist legislature could not rescind a land grant that was made by a previous legislature, citing that it was considered to be an impairment of obligations and conditions of the contract. This case revolved around a land fraud wherein a previous legislature unscrupulously sold lands in western Georgia and although the Indians of that state were not directly involved a question arose based on the fact that the lands were part of the Indians' territory. The legal question then became complicated by this acknowledgement of a legal status being held by the Indians of that state. These two cases were recognized as the predecessors to what became known as the famed Marshall trilogy.

Soon after the Americans fought for and gained independence from the British the new fledgling national government began to apply its own version of its newfound sovereignty. The lands and resources of the indigenous inhabitants came under assault in a manner that was beyond their comprehension. Although the Americans of the thirteen original colonies forcibly removed the British they retained and adapted many of the policies and laws of the former Crown sovereign. During this period in American history the settler population had grown to a point where Indian lands were enviously coveted and the Americans were intent on exerting their authority to dispossess the indigenous peoples of their rights to the lands that had been under their traditional forms of authority and governance for thousands of years prior to being “discovered” by Europeans.

Recently freed from the European rule the Americans continued with acts of dispossession and asserted new principles of law that retained many of the same deceptive methods employed by the British Crown. In violation of laws set in place by the United States federal government many settlers began to settle and occupy lands of the Indians and as history reveals legal challenges were brought before the Supreme Court by the Indians themselves. The chronology of historical events that proceeded this era of legal challenges are as follows: King George III’s issuance of the Royal Proclamation of 1763; American Independence (1776); the Treaty of Paris (1783); the North-West Ordinance (1787); and the Treaty of New York (1790) (Wiessner 1999:95-96; Crystal 1996:111).

It is Kent McNeil’s (1989:227-228) contention that the historic impacts of the Royal Proclamation of 1763 has covered the legal infringements of the King George III covenant and has relevance as being recognized by the United States Supreme Court’s Chief Justice John Marshall as being worthy of consideration in the cases to be discussed. Melvin Crystal

(1996:111) maintains that in order to establish dominance of claim over the disputed North American continent the French and British fought what became known as the Seven Years War and upon its conclusion the two nations agreed upon and signed The Treaty of Paris.

The dividing of North American soil between the French and British displayed that, through the act of war, they were then able to assert claims of sovereignty over this disputed territory and hegemonic control. According to American historian, Gerald Kurland (1971:81-84) in 1775 the American Congress began to take major steps to create an independent American government; this move was based upon a number of circumstances that called for liberty, escape from taxation, and the ability to relieve itself from British restrictions of the mercantile system. The American's declared independence from British rule came after a number of hard fought battles wherein the Americans eventually succeeded in war, with the assistance of their Indian allies.

Native rights, civil liberties and Canadian constitutional law attorney, Thomas Berger (1991:69) points out that in 1783 the United States Congress issued a proclamation that stated "no White person might settle in or purchase lands claimed by Indian peoples," within territories that lay west of the original thirteen colonies, without Congressional approval. It appears that this proclamation echoed the content of King George's Royal Proclamation of 1763 and as a matter of legal convenience and assertion of its sovereign authority purposefully replaced the term "British" with "U.S. Congress" making it clear as to who might be the purchasers of the Indian lands. Robert Williams, Jr. (1990:106) argues that when the Spanish Crown issued a 1573 royal proclamation it considered its extensions into the New World as "pacifications" rather than "conquests" and that the Indians must submit and obligate themselves to Christian Europeans.

Daniel Boxberger (1993:7) points out the Native policies in Canada and the United States originate from the Royal Proclamation of 1763 and that the rights to land and resources continue to exist until such time as these rights are extinguished through treaty or agreement. I concur with the analysis provided by Boxberger as he argues that aboriginal rights in the United States and Canada include the use of land and water resources.

UBC's Canada Research Chair in Environmental law and Sustainability, Benjamin J. Richardson (2009:59) argues that the Royal Proclamation of 1763 ceased to have effect in the United States when Great Britain ceded the territories to the United States with the signing of the Treaty of Paris in 1783. According to Charles Eliot (1969:250) it was a short two decades in passing when the United States negotiated a Treaty with France and as a part of the agreement, bought the Louisiana Territory for \$15,000,000. The Royal Proclamation along with the Treaty of Paris and the Treaty with France contained Articles that recognized the rights of the Indians of North America that inhabited the lands that fell under the auspices of the Europeans and the new government of the United States of America. Charles Eliot (1969:252) points out that within the Articles of the 1803 Treaty with France it states that the "inhabitants of the ceded territory" would enjoy all of the "rights, advantages, and immunities of citizens of the United States." These treaties and agreements were predecessors to the nineteenth century decisions made by Chief Justice Marshall and it is my opinion that they collectively influenced the rulings in the precedent setting Cherokee Nation cases.

United States constitutional historian Woody Holton (2007) indicates that when the British ceded their former North American colonies with the signing of the Treaty of Paris (1783) the ceded land base stretched all the way to the Mississippi River to the east. Once again

the Indian allies of the British were left out of the negotiations and it was their traditional land holdings that were given as a spoil of war to the Americans.

As mentioned in another chapter, the content and assurances of the Royal Proclamation of 1763 were to be honored by the new American government and Siegfried Wiessner (1999:95-96) quoting from the North-West Ordinance of 1787 cites that:

The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

What is abundantly clear here is that the newly formed legislative branch of the American government had recognized the obligations of the former sovereign and then embedded these principles within the North-West Ordinance of 1787. This recognition should have been the basis of argument in the legal cases that were to occur in the next four to five decades. A number of principles to note in the Ordinance are “good faith,” “without their consent,” “in justice and humanity,” and “preserving peace and friendship.” In hindsight the American government and its settler populations intentionally veered away from these principles and forged a new path that ultimately led to the challenges brought for to the United States Supreme Court in the early nineteenth century.

After a declaring war with the state of Georgia in 1784 the Creek tribe and the United States signed the 1790 Treaty of New York which made it illegal for United States citizens to settle on lands of the Creek people, and Berger (1991:71) notes that the state of Georgia refused to abide by the terms of the treaty and President Washington did not respond to this mutinous behavior in any manner. According to Holton (2007:269) the Creeks Indians came to the conclusion that by negotiating and signing of the 1790 Treaty of New York they prevented the

federal troops from invading their villages. The refusal of the political leadership of Georgia to recognize the principles embedded in the Treaty of New York encouraged its citizens to illegally settle on Creek lands. The state of Georgia rejected the terms of agreement of the 1790 Treaty and these actions precipitated the precedent of non-acknowledgement of Congressional authority during the early American colonial era. President Washington's refusal to reprimand the state of Georgia and its citizenry promoted the ideology that the transitional governance system of the Americans was in a weak position as its authority was still in question.

Ward Churchill (1999:20) argues that conventional and customary law requires that negotiations between governments of nations must occur to complete a treaty and that in the United States the principles of treaty making between aboriginal peoples and the US government have become domestic law under Article I, Section 10 of the Constitution. According to Indian treaty and negotiation consultant, Richard Price (1991:4) the federal government of Canada's treaty making process was comprehended as a negotiated agreement that could only occur between two or more nations. European Law experts, Peter Cummings and Neil Mickenburg (1980:54) argues that prior to the legal challenges by the Cherokee Nation the United States Attorney-General conducted an examination that concluded that the treaties between the Indians and the United States were "ineffective" because the Indians "were not" an independent nation. Therefore, the question arose of whether or not the Cherokee Nation was an independent nation with whom the United States Federal government could negotiate a treaty became the basis of the first legal challenge that was ruled upon by United States Supreme Court Chief Justice, John Marshall.

Peter Cummings and Neil Mickenburg (1980:54) have concluded that the Canadian government did not consider indigenous peoples to be functioning as independent nations when

the original treaties were made and were considered to be subjects of the Queen. Cummings and Mickenburg (1980:54) also argue that, “In 1828, the United States Attorney General examined the contention that the treaties between the Indians and the United States were ineffective because they were not treaties with an independent nation.”

Highly acknowledged scholars in the field of Native American Studies, David Wilkins and K. Tsianina Lomawaima (2001:22) contend that the famed Marshall trilogy, *Johnson v. McIntosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia*, collectively determined that the federal government could purchase the exclusive rights of occupancy of titled lands if it so desired. Native American water rights expert, Lloyd Burton (1991:32) lists the following three precedents that were a result of Chief Justice John Marshall’s well-documented nineteenth-century Supreme Court decisions:

- 1) Stripped tribes of fee simple ownership of their lands.
- 2) Declared tribes as domestic dependent nations
- 3) Barred state intervention in exercising jurisdiction over Indian lands

Johnson v. McIntosh was the first case in the Marshall Trilogy and according to Steve Newcomb (2008:73) the case did not directly involve American Indians at all and focused on whether or not either settler (Johnson or M’Intosh) had the superior title to the lands in question. Anishinabe scholar in Indigenous law, John Borrows and fiduciary law expert, Leonard I. Rotman (1997:5) identify Johnson as a colonist that purchased land from its original Indian owners while William McIntosh purchased his title from the United States government after the American Revolution.

The controversy involved two differing methods of procuring title and rights to lands that should have been protected under King George III’s Royal Proclamation despite both purchases

being completed after the United States gained its independence from the British. Leonard Baker (1974:744) made the argument that the Americans and their Congress had continued the relationships commenced by the British authorities that in essence considered the Indian nations as being distinct political communities with rights to all lands within their territorial boundaries. Baker (1974:739, 744) identifies some key points in *Johnson v. McIntosh*, wherein a direct relationship between the British Crown, American Congress and Indians continued to exist, implying nation-to-nation recognition, but in the same ruling, “declared Indians as wards of the government.”

The guarantees within King George III’s Royal Proclamation of 1763 should have been an assumed responsibility of the United States as the rights of the Indians then became transferable from the British to the Americans as a spoil of war. Whether this was considered a valid argument as the question of whether or not the American Revolution and its battles were considered to meet the criteria of a justifiable war under the Law of Nations.

Another very important legal position in the Royal Proclamation has been mentioned by Indigenous legal scholar, Sharon Venne (1998:8) that within the document Indians are referred to as “Nations” and distinct societies that had their own systems of political organization therefore having the ability to negotiate treaties with other nation-states. As mentioned previously, King George III acting on behalf of Britain was confronted with a difficult task that had social, cultural, and political impacts on both the indigenous populations and the foreign implanted settler populations.

According to land law expert D.W. Elliot (1994:29) one of these tasks revolved around the legal character and validity of the Proclamation itself as it described the Indian lands as “not having been ceded to or purchased by Us,” which implies that the pre-existing rights and tenure

over lands and resources remained intact and preserved. But the Court said that the Indian interest was based not only on the Proclamation but also on the fact of traditional Indian occupation of the land prior to the arrival of Europeans. Recognition of prior occupation is a broad all-encompassing fact that was a historical commonality amongst indigenous peoples of the Americas. Elliot (1994:35-36) argues that the United States Supreme Court held that the Indians' interest could only be alienated to the Crown (or to the United States government), not to Johnson. This finding was not surprising, since the Proclamation had said that its interests could only be alienated only to or through the Crown or its agents.

The principles embedded within the Doctrine of Discovery was considered as a primary argument in *Johnson v. McIntosh* as Marshall determined that the Indians did not retain authority or autonomy after the United States declared independence from the British. Legal historian Lindsay G. Robertson (2005:5) contends that Chief Justice Marshall positioned the Doctrine of Discovery as the primary argument of the United States in asserting acquisition of ownership of lands that previously had been in the ownership of the Indians. Robertson (2005:75-76) suggests that upon discovery of North America by Europeans the indigenous peoples lost title to their lands and from the assertion of European sovereignty they retained only an occupancy right. According to Kent McNeil (1989:245) Chief Justice Marshall determined that the original thirteen colonies were acquired by discovery, yet argues that the principles of discovery could be converted into conquest, therefore implying that Indian lands could be taken.

Christopher Jenkins (2001:4) in his discussion on aboriginal rights theory argues that European nations claimed superior rights under the premise of the right of discovery and claims to the New World. According to Jenkins (2001:4-5) Chief Justice Marshall recognized that the original inhabitants and "rightful occupants of the soil" retained a justifiable claim to retain

possession of these lands but in his rulings determined that discovery gave exclusive title to those who first asserted the original principle.

Arguably, the circumstances that led up to the transference of authority were completed without any consideration of the rights retained by the Indians as European sovereigns confronted them with the assertion of discovery principles. Chief Justice Marshall's ruling in the first Cherokee case was based on the thought that the Indians held limited concepts of property ownership and that the Court did not recognize the Cherokee as being a foreign nation. Benjamin Richardson (2009:60) acknowledges this fact as he purports that Marshall's decision in *Johnson v. McIntosh* concluded that the tribe held "limited, tribal ownership and sovereignty."

Steven Newcomb (2008:40) argues that the conclusion in *Johnson* was based on the idea that amongst themselves, the differing nations of Europe understood that the conveying of title was completed upon the issuance of land grants despite the lands being "in the possession of the natives." Conquest, discovery, and a looming question on whether aboriginal peoples understood European concepts of land ownership were the foundational unanswered question that led to presumptions that the original inhabitants did not fully comprehend such principles because of their primitive state of existence.

Constitutional law expert Milner S. Ball (2000:1192) argues that in *Johnson* the non-Indian purchaser did not assume "absolute title" to the land because it could not according to constitutional law, be purchased from the Indians because they (the individuals) were not a nation unto themselves or did not or could not defeat or conquer the Indians in an act of war. Therefore, according to Ball (2000:1188) since the non-Indian could purchase lands from the Indians, and assume whatever title from the Indian sellers that they were at that point in time incorporating themselves to the Indian nation. In essence the non-Indian purchaser then held

whatever form of title that was recognized under Cherokee law and were then protected under these 'Indian' laws, which meant that they (land purchasers) were subject to tribal laws. Ball (2000:1188) also argues that since the Crown (in this instance the United States) had not defeated or conquered the Indians that they could not be incorporated into the settler's government.

The complexity of Justice Marshall's decision in *Johnson* revolves specifically around the fact that the Indians had never been authorized by United States to sell lands because the US, as the succeeding sovereign, had not recognized or ratified any such sale of land. This essentially meant that the Cherokee could not be incorporated into the settler society's government and, therefore, could not themselves offer protection to non-Indian land purchasers. The United States assumed that when they acquired sovereignty that the Cherokee automatically were subject to their laws, yet up to that point and time, the United States were treating them with the respect of being a nation.

It is argued by Kent McNeil (1989:227-228) that the final conclusion in *Johnson v. McIntosh* proved extinguishment of title through the act of discovery and in order for individuals to hold title to the lands in question must do so under the laws of the Indians because previous to this time there was no legal action that considered the Indian land rights as held under the Royal Proclamation of 1763. In the end the Court ruled in favor of McIntosh, a ruling that supported the land purchase from the United States government yet it determined that Johnson's title was also valid under the Indian's law but being from a different source was not enforceable in or by the American Courts (Borrows and Rotman 1997:5; Elliot 1994:35-36; Baker 1974:744).

According to Robertson (2005:119) the Cherokee were Georgia's "tenants," and it was to their discretion if they chose to either evict or coerce their removal by exercising rights as a

landlord. Furthermore, Georgia based their position on the British Crown's assertion of rights under the Doctrine of Discovery, which meant Georgia acquired title to the lands of the Cherokee Nation under these principles. Daniel Boxberger (1993:7) argues that the theory and practice of aboriginal rights are embedded within the Royal Proclamation of 1763 through the recognition and assurance that the "Aboriginal rights to land, and by extension to resources, continue until such time as these rights are extinguished by treaty or some other form of agreement."

The conclusion in *Johnson v. McIntosh* ruled in favor of the defendants, and held that the claim of title could only be legally validated and recognized through the United States and that the plaintiffs could not claim title through the Cherokee Nation. Carol M. Rose (1985:85) argues that the Court decided that the Indians did not undertake "acts of possession" under the rubric of international law, thus, invalidating the claims of the plaintiffs that would have provided evidence of a property right. This decision clearly informed the individuals and states that the alienation of lands held by the Indians could only occur through a process that included the Crown, a right that became an obligation of the United States government. According to Siegfried Wiessner (1999:97) the regime of international law became recognized as being valid and having far reaching legal implications on treaty-making and administrative practices in the future.

The second of the legal challenges put forth to the United States Supreme Court was *Cherokee Nation v. Georgia* (1831) a case where in the Court was to decide whether the Cherokee Nation met the status of being a "foreign state" so as to prevent Georgia from imposing state laws in Cherokee territory (Miller 2008:54). At stake was the petitioner's

recognition of its sovereignty, a matter that they cautiously entrusted to the foreign system of law to make this determination and as we will see it did not turn out in favor of the Cherokee Nation.

The final ruling in the Cherokee Nation case defined and recognized the Indians as a ‘domestic dependent nations,’ and according to Russell (2005:83), Chief Justice Marshall defined them as “distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial.” Marshall’s colorful statement did little to rectify the broad subject of indigenous sovereignty within the political framework of the relatively new political and legal systems of the Americans. According to constitutional law theorist, Susan Williams (1997:13) as a result of the decision in *Cherokee Nation v. Georgia* the United States Supreme Court was forced to outline the federal, tribal and state relationships under the United States Constitution, which ultimately recognized that tribes and states to be separate sovereigns.

The Eurocentric ideological definitions of the indigenous peoples of the North American continent and the first lands “discovered” by Europeans were used to finalize the decision made in *Cherokee Nation v. Georgia*. President of the Native American and Indigenous Studies Association, Makere Stewart-Harawira (2005:77) concurs as the indigenous peoples and their cultures were defined as being “primitive,” lacking of both recognizable forms of “civilization or culture,” and no conceptualizations of any social organization. Regardless of intent these notions had influence on the final ruling of Chief Justice Marshall as the positioning of arguments that revolved around principles and physical actions that justified the act of discovery were enacted upon uncivilized peoples of the New World.

The non-recognition of Cherokee sovereignty as a foreign nation-state led to this independent acting polity as being a “domestic dependent nation” and McNeil (1989:246-247)

argues that Marshall's description was intended to be politically correct and reflected the intent and purpose of the current executive administration. Settler interests and their need for lands that were in possession of the Cherokee Nation drove this reflection of political intent by the State of Georgia and the United States executive. According to David Wilkins (1995:90) it was determined in this first Marshall decision that Indian tribes or nations within the United States could not be recognized as being a foreign state with which treaties could be made. What this opinion accomplished was that it created a foundation for the cases that were to follow in the coming year and time and time again has proven to be a weak starting point for any other legal challenges that were brought forth to the United States Supreme Court.

The Cherokee recognized itself as a polity that deserved equal status and the recognition that should have accompanied this stature. The Courts determination that the Cherokee Nation did not hold sovereign status severely impacted the manner in which the Indigenous peoples of North America were viewed and had great influence on their social, political, and legal status. It is clear that as a result of the first Marshall decision that the social and political organizations of the Cherokee were declared as being non-existent which served the best interests of the immigrant society as they imposed Christian ideologies that were contained within the discovery doctrines principles. The political governance system of the Cherokee at this point had little or no influence or rights associated with its former status as they had become wards of the federal government a legislative decision that put to rest the Cherokees' claim of nation-state sovereignty. What is also apparent is that limitations then could be placed upon the real conceptualizations of property ownership and questioning whether or not the Cherokee had any rights to hold title to their lands from this point forward.

The Doctrine of Discovery was brought into this court as a measure to challenge the sovereign status of the Cherokee Nation and to establish whether or not they retained any property title rights that existed before British rule and more importantly after Britain hegemony in the United States came to an end. The Cherokee Nation was indisputably forced into this situation and had they known that such a ruling was to negatively impact their sovereign status they might have considered other alternatives, as the eventual outcome was one filled with human tragedy.

It was not long after the *Cherokee Nation v. Georgia* (1831) case that a legal challenge was brought before the Supreme Court of the United States that specifically questioned the right of the state of Georgia to impose its laws within the territory of the Cherokee Nation. Robert Miller (2008:55) argues that in *Worcester v. Georgia* (1832) its intent was to criminalize a New England missionary's right to occupy lands within the boundaries of the Cherokee Nation, an occupation that was granted by the Cherokee Nation itself. The state of Georgia repeatedly insisted that their laws superceded both the laws of the Cherokee Nation and the Federal government and according to Miller (2008:55) the Court ruled that Georgia's assertion conflicted with the federal Constitution, treaties and laws and violated the principles of federal authority.

Larry B. Leventhal (2002) in his discussion on Indian tribal sovereignty contends that the federal government has plenary authority to regulate Indian affairs and Georgia's authority did not extend or apply to Cherokee sovereignty that was recognized as being separate and distinct. Therefore, despite Georgia's claims the federal government made it explicitly clear that they were the sole sovereign authority over Indian affairs.

According to Thomas Berger (1991:73) Chief Justice Marshall used the British policy of King George III's Royal Proclamation of 1763 as a starting point to determine the legitimate

status of Cherokee sovereignty and the issue of land title by noting similar characteristics of both the British and Cherokee governing institutions. David Wilkins brings to light a question that should have been given serious consideration before the final determination in *Worcester v. Georgia* was handed down. Wilkins insists (1995:84) that the Doctrine of Discovery influenced federal law by making the Federal government the absolute titleholder of Indian lands and concurrently relegating Indians as mere occupants of these lands. Peter Russell (2005:93) concurs with this position based on Marshall's argument that the discoverer had exclusive rights of land acquisition accompanied the act of discovery and subsequently held "clear title to all the lands." The state of Georgia then passed laws to take control of lands belonging to the Cherokee Nation despite the uncertainty of the outcome of this Supreme Court decision, which meant the annulment of Cherokee tribal laws and the imprisonment of tribal officials (Russell 2005:94).

Leonard Baker (1974:733, 735) contends that the final ruling in *Cherokee Nation v. Georgia* was arrogantly and blatantly ignored by the state of Georgia as it first of all claimed that the Court did not have jurisdiction as the United States government earlier in the nineteenth century made promises that included possession of Cherokee lands. The mutinous behavior exhibited by the state of Georgia reflected the attitude that carried over from the early colonial days when it was declared that Indians had become "Outlaws of Humanity" as they committed crimes against the British that went against the "Law of Nature and Nations" (Williams 1990:216, 218). The racial profiling of the Indigenous peoples of North America coupled with the Supreme Court's declaration of the Indians being domestic dependent nations and wards of the Federal government set the stage for the following Marshall decision.

Milner S. Ball (2000:1193) concludes that as a result of Marshall's decision in *Cherokee Nation*, wherein it was determined that the status of complete sovereignty held by the tribes fall

under the United States therefore any attempt to acquire Indian lands or to make a political connection or alliance with them would be constituted an invasion of their (the United States) sovereign territory and thereby considered an act of hostility.

The decision in *Cherokee Nation v. Georgia* weakened the legal status of the Indians as the treaties made between the Cherokee were essentially nullified with the ruling made in this Supreme Court decision. The sovereign status of being a recognizable “Nation” and the subsequent categorization as being wards of the Federal government weakened the Cherokee’s rights of land ownership and political autonomy over lands within the state of Georgia. Prior to this Supreme Court decision Thomas Johnson and others bought land from the Piankeshaw Indians which were under the protection of the Royal Proclamation of 1763, lands that D.W. Elliot (1994:35) claims were subsequently bought from the United States government and then occupied by McIntosh.

What became evident in the *Johnson v. McIntosh* (1823) case was the matter of how the Crown had come to its assumed authority over North America. A leading aboriginal law authority, Thomas Issac (2004:7) argues that at the heart of the contention was whether North America and its Indian inhabitants were conquered, which clearly implies conquest by acts of war, or under rules of the doctrine of discovery. If the argument were based solely upon the doctrine of discovery the legal implications then would be based upon the discoverer’s claim and justification that the Indians did not have any recognizable forms of law and governance. What is unclear is whether the rights of possession and duties or obligations of the “conquering” sovereign passed to the United States with the relinquishment of British hegemony over these lands in question. Under the Laws of Nations did the British conquer the Indians of North America, and if not did the Doctrine of Discovery fully encapsulate the full intent of its

principles and to what degree were the rights of the Indians and were they fully considered in *Johnson v. McIntosh*.

With the state of Georgia and the Federal government's refusal to acknowledge and adhere to the Supreme Court's authority, as evidenced after *Cherokee Nation v. Georgia*, the influence of the judiciary became limited due to this act of insubordination.

As noted above, the final Supreme Court decision in the famed Marshall trilogy was *Worcester v. Georgia* wherein a missionary was convicted under Georgia law of living within the boundaries of the Cherokee territory. According to Elliot (1994:44) Worcester disputed the constitutionality of Georgia's state laws stating that they violated federal laws and treaties that were previously made between the federal government and the Cherokee Nation. Worcester based his argument on the fact that he had obtained permission from the Cherokee to live amongst them and did so according to the laws of the Cherokee Nation. Current UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya (1996:136) argues that the legal status of the Cherokee as a political community was under the protection of the United States and based upon this understanding the state of Georgia "could not" extend its criminal jurisdiction over Cherokee territory.

Bruce Clark (1990:15) declared that the *Worcester* decision was based upon the European discovery of North America and ignored the pre-existing right of self-government as held by the aboriginal peoples. The Doctrine of Discovery became readily accepted as a convention of international law and under its auspices came a variety of consequential edicts that assisted in burying the rights of property ownership practices of aboriginal peoples.

Worcester according to Harold C. Syrett (1967:210-211) declared Georgia law as being unconstitutional and recognized that the federal government, not Georgia, had full jurisdiction

within the traditional territory of the Cherokee Nation. Syrett (1967:211) further asserts that in 1835 the federal government negotiated a land surrender treaty with the Cherokee Nation of all their holdings that lay east of the Mississippi while passing trade and intercourse acts with the Indians. What should be considered at this juncture is the autonomous status of the Cherokee Nation as being capable of entering into a negotiation process with the United States, a point that should have been guaranteed the rights of the Cherokee Nation within the state of Georgia. Kent McNeil (1989:247) argues that in *Worcester v. Georgia* Marshall affirmed that “Indian nations had always been considered as distinct, independent political communities,” and that the laws of the State of Georgia, and other states could not apply of their “own force within Indian territories.”

Despite the acknowledgement that Indian nations retained a form of inherent right to self-government it became apparent that, despite the recognition of nation status held by the Cherokee in *Worcester*, the State of Georgia chose to ignore the rights and laws of the Cherokee and according to Bruce G. Miller (2001:33) continued to confiscate lands within the Cherokee territory.

At the conclusion of *Worcester* the United States President, Andrew Jackson, vehemently challenged the Cherokee rights as upheld in Marshall’s decision and Russell (2005:96) contends that the president was firmly committed to moving the Indians to lands west of the Mississippi River, a policy that was supported by a majority in Congress. This is more than likely the reason that the decision was challenged by the State of Georgia and President Andrew Jackson’s executive branch of government, a challenge that ignored Marshall’s ruling and declared it unenforceable. Baker (1974:733) argues that the United States government, under President Jackson’s leadership had ignored its own supreme law of the land, the

Constitution of the United States, when it ignored the treaty commitments it made with the Cherokee Nation. The political actions against the Cherokee Nation by President Andrew Jackson and his administration along with the State government of Georgia not only set an Indian policy precedent their collective anti-Indian legislations constitute a US constitutional violation of the highest degree.

As James Tully (1995:118) demonstrates the 1665 Royal Commission on Indian Affairs set parameters for the relations between aboriginal nations and British North America which in turn led to the King George III's issuance of the 1763 Royal Proclamation. Tully (1995:137) argues that the Royal Commissions dealt with aboriginal nations as "equal partners in confederation." The recognition and affirmation of aboriginal sovereignty by the 1665 Royal Commission, according to Tully (1995:120) confirmed that "long use and occupation of a territory" provided a nationhood status for aboriginal peoples as they had governed themselves under an organized and independent set of laws.

Environmental law and policy expert, Lloyd Burton (1991:32) argues that the rulings made by Chief Justice Marshall in these three United States Supreme Court decisions collectively had the following consequences upon Indians and Indian lands: 1) stripped tribes of fee simple ownership of their lands; 2) declared tribes as domestic dependent nations, and; 3) barred state intervention in exercising jurisdiction over Indian lands. I agree with Burton's conclusions on the effects of the Marshall decisions upon the indigenous peoples of the New World. This investigation is forced to also take into serious consideration the sub-sets or underlying issues that make up the total picture of the impacts of the Marshall trilogy.

The final rulings made in Marshall Trilogy were ignored by President Andrew Jackson and his constituents, primarily in this instance the state of Georgia, yet it must be understood that

other southern states were in support of Jackson's Indian removal policy. During the Jackson administration Chief Justice Marshall's rulings were disregarded and cast aside, which created a political and judicial juggernaut that had resulted in direct violations of the recent American constitution. At this point in America's history, Chief Justice Marshall was highly regarded as a constitutional expert and a great deal of his judicial decisions was directly dealing with rights regarding property law. American law and political historian, James F. Simon (2006:125) contends that Chief Justice Marshall had written a number of undivided legal opinions that privileged the federal government's authority over the states in the protection of private property rights. The precedents set in the Marshall Trilogy carried forward into the modern era and are often cited by the Supreme Courts of the United States, Canada, Australia and other Commonwealth countries.

In New Zealand, an aboriginal land where the British Crown had asserted its authority over the Maori and their lands a question arose surrounding whether or not settler populations could acquire title to Maori lands. According to Kent McNeil (1989:229) this question was brought before New Zealand courts and known as *The Queen v. Symonds* (1847) and was intent on answering if the Crown had the exclusive right to extinguish aboriginal title to Maori lands with their consent. It was determined that the source of title resided with the Crown as it was determined that they were the original proprietor of the lands, despite the agreement made with the Maori in the Treaty of Waitangi (McNeil 1989:229). According to Solicitor for the Supreme Court of New South Wales, Larissa Behrendt (2010:215) the facts in this case were similar to the U.S. case of *Johnson v McIntosh* in that what was brought into question was whether or not an individual (settler) could acquire legal title of lands bought directly from aboriginal owners.

In the 1869 Court of Appeal decision concerning the Quebec case *Connolly v. Woolrich* (1867) it was determined that conquest provided title to the courts of the conqueror and recognized that it was acquired in this manner and maintained by force (Clark 1990:17). According to P.G. McHugh (2004:157) in *Connolly v. Woolrich* (1867) Justice Monk took into consideration that the charter of the Hudson's Bay Company bestowed upon them the territorial rights and political organization while abrogating the laws and usages of these lands held by the Indians. Bruce Clark (1990:13) argues that Monk J. came to the conclusion that the aboriginal interests (legal or economic) were never abolished and maintained in its original form despite their engaging in trade practices with representatives of France and Great Britain.

According to Australian historian, Henry Reynolds (1987:32-33) Justice Blackstone of the Australian court determined in *Cooper v. Stuart* that in 1788 Australia had consisted of "a tract of territory practically unoccupied without settled inhabitants." During this period it is apparent that the settler societies were attempting to assert English law that allowed for occupancy rights to take precedent over land that were considered to be *terra nullius*. The 'empty land' theory was applied as a method of assuming control of these indigenous lands with an added assumption that there were no "prior legal code and no land tenure had ever existed" (Reynolds 1987:33). According to property law attorney, Michael Weir (2002:1) Justice Blackburn argued that even in the remote possibility that aboriginal or native title did exist at that time (1788), this right was extinguished when Europeans settled in Australia.

The Queen v. Symonds (1847), *Connolly v. Woolrich* (1867), *Cooper v. Stuart* (1889) are cases dealing with aboriginal land rights in territories colonized and subsequently claimed by the British Commonwealth. At the time these cases were ruled upon the question of differing circumstances in regards to separation of land and resource rights had not been answered by any

court. This changed in 1908 as aboriginal/Indian water rights came to the forefront in a legal dispute over the waters of the Milk River that meanders into Canada prior to emptying into the Missouri River.

A legal controversy arose in the state of Montana between non-treaty water users and treaty Indians over the usage of waters that flowed in the Milk River. The Milk River that originated outside the Fort Belknap Reservation was being diverted by white settlers in such quantities that it left insufficient supplies to meet the irrigation needs of the indigenous peoples living on the reservation. In response and after repeated unsuccessful attempts by agents of the Bureau of Indian Affairs (BIA) and the U.S. Attorney to regain access to this resource the situation was forced into the courts where an adjudicated decision was made on whether or not Indians maintained reserved rights to water prior to the advent of treaties between the United States and Indian tribes. The case became known as *Winters v. United States* (1908) and marked a period wherein Indians of the United States petitioned the colonizer's courts to recognize their rights, in this case, to the customary rights and practices of usage to the waters of the Milk River.

According to US water rights advocate, L. Ward Bannister (1915:281) an important result of this case was the acknowledgement of treaty rights held by Indians in the United States which in turn granted regulatory powers to the federal government over these water resources. Water and Human Rights scholar, Edward S. Cahn (1969:100) argues that when the Indians gave up lands in treaties made with the United States that they retained rights to water and that the Solicitor of the Department of Interior was charged with protecting this right. Water rights historian, Daniel McCool (1987:37, 47) in his examination of Indian water settlements, contends that the federal government argued that when the Indians relinquished lands within treaty reservation boundaries the water rights did not become owned by non-Indian purchasers. The

collective perspectives of Bannister (1915) Cahn (1969) and McCool (1987) provide evidence that the federal government of the United States irrefutably is obligated not only to recognize aboriginal water rights but must protect these rights from non-Indian users.

The 1908 decision set a legal precedent that clearly affirmed that Indian reserved rights existed prior the treaty era, therefore establishing Indian priority rights over settler riparian rights, as it existed in the English common law tradition. Historian Donald Worster (1985:298) and legal water expert David F. Getches (1984:291-295, 300, 305-311) interpret the Supreme Court decision as giving tribes an unlimited claim on waters that originate or flow through Indian reservations and as requiring non-treaty individuals to buy the right to divert water. According to American Indian environmentalists Chibitty et al. (1977:12) the Fort Belknap Indian reservation was not created by treaty, instead was created by executive order through an Act of Congress (25 U.S.C.A. 71) because the United States was prohibited from making treaties with Indian tribes in 1871.

Despite the Fort Belknap Indian Reservation not being created through the treaty process the Indian water users based their arguments in *Winters* upon claims that their pre-existing rights stemmed from a much older water rights system. In her examination of Western United States Indian water settlements, Kathrin Wessendorf (2011:70-71) concludes that the Indian reserved water rights were older than most states and in theory extended to all the water that could be reasonably used for the purposes (which included irrigation) of a reservation.

One of the central components of the arguments posed by the Indians and the federal government was that the priority date of water rights was established before the western water laws came into existence. Susan Williams (1997:16) implies that Indian water rights are vested as a property right at the time the reservations were created and that tribes had been using the

water since time immemorial, thus offering a validation and credible source of aboriginal water rights. Williams (1997:22) also contends that as a property right, water is in a unique category, as it cannot be owned by anybody, and rights are specific to use, with governments having the ability to regulate the rights to its use.

According to Daniel McCool (1987:39) Carl L. Rasch served as U.S. Attorney for the District of Montana from 1902-1908, and was well aware of the ongoing controversy over the waters of the Milk River and listed four points that he deemed as worthwhile of consideration:

First, the Milk River was part of the Fort Belknap Reservation and therefore was never a source of public water subject to appropriation. Second, he argued that the reservation held riparian rights in sufficient quantity to “carry out the objects and purposes for which said reservation was created” (Justice Department memorandum n.d., about December 1905:3). Third, he claimed that depriving the Indian reservation of water would violate the treaties and agreements made between the Indians and the government. Finally, he argued that state legislation cannot destroy the rights of the federal government as a riparian landowner.

In his examination of the historical usage of water during the early colonization period in the eastern region of the United States, Leonard M. Cantor (1970:19) asserts that it was the riparian rights doctrine that gives holders of lands that border water systems, and in some instances, the upper riparians, the right to a ‘reasonable use’ of the water. The major problem associated with the English version of the riparian doctrine is that it did not have a clear and forthright statute that dealt with waters that originated and flowed from one country into another. Chair of the Water Resources Committee of the International Law Association Charles B. Bourne (1997:111) argues that to remedy its shortcomings in the North America the riparian doctrine stated that waters flowing from one territory to another must be “undiminished in quality and unimpaired in quality.”

Waters that originated outside Indian reservations and subsequently flowed into and through the federally protected lands were definitely affected by the riparian rights doctrine. While the intent of *Winters* was to resolve water allocation needs of the members of the Fort Belknap Indian reservation it must be made clear that the Milk River originates in Canada. There are many variables and unforeseen circumstances between the countries that share one or more water resources that led to the inevitable legal challenges by water-dependent users that lived in near proximity to international flowing bodies of water. According to Frank Trelease and George Gould (1986:647) the United States Department of Interior provided the federal government of the United States with the authority to prevent states from interfering with national treaty obligations as it instituted the document on the Use and Control of the Waters of Interstate and International Streams (1956).

According to Nigel Bankes (1991:228) two important questions were answered in the precedent setting *Winters v. United States* (1908): firstly, whether or not an Indian water rights doctrine existed; secondly, the priority treaty right to waters that was established by the date of the treaty in question. The Committee on Western Water Management (CWWM) (1992: 92, 93) argued that federal proprietary claims “trumped” state-created water rights as the priority date was established when the Indian reservation lands were set aside by treaty, statute, or executive order. The Committee based their contention on the United States Supreme Court’s decision in *Winters* wherein extensive rights and control over reservation water resources were upheld and protected. Charles Wilkinson (1999:166) notes the significance of this United States Supreme Court ruling in *Winters* as it recognized tribal water rights that dated to the creation of a reservation, thus being “senior” under the first-in-time, first-in-right principle that applies in Utah and other western states.

The priority date for the reserved water rights of the Fort Belknap Reservation was established when the lands were set aside by an Act of Congress in May of 1888 and according to Pacific Northwest Indian water rights lawyer, Robert Dellwo (1971:219) the priority treaty rights were established a year earlier than the creation of the State of Montana (1989). The importance is that this fact nullified the non-Indian appropriator's arguments that were based upon the prior appropriation doctrine.

David Getches (2002:16, 17) contends that the establishment of the "reserved rights doctrine" in the *Winters* decision guaranteed Indian tribes not only the right to use waters but did in fact create a dimension of property rights in land and water. Diana White Horse Capp (2002:132), an indigenous environmental activist, views *Winters* as a legal precedent that formally protects Indian tribes' rights to water under the Reserved Rights Doctrine that implies seniority that was established by the "since time immemorial" conceptualization. Robert Dellwo (1971:224-225) interprets the term "immemorial" as having the legal meaning that indicates a time, "when the lands and waters involved were part of those used by the Indians for generations or centuries (immemorially) before their taking." The "time immemorial" perspective creates space for a broad and liberal interpretation and has a significant impact especially when determining seniority over the waters that originate outside reservation boundaries and subsequently flow through these lands.

The prior occupancy concept was therefore an influential aspect that had bearing on the conclusion in the *Winters* decision. Historian Kenechi Matsui (2009:35) notes that the historical occupancy did not refer specifically to the pre-contact occupation instead alludes to the reality that the making of treaties with Indian tribes, acknowledged the "Native presence" prior to the formation of the American states. Historical occupancy by aboriginal tribes or groups prior to

the formation of American states is a fact and the issue of sovereignty came into question when the Court's decision acknowledged the United States government as entering into a negotiation process to make a treaty with Indians. Like it or not it is generally understood and not questioned that treaties can only be made between two sovereign nations.

The United States Supreme Court's recognition of Indian water rights being senior to those of non-Indian water users had a significant impact on the development of water management regimes of those states in the arid western regions of the continental United States. Richard Bartlett (1988:50) views the water rights of Indians as being more substantial than the riparian rights of the non-Indian water-dependent users. The message sent to the non-Indian water users in all of the United States was that the laws that they had depended on to gain unfettered access to waters in or around Indian reservations might not be accessible from this point on without paying some form of compensation.

The recognition of Indian rights in *Winters* is an indication that these rights are intertwined with both water and land, therefore having far reaching legal implications in current aboriginal land title and natural resource claims in Canada. Environmental lawyer and consultant, Linda Nowlan (2004) argues that *Winters* may or may not be applicable to water rights on reserve lands in Canada, citing that most Canadian reserves were created by "unilateral action" of the government and not by treaty. The manner in which reserves were established in Canada changed by the time that British Columbia was admitted to the Union through section 146 of the Constitution Act, 1867 and entered Confederation effective July 20, 1871 (BNA 1867:28).

The Winters Doctrine has had significant legal bearing on aboriginal water rights in Canada and in this study it warrants consideration in its applicability in the Province of British

Columbia as the Canada's Supreme Court Justices' refer to its legal implications. The theory regarding water rights in British Columbia therefore continues to be impacted by a number of factors. Claudia Notzke (1994:31) notes that the aboriginal water rights in Canada were not abrogated by legislation, implying that these rights remain legally secure. Kenechi Matsui (2009:54) views the jurisdiction over Native lands and water by the US federal government as being the foundation of a similar jurisdiction assumption that was specifically based upon federal trusteeship under Subsection 91(24) of the British North America Act of 1867.

In Canada, the BNA Act, 1867, gave the federal government exclusive jurisdiction over "Indians and lands reserved for Indians" and other lands that were classified as Federal, such as National Parks, along with priority over international water issues (Government of Canada 1973:274-275). It is obvious that the matter of "trusteeship" over Indians as stated in Subsection 91(24) of the Act is a carryover from legal decisions made during the Marshall trilogy wherein Indians were determined to be "wards" of the federal governments. It served the best interest of the Canadian governments to perpetuate this identification of aboriginal peoples that were to be classified and placed into this status.

Therefore, aboriginal water rights in North America remain steadfastly entrenched within assimilationist policies, acts and treaties of the Dominion federal governments of both the United States and Canada. James Tully (1994:177) claims that from the outset of the colonial period the Canadian Crown recognized the Indian Nations as having equal status with European nations and understood that Indian lands could not be surrendered except through public negotiations that did not occur under duress. The infringement of water rights in British Columbia during aftermath of Confederation followed a similar path taken by the United States and according to Robert Dellwo (1971:238) consideration was given to the special rights and status of Indians and their

lands prior to the reservation era, a point that has carried forward into the Supreme Court decisions in post-confederation Canada.

Prior to the Supreme Court ruling in *Winters* the non-Indian water users were dependent on a series of European derived water doctrines whose principals were molded to accommodate the circumstances of the arid western region of the United States. David Getches (1984:82-84) argues it was very early in the 19th century when the doctrine of prior appropriation was formalized, replacing the common law principles embedded in English riparian doctrine. According to Getches (1997:3) the development and evolution of the prior appropriation doctrine was a response to meet the needs of miners in northern California as it was an imperative to secure the rights to use and divert water in order to secure their capital investments.

According to Donald Worster (1985:1) in response to the environmental conditions in the west, a new and unique legal framework was destined to occur as non-riparian users were engaged in projects that were reliant on the diversion of water from streams and rivers. Therefore, riparian rights which are linked to ownership of lands that lay adjacent to the water source therefore contravened the western water-users beneficial use concept that often meant moving the water, in many instances, far beyond the riparian area. According to environmental rights advocates Mark Reisner and Sarah Bates (1990:29-30) the priority rights to water were given to the first person or party licensed to use the water in a beneficial manner.

John Shurts (2000:40) argues that the fast growing Mormon populations in the 1850s link the main component of the prior appropriation system to the utilization of water resources in the arid Far West. The limited available water supplies in the Utah Territory forced the Mormon settlers to develop laws and water management practices that according to Ralph Johnson (1971:4) allowed for inter-basin transfers and the adoption of the principle of beneficial use. The

principle of beneficial use simply meant that the water must be used and cannot be reserved for future use. The point made earlier by Susan Williams (1997:22) on the connection between property rights and the rights associated with use of water is clearly underpinned by the principle of beneficial use. Williams (1997:15) argues that the aboriginal water right is a property right under U.S. law and that the dilemma revolves around the fact that the water right has not been quantified, which allows for non-Indians to divert water belonging to Indian tribes.

What must be understood is that the foreign nature of the transplanted principles of this doctrine was outdated and non-relevant in the arid Far West region of North America and the evolution into the prior appropriation doctrine was an inevitable circumstance to accommodate the needs of the settler society. Under the prior appropriation doctrine, priority rights to water were given to the first person or party licensed to use the water and these rights were not based specifically on ownership of lands adjacent to the water source (Reisner and Bates 1990:29-30). In the view of Donald Worster (1985:1) the acceptance of this doctrine gave non-riparian water users the right to divert waters from streams and rivers along with creating an innovative and equitable legal framework for this water scarce region.

The Winters Doctrine is cited and referred to in many cases that deal with aboriginal/indigenous water issues. The following water related cases were influenced by the legal precedent set in *Winters* and the final determinations were underpinned by this widely cited aboriginal water rights case. According to Charles Bourne (1997:43, 74) in *Kansas v. Colorado* (1943) the state of Kansas argued that Colorado was overstepping its use of the water flow in the Arkansas River to a point that it was depriving Kansas farmers of waters that had been previously utilized, therefore violating the rule of equitable apportionment. This case has similarities to the problems dealt with in *Winters*, only the petitioners and defendants were states

and dealt primarily with interstate rivers and the manner in which usage was quantified and distributed.

In 1963 a Supreme Court ruling was handed down in *Arizona v. California*. According to the American Indian Lawyer Training Program (AILTP) (1999:52) the reserved rights doctrine was applied to federal public lands which limited the primary purposes for which the reservation was created and thus, these water rights must comply with state law. Initially, the primary intent for the establishment of Indian reservations was to reserve lands for the exclusive use and occupation for Indian tribes. In an analysis of *Winters* Rodney T. Smith (1992:168) argues that the date of the creation of the reservations in question was used to establish priority Indian water rights and the court determined that water uses by non-Indians could not interfere with water rights of the five tribes. Charles T. Dumars, Marilyn O'Leary and Albert E. Utton (1984:5) in their comprehensive study on Pueblo Indian water rights contend that this case was used in a fishing rights case to support the claim that an apportionment of a natural resource (salmon) was at one time exclusively utilized by Indians in a way that provided them with a "moderate" living. Historically, the five tribes in question were exclusively utilizing the water flows in the Colorado River; therefore the court justified the quantification of specific amounts of reserved water for their use.

Daniel McCool (2002:81, 159) notes that when the negotiators of the 1922 Colorado River Compact allocated 15 million acre feet of the water flow in the Colorado River it was considerably more than the water system could provide as the flow was measured during unusually wet years. McCool (2002:167) makes it clear that when the Compact was negotiated there were no Indians or Bureau of Indian Affairs (BIA) present therefore no tribes were

signatories of the compact and as a blatant and deliberate fact, tribal water rights were not mentioned or identified in the compact.

These court cases that have dealt specifically with Indian water issues have resulted in what should have been considered as momentous victories for reservation Indians in the United States. It has been determined by Daniel McCool (2002:23) that these court victories are short lived as the Indians ended up with “paper water” awarded by the courts, while the non-indigenous settlers always seemed to end up with the greater shares of “wet water.” Therefore, the reoccurrence of ignoring the court’s decision is a carryover from the Marshall trilogy and Winter’s decision, evidence being that the Jackson administration and the state of Georgia chose to ignore the Chief Justice’s ruling and to this day the Indians at Fort Belknap have not yet received the waters awarded in their precedent setting case.

In Canada there have been recent twenty-first century Supreme Court legal decisions that were considered as major victories by the aboriginal plaintiffs. Although the cases to be presented do not directly revolve around water rights issues they are indirect sources for substantiating aboriginal water rights claims in the province of British Columbia. In *Calder v. Attorney General for British Columbia* (1973) the Nishga claimed they held aboriginal land title to their traditional territory maintaining Nishga jurisdiction and authority within the territory.

While *Calder* was not specifically a water rights case a broad interpretation revolving around land use and occupancy should have included water, as land title and resource rights are inseparable. For example, in *The Nishga Final Agreement*, Mary C. Hurley (2001) proposes that to protect their land interests the Nishga formed the first ‘Nishga Land Committee’ in 1907 with the intent to stop non-aboriginal settlement and resource development. In 1968 the Nishga Land

Committee hired Thomas Berger to assert a legal claim over aboriginal land title to the Nass Valley, a claim that the Province of British Columbia did not recognize.

Legal historian and constitutional law theorist, Mark D. Walters (2009:39) points out that it was the Nishga nation's contention that land title existed prior to the common law being brought to North America and that land title was not given to them through any treaty, grant or proclamation. Michael Asch (1984:48) concludes that up until the "*Calder*" decision in 1969 the Province of British Columbia asserted that aboriginal title was non-existent, a contention that the Court agreed with as it dispelled the Nishga claim on the issue of non-recognition of aboriginal title.

It is Michael Asch's (1984:52) opinion that as a result of the decision in *Calder*, aboriginal rights were recognized as pre-dating the establishment of European sovereignty, yet the courts continue to insist that these rights can be modified and limited by laws and policies of the provincial and federal governments. Asch (1984:53) also mentions that many of the aboriginal rights continue to exist at this time, despite the fact that it was not recognized at the time of the actual origin of Canadian sovereignty and it remains a legal duty for aboriginal societies to prove themselves as functioning as an ordered and civilized entity.

It is safe to say that the complex nature of land claims and jurisdiction issues brought forth by the Nishga created space for an appeal process to be heard by the Supreme Court of Canada. Margaret Anderson (2008:266) argues that the Nishga appeal was heard and subsequently ruled on by the Supreme Court of Canada in 1973, and the split-decision ruling acknowledged the Nishga claim that they held title prior to British Columbia entering Confederation. The overlying presumption of the defendant (Attorney General of the Province

of British Columbia) was that the province of British Columbia had gained jurisdiction and authority from the British Crown when the Dominion of Canada asserted its sovereignty.

As a result of the legal ruling in *Calder*, Claudia Notzke (1994:46) argues that the fishing rights of aboriginal societies in British Columbia were legally recognized as being of paramount importance, especially in regards to aboriginal title. Aboriginal title therefore was not extinguished or compromised based upon and continued to exist despite the assertion of British authority over lands and resources of the province of British Columbia. Peter Russell (2005:273) argues that the settler authority did not arise from the assertion of British authority, as Native title was not surrendered through a treaty process. It is clear that the courts never viewed water or land rights as being separate issues. Richard H. Bartlett (1988:9) highlights that the language and analysis of the Canadian courts have suggested that water rights in British Columbia are defined by the historic and traditional use of water by aboriginal societies.

In October of 1969 Justice Gould of the British Columbia Supreme Court ruled that the Nishga claim of territorial rights did not survive the establishment of colonial land legislation in British Columbia (Sanders 1996:90; Asch 1984:48). Traditional chiefs of the Gitksan and Wet'suwet'en, Gisday Wa and Degam Uukw (1992:21) claim that when the *Calder* case reached the Court of Appeals that the Nishga were referred to as "a very primitive people with few of the institutions of civilized society and none at all of our notions of private property." It was the opinion of Gisday Wa and Degam Uukw (1992:87) that the legal arguments in *Calder* turned into a debate on whether aboriginal rights could be extinguished by colonial ordinances or specific legislation.

Dale Turner (2008:33) claims that *Calder* was a milestone in federal Indian law as the case determined that aboriginal title exists in Canadian law and that it cannot be extinguished

without ‘clear and plain intent.’ The observations made by the Gitksan and Wet’suwet’en chiefs reflected the court’s attitude towards the aboriginal plaintiffs and if the colonial government and its courts were to attempt a legal extinguishment then the aboriginal peoples had to have the capabilities to understand the clear and plain intention of British Columbia’s representatives. What I am arguing here is that if the Court’s hierarchy was under the impression that the aboriginal peoples were uncivilized and did not have an understanding of the concepts of European property law then an extinguishment of land title could not be carried out with clear and plain intent.

Michael Asch and Norman Zoltkin (1997:210) argue that there is no current specific legislation or case at bar that exhibits the Crown’s clear and plain intent to extinguish Indian title, or for that matter, a request for Indians to voluntarily surrender their title. While the Asch and Zoltkin perspective has changed since the introduction of the comprehensive land claims policy in British Columbia Justice Hall’s decision in *Calder* continues to set legal guidelines and parameters for the courts. Despite the establishment of a legal guideline that protects the manner in which the federal and provincial governments can extinguish Indian title to lands the Province have mandated special interests groups to engage in a water allocation process under the Water Act Modernization. It is my intent to have a greater and expanded discussion on this mandate in the conclusion.

It was definitely in the best interests of British Columbia to have the courts rule against the Nishga as the unanswered question on the legal entitlement of lands and resources would then be resolved with a certain degree of finality. According to Tim Raybould (1997:140) the ruling in *Calder* inferred that that aboriginal title might still exist within the traditional non-treaty territories and that the Nishga and other aboriginal nations in the province of British Columbia

may still be in legal possession of their lands. In the *Calder* case Justice Hall described aboriginal title as such: “a right to occupy the lands and to enjoy the fruits of the soil, the forest and the rivers and streams” (Bartlett 1988:7; Notzke 1994:46). This statement whether intentional or not created a platform from which to launch and assert rights associated with other natural resources, including water, within the province of British Columbia and what form that may take in the future is unknown.

What is abundantly clear was that at no time in the pre-contact and pre-sovereignty era did the aboriginal societies enlist to abrogate their rights to the land and resources (which includes water) to any foreign government. This statement of fact cannot be challenged by the provincial government of British Columbia or the federal government of the Dominion of Canada because neither has defeated or conquered the aboriginal peoples in British Columbia through an act of war.

Yet as recently as 1973, in the Supreme Court of Canada’s decision in *Calder v. Attorney General of British Columbia* aboriginal title was recognized based upon the Indians’ historic occupation and possession of their lands. Richard Bartlett (1988:7) in his evaluation of *Calder*, acknowledges that Justices Judson, Martland and Ritchie concurred on the fact that “when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. So, in the discussion on whether or not aboriginal water rights existed prior to the establishment of Canada’s sovereignty, the answer is, a big YES.

In the view of legal and constitutional law historians Hamar Foster and Benjamin Berger (2008:254) it was determined in the Court of Appeal in *Calder* that the Royal Proclamation of 1763 “did not apply” in BC, as the Court determined that at the time of its issuance the province was *terra incognita* (unknown lands) and that Indian title had been lawfully extinguished. It is

my opinion that the Nishga question of land title was intentionally delayed and prolonged by the provincial government of British Columbia specifically because they were vainly attempting to prepare legal positioning and arguments against a very strong entitlement challenge by the Nishga.

The Supreme Courts of Canada have taken a lead role in attempting to devalue both the human rights and aboriginal rights of the indigenous peoples of British Columbia. In *Calder* (1973), Chief Justice Dickson recognized aboriginal title as not originating in the Royal Proclamation of 1763, but from the fact that the Indians were living in organized societies and occupying their ancestral lands when the settlers first arrived and this was the basis of their title (Asch and Bell 1997: 59; McNeil 1997: 135). Justices Dickson and Contra Hall argued in their conclusion that aboriginal title existed but not within the legal frameworks of this foreign system of law. Justice Hall's conclusion that the Royal Proclamation did not apply to British Columbia was based on the fact that the colonial government of British Columbia before confederation had been "sovereign," a point that Bruce Clark (1990:133) maintains is ludicrous as the colonial government could not legislatively extinguish the Indian right or title.

Another critical point that "erupted" out of *Calder* is that the aboriginal rights here in Canada did not have to originate from treaty or agreements made with the Dominion government. It is my opinion that this puts the aboriginal peoples in British Columbia in a very strong legal position but also cloaks some hidden uncertainties that were uncovered in the courts at a later date. Until the ruling in *Calder* the Province of British Columbia maintained that the Royal Proclamation of 1763 was not the basis of aboriginal title and rights basing their arguments on the dates of the Province joining Confederation with the Dominion of Canada. And the impact on aboriginal peoples became clear when in the aftermath of the 1994

Delgamuukw decision as it became clear that the “onus of proof” had then become placed upon the aboriginal claimants.

According to Michael Asch (1984:49-50) Justice Judson took it a step further and argued that centuries of occupation meant that land title belonged to the Indians and thus, met the requirements of English law. I want to point out here to avoid any confusion: Justice Judson makes a definitive argument that “aboriginal title” is separate and distinct from the British requirement of “land title.” Justice Judson also considered that when the colonial government of British Columbia attained sovereignty (1872), he determined that BC had not begun to be a responsible government as it was subject to the provisions of the *British North America Act of 1867* prior to Confederation (Clark 1990:131). A leading aboriginal law authority, Thomas Isaac (2004) argues that while aboriginal rights were recognized and affirmed as a constitutional right guaranteed in s. 91(24) of the *Constitution Act, 1867* (BNA, 1867) the federal government held legislative powers that allowed the right to legislate and intervene.

At this juncture it is important to enter into the discussion the ‘Living Tree’ doctrine as first introduced by Lord Sankey in his progressive approach to constitutional interpretation that according to Sharpe and McMahon (2007:13) has left an indelible mark on Canadian constitutional law. In October of 1929 Lord Sankey, speaking on behalf of the Judicial Committee of the Privy Council, recognized two prevalent themes that had a bearing on the *Persons* case (*Edwards vs. the Attorney General of Canada*) ruled on by the Supreme Court of Canada (Sharpe and McMahon 2007:173): firstly, that legal rules or customs were products embedded within their social and historical context and that these laws may outlive the customs and traditions of their origin; and secondly, that differences can occur in statutory and constitutional interpretations (Sharpe and McMahon 2007: 179, 180).

According to Sharpe and McMahon (2007:ix) the *Persons* case is formally referred to as *Edwards v. Attorney General of Canada*, and recognized an ideal of universal personhood while concurrently challenging Canada's constitutional law. The plaintiffs argued that under section 24 of the *BNA Act*, women were not permitted to be appointed to the Senate based on the presumption that they were not a 'person' under the legal meaning of the constitution (Sharpe and McMahon 2007:ix). As a result of the *Persons* case Canada's constitution was thereafter considered to be a document that metaphorically referred to as a 'living tree capable of growth within its natural limits' (Sharpe and McMahon 2007:ix).

The 'Living Tree' doctrine simply implied that laws and customs transform over time and due to this fact the evolution and changes to these laws and customs must be given fair and equitable recognition by the courts. Therefore, the Constitution of Canada must not be considered to be static or frozen in time, with the understanding and legal recognition that it is a living document that should be allowed adapt to the ever changing social and political realities of contemporary society.

The next Canadian legal decision of importance is *Guerin v. The Queen* (1984) and in the opinion of Kent McNeil (1989:284-285) and others (McHugh 2004:358; McLeod 1992:8; Turner 2008:17) Canada was held liable for its breach of fiduciary obligations owed to the Musqueam Indian Band of British Columbia. *Guerin*, in my opinion, was a very small victory whose impact might be considered detrimental to the aboriginal peoples' assertion of land title and possessory rights to the natural wealth in this province. Lindsay Robertson (2005:144) mentions that after citing Chief Justice Marshall in *Johnson*, the Supreme Court of Canada in *Guerin* determined that "Indians have a legal right to occupy and possess certain lands, the ultimate fee to which is in the Crown." A dual edged sword was presented in the final outcome of *Guerin*, as the Crown

could only be negligent in its fiduciary obligation, an obligation it could only hold, if it held fee to the lands in question, a right that they have claimed by the right of discovery.

According to Dale Turner (2008:17) prior to the decision in *Guerin*, the relationship between aboriginal peoples were characterized within the Royal Proclamation of 1763, section 91(24) of the BNA Act of 1867, the Indian Act of 1876, and the legal support of *St. Catherine's Milling and Lumber Company v. The Queen* (1888). Mark Walters (2009:45) mentions that in *St. Catherine's Milling* a justification for taking of aboriginal lands was made when it was determined that the Indians “ ‘over run...rather than inhabited’ their hunting territories; Indians ‘were not in possession of any particular portion of the land.’ ”

Brian Slatterly (1987:729) argues that up until *Guerin*, aboriginal peoples were entitled to possess their homelands, up until the time that their title was extinguished by a voluntary surrender to the Crown or by legislation. Again the surrender or consent to abrogate aboriginal title must be completed with a clear and plain intent by the Crown for a lawful extinguishment to be recognized.

In 1984 an aboriginal fisherman, Ronald Sparrow was charged with violating fishing regulations under the *Fisheries Act* and according to Crystal (1996:118) became one of the first cases decided by the Supreme Court of Canada to consider how section 35(1) of the Constitution should be interpreted. John Borrows (2007:60) and Brian Burke (2000:15-16) argue that *Sparrow v. The Queen* (1990) was the test that determined and identified the practices, traditions and customs as rights of aboriginal societies that were recognized and affirmed by section 35(1) of the *Constitution Act*, 1982.

It was in the aftermath of *Sparrow* wherein it was determined that s. 35(1) rights were not absolute and that infringements might occur if justifiable legislation passed certain tests. It is

Larissa Behrendt's (2002:88) contention that it was at this time that it became a duty of the Crown to consult with indigenous peoples prior to taking actions that may infringe or destroy indigenous rights. Borrows (2007:108) maintains that in *Sparrow* the Supreme Court ruled that in the years prior to the enactment of the *Constitution Act*, 1982 the federal government could extinguish aboriginal rights without engaging in a meaningful consent process with aboriginal peoples. For aboriginal peoples the duty to consult simply meant that the Crown had already taken the infringement action and notifying aboriginal peoples of the extinguishment completed the process.

Michael Mandel (1994:366) cites a direct quote from *Sparrow* (1990:290):

Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group. Courts must be careful, then, to avoid the application of traditional common law concepts of property.

Therefore, the Court answered the question in that conservation and management of fish stocks were justifiable infringements under s. 35(1) because it preserved fish stocks for both aboriginal and the public's interest. McNeil (1997:33, 35) argues that the recognition of the "compelling" and "substantial" objectives as being "reasonable" warrants careful scrutiny as it involves maintaining equilibrium between the constitutional rights of aboriginal peoples and those of non-aboriginal populations in Canada.

As a result of *Guerin* and *Sparrow*, the Supreme Court of British Columbia (1991:135) acknowledged that the Indians of the province of British Columbia did have aboriginal interests of some sort in the lands and waters that they actually used for subsistence. The legal implications may not be as translucent as they appear because they does not clearly address the possibility of reduced habitat of spawning salmon or man-made stream alterations or physical structures that have inhibited water flows. What many have considered to be a victory is that

after *Sparrow* a new beginning for aboriginal rights was being taken into serious consideration, as it was clear that aboriginal peoples must be consulted and negotiated with in good faith (McHugh 2004:565). McLeod (1992:9) maintains that despite the Supreme Court's reluctance in *Sparrow* to allow the oral histories into the legal proceedings as evidence is considered as a remarkable achievement that strengthened the "trust-like" relationship between Canada and the aboriginal peoples.

These precedent setting Supreme Court decisions acknowledged that indigenous peoples did have 'rights' associated with prior occupation and continuous use of lands for millennia before the arrival of European peoples and their foreign-based legal systems. The complexity of settler concepts of property ownership and the subsequent rights associated with indigenous priority rights continues to be a problematic issue that has yet to be fully resolved. In *Van der Peet*, Chief Justice Lamer contends that aboriginal peoples must show that pre-existing laws and customs were practiced prior to European contact and colonization to establish exclusive use and occupation rights ((McNeil 2001:92).

The laws and customs in question in the *Van der Peet* case stemmed from the aboriginal rights to sell salmon. Leonard I. Rotman (1997) insists that Lamer C.J.'s decision in *Van der Peet* was based upon the fact that the selling of salmon was an "element of a practice, tradition or custom integral to the distinctive culture of the aboriginal groups claiming the right: moreover, the right had to be traceable to pre-contact practices. McNeil (2001:92) also interprets this decision as establishing that aboriginal rights did exist prior to the creation of Canada, which infers these rights as being an integral part of the social, cultural and political institutions of a civilized society.

What became clear at this point is that aboriginal peoples did possess a legal tradition that was in existence and practice for a great length of time prior to the arrival of Europeans. The legal recognition of aboriginal rights up to this point of time in the history of British Columbia and across Canada had for the most part been non-recognizable and had mostly been connected to treaty-based rights that were “given” not held in perpetuity by aboriginal societies.

The hereditary chiefs of the Gitksan and Wet’suwet’en had claimed ownership of territory and jurisdiction over 58,000 square kilometers of their traditional territory in the province of British Columbia (3 S.C.R. 1010). The case was filed by Delgamuukw (Earl Muldoe) on his own behalf and other members of the House of Delgamuukw and Haaxw and others (thirty-eight Gitksan Houses and twelve Wet’suwet’en Houses) v. Her Majesty the Queen (3 S.C.R. 1010) and is most commonly referred to as *Delgamuukw*. As mentioned previously, the Government of Canada (1973:274-275) cited the BNA Act, 1867 as giving the federal government exclusive jurisdiction over “Indians and lands reserved for Indians.” This in essence was a declaration of sovereignty over aboriginal peoples and their traditional territory and based within Canada’s constitution. Professors of political science, Tom Flanagan and Christopher Alcantara along with economist Andre Le Dressay (2011:27) note that Indian reserves are “islands of federal jurisdiction within seas of provincial jurisdiction.” Flanagan et al. (2011:27) further contend Canadian sovereignty was not an issue in *Delgamuukw* despite the decision that aboriginal title had not yet been extinguished in British Columbia.

Although many aboriginal groups consider the *Delgamuukw* decision as a victory, it became abundantly clear that certain entitlements and rights to lands and resources could be extinguished through a consent process. Yet, a warning embedded within the Flanagan et al. (2011) statement should be considered very carefully, noting the “not yet been extinguished”

phase. Thomas Issac (2004:106-107) argues that aboriginal title was recognized in *Delgamuukw*, which created a perplexing situation for the government of British Columbia, the general public and aboriginal people.

The source of aboriginal title, sovereignty, systems of law, physical occupation and being able to prove occupancy and use prior to the establishment of the common law in British Columbia were questions answered in *Delgamuukw* (Burke 2000:7). Henderson et al. (2004:4) argue that after *Delgamuukw* a new constitutional meaning and role came into being which forced aboriginal title not only to be recognized as existing in Canadian constitutional law but must be given status within the constitutional principles and texts. It is my opinion that the recognition of aboriginal tenure and title during the pre-contact period was a legal victory that has since forced aboriginal bands in the province of British Columbia to the negotiation tables wherein the primary purpose is to extinguish title through a consensual process.

Delgamuukw was appealed and the retrial was ordered based on technical reasons that included the accommodation of aboriginal oral histories as being authentic sources of historical evidence that according to Turner (2008:82) created a legal space for admitting the oral tradition of aboriginal societies into the Canadian courts. Cynthia Callison (1995:167) argues that in the first proceedings the European's written documents were allocated a greater weight as historical evidence than the aboriginal oral tradition.

Aboriginal rights Lawyers Louise Mandell and Leslie J. Pinder (1997) in an unpublished summary of the *Delgamuukw* decision argue that to prove physical occupation of lands prior to the Crown's assertion of sovereignty (1846) aboriginal laws relating to the lands in question must be present to establish aboriginal occupancy. The reluctance of the court in the first legal deliberations had then created a legal dilemma of its own making that forced the courts to allow

the oral testimonials of the traditional “house speakers or representatives” of the Gitksan and Wet’suwet’en. Mandell and Pinder (1997) also assert that the fiduciary responsibilities and obligations of the Crown requires a consultation process that addresses the concerns of the aboriginal peoples whose lands are at issue and must be concluded in good faith.

Borrows and Rotman (1997:4) cite from *Delgamuukw* that: “...Aboriginal laws...could be described as law before the creation of the colony...[and prior to 1858]...ceased to have any force, as laws, within the colony.” Therefore, the court in *Delgamuukw* had recognized the existence of aboriginal laws prior to British Columbia becoming a colony and after asserting the principles of the Doctrine of Discovery had then replaced the aboriginal system of laws with their own set of laws. What the court was inferring is that the aboriginal laws and rights had been extinguished with the establishment of British Columbia as a colony of the British Crown that in my opinion most emphatically makes *Delgamuukw* a proclamation of sovereignty in a territory where the issue of land tenure is not resolved and predisposed to legal and political inquiries.

There is opportunity to continue a much greater dialogue on the impacts on the rights of aboriginal peoples that came to the forefront of the legal ruling in *Delgamuukw*. Land and resource rights are a central concern when evaluating the infringements on aboriginal resource rights in the province of British Columbia. Central to this inquiry is the issue of water rights which is indubitably connected to land tenure and title and now the onus of proof has been placed in the hands of aboriginal peoples who wish to make such claims over territory and its natural resources. Louise Mandell (1987:359) argues that the Crown had arrogantly asserted its power, authority and jurisdiction while assuming land title and rights based within “discovery” principles under the Crown’s own presumption that it conquered the Indian Nations.

Despite what the Canadian Supreme Court has determined in any of the preceding cases it is clear that during the time period before and after the assertion of Crown sovereignty, the aboriginal peoples in British Columbia were never physically conquered through any act of war. The legislatures of the Parliament of Canada can only make a claim of conquest under their own presumptuous notions that a justifiable takeover occurred that gave them title to aboriginal land and rights to natural resources.

Prior to *Delgamuukw* a case that had an impact on this Canadian Supreme Court ruling was the 1992 Australian High Court decision in *Mabo v. Queensland*. According to Michael Brown (2003:46-47) the burden of proof shifted to the government to provide evidence that the prior occupants had voluntarily abandoned their lands. The Crown's perspective of first settlement in 1788 gave them rights of absolute beneficial ownership to the continent under the *terra nullius* doctrine, a presumption that Siegfried Wiessner (1999:72) argues did not take into consideration the existence of previous aboriginal proprietary interests in the land.

The significance of this Australian High Court decision is that the traditional laws of the Murray Islanders were allowed to be admitted as evidence by the court through oral testimonials that provided historical evidence of principles of land ownership. According to Peter Russell (2005:199) a long established oral tradition provided land rights on and around the Murray Islands that was regulated by 'Malo's Law.' This system of law provided individual and communal tenure over both land and waters within the traditional land holdings of the Murray Islanders. The Court maintained that native title might be lost if the people did not continue their connections to the lands and the terms of their own traditional laws (Malo's Law) and customs (Nettheim 2003:9). Garth Nettheim (2003:9) argues that the *Mabo* Court contended that when

British sovereignty was asserted it acquired “radical title” but not “beneficial title” to the lands of indigenous peoples.

Ulla Secher (2005:179) describes radical title as being “a full and unfettered proprietary right except to the extent of native title.” Which in layman’s terms means that the right is a part of the individuals (in this instance the Crown) estate, assets, or property and does not arise from the person’s legal status (Gardner 1999:324). According to Justice Dickson in *Calder* beneficial title or interest is characterized by the Crown’s fiduciary obligation (in the U.S. ‘trust status’) to deal with the land in question as being *sui generis* indicating that the right or interest cannot be removed or surrendered McNeil (1989:286). Therefore, in *Delgamuukw* when Lambert J. rejected the “frozen title theory” it is Fae E. Korsomo’s (1999:128) opinion that this indicated that aboriginal title continued to exist despite England’s claimed sovereignty over this territory.

The impact of *Mabo* on other court decisions is significant especially from the standpoint of admittance of oral traditions as a means of providing historical evidence of pre-contact systems of traditional governance. The point made by the Australian High Court that if the aboriginal people did not maintain their connection to the land is of great importance as the *Delgamuukw* decision has placed the onus of proof upon aboriginal people in British Columbia to provide evidence of continuous use and occupancy. Therefore, it is now an important endeavor for aboriginal nations to gather supporting evidence that identifies and describes the manner in which they used their lands and resources.

According to Louise Mandell and Leslie Pinder (1997) in an unpublished summary of the *Delgamuukw* Decision have concluded that aboriginal title must be proven through exclusive occupation of the lands in question prior the Crown’s assertion of sovereignty in 1846. Mandell and Pinder (1997) argue that the physical occupation may be established by providing evidence

of “construction of dwellings through cultivation and enclosure of fields or regular use of definite tracts of land for hunting, fishing or otherwise exploiting the resources...” Previously mentioned was that land and water rights are a collective right of aboriginal peoples and for the *Syilx* it has been established that these Salish tribal peoples were in exclusive occupation for a few thousand years. It also has been stated that it is not the intent or purpose of this inquiry to either defend or argue against any other Salish group that is making an exclusive claim to shared-use boundary areas.

Previously, in 1974 there was a landmark legal decision, *U.S. v. Washington*, and according to Bruce Miller (2001:7) the legal argument centered on the specific amounts of salmon harvest by Indians under the specified terms of the western Washington treaties that were negotiated and signed in 1854-56. While this case, which became better known as “the *Boldt* decision,” was not determined to be a “water allocation or rights” case the decision had a favorable outcome specifically on the quantity and quality of waters to meet spawning needs of the migrating salmon in this region. Claudia Notzke (1994:56) argues that as a result of the *Boldt* decision a positive element over and beyond being a treaty fishing rights victory, the tribes were empowered, justifiably so, to halt environmentally destructive actions that threatened the waters upon which the treaty protected salmon migrated. Notzke (1994:56) further contests that the impacts of this ruling has brought into question the rights of indigenous peoples to negotiate with natural resource developers to determine the negative effects of the proposed projects prior to the development and implementation phases.

Aboriginal scholar N. Bruce Duthu (2008:86-89) cites Justice Blackmun’s opinion in *Brendale v. Confederated Tribes and Bands of the Yakima Nation* (1989) as the tribes recognizable authority to regulate land use throughout the reservation based upon historic pre-

contact sovereign land use powers. Therefore the U.S. Supreme Court's legal recognition of Yakima Nation customary laws was influenced by the customary practices that regulated the usage of land and resources. The recognition of pre-contact customary laws and practices of aboriginal peoples of the Americas is aligned with Hoebels' criteria of meeting the requirements of European systems of law, an issue that will be addressed in more detail in Chapter Six

Chapter Five

UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

It is abundantly evident that Indigenous peoples were in political control and physically occupied in its entirety the landmass that comprised the North American continent. The dispossession of lands and forced displacement of indigenous populations were accomplished under the various European doctrines that have been discussed in earlier portions of this study. The human rights of indigenous peoples were ignored as the European nation-states executed the self-serving practices of colonization on distant and foreign lands that subjected the people to tactical acts of colonial subjugation. As previously mentioned there were attempts by a few scholars and a small number of missionaries that championed the human and religious rights of the indigenous peoples of the Americas.

In retrospect, it is clear that the social, cultural, and political institutions of indigenous peoples were swept away without any meaningful form of consultation, compensation, or a legitimate consent process. The persistence and intent of maintaining the social, cultural, and political ideologies of the colonizers has had indelible repercussions on the ancient practices and institutions of indigenous peoples. For nearly a century the indigenous peoples of North America have challenged the legitimacy of these colonization policies at international forums with the intent and purpose to heighten the social and political awareness of the ongoing human rights violations perpetuated against indigenous peoples.

According to international relations expert, Evan Luard (1990:23) the League of Nations was established in 1918 to provide a sense of “collective security” amongst European nations and as global security became an at large issue it evolved into the United Nations. According to

a leading Swiss scholar in development studies, Gilbert Rist (2000:59) the League of Nations became the first permanent international political institution and became the main international body which indigenous peoples approached to list their grievances.

For indigenous peoples the Covenant of the League of Nations offered little in the sense that its primary purpose was to meet European security in the immediate post-World War I era. Makere Stewart-Harawira (2005:76) contends that the League of Nations created a new form of international order that formalized and implemented doctrines of wardship and trusteeship over indigenous peoples and their territories. Yale University (2012) under the Avalon Project lists Articles 22 and 23 of the Covenant of the League of Nations wherein it implies that indigenous peoples are not able “to stand for themselves,” and that treatment of native inhabitants and their territories (which includes natural resources) are under the control of the colonizing sovereigns.

The promotion of terminology associated with concepts of wardship and trusteeship is in itself a blatant form of European imperialism and is founded within racist ideologies that served to expand authority and control over native peoples and their territories. It is a primeval form of advancing the economic speculations of the natural resource capital found on indigenous lands and entrenching European authority and control through an international political instrument. The immense economic potential found within the indigenous peoples’ territories was coveted by the member states of the League and it served their best interests to continue the promotion of the idea that indigenous peoples and their social and political institutions were primitive and uncivilized. Thus, allowing, without indigenous consent or participation, the continued domination by European nations.

The League of Nations regional security mandate served the world’s needs for a short time but as global concerns, fears and instability intensified it was a logical move to form a new

institution that could meet these concerns. The United Nations was formed shortly after the end of World War II and President of the International Progress Organization, Hans Kochler (2001:133) insists that its formation was a result of the unequal balance of power relations between the major international post-war member states that perpetuated the continuation of colonial subjugation of Third World countries. Despite the UN's intent to provide a semblance of global security for its membership it was being influenced by articles of law, which according to Garth Nettheim (1998:32) did not allow for intervention measures that compromised the domestic jurisdiction of a State, yet obliged these same members to adhere to human rights issues.

Just as the League of Nations exhibited signs of its geo-political limitations, especially with the fast growing humanitarian needs outside of its European-based boundaries the United Nations was confronted with similar internal and external limitations that confronted its predecessor institution. The main influences were the rapidly changing social, economic, and political realities during the post-World War II era. According to political scientist Dr. Peter Urmetzer (2003:117) there are those who contend that the primary intent on the evolution into the United Nations was economically driven as upon its founding in 1945 the United Nations ratified the International Monetary Fund (IMF) and the World Bank (WB).

Nobel prize-winning American economist, Joseph Stiglitz (2003:19), argues that the primary contribution of the IMF and WB to the developing world was its self-imposed task of being a global lender of money. The industrialized nations therefore function as global monetary lenders to developing Third World nations. The Bretton Woods institutions, according to historians Jurgen Osterhammel and Nieis Petersson (2005:123, 125) operated under three basic principles: fixed exchange rates, the free flow of goods and capital, and the freedom of

governments to implement their economic policies, all of which basically meant global trade liberalization.

The global movement towards a more liberal exchange of trade commodities as described by Osterhammel and Petersson is evidenced by the development and growth of economic globalization in the modern era that coincidentally has led to the expansive exploitation of natural resources on indigenous lands. While global wars such as World War I have sparked the development and implementation of collaborative efforts to assist in rebuilding the economies of war ravaged European states these efforts supported the growth and expansion of globalization.

The International Bank for Reconstruction and Development (IBRD) was established with the mandate to assist Europe's recovery and rebuilding processes and became dependent on loans, policy advice, and technical assistance from the skilled staff of the World Bank (IBRD 2007:11, 12). World War I had enormous impacts on the social and economic institutions of European nations and the United Nations played a vital role in the rebuilding process. Ajit M. Banerjee and Murari R. Sharma (2007:7) note faults and weaknesses in the leadership and accountability of the United Nations as they assert key senior appointments were based upon political expediency and connection, rather than competence and quality of leadership, which resulted in many failures.

Leading the list of failures of the United Nations has to be the global human rights issues that over the past six decades have resulted in many gross violations. Topping the list of atrocities are the acts of human genocide in the New World, the cost in human lives that renders the loss of life in both World Wars I and II as small in comparison. These failures occurred despite the adoption of the Universal Declaration of Human Rights (UDHR) and Nepalese Ambassador/Permanent Representative at the UN, Dr. Shambhu Ram Simkhada (2007:190)

credits the United Nations as not being capable of keeping in stride with the rapid changing social, economic, and technological realities that have occurred since World War II.

International relations expert, Evan Luard (1990:108) argues that the UDHR was formulated in 1946 by “almost the entire international community” and established a set of standards by which these governments would be judged by their contemporaries. The UDHR was adopted by the United Nations General Assembly in 1948, yet according to Chief Commissioner of the Canadian Human Rights Commission, R.G. L. Fairweather (1979:310) it was not until 1976 that its principles were embodied in international law with the ratification of the requisite number of states. Fairweather (1979:318) argues that the Canadian domestic policies on human rights issues while eloquent are rhetorical in nature and clearly out of step with the UDHR.

Legal advisor to the UN Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Inga Winkler (2012:71-72), argues that the principles of the declaration are considered as being non-binding recommendations but can become legally binding if they attain the status of customary law.

Dr. Simkhada (2007:190) points out that over its sixty years of existence the declaration has done little to change the human rights situation around the world and argues that radical changes are needed within the United Nations to address the contemporary reality. James Henderson (2008:67) argues that despite its international acceptance the UDHR, along with other covenants that guarantee the most basic and fundamental rights of all human beings, indigenous peoples continued to be recognized as non-peoples, insinuating that they were not entitled to the same rights bestowed upon other humans. This “non-peoples” categorization is a carryover from the sixteenth century during which time Vitoria and others were making arguments that the

indigenous peoples of the New World had human rights as they were indeed human beings (Venne 1998:5; Stogre 2007:6; Anaya 1996:12). Although not specifically stated the collective rights of the indigenous peoples of the Americas was a central debate during the sixteenth century Council of the Indies, and again, continues to be a contentious contemporary issue. John Bowden (2000:12) insists that the issue of collective rights of aboriginal peoples is vested within frameworks of special cultural and historical ties to their territories which then substantiate the right to self-determination within that territory.

These argumentative debates over whether or not indigenous peoples of the Americas possessed rights as a collective have influenced the perceptions of those in positions of authority, especially as nation-state assert hegemony over indigenous peoples and their territory. The centuries old issue of rights to lands, territory and the natural capital that were owned, occupied, used or acquired by indigenous peoples of the Americas have in the past and in contemporary times been argued by indigenous peoples as being a collective right. The basis of the collective rights argument by the indigenous peoples of North America, especially revolving around human rights violations, was what propelled indigenous rights activists to approach the United Nations in the 1970s. The International Indian Treaty Council (IITC) was formed in the aftermath of the 1973 Wounded Knee occupation in its attempt to heighten global awareness of the continuation of racist policy-making, human rights violations, and the invasion and occupation of indigenous territories by the United States military (Means 1981).

In 1974, approximately 5,000 representatives of indigenous peoples of the Western hemisphere gathered at a small Indian village, Wakpala, that is located on the Standing Rock Indian Reservation in the state of South Dakota to discuss and share the human and land rights violations that they were currently experiencing (Sam and Armstrong 2012). In response to the

similarities that confronted these indigenous peoples it was decided that a collaborative attempt must be made to bring to the attention of the international community the social and environmental costs that were a result of rampant and immoral acts against indigenous peoples and their traditional homelands. The most prominent leader of the American Indian Movement (AIM) at that time was Russell Means, a frontline Lakota activist who was sanctioned by the traditional elders in North America to act in the capacity of a representative diplomat to heighten awareness at the United Nations (Morris 1992:76).

This political move by the indigenous peoples of North America was not the first attempt to heighten the awareness of colonial subjugation. Soon after the League of Nations was formally confirmed and recognized by global leaders, a Cayuga Chief and emissary of the Iroquois Nation, Levi General (Deskaheh), approached the League of Nations. According to Ronald Niezen (2009:6) and Anthony Hall (2005) Deskaheh asserted to be representative of a sovereign state, basing his claim upon the Haldimand Treaty of 1784 between King George III and the Iroquois Nation. In the 1784 Treaty, according to Niezen (2009:6), King George III conveyed the Grand River Land on the Canadian side of Lake Erie to those Iroquois who had fought on the side of the British during the American Revolution.

The failure of the government of Canada to recognize its obligations to the Iroquois under the 1784 Treaty prompted Deskaheh to venture to Europe to lobby the League of Nations. The efforts of the Iroquois emissary were not well received by the international community because his arguments were regarded as being a domestic affair of a state (Canada) and furthermore, the League was not willing to bestow the nation-state status upon the Iroquois (Niezen 2009:15). Notwithstanding, Deskaheh's effort brought to the Leagues' attention that the indigenous peoples

of North America were dissatisfied with the non-recognition of the treaty obligations made between a European sovereign (King George III) and the Iroquois.

Therefore the action of Deskaheh in the early twentieth century may have influenced the decision in 1974 by the indigenous representatives of the IITC to launch an effort to heighten global awareness of the atrocities being committed at the hands of various agencies of the United States government. Sarah Pritchard (1998:62, 63) claims that as a result of the Indigenous militancy that occurred during the 1970s the Working Groups of the United Nations were forced to sway from a position of neglect and ignore to one of inclusion by allowing the indigenous voice to be heard at certain agendas.

Just as the League of Nations was a conglomerate of powerful peoples representing powerful nations the modern United Nations is comprised of powerful nations that represent global security interests with the backing of large military forces. As covered in the section on globalization, the global security issues seemingly are driven by mandates that are economic in nature as nations and multi-nationals are intent on procuring and maintaining access to the limited global natural resource supplies. If it is understood at some point in this discussion what exactly is the driving force behind the decision-making processes of the international political bodies such as the United Nations then it becomes a much easier duty to comprehend the back door agendas of these political bodies.

It served the best interests of the League of Nations to decide that the plight of the Iroquois was best left to the Canadian government to be resolved as an internal domestic affair. What is an important fact to consider is that a single human being brought to the League of Nations a justifiable social and political challenge that was worthy of their consideration under international law, yet the pleas were ignored. Another important point was that the Iroquois

considered themselves to be a sovereign nation and it is obvious that Britain's King George III recognized this as fact because he negotiated a treaty with his Indian allies.

According to Jerry Mander (1992:199), founder of the International Forum on Globalization (IFG), the definition of "nation" must include these following components: common culture and heritage, common language, stable geographic location over time, internal laws of behavior that are accepted by members of the community, boundaries recognized by other nations, and formal agreements (treaties) with other nations. Sidney Harring (2004:443) argues that at the time of European "discovery" there were over five hundred, highly organized Native American "nations" that functioned under political hierarchies and systems of laws. The failure of the League of Nations to formally recognize Deskaheh as a legitimate representative of a nation-state was an act that set an international precedent that was to influence the legal recognition and status of indigenous peoples until the IITC's emergence as an international political body.

As argued in other sections of this investigation there were and always have been numerous social, cultural, and political circumstances that should have provided more than adequate examples of the criteria mentioned by Mander. In the Americas, at the time of conquest (late 15th century or early 16th century) it is argued by Denys Delange (1993:5) that the indigenous population (70 million) was greater than Europe (65 million). Among these millions of indigenous peoples were thousands of separate and distinct cultures all of which belonged to various linguistic groups. Concepts of political autonomy and recognizable territorial boundaries were evident in field notes of various ethnohistorians, explorers, missionaries, military men, and fur traders, not to mention the oral historical narratives of indigenous peoples themselves. It is also well documented that colonizing nation-states engaged in nation-to-nation agreements that

were in the form of “treaties” and provide ample evidence of the recognizable nation status of indigenous peoples.

Nevertheless, the international community of nations was forced into action by the indigenous peoples and in 1977 the International Indian Treaty Council was recognized as a Non-Governmental Organization (NGO) with Consultative Status to the United Nations Economic and Social Council (UNESCO) and subsequently in the following year was placed on the agenda at the United Nations (Means 1981). The recognition at the United Nations by no means accomplished the goals of the IITC; nevertheless, for the first time in modern history, indigenous peoples were granted an international venue upon which to address the continuance of human rights injustices. On September 20-23, 1977 in Geneva, Switzerland, an International NGO Conference On Discrimination Against Indigenous Populations was held at the UN, which according to Douglas Basinger (1977:4, 6) was attended by more than 100 representatives and official delegates of Indian governments. The rise and recognition of Indigenous peoples being recognized as a legitimate organization with consultative status by UNESCO according to Patrick Thornberry (2002:22-23) provided indigenous groups with rights to participate in UN meetings.

James Henderson (2008:34) argues that the inclusion of indigenous peoples at the International NGO Conference on Discrimination against Indigenous Populations in the Americas, which was held in Geneva in 1977, served as acknowledgement that indigenous peoples were subject to international law. At this period it was the best-case scenario for indigenous peoples yet inferred that they were “subjects” of international law that essentially meant that “others” were the makers of laws.

In many instances the natural resource wealth found within the indigenous peoples' territories perpetuated the forced displacement of indigenous populations in order to accommodate and supply the economic development projects of corporations and the nation-states. As mentioned previously the acts of dispossession that were instituted and forcibly acted upon were based within the principles of the doctrine of discovery.

The acceptance of indigenous peoples representatives at the UN most assuredly came as a shock to many of its member nation-states and created a situation where business as usual was no longer an accepted norm. Asbjorn Eide (2009:38) was appointed by the Sub-Commission to be the first Chairman-Rapporteur of the Working Group on Indigenous Populations (WGIP) in 1982. According to Erica Daes (2008:32) the Norwegian Eide was very deserving of this appointment based on his distinguished career as a legal scholar, he organized the first meeting of the WGIP in 1982.

One of the first problems that the United Nations encountered with the IITC and other indigenous groups was an acceptable identification and definition of what constituted an indigenous person or group. According to Goehring (1993:5) UNESCO and the Commission on Human Rights adopted the following definition:

Indigenous Populations are composed of the existing descendants of the peoples who inhabited the present territory of a country wholly or partially at the time when persons of a different culture or ethnic origin arrived there from other parts of the world, overcame them and, by conquest, settlement of other means, reduced them to a non-dominant or colonial situation...descendants...isolation...preserved almost intact the customs and traditions of their ancestors....

Patrick Thornberry (2002:37) argues that the term "indigenous" suggests an "association with a "particular place" and a long term occupation of "a locality, a region, a country, a State." While a clear and internationally accepted definition is still being worked out by states it

nevertheless has been established within international legal forums that the terms indigenous applies to the “original or first inhabitants” of a territory (Thornberry 2002:38).

As Jerry Mander has argued this universal identification includes many of the same principles as the definition of a nation state and it remains a fact that indigenous peoples along with their social, cultural, and political practices remain intact and, in most instances, have never been defeated in an act of war by the settler populations. The identification of indigenous people has created a legal and political backlash as a number of nation-state governments stalwartly objected to the definition based solely on the fact that the colonizing settlers were mostly foreign Europeans (Tauli-Corpuz 2008:12; Thornberry 2002:39, 62, 72).

According to Alexandra Xanthaki (2007:102) 1985 marked a period where the collective indigenous rights were included and reviewed by the Secretariat of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. The review process led to the first draft of the United Nations draft Declaration in 1994 and according to Daes (2008:36) the resolution was forwarded to the Commission on Human Rights by the Sub-Commission where it received approval. A few decades had passed since Deskaheh’s first attempt to gain access to an international forum on which to present his arguments concerning the injustices that befell the Iroquois Confederacy and his efforts had become a reality.

It was expressly the opinion of Patrick Thornberry (2002:25-26) that the Draft Declaration on the Rights of Indigenous peoples demanded that States observe these points:

...a right of self-determination, the draft Declaration demands that States observe a range of collective rights, respect indigenous autonomy and customary law and institutions, protect the peoples from genocide and ethnocide, abstain from removing them from their lands or territories, respect their traditions and indigenous knowledge, educate them in their own languages, restore and protect the environment, respect indigenous citizenship and allow international adjudication of treaties and agreements between States and the indigenous.

What the first Draft Declaration reflected was that indigenous peoples had the right to self-determination and although this investigation is not focused on this subject it does create a dialogue that revolves around rights associated with usages of natural resources. Henderson (2008:79) argues that the traditional occupation and use of these lands and territories is indicative of traditional ownership which in turn offers credence to the right to use and develop the natural resources found within their ancestral lands. The concept of self-determination is the cornerstone of the initial Draft Declaration that subsequently evolved into the United Nations Draft Declaration of Indigenous Peoples (UNDRIP). In essence the UNDRIP recognizes that indigenous peoples have the right to self-determination which implies the right to self-government and rights to their traditional territories which include the surface and subsurface natural resources. According to Indigenous peoples human rights attorney, Paul Joffe (2010:87, 88) the Declaration constitute 'soft laws' and are considered non-binding yet they still obligate states to comply and co-operate.

Russell Barsh (1988:70) proposes that the first article of the United Nations Charter clearly states that the indigenous people retain the right to their own cultural, economic, social and political institutions along with the right to their lands. Asch and Zoltkin (1997:221) point out that Article 1 states that indigenous peoples have the right to "full and effective" enjoyment of all the human rights and fundamental freedoms, yet surprisingly indigenous peoples of Canada are required to extinguish their human rights to participate in the Canadian federation.

The legal and political impact of the UNDRIP has far reaching implications on current international policy making especially when a great deal of the remaining natural resources are found on indigenous lands. As mentioned previously in the globalization chapter, the availability of resources is dependent on being readily accessible by the multi-national resource

developers, which are in many instances, subsidiaries of colonizing nation-state governments. According to Makare Stewart-Harawira (2005:101) the earth's resources are considered as a 'standing reserve' for those that have the ability to exploit, develop, and therefore profit economically.

Central to the profiteering by the corporate powers and nation-states are the natural resource wealth that is present within the territorial boundaries of the world's indigenous peoples. For instance, Ward Churchill (1996:27) asserts that almost "two-thirds of all U.S. domestic uranium deposits, a quarter of the readily accessible low sulfur coal, a fifth of the oil and natural gas, and substantial deposits of copper and other ores lie within reservation boundaries." Goehring (1993:41) ascertains that in Australia most of the remaining mineral reserves are on lands claimed by its aboriginal peoples, and percentage estimates of the remaining natural resource wealth in the U.S. corresponds with Churchill's calculations.

For purposes of this research, which is focused on aboriginal water issues, it is an imperative to point out the fact that this natural resource is considered a tradable good on the world's market system. As will be further evaluated and discussed in another chapter under the international policies and treaties that threaten Canada's fresh water resources. Andrew Biro (2006:104) mentions a well-known fact that Canada controls approximately 20 percent of the world's fresh water resources. According to Goehring (1993:43) a significant amount of the untapped mineral wealth in Canada lies on lands claimed by its aboriginal peoples. Given the fact that a large percentage of Canada's natural resource wealth, as noted by Goehring, is present within the territories claimed by aboriginal peoples the federal government of Canada has found that it is much easier to open up these resources through international policy making.

The IITC along with its growing global support network that included other indigenous peoples had a window of opportunity to begin the process of launching a collective voice at the international level within the United Nations. The multitude of problems confronting indigenous peoples ranged from forced displacement from territories that held valuable natural resources. As mentioned by Churchill and Goehring a high percentage of the remaining natural resource wealth was found within the reserves and reservations of the indigenous peoples in North America. Before, during and after the establishment of the North American human enclosure systems, as history reveals, the settler populations and their nation-state governments were already coveting the natural capital of the Americas.

The indigenous peoples of North America were confronted with another form of political oppression, as the federal governments themselves were engaging in blatant acts that were intent on gaining access to the natural wealth that was supposedly protected by these same governments. There are far too many examples to discuss in detail, yet the events that led up to the 1973 Wounded Knee occupation on the Pine Ridge Indian Reservation and the forced displacement of the Navajo resistors at Big Mountain are two prime examples.

The UNDRIP, according to Henderson (2008:65) recognizes Indigenous peoples' right to self-determination, self-government, along with the rights to their traditional territories outside of lands they occupy, which includes surface and subsoil resources. In 2001 Canada accepted the right of self-determination of its indigenous populations as long as they respected the "political, constitutional and territorial integrity" of the government of Canada (Xanthaki 2007:110). Xanthaki (2007:102) insists that collective land rights and the prohibition of genocide and ethnocide, along with rights to natural resources are and remain the primary reasons why the United States and Canada refused to sign the initial UNDRIP, declaration.

Staff writer for The Washington Post, Krissah Thompson (2010) issued a press release that delivered the news that the federal administrations the United States had agreed to sign the declaration. On November 12, 2010, Aboriginal Affairs and Northern Development Canada (2010) released Canada's statement of intent to sign the UNDRIP declaration.

The United States and Canada are fearful that the UNDRIP might gain international legal status which would put into question the legality of such colonial discovery principles that allowed for the presumption of land title and ownership over indigenous lands in North America. In Canada, and other Commonwealth countries, the UNDRIP requires the Crown to develop a program for implementing the Declaration which would include meaningful acts of consultation and collaboration with Indigenous peoples that were aligned with Constitutional rights (Henderson 2008:98). Anaya and Wiesner (2009:99) acknowledge that the Declaration is not a binding document yet is reflective of customary international law, and the U.S. as its basis for voting against it, claimed that the document is not, nor can it become representative of customary international law.

Former Deputy Director General of UNESCO, Rodolfo Stavenhagen (2011:151) describes the Declaration as being 'soft law' based on the fact that it does not include enforcement mechanisms, yet because it is a "universal human rights instrument" it serves as a moral and political binding document for the UN member states. Stavenhagen (2011:151-152) also asserts that it "is possible and likely" that the UNDRIP can evolve and be accepted as customary international law if "national, regional and international jurisprudence and practice can be nudged in the right direction."

It is clear that the wording of the UNDRIP is problematic for those states that initially refused to sign the document. Human rights, collective rights, ownership of resources, and title

to land are the primary reasons that North American countries, Canada and the United States, voted against the declaration. It is much easier for those states that have signed the Declaration to say that they will develop policies that recognize the human rights of their indigenous populations but more difficult to fully implement. Henderson (2008:95) argues that Canada is one of four states to have opposed the Declaration, which implies that it has a problem with creating and enacting domestic laws that recognize the collective human rights, ownership of resources and exclusive title to lands. What is missing here is that the greater non-aboriginal population is missing out on guarantees that should become an amendment of the Canadian Constitution.

It is Yaqui activist, Andrea Carmen's (2009:92, 93) opinion that the Declaration is the first international standard that has focused on collective rights rather than individual rights and provides a framework for redress, restitution and conflict resolution. Carmen (2009:94) adds that the recognition of rights to lands, territories and natural resources are a right of indigenous peoples and an obligation to states to "ensure and facilitate the exercise and implementation of these rights." The criteria of obligation is also what may make the non-signatory states leery of signing the Declaration as it would mean acknowledging collective rights that to this point in their colonial history has not been regarded as protected under their constitutions. Wording such as free, prior, and informed consent create a quagmire of problems for these states as resource development schemes under international trade agreements are then in jeopardy of becoming null and void. This discussion is covered in the globalization chapter specifically under natural resource extraction and under the consent process as defined in the *Delgamuukw* decision.

The concept of self-determination continues to be at the core of the collective rights issue. The recognition of self-determination for indigenous peoples would provide an

affirmation that indigenous peoples continue to possess the right to self-government “within” existing states. What this means is that indigenous peoples’ rights extend beyond their current colonial reserve or reservation boundaries to include rights to surface and subsurface natural resources (water, oil, natural gas, and other precious and semi-precious minerals) within pre-contact traditional territories. This is one important reason why Canada, the United States, and New Zealand refused to sign the declaration. These governments simply do not want to acknowledge the pre-existing rights of indigenous peoples in North America or New Zealand. Canada actively lobbied against the declaration and the unresolved title and rights issue in British Columbia, in my opinion, is why the Harper government refused to support the Declaration.

According to Secretary of the Mohawk Nation at Kanawake, Kenneth Deer (2010:24), Canada, led by the Harper government “without consultation,” actively lobbied against the declaration. Deer (2010:27) argues that the recognition of collective rights are embedded within Article 3 of the Declaration and do not sit well with the states in opposition as it stated:

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.

Erica Daes (2011:39) agrees with Deer’s perspective as she points out that some States have indicated that collective rights are considered to be human rights and while individual rights supercede collective rights, once adopted as an international collective right it then supercedes domestic law. Bowden (2000:12) make a similar argument in that if the aboriginal right to occupy a territory constitutes an act of self-determination then the aboriginal peoples do have a special cultural and historical relationship to their territory. This recognition of self-determination in my opinion should extend into perpetuity until such time as aboriginal peoples are lawfully defeated and conquered in a legal and justifiable war and the traditional leadership

willfully consent to abdicate their sovereign status and rights to their lands, territories and resources.

Therefore, it is my determination that if the international legal community recognized and adopted a strategy wherein human rights are a collective right then both the individual and collective groups of indigenous peoples would have equal status and rights within the States. Canada, for one, was leery of the Declaration as its aboriginal populations were beginning to comprehend that they had a legal argument and position to assert their collective rights to the natural resource wealth. Here in British Columbia, which so happens to be unceded territory, the legal recognition of pre-existing title and rights over a very large section of the province have backed the provincial and federal governments into a dark and threatening corner. This is specifically why the government is going full throttle to engage as many bands as possible into the comprehensive claims process to settle and curtail the collective rights of aboriginal peoples within their traditional territories.

At this point it is worthwhile to mention that according to Victor Menotti (2009:2) the UNDRIP has created a unique opportunity to institute a new international system based upon indigenous values that could possibly stem the tide of the global ecological crisis. Indigenous activists and scholars, Adelfo Montes and Gustavo Torres Cisneros (2009:147) argue that the United Kingdom (UK), acting as the European Union's representative, is the main opponent to the declaration and its objections revolve around the collective rights issue as it contravenes the UK view, which is primarily based within the rights of the individual subject.

The UK's objections stem from Article 25 to 32 of the Declaration that are linked to the issues of self-determination and collective rights. Montes and Cisneros (2009:160) focus on what might be considered the wording that is problematic for the UK as the usage of expressions

such as, “which they have traditionally owned or otherwise occupied or used” provides a legitimacy to indigenous peoples’ historical claims of such described lands. The terminology may be legally interpreted as inferring an exclusivity of control and possession of lands and resources based upon indigenous concepts of ownership that is not aligned with European concepts of land tenure. Montes and Cisneros (2009:160) provide a counter argument in the interpretation of Article 25, as according to them, it is possible to interpret it as meaning that indigenous peoples do not have the right to own, possess or control lands that are no longer under their control. The historic occupation prior to Europeans should establish legitimate land ownership even under the European conceptualizations of land tenure practices or law and thereby recognize the assertion of political control by indigenous peoples in the Americas for centuries, even thousands of years before European settlement.

Erica Daes (2011:33) points out that Article 25 established the principle of restitution of land and because this presented problems for Canada as it was well into its attempts to settle British Columbia’s unresolved aboriginal title and rights issues, through a comprehensive land claim agreement strategy.

Article 26 revolves around the indigenous peoples right to own, develop, control and use lands, territories and resources they currently possess along with the legal recognition by states that implicitly respects the customs, traditions and land tenure systems of the indigenous peoples. Mattias Ahren (2009:209-210) argues that these rights could be interpreted as extending to lands that are not still in Indigenous peoples “possession.” This is a point that may eventually lead to indigenous peoples asserting claims of resource ownership and rights of development of these resources that were historically in their possession and control. Yet Ahren (2009:210) warns that the legal interpretation of the word “possess” can vary in different jurisdictions, which may

subsequently suggest or imply exclusive possession over property. This is more than likely one of the main points of objection by the non-signatory states, especially Canada's province of British Columbia as land entitlement is yet an unresolved issue that is currently being challenged by many aboriginal groups.

According to Robertson (2011:56) both United States and Canadian law prescribes that Indian tribes "lost" their ownership of lands and territories by virtue of European discovery while Article 26 is based on the recognition of indigenous title to traditionally-held lands that are not specifically recognized by statute or treaty. Anaya (2009:87) points out that there exists a possible social and political dilemma surrounding Article 26 as it implies that indigenous peoples have privileges to rights that other people do not have and points to the fact that citizens of settler societies have come into legal ownership of lands claimed by indigenous peoples. The question arises as to whether or not the indigenous peoples have access to subsistence gathering along with surface and sub-surface resource rights within these lands and territories despite what is contended to be lawful ownership under recent colonial law.

Inga Winkler (2012:193), who is the Legal Advisor to UN Special Rapporteur, Catarina de Albuquerque, argues that under Article 26, indigenous peoples retain the ability to "acquire, and to own, use, develop and control" the water resources in their lands and territories. Winkler (2012:194) also gives fair warning that it is "far too early" to reach conclusions that the UNDRIP is a reflection of customary international law.

Gordon Gibson (2009:147) former assistant to the Federal Minister of Northern Indian Affairs and special assistant to former Prime Minister Pierre Trudeau argues that Ottawa's concern is that Article 26 could possibly complicate the federal governments accommodation policies and cause "legal chaos" for Canadian Indians. Gibson (2009:146-147) bases his

argument on the government of Canada's main concern which deals with the specific language of Article 26 in that Canadian Indians have rights to "lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired."

Article 27 obligates states to provide recognition to the laws, traditions, customs and land tenure systems of indigenous peoples. Montes and Cisneros (2009:161) argue that states must adjudicate the rights of indigenous peoples to their lands, territories and resources. Again this creates a multitude of problems for Canada, especially in respect to the NAFTA and GATT, as previously stated, since much of the remaining natural capital of this state lies on indigenous lands. At the present the province of British Columbia is engaged in a comprehensive treaty and accommodation process that is dependent on aboriginal peoples willingness to consent to give these rights away.

Indigenous peoples rights advocate, Willem Assies (2010:61-62, 69) insists that indigenous peoples remain 'invisible' and provides evidence of the shortcomings of Article 27 of the UNDRIP, as well as the NAFTA wherein indigenous peoples are defined as 'public entities' rather than legal entities, therefore considered to be recipients of state care rather than peoples with rights. Assies (2010:69) also contends that the concept of territories, referring to indigenous ownership of these territories and resources, simply does not exist under Article 27. Which would alleviate the need to depend on Article 28, which is controversial in nature as it calls for legal interpretations that would mean defining the processes of redress, restitution and compensation (Montes and Cisneros 2009:161).

Ahren (2009:2111) in his analysis of Article 28(1) revolves around traditional usage and recognizes indigenous peoples' rights to areas that were "traditionally used or otherwise occupied." It is important to note that Article 28 would encompass only redress, restitution and

compensation for rights to lands and resources that have been illegally taken. As it stands, the government representatives for the province of British Columbia are insisting that their perceived sovereignty rights are superfluous, in an attempt to sell to the general public the idea that settler rights and interests are not being threatened. As mentioned in other sections of this dissertation these arguments are based totally on legal and political actions that are based within theoretical concepts of European style tenure. Various colonial acts, doctrines, and laws are the basis for argument and weaknesses are fast becoming exposed as aboriginal peoples in British Columbia are simply saying “no” to the consent processes of treaty-making and accommodation.

Article 29 is based on the states’ agreement to establish and implement environmental protection and conservation programs that in turn would enhance the productivity of indigenous lands, territories and resources (Montes and Cisneros 2009:161-162). This is a double-edged sword as on one hand the states are intent on resource development and extraction and what comes to mind is the concept of sustainability from an indigenous perspective. Sustainability from a European perspective is linked to economic development and a sustainable economy.

On the other hand, if the indigenous perspective on sustainability were to be implemented as a model of sustainable development, then any form of large-scale resource development schemes would not be allowed to move forward within the indigenous traditional lands and territories. Therefore, it appears that Article 29 could create an immense problem for any signatory state, but it must be acknowledged that this declaration may be non-binding and its content non-enforceable. Winkler (2012:193) argues that Article 29 of the UNDRIP indicates that indigenous peoples retain the right to the conservation and protection of the environment, along with ensuring the productive capacity of these resources, which includes the natural resource of water.

According to Paul Joffe (2010:78) a senior foreign policy counsel for the World Resources Institute, Article 30 of the Declaration obligates the states to consult with indigenous peoples prior to engaging in military activities on their lands or territories. A loose interpretation could possibly mean that absolute restrictions could be the order of the day, yet Canada would be incorrect if it made this determination. The indigenous peoples could, if they so desired, allow military activities through a consensual agreement process or upon request to assist in events of natural disaster or other emergencies on indigenous lands. In the Americas, the indigenous peoples have much to be concerned with as in the past military and police activities have reportedly caused environmental degradation and led to the criminalization of indigenous peoples that resisted these actions (York and Pindera 1991:282; Benjamin 1996:234, 245). Jerry Mander (2006:4) argues that from the jungles of the Amazon to the tundra of northern Canada the native peoples are facing “grave threats” to their lands and resources as global corporations accelerate their attempts to gain access the rich and significant natural resource wealth.

Article 31(1) of the UNDRIP revolves around indigenous peoples’ collective intellectual property, and the right to maintain, control, and protect their cultural heritage and traditional knowledge systems (Joffe 2010:81). Canada’s objections, according to Joffe (2010:81) stems from the usage of the terms “control” and “protect” and Canada thereby proposed to have amendments made to delete these terms and insert “may have the right...” into this Article. Once again it becomes abundantly clear that the precise wording of the Draft Declaration had made Canada very uncomfortable and it did not want to be legally bound to these principles.

Article 32, in my opinion is most critical because it has the most influence on the aboriginal water rights issues that are blatantly ignored by most nation states. In her analysis of Article 32, Andrea Carmen (2009:93) argues that the states are legally obliged to obtain “free,

prior and informed consent,” as a prerequisite before proceeding with any project that has any adverse effect to indigenous lands or territories, which includes other natural resources. It is my opinion that Article 32 is the strength of the UNDRIP as it could be cited and used as a protective measure to safeguard Canadian fresh water resources. For instance, in northern Alberta, aboriginal peoples have allowed the resource development at the ‘tar sands,’ while other aboriginal and non-aboriginal downstream water users are confronted with degraded water resources that are directly connected to the extraction of the tar sands. My question is whether or not the downstream water users were given the same opportunities of “free, prior, and informed consent.” It is very obvious that the environmental disturbances would have an adverse and long-term effect on the water resources, yet in the same breath this resource development project was sold to the public as a sustainable development project.

Aboriginal and non-aboriginal peoples that eventually will be impacted by the degraded and contaminated water systems as a result of the resource development and extraction of the tar sands might seriously consider citing Article 32 to halt the resource exploitation in Northern Alberta. Burger (2011:8-49) argues that Article 32 calls for the approval of “any project” that has direct impacts upon indigenous peoples’ lands or territories prior to the development and exploitation of “minerals, water or other resources.”

Human rights activists and scholars, Clive Baldwin and Cynthia Morel (2011:124) make the argument in their co-authored chapter “Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation,” that Article 42 obligates governments to respect the right to property of indigenous peoples and cite the Supreme Court of Belize case *Cal v Attorney General of Belize* that upheld these general principles of international law. Baldwin and Morel (2011:126-127) also mention that Article 43 establishes a minimum standard of collective and

individual rights, based on basic human rights and fundamental freedoms as set out in international law. Where international treaties exist between indigenous peoples and states, these governments are bound to protect the rights of indigenous peoples.

It is my opinion after an analysis of the UNDRIP Articles 26-43 that Canada's fears are based on the usage of certain terms that could lead to a legal determination that would obligate the federal government to conform to the principles of international law in regards to the collective rights of indigenous peoples. Natural resource development in Canada has the potential to uplift the global economic stature of this nation state and the UNDRIP has the potential to place extreme limitations on any large development projects. The mere potential of catastrophic oil spills has curtailed the Keystone pipeline that was to extend from Northern Alberta to the Gulf of Mexico.

The legal and political acknowledgment that indigenous peoples are in political control of their traditional territories is important in declaring to the world that despite the acts of dispossession carried out by colonial policies we are still here and asserting our aboriginal rights to the lands and resources. Indigenous peoples in the four corners of the world were repeatedly forced to engage in resistance activities to protect their abundant natural resources and while doing so were often categorized as being terrorists, intruders, vagrants, dumb brutes and squatters (Hanke 1959; York and Pindera 1991).

The indigenous peoples have been met with fierce resistance from the international community throughout the history of colonization as they have attempted to retain the rights to their traditional homelands. Dalee Sambo Dorough (2009:267) highlights what she has called "a significant spin-off-effect" making the argument that indigenous peoples have gained first-hand training in the field of international relations and diplomacy in foreign affairs while breaking the

barriers at the United Nations. Deskaheh's attempts in the early twentieth century did not go unnoticed and provided the incentive for indigenous thought and perspective to be carried forward into the modern age. It must always be acknowledged that the many sacrifices of countless individuals, too many to mention here, have contributed to the development and subsequent passage of the UNDRIP. The legitimacy of rights within this declaration most assuredly will be challenged and it has become evident that the language of the Declaration has posed both legal and moral problems for the states that did not originally sign the Declaration.

James Anaya and Siegfried Wiessner (2007:3-4) argue that the U.S. cites its objection to the Declaration as the language being "overly broad and inconsistent" especially on the provisions that deal with land and resources. This objection by the U.S. comes as no surprise as mentioned earlier that much of the remaining natural resource wealth lies within the boundaries of Indian reservations. In the opinion of the United States the rights and status of the indigenous populations have been morally and legally dealt with in accordance with the provisions of the treaty making between Indian tribes and the federal government.

The government of Canada in the earlier developmental stages of the Declaration was a supporter of the document and I argue that the reason for a 180 degree turn around was they saw an opportunity to abrogate the rights associated with aboriginal land entitlement in the Dominion province of British Columbia while concurrently gaining access to the natural resources through instituting a comprehensive treaty and accommodation process. It is my belief that as a result of completing the research for this inquiry that the federal government seized the opportunity to get the consent of aboriginal peoples to voluntarily give their rights away to the unceded territories that make up the province of British Columbia.

One of the main problems that I have with the adoption of principles which protect human and land rights issues, is based upon the fact that elected Department of Indian Affairs (DIA) or Bureau of Indian Affairs (BIA) political or business councils and/or representatives, do not 'reflect' the wishes of the collective body of membership or work to preserve the land and its abundant natural resources. In contemporary times it seems that the political bodies of aboriginal peoples are more intent on focusing on the potential of monetary rewards associated with economic development schemes, which in most instances are violations of ancient cultural protocols that do not call for or allow over exploitation of any natural resources.

Indigenous peoples rights advocate Claire Charters (2009:195) argues that the significance of the Declaration does not lie in its effect in international law as declarations in themselves have little influence, but it does have an impact on the establishment of customary international law. With the political potential and impact of its directives (articles) the states could easily resort to the Jacksonian mentality of the early nineteenth century and insist that the principles be enforced by the UN, which in reality is precisely what signatory states are paying lip service to as they continue with business as usual.

According to Peter Hogg (2005:758) the most definitive reason that Canada does not react to the UNDRIP is that it is not a treaty, thus is not binding in international law and as a declaration it is not incorporated into Canada's domestic law making it unenforceable in Canadian courts. Julian Burger (2011:55) argues that the Declaration "is not an international human rights treaty" which implies that it is not open to ratification and independent monitoring yet the basic principles and rights may be moved from the international to national and local arenas for recognition.

The 1909 Boundary Waters Treaty (BWT) and 1961 Columbia River Treaty (CRT) should fall within the recognition and protection of international human rights (individual and collective) protections as these shared water systems flow between the two participating nation-states. Under certain Articles of the Declaration there exists a presumption that the individual and collective rights of indigenous peoples are to be protected despite agreements made with resource developers under NAFTA and the GATT. Water under the Declaration, especially under the two international treaties mentioned above, should heighten the rights of indigenous peoples that would be affected by these long-term and legally binding agreements. What tribes should be concerned with is insisting that protections are guaranteed within the terms of agreements prior to supporting any new ratification of these treaties, especially the Columbia River Treaty that is currently undergoing a renewal process.

Under the Columbia River Treaty, Canada obligated itself to build three dams on the upper Columbia River. Environmental advocate and eco-analyst Marc Hume (1992:11) lists the three Canadian dams, Duncan, Keenlyside and Mica whose main purpose was to control the flow and to provide water storage. The social, cultural, and political institutions of the Okanagan Nation were immediately impacted when the Canadian government met the terms of the treaty and completed the water storage facilities on the Columbia River.

Hume (1992:11) contends that the government of Canada agreed to this massive project in return for a share of surplus downstream power under a 30-year agreement and over this period the dollar amount profit amounted to \$1 billion while the environmental loss was never tabulated. It is my opinion that the altered water flow of the Columbia River had immediate and lingering impacts on the abundant and diverse water-dependent species that depend on this

habitat for survival and without a doubt the man-made structures upset the natural equilibrium of this region.

It is my opinion that the Boundary Waters Treaty of 1909 had a huge impact on the international waters that are shared resources for the United States and Canada. This treaty meets the criteria of being an international treaty and its self-imposed authority has had influence on the inter-regional waters, flora and fauna, as well as, the aboriginal and non-aboriginal peoples that inhabit the Columbia River basin. Geographer Frederic Lassere (2007:158) mentions that the International Joint Commission (IJC) determined that the government of the country must first approve any water diversions that affected the boundary waters. Lassere (2007:158) provides an example wherein Canada amended the Act with Bill C-6 that disallowed bulk water removals that are greater than fifty cubic metres per day that undoubtedly would have an effect on water flows from Canada to the United States. David Johansen (2002) of the Law and Government Division summarized for the Parliament of Canada, that the amendment Bill C-6 prohibited the bulk removal of water (primarily from the Great Lakes) while continuing to fulfill its Treaty obligations while maintaining federal government jurisdiction over boundary waters as stipulated in the Treaty.

Merrel-Ann Phare (2011:15) writing on behalf of the Centre for Indigenous Environmental Research argues that as recently as 2008 Canada assisted in defeating the UN Human Rights Council (HRC) resolution that would have recognized water as a human right. Phare (2011:15) reports that the UN General Assembly 9 voted in July 2010 and successfully passed the resolution wherein the right to water and sanitation is now international law making Canada's abstention from voting a fruitless effort.

So then how does the UNDRIP have an effect in our aboriginal communities when the UN and global politics seem to be so far removed from our daily existence? The Boundary Waters Treaty of 1909 and the Columbia River Treaty of 1961 were completed without aboriginal participation and under Article 32 of the Declaration as presented earlier by Montes and Cisneros (2009) the states are legally obliged to obtain “free, prior and informed consent” prior to proceeding with developments that have adverse effect to the indigenous lands and resources. Therefore in the re-negotiation process of the Columbia River Treaty the basic principles and rights that affect aboriginal peoples on the local level must be addressed and it is my opinion that aboriginal people should be sitting at the same table as active participants while these discussions and negotiations are taking place.

The UNDRIP most assuredly is being met with skepticism and wariness by the governments and legal advisors of the United States and Canada as they must now take into consideration that aboriginal nation governments are recognized by international political and legal institutions as being legitimate sources of authority. Dalee Dorrough (2009:273) argues that in response to the implementation of new human rights frameworks it is the aboriginal community members that are incorporating these Declaration instruments within their own political governance institutions.

The potential impacts of the UNDRIP on the social, cultural, and political institutions of aboriginal nations in Canada and the United States are not fully being realized or comprehended. While some indigenous communities have members who actively engage in the UN Indigenous forums the majority of indigenous peoples are far removed from any knowledge of the UNDRIP because of a lack of education or simply being enveloped in a “no see, no care” attitude. It is my opinion that the multinational resource development corporations are in a hurry-up offense in

their attempts to secure development schemes within nation-states that have resisted the ratification of the UNDRIP. The United States is the poster child of the Jacksonian mentality as they stubbornly refused to recognize the rights and laws of the Cherokee Nation within their own Constitution and Supreme Court rulings in the nineteenth century.

It is John Ralston Saul's (2009:314) contention that the language used most commonly in Canada is a derivative of nineteenth century British and French concepts and expressly reflects old concepts that he describes as being "monolithic." While Saul's perspective that the common language more or less originates from one source for aboriginal peoples that have their own distinct language groups the translation and interpretation of the language used in the policies, treaties and Supreme Court decisions can be problematic for aboriginal peoples. Especially when we look at wording used in the UNDRIP such as "free, prior, and informed consent" which is seemingly straight forward yet when coupled with terminology like "consultation" and the manner in which this term is used by governments, we begin to understand that language most assuredly should be considered a barrier.

Chapter Six

ORAL NARRATIVES AND CUSTOMARY LAW

A starting point in the process of describing the customary laws of indigenous peoples, in particular the Salish speaking tribal groups, is that for thousands of years their cultures were rooted within the oral tradition. Therefore, the indigenous societies have depended on oral narratives to be the primary method of transferring historical events of the past along with the complexities of the knowledge systems that were based within a reciprocal human/land relationship.

The oral narratives of indigenous/aboriginal peoples have irrefutably been categorized into the European genres of mythology and folklore. Despite the contention of Western thought and perspective these stories are not considered by the *Syilx* to be quaint myths, folklore, or fairytales, instead are considered to be *captikxw*. As a teaching methodology the omnipotence of the *captikxw* serves as a nexus between the multi-dimensional realities as understood by the *Syilx*. In the *Syilx* worldview the *captikxw* are considered to be non-linear and non-historical narratives that allow space for the tenets to reflect responses and experiences to our natural world environment which are rooted within these same multi-dimensional memories or experiences of the periods when animal and plants dominated the world. The process of codifying these tenets through the *captikxw* allow for the achievement of a succinct and comprehensible expression of societal laws that originated before the world was fit for human inhabitation.

Little consideration has been given to the ancient historical nature of the oral narratives of aboriginal peoples because of the method of recording which happens to be oral and not written. Somewhere it has been previously determined that the written texts are constituted as being

associated with civilized societies. It was not so long ago that notable events experienced by Europeans were recorded in art forms on various caves found across the vast reaches of the European and Asian continents. Without developing arguments about the length of time that these societies followed such practices, it is clear that these recordings of historical events were based upon real life recollections and remained alive within the oral tradition of these societies.

The simplicity or complexities of these stories and events as depicted in the carvings, paintings, and inscriptions on the walls of these caves were considered by authorities to be art forms that were then associated with a religious belief. There have been attempts to decipher the meaning of these ancient works while concurrently giving the paintings a historical time frame. Somehow, even though these prehistoric works are not written texts they are not associated with primitive cultures because European peoples made them. On the other hand the markings and writings found in North America, according to Garrick Mallery (1972:25, 28) were given the simplistic term of being “picture- writing” and considered by ethnographers to be a distinctive form of “thought-writing” which provides information on tribal histories, religion, and customs. James D. Keyser (2002:11) describes rock art as engravings and paintings on nonportable stones while considering the various figures as having characteristics that resonate with this specific geographic locale.

While one society (the Europeans) has created for itself an opportunistic advantage through the development of war armaments and claims an authoritative dominance over other peoples of the world, its origins are similar in nature to those it has conquered. As the oral narratives of the *Syilx* and other Salishan tribes will reveal, the return of the white man to this continent was a circumstance that was inevitable (which will be discussed in the “Twins” *captikxw*). As far as laws and practices of aboriginal/indigenous peoples are concerned it is

abundantly clear that the ancient oral narratives held these laws for thousands of years. The *Syilx* and their northern allies, the *Secwepemc* clearly note that there were various phases of existence and acknowledge that there was a time in the past when our societies were still in a development phase where we were ‘not quite human.’

According to *Syilx* elder and traditional storyteller Martin Louie (1981) there was an era wherein humans existed in an underdeveloped and primitive state prior to developing and transforming into human beings that had the ability to think, reason, and dream. This period may be associated with western scientific knowledge that has given approximate dates that correspond with the time period Louie (1981) refers to as when humans existed in a more primitive state and can provide a reference point for the discussion on original laws of the *Syilx*.

According to Beck et al. (2005:1) the original Cro-Magnon skeletal remains, discovered by French paleontologist, Edouard Lartet, were subsequently dated to be approximately 40,000 years old. Jeffrey Goodman (1981:18) argues that “near men” called Neanderthals dominated the European landscape approximately 180,000 years ago. Joseph Campbell (1972:32) attributes evidence of mythological thinking to the period of Neanderthal man, as archaeological evidence comprised of bear skulls was disposed of in both a symbolic setting and manner.

During a 1964 excavation in Southern California by an archaeological team that included L.S.B. Leakey, R.E. Simpson and T. Clements (1968:1022) they credited the artifacts discovered, as being worked (by humans) between 50,000 to 80,000 thousand years before the present, which as a scientific fact gives credence to human occupation in North America for thousands of years prior to the Bering Strait land bridge. Archaeologist Christopher Hardaker (2009:3) argues that the total absence of projectile points at the prehistoric Calico site gives rise to the possibility that these artifacts could be between 100,000-500,000 years old. While it is not

the intent to argue what Goodman refers to as the “American Genesis,” and the possibility that the origins of man dispersed out of the Americas, it is worthwhile to take into consideration the evidence at the Calico site.

The Salishan creation stories reveal that there existed a phase of human existence wherein our societies were at the cross-roads of evolving into the thinking human being with societal practices that were not based upon animalistic instincts. This era of existence was marked by these societies having the capacity to work together in an organized, collaborative and reciprocal manner that mimicked the teachings of our great teacher *Sn'klip* (Coyote).

Therefore, according to the chronology of this development within our aboriginal society we have through body and mind memory the ability to document through oral narratives these ancient pre-historical events. We understand that the dominant society, which has taken the position, based within a recently developed western science methodology, that there is no possible way that we could comprehend such ancient historical occurrences. Yet, *Syilx* oral narratives are documentations of events that occurred in the ancient past and can be placed within western science timelines, thus, making an argument of knowledge of the ancient historical past that now can be corroborated through western science.

According to John Borrows (2007:35, 54), a leading *Anishinabe* (Chippewa) scholar in indigenous and constitutional law, it is within the traditional stories of indigenous societies that indigenous laws are expressed and these narratives have the potential to be an important source of law for contemporary legal decision makers. Borrows (2007:4; 2010:11) argues that indigenous customs and conventions have been incorporated into Canadian law, despite the fact that these same legal systems of indigenous peoples have been “ignored, repressed, or concealed.” Borrows (2007:17) argues that the diminishment of the indigenous legal tradition

has led to a perception of it being a myth of inferiority. Borrows (2007:104-105) also contends that the aboriginal peoples of British Columbia were “never conquered and never agreed to relinquish their governmental rights” a point that he insists should place aboriginal sovereignty “on a footing equal or superior to Crown sovereignty.”

While I agree with what Borrows is saying we as indigenous peoples of North America have been and continue to be burdened with an appropriated foreign legal system that suffocates and ignores indigenous systems of customary laws and practices. Furthermore, our customary laws are relegated to a status of being inferior despite the fact that these regimes were in existence prior to the arrival of civilized European societies whose laws eventually supplanted indigenous systems.

According to John Borrows (2010:51), customary law is defined “as those practices developed through repetitive patterns of social interaction that are accepted as binding on those who participate in them.” Therefore, the Borrows definition creates legal space for the inclusion of the customary practices of aboriginal peoples in North America within the framework of international law, as well as, the domestic laws that were developed throughout the colonial period to the present. The laws of indigenous societies as they existed prior to the imposition of European customary practices should have been given retrospective recognition within the legal order of the foreign colonizers.

Borrows (2010:132) argues that when the first explorers landed in North America they encountered peoples that were functioning under well-developed laws and while being treated as guests began to participate in customary practices (feasts, ceremonies, dances, etc...) that ensured their survival in this new and often harsh environment. It is clear that during the initial colonization era the first settlers and traders conformed to the laws of aboriginal societies and in

many instances fully enjoined in the societal practices of their aboriginal hosts. According to Borrows (2010:134) the early European explorers and traders submitted themselves to indigenous legal orders by adopting and participating in the aforementioned customary practices that in many instances resulted in marriages between the women and European men.

The identification and legal recognition of the customary laws of indigenous peoples by colonial governments and their European-based system of laws have undergone a biased and racialized categorization by the courts and remain a heavily contested legal controversy. It must be recognized and acknowledged by the western judicial systems that the customary laws of indigenous peoples are very much alive and are continuously practiced within their territories despite the assertion of European hegemony. Because of the limited research of the customary law practices of indigenous peoples many conflicts arise as the courts of the colonizers engage in legal processes that place limitations pertaining to the mere existence of the institutional practices prior to the imposition of these foreign legal systems.

As mentioned previously the indigenous peoples of the “New World” were classified as primitive societies implying that they did not have any structured forms of legal, political, or social institutions that could be considered as comparable to European institutions. Furthermore, Ward Churchill (2003:134) cites U.S. Supreme Court Justice Robert H. Jackson’s “Menagerie Theory” that positions Indians as “less than human and that their relations to their lands is not the human relation of ownership but rather something similar to the relation that animals bear to the area in which they may be temporarily confined.” Therefore, indigenous practices that existed in the past are not recognizable as being alive as they could not have survived the colonial imposition of laws through centuries of occupation and assumed conquest.

Ward Churchill discusses some important points that warrant further evaluation and discussion. According to Solanes et al. (2007:98) “customary international law is one of the most widely recognized sources of international law,” and has been consistently used as an interpretive source to define obligations and responsibilities that are embedded within treaties. Solanes et al. (2007:98) point out that within the international economic order the rules of the international economic bodies such as the World Trade Organization (WTO) must be “interpreted and applied” to comply with the customary international laws of other international treaties and agreements. The most commonly used example is the Vienna Convention on the Law of Treaties (CIL) that binds all States to its rules, despite those States not being a signatory, while concurrently providing foreign investors with certain privileges, rights, and protections (Solanes et al. 2007:99).

Cree scholar and aboriginal rights activist, Dr. Greg Younging (2008:63) insists that customary laws of aboriginal peoples have developed over thousands of years and are intertwined with the complex and guarded traditional knowledge systems. Younging (2008:77) views the rising role of customary laws within the UN forums, such as The World Intellectual Property Organization (WIPO) and the Convention of Biological Diversity, as being a pivotal tool in protecting traditional knowledge from exploitation by economic-driven global institutions.

Along with the Universal Declaration, other declarations have reformed the customary law of the colonial era and generated postcolonial customary law, conventional law, and pre-emptory norms in international law (Henderson 2008:30). However, according to Anaya and Wiessner (2009:99) the states that did not vote for the ratification of the UNDRIP did so on the presumption that the document did not meet the legal requirements of customary international

law while contending that the UNDRIP is not and cannot become a recognized form of customary international law.

Henderson et al. (2000:57) argue that customary law continues to lead a double life since the “practice, habit, or duty,” of a community, often identified as customs and implicit norms, could also be considered an objective and expressed form of common law. Indigenous peoples and their communities in the general sense have functioned under customs and practices that include treaty making and the formation of legitimate political confederations. The most notable and highly recognized North American indigenous confederacy is the Six Nations Confederacy while within the Salishan tribes of the Interior Plateau there are two such political confederations (George 2012; Douglas 1990). Colville Confederated Tribes elder, Wendell George (2012:49) mentions that the Columbia Indian Confederacy was formed in 1840 between the Wenatchi, Entiat, Chelan and Sinkuise (Moses-Columbia) tribes. George (2012:49) notes that the cultures of these tribes were very similar and while the primary intent of this confederacy was for the organization of buffalo hunting ventures into the Plains it acted concurrently as a mechanism for recruiting warriors and hunters.

According to Glen Douglas (1990) a *Syilx* traditional knowledge keeper who served as an interpreter and aide to Okanagan Grandchief, Tommy Gregoire, the first Okanagan/Shuswap Confederacy was formed in the summer of 1878 in response to the growing incursion of white settlers in the Interior Plateau. Over a century later the Okanagan/Shuswap Confederacy was reaffirmed in December 1986 at the Alkali Lake Reserve community hall due to the growing threat of political unrest that was threatening the rights of aboriginal people in Canada’s province of British Columbia. On June 9, 1990 during an Okanagan/Shuswap Confederacy meeting held at Willie and Lily Armstrong’s residence on the Penticton Indian Reserve, Glen Douglas

reiterated that an alliance was made with the Six Nations Confederacy on February 1, 1987.

International Treaty Council Director, William (Bill) Means, and indigenous rights advocate and lawyer, Sharon Venne were in attendance.

The formation of inter-tribal confederacies amongst the Salishan tribes of the Interior Plateau region are historical records of customary practices that were set in place to meet the current political needs of the nineteenth and twentieth centuries. While the nineteenth century confederations were formed primarily as military alliances the twentieth century inter-Nation confederacies were structured to offer a collective voice against political repression and ongoing colonial policies that threatened indigenous autonomy as well as human and land rights.

The expressions of the customary laws are embedded within these acts of confederation between the Okanagan/Shuswap and the Six Nations. Therefore, the Henderson et al. (2000) perspective of the communities of these nations, to follow “practice, habit, or duty” to stem the aggressive nature of external social and political influence, meet the criteria of what are considered to be common law practices. It was not long after the European invasion of North America that the common law began to disrupt the customary practices of indigenous peoples.

According to James Tully (2000:38) when Europeans arrived they came into contact with indigenous populations that numbered 60-80 million that were functioning under complex systems of social and political organizations that were much older (3000-30,000 years) than those of the colonizers. Yet, Tully (2000:57) argues that indigenous peoples are “given” proprietary rights to small portions of their traditional territories under the colonial domestic legal systems while the peoples and their systems of laws are not recognized under international law regimes of colonial government’s or their judiciaries.

Customary laws were also evident in the trading practices of the Salish as within the Wenatchi territory, exchanges of material goods could only happen between certain people. Walters (1938:75) argues that trade in the Wenatchi territory could only happen between certain trade friends (*sechauki*), and this was regarded and adhered to as a strict law, even to the point where if a *sechauki* died, trade could not occur until another trade relationship was established with the consent of the family or friends of the deceased. This trade relationship, according to Walters (1938:75) was not connected to any other tribal groups, yet similar practices were in existence and may not have been followed to these extremes. This is an example of customary law as it existed prior to European contact and the subsequent occupation and taking of indigenous lands.

Legal scholar Ardith Walkem (2009) argues that the philosophy of law is embedded within the Creation stories of aboriginal peoples and that these laws are based within the harmonious relationship and reciprocal interactions between humans and the land, a concept that is inclusive of all creation's life forces. The aboriginal perspective on the existence of a system and philosophy of law is presented through the oral tradition and therefore comes under attack on its reliability as admissible legal evidence by biased courts. Walkem (2009) touches on two important lines of thought that should be given serious consideration, first, that oral stories are the laws, and secondly, that these laws were developed through reciprocity and contain many shared elements from interactions between humans and land (including all life forms). Therefore, the aboriginal laws are intended to be an all-inclusive system that takes into consideration the unspoken but understood requirements of the land and all life forms that occupy and use these habitats. The Supreme Court of Canada has cast this aboriginal perspective aside and has continually asserted that their foreign-based laws as being superior.

John Borrows and Lenard I. Rotman (1997:4) cite *Delgamuukw* (1997) and *R. v. Williams* (1995) as indicating that the existence of laws prior to the creation of the colony of British Columbia, “ceased to have any force as laws within the colony.” What the Courts of Canada are saying here are that the aboriginal laws, practices and/or customs did exist but when the colony of British Columbia was formed the aboriginal laws were no longer an acknowledgeable system of authority.

The Okanagan (*Syilx*) contend that their societies were governed by a complex set of laws that were embedded within the ancient oral tradition, and insist that these practices were adhered to over many thousands of years (Armstrong). Customary law, according to Zorn (1990:283) resides within the consensual processes by which members of indigenous groups reached conclusions that maintained social harmony. One of the first steps is to broaden the recognition of the existence of these processes that had been developed over very long periods of time prior to the arrival of the European settler societies.

The indigenous legal traditions continue to be compared to the Western legal positions that are dependent on philosophies and theories that are attributed to, as only belonging to civilized societies. According to James Tully (1995:65) this thought stems from the advancements of European hegemony as independent modern constitutional nation-states began the gradual process of diffusing primitive customs in order to justify policies of colonization. The diffusion process, as mentioned by Tully, was accomplished through the deliberate act of superimposing European values and laws over the customary practices of the indigenous peoples. The sequestering of the Indians land in North America was a process that was justified under the European model of colonization, a process that was quickly molded to exonerate the indiscriminate taking of indigenous lands and resources. Tully (1995:69) argues that the

categorization of indigenous peoples of North America as being “primitives” advanced the promulgation of these societies as being of lesser nationhood status than colonial America.

The customary practices of the indigenous peoples were also embedded within concepts of land and property ownership with examples provided by cultural anthropologist E. Adamson Hoebel (1954) who conducted an extensive nineteenth century study on the Cheyenne. Hoebel (1954:24) cites the Wolf Lie Down incident that clearly exhibits the customary practices that are directly related to personal property ownership and the manner in which the laws of the Cheyenne delivered a just adjudication when these rights were violated by members of Cheyenne society.

It is my opinion that ethnographer E. A. Hoebel presents the Cheyenne traditional system of law as meeting the requirements of the European system of law and in doing so creates an opportunity for customary practices of indigenous peoples to be recognized within the legal systems of colonizing occupiers. It is not my intention to defend the pre-contact customary law practices of the original occupants of North America, but the presence of such a system does serve a greater purpose in establishing the existence of ‘legal’ practices by oral-based societies.

Hoebel (1954:24) contends that there exist four functions of law, which are required to establish a position within the European system of law: 1) responsibility (that they knew); 2) authority; 3) method; 4) adaptability of the society to accommodate these changes. Hoebel and American jurisprudential scholar, K.N. Llewellyn (1941:127) cite the traditional judgment delivered by the Cheyenne Elk Soldier Society in the ‘Wolf Lies Down,’ incident as meeting the legal parameters of the European system of law.

In my opinion the problems that are associated with legal measurements and tests provided by Hoebel are twofold; first, they are based upon an ethos of a literate society; second,

the indigenous system is regulated to the status of being primitive. Indigenous customary law practices are systematically categorized as existing (and being frozen) in a past and primitive state and are subject to scrutiny by authoritative administrators trained within the English system of law.

Hoebel's comparative study nevertheless created space for indigenous peoples in North America to present their versions of jurisprudence as it existed in the European pre-contact era. One or more of Hoebel's rules of the English law are embedded within the various versions of the *captikw* of the *Syilx*, making it worthwhile to use Hoebel's 'four functions of law' theory to test the validity of the *captikw* of the *Syilx*. Within Martin Louie's (1975) version of the *captikw*, "The War with the Frogs" as collected and transcribed by Randy Bouchard and Dorothy Kennedy it is apparent that the social, cultural, and political institutions of the *Syilx* meet the requirements presented by Hoebel. Although the following excerpt from Louie's version of "The War with the Frogs" is not dealing with a legal justice or remediation issue as Hoebel described in the 'Wolf Lies Down' example it does contain what he described as the four functions of law.

"The War with the Frogs" as told by Martin Louie, Sr. (1975) could be considered as one *captikw* that clearly provides evidence of the four criteria proposed by Hoebel.

A lot of people were sitting around a place called "Big Valley," near Kettle Falls. These people were frog people, and many hundreds of them had gathered to discuss a problem. The problem was that there were too many frog people for the land. Their Chief suggested that they should go to look for another piece of land... A crippled frog volunteered to go along, but the three frog volunteers said, "No. You cannot come with us; you will be in our way."...

Addressing Hoebel's first criteria that the frog people understood and knew the responsibility of law is evidenced as they were establishing and marking out land boundaries to be owned by

individuals of the frog 'nation.' The concept of land stewardship might be vastly different than European concepts of ownership yet in this story the geographical landscape that included valleys, mountain ranges and water systems defined these geo-political boundaries. And it was clear that the shared occupancy of lands within the physical landscape was comprehended as law. And it was clear that there were social relationships and political integration amongst the frog people as evidenced when the community gathered to discuss the current over population and land dilemma.

The second criteria dealt with authority. The authoritative leadership provided by the "Chief Frog" again is not tied to European concepts of monarchical leadership or dynastic rule but based upon egalitarian values. This is evident as overcrowding in the frog's current valley is dealt with when the Chief Frog calls the frog people to a meet and engage in a discussion to resolve the problem of overcrowding on the lands that they occupied. The chief may have provided the voice of the people but it was the peoples' collective decision-making process and active participation that allowed for the excursion to be undertaken. The egalitarian authority is evident as the crippled frog, despite his obvious physical limitations, had the responsibility and obligation to offer his assistance and also to have a voice in the discussion.

It was decided that the frogs would move to the new land. Packing their things, they left behind old people, women, and children. Only the strong ones would go to the new land. So they travelled to this new land and began to mark off areas of land for each frog family. After the land was claimed, there were still frog people left over who did not have any land. The chief said "those of you who did not get land, go to the other side of the mountain to get some more land. Look on the south side of the mountain, near a place called, 'Twin Peaks'" (Louie 1975).

Hoebel's third criterion was that of method. Only the strong frog people were to move into the new lands while the old, women, and children stayed behind. The formal precedent as described by Hoebel as a methodological requirement is based upon the first two criteria of

knowing and authority as the frog people delineated boundary lines to demarcate individual lands under the previously established law regarding ownership of land. The story actually involves a third party the swallow people who repelled the encroachment of the frog people through physical aggression.

Chief Swallow told a messenger to go to Chief Frog and tell him about the boundary running from the face of the cliff to the river—the frogs could come no closer than that; if they did so, this would mean war (Louie 1975).

The story continues wherein a war ensued that resulted in territorial occupancy and rights of the Swallow People being acknowledged by the Frog Nation. The ending in this *captikxw* shows that the ability of two different societies to adapt and accommodate to the social and political needs. The act of war to defend territory and the eventual compromise through political mediation is also considered to be a primary principle.

Jean G. Zorn (1990:276) quotes Bronislaw Malinowski as he indicates that all societies had forms of what he described as “primitive law” a theory that is aligned with the perspective offered by Hoebel (1974) in his study. In her analysis, Zorn (1990:290) indicates that the general perspective within the legal sphere was that tribal societies did not possess any laws that were worth mentioning and discordantly suggests that western societies copy and implements these legal ideas into their own legal frameworks. In his analysis of Cheyenne military societies, John H. Moore (1974:332) notes that the Dog Soldier Society was governed by its own military chiefs therefore this separation of authority added greater strength and tenacity to its membership.

The identity and classification of indigenous customary laws as existing within the “primitive” realm implies that the practices are something other than a law as understood within the European perspective. James W. Zion (1987:123) views this as an unfortunate circumstance because it implies that customs of indigenous societies are of a lower degree than “law.”

According to Zion (1987:124) the legal tradition of aboriginal peoples originated in custom and although the articulation of custom of the English people originated in myth or legend and became the basis of common law, some maintain that aboriginal peoples' "customs" continue to be myth or legend.

Zion (1987) argues that in many instances the courts final determinations are based upon the presumption that the customary laws of aboriginal peoples are primitive practices and do not meet requirements of the common law. Therefore, the customary practices of aboriginal peoples were not considered by civilized European societies to meet their criteria of being law. I argue that the reality of customs that became instituted, as collective practices by aboriginal societies were laws of the highest degree especially as these customary practices are intertwined with the natural laws of the specific environment that these societies shared with other life (*timxw*).

Gerald J. Postema (1999:256-257) argues that implicit rules of law arise from social conduct, expressly as a result of "direct expression in the conduct of people toward one another." Therefore, this expression of social conduct as practiced by indigenous societies, in particular the *Syilx*, were and continue to be echoing the teachings of *Sn'klips* laws and prescribe onto themselves the principles of organized societies existing in a collaborative and reciprocal manner. Postema bases his position on Lon L. Fuller's (1969:19) argument that explicit change and moral duty are based within social expressions of reciprocity. Andree Lajoie (2007:3) insists that the "Aboriginal legal tradition" qualifies as implicit law that originates from and is deeply rooted in aboriginal cultures and is transmitted orally or from pictograms, over many generations.

Chief Justice McEachern in *Delgamuukw* (1997) made it clear that, in his opinion, the Gitksan-Wet'suwet'en societies were "primitive, unorganized and lawless" and that their

existence was based upon survival instincts and informal customs (Newell 1996:54). The highest courts of Canada have made this legal determination that clearly puts the aboriginal peoples on the defensive from the outset and it is from this hierarchical vantage point that European laws suppress the customary laws of aboriginal peoples.

Donald J. Bourgeois (1986:254) argues that law and its expression is central to all societies although they may be different from one society to another, yet principles must have the ability to adapt and reflect the societal changes, as they exist in the contemporary era. Despite the acknowledgement that “custom” existed in all societies, Patrick H. Glenn (1997:613) reminds us that it is often very difficult to justify, as it must constantly be held up and compared to the legal standards of the present reality. The transformation of the customary practices of the indigenous societies of North America were hurried along with the forced colonization of both the people and land, while the Europeans made the indigenous peoples subject to a foreign system of law that they did not know existed.

Kent McNeil (1989:195, 197) discloses that when the Europeans arrived the aboriginal peoples had their own systems of law that acknowledged, among many things, concepts of property ownership as they obviously were in possession of these lands, a point in law that cannot be separated or isolated onto itself and become meaningless. Property ownership under the system of law as described by McNeil is based within the concepts of maintaining a reciprocal relationship amongst the societies and the natural world environment. Individual property ownership is a concept that within the indigenous reality was extremely difficult to comprehend as responsibility and obligation to the *timxw* meant maintenance and protection of the lands and resources so that all life may survive. Individual ownership of the earth (land and natural resources) was not present within pre-contact *Syilx* societies.

The concept of indigenous customary law practices could be misinterpreted and misunderstood as the ideas, thoughts and application of these practices are caught up in a cultural paradox that cannot delineate or separate the distinctions associated with the loss of meaning between indigenous and European languages. As mentioned above, property ownership under European concepts of law is based on owning a piece of the earth. While in the indigenous perspective the earth cannot be owned, instead a back and forth giving, sharing, and respect is a responsibility and obligation of the *Syilx*.

The worldview and ideological differences between cultures is worthwhile of consideration yet language, in my opinion, constitutes the greatest challenge as customary laws come under judiciary and constitutional scrutiny. Patrick Glenn (1997:618) argues that custom is not the teaching of the past but present reaction to it, while the legitimacy and validity factor may be comprehensible only to those people who put the thought into action and adhere to it after that time. Possession of land from the customary practice perspective is therefore considered a valid and vindicated action that could be comprehensible only to the societies that instigated the process.

In the modern era there is a variety of instances that continually prove to be problematic for indigenous peoples that reside within the Canadian province of British Columbia. When the Crown acquired and asserted its sovereignty it should have been obvious that the indigenous peoples had presumptive title through being ancient possessors of lands and resources of what at that time became the new holdings of the province of British Columbia. In recent times, individual bands have strategically asserted overlapping territorial claims that, in my opinion, have weakened and subsequently, jeopardized the assertion of indigenous claims of land entitlement over unceded territories. The provincial government is basing their claims on

assumptions that there were no clear and absolute possession actions over the unceded territories prior to the recognition of Crown sovereignty. The manner in which the Province of British Columbia gained access and control over these unceded lands is being protected under the English law of absolute possession and arguably adverse possession.

Jo-Anne Fiske (2000:18) insists that successive legal orders that indisputably consist of differing privileges and obligations continue to re-shape customary law as social relations change for the individual through the succession of customs. For aboriginal societies these variances may be quite subtle with very little change over long periods of time or quite rapid due to outside influences such as war, disease or fluctuating environmental effects. Those tribal groups that first encountered the explorers on the eastern seaboard of North America experienced a change in their social, cultural, and political order as they were introduced to colonization methods that were intended to control and dominate both the people and their natural world environment. As a consequence of the colonization process the customary practices became disrupted by Eurocentric ideologies that formed the spirit of settler or pioneering endeavors.

For instance, Indigenous legal scholar, Sharon Venne (1998:19) takes the position that the rights of peoples were initially recognized in the natural law forms that “flowed between human beings,” and insists that international law underwent a significant transformation with the assertion of the discovery principles as enacted in North America by Europeans. As discussed in other chapters the bitter legal reality associated with the Doctrine of Discovery had detrimental effects upon the natural world order that had been respected by the North American indigenous peoples for many millennia prior to the arrival of Europeans.

The customary laws of indigenous peoples in North America were present for a very long period of time prior to the multiple waves of European encroachment upon indigenous lands and

eventual permanent occupation and colonization. Sharon Venne (1998:19) argues that as a result of the alleged discovery of “Indigenous America” by Europeans many members of the European public were dissatisfied with the treatment of the indigenous peoples and the violation of their fundamental human rights. Arguments supporting Venne’s position are included within the dialogue of the Doctrine of Discovery, yet it is important to note that within the international arena a concern over the treatment of the indigenous peoples had taken place at the Council of the Indies in 1550 (Venne 1998:6).

It is the position of John C. Mohawk (2000:137) that the Holy Roman Emperor, Charles V, called for the investigation at Valladolid, Spain in order to investigate whether or not the conquest in the New World was a justifiable action. Venne (1998:7) argues that there were a number of other issues at stake that revolved around the central issue of whether or not the Indians were “legitimate humans in the eyes of the church and state.” The final conclusion was that while the Indians were recognized as having human qualities the Spanish were concomitant in their belief that they were a superior culture of people and the Indians of the New World should be grateful to have been conquered by the Spanish, thus making the conquest a justifiable act (Mohawk 2000:138).

According to Walters (1996:788) during the pre-colonial era the Indian nations governed themselves under an aboriginal customary law system and continued to function as an independent governance authority, despite the establishment of British colonial rule. The customary practices that defined the manner in which aboriginal societies of North America were to abide were different only in the fact that they were often kept alive through the oral tradition rather than in written form. Jean G. Zorn (1990:283) reminds us that the customary practices or

laws of aboriginal peoples are first of all a consensual process, an important point that will be further examined in the “oral narratives” section.

James Anaya (2009:80) argues that customary law consists of two key elements, the first is defined by what he calls “past uniformities in behavior,” followed by the “psychological element.” I interpret what Anaya is presenting as behavior being intricately connected to the natural world environment for a very long time strictly out of necessity that then influences the thought processes to conform to the obvious, and it is this adaptation process that becomes customary practices or law. Therefore the consensual process mentioned by Zorn (1990) then becomes a necessary process of customary law as there is a reciprocal exchange between the social and ecological realities that are interdependent and simultaneously reliant on the contribution of the other realm. The behavior processes of the human being is then shaped by their material needs which then creates an opening for the thought or psychological development to coincide in a harmonious relationship with the other.

Arguments by Anaya (2009) should be given serious consideration as aboriginal peoples have for a very long time understood the interconnectedness between physical ‘material’ world existence and the unproven and non-scientific realm of the unknown and little studied psychological existence within the collective mind of aboriginal peoples. It is a phenomenon wherein aboriginal peoples that occupy totally different ecological niches yet have the ability to know and understand the intricacies of behavior that stem from the unspoken psychological similarities. It is said that we are still drinking the same water that the extinct dinosaurs drank millions of years ago. Aboriginal societies understand the significance of the water cycle and throughout North America practice various ceremonies that recognizes the triad of the material (land, water, and other elements), the psychological realm (spirituality), and the human being.

For aboriginal peoples the material world existence is linked through the cyclical nature of water, a reality that has a significant influence in the maintenance of reciprocity between human beings and the *timxw*.

The customary practices or laws of aboriginal societies were developed out of long-term interactions with their natural world environment which implies that this relationship was dependent on respect and a deep understanding of the needs of maintaining and managing the food sources which includes plants, animals, and water-dependent species. According to Fiske (2000:18) customary privileges and obligations that shape law and these may change with successive legal orders as social systems develop and evolve. This point by Fiske will be further developed and discussed in another chapter as the importance of change is often obscured by other historical events. The matter of governance in regards to the point brought forth by Fiske is an important discussion as it is clear that the natural world environment was in a constant state of flux and those aboriginal societies had to adapt and change to accommodate the climatic fluctuations over the past ten thousand years and beyond.

According to Sidney Haring (2004:444-445) Indian law is deeply rooted in tradition and what he terms as “a lived law” which means it is not static and constantly evolves to meet the changing social conditions. The positions of Haring (2004) and Fiske (2000) address the social aspects in regards to the existence and development of customary laws of aboriginal societies. I argue that this perspective is worthy of consideration and must be taken a step further to include the accelerated cultural and political transformations that were associated with European colonization. These customary practices and laws obviously had to undergo serious adaptations when access to hunting and gathering grounds were restricted, which in turn upset the equilibrium dynamics of the social, cultural and political systems of aboriginal societies.

According to the Law Commission of Canada (2006:4) the Indigenous legal traditions are derived from the oral tradition and were developed through a consensual process and are described by colonial courts as being a form of cultural custom rather than law. The Law Commission (2006:14) recognizes that every culture has developed its own conceptualizations of historical truth upon which legal traditions emanate and the potential for misinterpretation is present within cultures that are unfamiliar with these culturally biased truths.

Returning to the discussion on the picture-writing as mentioned by Mallery the stories depicted upon rock formations in North America were quite possibly reminders of let's say, the movement of the animals depicted upon the face of cliffs or walls of caves. The psychology of prehistoric aboriginal societies in North America is left to speculation but from an indigenous perspective, the direction the animal is facing may indicate a migratory route of the said species depicted in the picture writing. This depiction would allow following generations of hunters to know that this was and continues to be a migratory route of let's say the bison. Therefore, a customary practice of returning to this site year after year during a particular season became an annual practice that quite possibly led to the development of a sedentary life style and continuous occupation of these sites. This thought is what Fuller (1969:234) refers to as assisting in "filling in the gaps" and noting the development of interactions between man and food sources wherein specific practices over long periods of time evolved into the formation of societal laws. These societal laws were more than likely early forms of sustainable practices where success was dependent on aboriginal societies becoming stewards over the natural resource food supplies in that specific ecosystem.

Henderson et al. (2000:14) make the argument that the contemporary systems of British law were derived from Celtic, Roman, and Teutonic and Norse customs and were based within

the oral tradition and assert that this developmental process of law occurred well before the birth of Christ. Historian Ben Finger (1959:478) notes that Britain was conquered by the Iberians, Celts, Romans, Angles, Saxons, Danes, and finally the French Normans which gave rise to continental feudalism wherein the English Church succumbed to Norman influence. Professor of Jurisprudence at the University of Oxford, Frederick Pollock (1887:12, 20) argues that absolute ownership of land did not exist in England except in the Crown, which in the literal interpretation meant all lands belonged to the nation. Pollock (1887:53) also argues that the European version of feudalism was simply a “co-operative association for the mutual defense of the members” and a nation that was willing to take up arms in defense.

In most circumstances the laws of the land in this European region were based within archaic customary practices of those conquering invaders of what became known as the nation-state of Britain. The notable similarity between the social and political transformations of laws that dealt with land ownership and tenure principles in Britain is that absolute ownership did not reside with the individual or community but to the nation. For the *Syilx* this was the law and was recognized by all persons and communities, with the understanding that they had stewardship over certain resources within these ecosites and that this region was a singular part of the whole nation. Stewardship from the *Syilx* perspective meant that they had the responsibility to protect and maintain the political boundaries of the entire territory.

The Okanagan and other Salishan speaking tribes have a rich history that has been kept alive through the oral tradition for thousands of years. The primary sources of this history are the traditional storytellers, keepers of laws, and the traditional knowledge keepers, who collectively have maintained the oral tradition prior to and during the colonization of their territories by the Europeans. As mentioned this method of recording archaic history of regions

occupied by this linguistic group of aboriginal peoples has been relegated to be nothing more than mythology and folktales of primitive societies.

Over the past ten millennia the oral tradition of the *Syilx* is identified and referred by this Salish group as “*captikxw*.” Therefore, for the *Syilx* the laws that determined the spiritual and physical relationship between the animals, humans, and the natural world were handed down from a greater power that created the universe and the physical transformation of the *Syilx* as described by Louie (1981).

The *captikxw* according to Armstrong et al. (1993:1) are the historical records of truths and knowledge of the natural laws made active through the meaning of the story as passed down from person to person and from generation to generation. *Syilx* traditional knowledge keeper and scholar, Dr. Jeannette Armstrong (2010:23,112) argues that the *captikxw* plays multiple roles as being a source of documentation and communication through mimicking nature imagery, and a method of categorizing *Syilx* knowledge systems and the conventions that defined the ancient human/land/animal relationships.

Syilx scholar, Dr. William Cohen (1998) maintains that the natural laws and responsibilities of the *Syilx* are revealed within the *captikxw*. The *Syilx* have maintained a long-term relationship with the natural world, which has been and continues to be guided by the *captikxw*. Laws are not subliminally hidden in the multi-layered theoretical concepts of the oral tradition, instead are clearly stated within the *captikxw*. At times, however, true meaning and application of these laws have become hindered and influenced by the imposition and transference of European thought and ideological processes. It will be of great importance to enter into a dialogue that focuses on the past and contemporary relevance of indigenous laws as embedded within the *captikxw* of the *Syilx*.

In the analysis and deconstruction of the meaning and application of the *nsyilxcen* term “*captikxw*,” Dr. Armstrong affirms that the ethos of the *Syilx* are embedded within the ancient narratives, thus allowing for the collective body, mind, and land memory to continue to exist in this contemporary era (2010:113, 123-124, 128). The *captikxw* continually impel the *Syilx* to abide by their teachings (laws) as these ancient narratives survived through many multi-dimensional transformations, as well as tactics employed in the European colonization processes of assimilation and acculturation.

Yet, it must be made clear that the interactions between *Sn'klip* and other animal representations within the *captikxw* are not reflecting a system of belief or religious practice, instead are viewed by the *Syilx* as “records of the natural laws” (Armstrong et al. 1993:1). Armstrong (2010:145) notes that “Coyote...made the laws for the *xatmasqilxw* –first people...which results in establishing ethics observed by the Okanagan *Syilx*.” Harry Robinson (2005:10) supports the previous perspectives by Armstrong and Cohen as he explains that the *captikxw* are holders of the laws that bestow rights as given to the *Syilx* by the thought of the Creator.

The *captikxw* of the *Syilx* and other oral narratives of Indigenous peoples offer to the West an opportunity to understand laws, traditions, historic realities, and cosmologies of indigenous peoples. Cynthia Callison (1995:166) asserts that the oral tradition of aboriginal societies functioned as repositories of trans-generational knowledge systems that survived European policies of assimilation and acculturation and continues to provide societal control over the conduct within the aboriginal societies.

The intent of the following section is based on the premise that the oral tradition continues to hold the customary laws of the *Syilx* and determines the manner in which our social,

cultural, and political institutions function in this modern era. I have chosen to enlist participation from our traditional allies, the Shuswap, to share their knowledge and expertise of their oral tradition, primarily to be used as an additional source that provides the basis of customary law, as it exists within the greater Salishan territory.

The original laws regarding the natural resources, in this case, water, are embedded within the oral narratives of the *Syilx*. It must be made clear from the very outset that the worldviews and social consciousness of the past and contemporary *Syilx* societies are not based within European concepts of mysticism or religious ideologies and practices. Instead the oral narratives are situated within story form that functions as a historical documenting system that conveys the laws that govern interactions within the human society and determine the reciprocal relationship with our natural world environment.

These eras of existence have, according to the oral narratives (*captikxw*) of the *Syilx*, been preceded by a long-lasting period wherein plants and animals dominated the world. According to the *captikxw* the territory of the *Syilx* was set in place by their great teacher, *Sn'klip* or Coyote. The *Syilx* understand that the laws that guide their responsibilities and obligations to one another and to their natural world environment are embedded within the *captikxw* and *Sn'klip's* laws are the primary principles upon which *Syilx* societal relationships are formulated. The *captikxw* contain the history of evolution of both the natural world and the physical transformations of the *Syilx*.

The oral tradition of the *Syilx* prescribes approaches that guide the social, cultural, and political institutions, while concurrently narrating responsibilities to the natural world. The source of the original laws reside within the ancient oral tradition and define rights of the

individual within the greater human society and determine the role of our nation in the contemporary era as caretakers of these laws.

It is through these ancient narratives that the *Syilx* continue to understand the history, formation of ethics, protocols, customs, and laws that were embedded within these teaching stories. It is clear to the *Syilx* that the cultural obligations and responsibilities are defined within the ancient oral traditions that have guided the interactions between the human beings and the natural world over many thousands of years.

Orality for at least the past ten thousand years has been the primary methodology wherein the ethical guidelines of the social, cultural, and political institutions of the *Syilx* have resided. It is not the purpose of this inquiry to defend orality, yet it must be understood that the expression of social, cultural and political concepts reside within the oral tradition. Rodney Frey (1995:142) while discussing the fundamentals of orality, mentioned that the auditory experience is a flow of sound but does not offer a visual presence of images of the world, yet reveals the action, process and becoming of reality.

I begin with descriptions of human life existence within the oral narratives of both the Okanagan and Shuswap to argue that these linguistically related tribal groups of the southern Interior region of British Columbia contend that their ancestors did occupy their traditional territories for tens of thousands of years before the present.

An Okanagan traditional storyteller and author, Harry Robinson (1989) recounts his version of the *capikwx* “The First People.” Robinson (1989:31) begins his rendition with this excerpt:

In the beginning, there is nothing but water and darkness. God changes all this by his thoughts, creating the sun, causing a bush to grow up from a vast expanse of water, its blossoms transformed into the first people.

Robinson (1989) infers that the original law of the human being resides in this oral narrative as it details the relationship between the sun and the water world. The cosmology of the *Syilx* begins at this juncture in time and space and Harry Robinson suggests that planet earth, in its earliest form, existed in a place of darkness and consisted only of water. Total darkness implies nothingness, a place where there is no life, a void in both space and time, a place of sacredness. The Creator thought of the sun and it came into existence, it gave heat and light and allowed the Creator to see this world that at that point in time, was made up of only water.

The original law of the *Syilx* resides in this oral narrative as it establishes the first relationship and interaction between the sun and the water-covered earth. During the early stages of the sun's physical existence, according to Eric Roston (2009:29-30) the sun emitted enough energy in the first half billion years of Earth's history to create what he describes as "earth's starter atmosphere," which allowed the earth to release and retain its own energy resources. It is of great importance to bring theories of western science into this dialogue to establish a sequential time line to situate an era, or beginning point, referred to in this particular *capitkxw*. Biochemist and molecular biologist William Day (1984:11-12) presents tangible evidence that three billion years ago the earth was encapsulated by "shallow primitive oceans." According to Day (1984:17-21) fossils of stromatolites (cabbage-shaped or branched laminated structures) and other unicellular and algalike microorganisms were found deep within earth's strata.

In an interview, a traditional Okanagan storyteller Martin Louie, Sr. (1981) described worlds of existence that preceded the creation of man. According to Louie (1981) this period of existence is referred to by the *Syilx* as *chip-chop-tikilxwh*, and describes periods of time or phases of this world when only mineral, plants, and animals were present. Louie (1981)

describes the following phase of existence as *st'elsqilxw* which describes the first era when human beings were formed (the era where humans were 'wild'). The next phase *xatmasqilxw* describes when humans developed the capacity to have rationale thought and the next phase *sqilxw* (the dreaming ones) describes an era wherein humans organized themselves into societies and learned to live in peace upon the land, the present day existence of humans, *outmasqilxw*, describes the existence after the arrival of the newcomers (Europeans) (Armstrong et al. 1993:3).

Derickson (Armstrong et al. 1993) provides the *Syilx* view of those changes. She explains that: "They (the *Syilx*) became changed through learning to live on the land. The *captikxw* tell of four stages of learning that they went through..." The four stages being

- 1) *st'elsqilxw* (torn from the earth...)
- 2) *xatmasqilxw* (in front of us...)
- 3) *sqilxw* (dreaming ones, bound together,...)
- 4) *outmasqilxw* (to struggle and/or come after...)"

Therefore according to Derickson (1993) the four stages of learning corresponded with the four existence phases as described by Louie (1991). The phase *chip-chop-tikilxwh* preceded human development by millions of years. It is my opinion that the *st'elsqilxw* (torn from the earth) era extended from approximately 180,000-250,000 years ago. The *xatmasqilxw*, (in front of us) era would have existed between 180,000 to 40,000 years ago. The era of the *sqilxw* (dreaming ones, bound together) beginning approximately 40,000 years ago and finally the *outmasqilxw* (to struggle and/or come after...) era is the present.

In order to comprehend the stages of development of the world order and the manner in which the original laws of the *Syilx* were inaugurated it is an imperative to identify these phases or eras. It is also important to identify these developmental stages to be able to determine that the laws were formalized in one phase and were communicated through the oral tradition to the next era of existence. In a later discussion on the oral tradition of the *Syilx* it should be

understood that a majority of the principles of law originated in the first two developmental stages, as presented by Martin Louie (1981).

Based on Martin Louie, Sr.'s (1981) description of three previous world existences that preceded the current human existence the indicated time period corresponds with the era of human development described by Ignace (2012) which would then have occurred in the *st'elsqilx* existence. As noted by Louie (1981) the period wherein humans were still 'wild' would have occurred in this time period as it was early in the development of human beings, and the time period juxtaposed with Goodman's (1981) perspective would have occurred 180,000 years ago. According to both Louie (1981) and Ignace (2012), based within Goodman's (1981) findings the *xatmasqilxw* phase might have begun as early as 70,000 years ago but at least 35,000 years before the present.

Dr. Ron Ignace, a *Secwepemc* (Shuswap) scholar and traditional knowledge keeper eloquently described this period when aboriginal societies were at the stage of not-quite-being-human. Dr. Ignace (2012) recalled a story wherein he describes *Sk'elep* (Coyote) as being the Creator's (*Tqeltk Kukwpi7*) number one helper despite having many characteristics that in today's modern and 'civilized' reality would be categorized as being distasteful and of a primitive nature. Dr. Ignace (2008:36) also makes it abundantly clear that there is a difference in story types: *Stseptekwle*, hold the stories of *Secwepemc* laws and originate in "ancient times when animals and humans could change shape and communicate"; *slexey'em*, are the stories that people tell of daily life experiences and are considered to be "handed down, experienced stories." The following excerpt is an example of a *Secwepemc* oral narrative that takes place when Coyote was upon the land, therefore is a *Stseptekwle*:

It is said, as Coyote was sitting on a rock, two medicine people from the coast came upon Coyote. They tried to transform Coyote into stone but they weren't

able to. They were only able to transform his tracks into stone, which can still be seen. *Sk'elép* stated 'why are you trying to cause me harm like this? I am more powerful than you, I could do you more harm'. Coyote said "I know the Creator put you on this land like myself to fix up the land for your people and he has given me that work, too, for my people, the coyote people. Coyote said, 'this is my land, I won't allow you to stay here. I will only allow you to pass through but you must pass through quickly.' Coyote went on to say 'I will not interfere in your work and you should not interfere with my work but we should strive to look after each other and help one another' (Ignace 2012).

According to Dr. Ignace (2012) this story defines where the supreme authority within *Secwepemc* territory originates and that the tracks left in the stone are a physical and visual reminder of the historical event wherein people from the west had attempted to encroach upon the territory of the "Coyote people." The story recounts an event when the Creator, *Tqeltk kukwpi7*, came down and gave the *Secwepemc* their respective homelands along with their own language. According to Ignace (2012) who was a recipient of ancient knowledge passed down through many great *Secwepemc* elders and medicine people, the *Secwepemc* were considered as being human and in the same breath were described as being 'wild.'

What also should be given considerable thought in the Ignace (2012) story is that the duties and obligations of two medicine women from the coast is recognized by Coyote as being handed down by the "Creator," or *Tqeltk kukwpi7*. It is also important to note that the coast region is to the east of the *Secwepemc* territory. Therefore, according to custom, which is guided by ancient ethics and protocols of Salishan peoples, it becomes very clear that these lands in the west were occupied and governed by Interior Salish peoples. Another consideration is that at the time of this incursion from the west coast these "medicine women" were not of the Coyote people, inferring that the territory to the west of the *Secwepemc* territory belonged to another linguistic group.

Joe Jules (2012), in his own words identifies himself as being "born as a guardian to the land." Joe Jules is of mixed Shuswap and Okanagan ancestry and is what I describe as being a

“land speaker.” Being a land speaker implies that his intricate connection and subsequent knowledge of the land has led him to be a human being that carries the voice of all living things upon the land, more specifically the animals, lands, waters, and other natural world elements that are present within the geographic region that he occupies. Joe Jules mentioned that the sacred laws and beliefs of his people are what have guided the *Secwepemc* for countless generations. Jules insists that these laws define the interactions between all of their living relations upon the land and water and cites a specific story wherein beaver and porcupine in the distant past both lived in the water as brothers. In Jules’ (2012) rendition of a *Stseptekwle*, Beaver’s laws were ignored forcing him to issue a challenge to porcupine to see who could chop down a tree the fastest. The loser was to be banished from the water and would from that time forward be a land animal. Porcupine lost the challenge and ever since that time, when Porcupine returns to the water he still exhibits the utmost respect for his former home environment. Jules (2012) recounted a story wherein he personally witnessed a Porcupine approaching a creek and before drinking issued a crying or lamenting song that in his opinion showed his feelings of loneliness, regret, and loss of his former home environment.

This Beaver and Porcupine story, as told by Jules (2012), in my opinion, is laden with a set of living laws that would be considered as guidelines for ethical behavior that were specifically intended to show how to coexist and respect the natural element of water. The Beaver and Porcupine at one time in the distant past shared a home, which indicates the ability of two separate and distinct species being able to co-habitat the same space. At a point in the story porcupine became lackadaisical in his responsibilities that included keeping the house clean and storing food resources for the long winter months when food would be scarce. This story holds a

law that that tells of consequences that arise if one does not follow and maintain the natural laws that ensured both the quality of the water and the ability to co-habitat the water world.

The *Stseptekwle* of Beaver as recounted by Jules (2012) is considered to dictate a series of water-related laws that are considered to be sacred obligations to the natural world. The customary laws that are embedded within the oral tradition of the *Secwepemc* concurrently provides information on needs of the water-dependent species and instructs the aboriginal peoples of their responsibilities to the natural world environment. These laws reflect the natural order of life that existed prior to European contact and the *Stseptekwle* of the *Secwepemc* continue to guide the interactions and responsibilities to the land and water within their respective territory.

Secwepemc knowledge keeper, Mike Joseph Arnouse (2012) recounts a *Stseptekwle* that in his opinion is connected to the *Secwepemc* creation story. A brief summary of the *Stseptekwle* as recounted by Arnouse entails a single drop of water that falls upon a high mountaintop and enters a small stream that flows down the mountainside. As the water drop moves down the mountain side it nourishes the plants, trees, and animals that walk and crawl about the earth, and those that fly on wings. All life forms are happy to be able to have a share of this gift of a single drop of water as it falls from the clouds and joins other drops of water to form a small stream that nourishes all life forms as it travels down the mountainside.

Mike Arnouse (2012) was asked about the customary role of the *Secwepemc* chiefs and his response was that besides being responsible for their own life, they were responsible to gather the people for ceremonies to pray for the land and water. Arnouse (2012) also asserted that the land and water were regarded, as “gifts” from the creator and that it was the duty of the people to ensure and maintain the health of the land and water. The ethical responsibility of the

Secwepemc high leadership went far beyond simply being a customary practice to protect and ensure a healthy reciprocal relationship with the land and water but insisted that ceremonial ritual was central to maintain kinship between humans and the sacred life forces of the land. Arnouse (2012) reminds all humans, in his own words, that “Nature doesn’t really need us; it’s us that needs nature.” According to Arnouse (2012) the Creator of all things gave these customary laws directly to the *Secwepemc* through the oral tradition.

Ignace (2012), Jules (2012), and Arnouse (2012) are all elders in training, meaning that they are not recognizable as being old and wise, yet transmissible knowledge remains alive through such aboriginal “historians, law keepers, and guardians of the land.” The knowledge of *Secwepemc* traditional laws is based within a deep understanding as bestowed upon them by their respective elders who have guided their journey of life.

Sanpoil traditional storyteller, Clara Moore (2007:124) provides her version of “Why Coyote Changed the Course of the Columbia River” and points out that when Coyote received Beaver as his wife from the Kettle Falls people, he bestowed the appointment of Beaver as the first salmon chief at Kettle Falls.

The *Stsptekwle* of the *Secwepemc* are similar to the *captikxw* of the Okanagan as the chronicles of laws embedded within are intended to flow through time as Coyote’s people continue to share these laws while upholding the ethics, protocols, and values upon which they are based. It is important to note that these laws were created during the time period when the animal and plant life forms ruled and dominated the world. It was during the archaic and prehistoric period that Coyote made laws that were intended to provide instructions of management and governance over both the water and food resources, in particular the salmon that continues to be a vital sustenance source and valuable trade item for the *Syilx*.

Clara Moore (2007:124-125) recounts that when Coyote made Beaver the salmon chief the law he laid down was that the salmon must be shared with all that came to this particular fishing site and that sharing not greed must weigh into any of the decision-making. What is also of great importance to remember is that the first salmon chief at Kettle Falls was a woman (Beaver, Coyote's Kettle Falls wife). Egalitarianism amongst the *Syilx* was clearly defined as law in the Moore story as leadership and authority in the decision-making process was to be shared between men and women.

In July 2012, I conducted a group interview with three *Syilx* matriarchs that are recognized as law keepers, traditional historians and storytellers, and a *Secwepemc* man who was raised by a traditional Chief of the Inkameep Indian Band. Delphine Derickson a descendant of Chief Chermut is recognized as a holder of traditional knowledge that has a unique ability to bridge two separate and distinct cultural worldviews for those of us that are monolingual. Delphine Derickson Armstrong identifies herself as '*Lekemnalks*' (summer weasel skin dress) and notes that her main teachers were her grandmother, Christine Joseph, her uncle, Charlie Armstrong, her father, Willie Armstrong, and her uncle, Martin Louie, Sr. Derickson's teachers are indisputably recognized as 'law keepers' of the Okanagan (*Syilx*).

As mentioned previously, according to Dr. Jeannette Armstrong (2010), the ethos of the *Syilx* originated in the ancient past and remains alive in the contemporary body, mind, and land memory, despite forced assimilation and acculturation processes of European colonization. It is from this perspective that Derickson 'speaks,' as she reiterates the meaning of the ancient past memory that remains alive and concurrently influences and guides her physical, mental, and spiritual existence in the contemporary world.

Delphine Derickson (2012) identifies beaver as serving two roles: first, being the keeper and manager of the water and second, the holder of laws. These responsibilities are based within beaver's ability and role of being a manager of water that reflects and entails intricate knowledge of a whole systems management regime that has beneficial outcomes for all life forms that depend on this resource. According to Derickson (2012) the water laws of beaver are embedded within the *captikxw* and *stunx* (*Syilx* name for Beaver) like the *Syilx* are dependent on the water systems within the territory. Beaver manages the water systems in the *Syilx* territory while the *Syilx* are responsible to preserve the ecological integrity of these water systems by concurrently protecting the land and water systems.

Dr. Jeannette Armstrong is a recognized land speaker of the *Syilx*. She carries a water name, *Laxlaxtkw* (sparkling rough water). Her teachers include her mother, Lily Armstrong, Grandmother Christine Joseph, uncles' Charlie Armstrong and Martin Louie, Sr. (*Sin-pac-cheen*: First Dawn in the Morning, the First Light), Tommy Gregoire, Harry Robinson, the two sisters Marie and Madeline Qualteer, Cashmir Pierre, and Ned McDougal (*Quilquilsneena*). Her mother Lily Armstrong and Uncle Martin Louie, Sr. are direct descendants (grandchildren) of the last Salmon Chief at Kettle Falls, *KinKanuxwha*.

At the age of fourteen Jeannette Armstrong became an interpreter for many respected elders who were well known and respected as knowledge keepers, traditional story tellers, land land/law speakers amongst the *Syilx*. Jeannette Armstrong was also brought up to be an interpreter at the winter dance (*sneewham*) and admits that this duty is where she gained invaluable knowledge as it forced her to ask the singers exactly what they were talking about, thus broadening her knowledge of the 'old' language that is seldom used in the contemporary era.

Jeannette Armstrong agrees with Delphine Derickson and acknowledges that beaver (*stunx*) is holder of laws in regards to water as in a *captikxw* (Beaver's winter dance) wherein *stunx* is killed, *Sn'klip* throws or spreads his (*stunx*'s) body parts to the different parts of the Salish territory. According to this *captikxw*, within each body part are responsibilities and roles that are bestowed upon the recipient tribal group and it is understood that each separate group is interconnected to the other recipients with water being the common denominator. According to a Methow traditional storyteller and knowledge keeper, Suszen Timentwa (1938:199) after wolf had killed beaver, the body was cut up into eleven pieces and the Methow tribe was given the heart of beaver.

This is evident in the story as recalled by Jules (2012). The law is that when the winter dance singers stand before the center pole at the winter dance it is *stunx* that they address when they have any prayer or words related to water. Therefore, *stunx* is always relied upon to assist in hearing and relaying the prayers that are sung or spoken to ensure the continuance of this sacred element to provide life for all the *timxw*, which includes the human being. What this law entails is that in this contemporary era all human beings regardless of origin are included in this prayer without discrimination. The *Syilx* concept of *timxw* is all inclusive, and the colonizing Europeans and all peoples that have come to call *Syilx* territory their home are now considered to be an integral part of this land. And there are *captikxw* that prophesized the return of the white man to this land and Delphine Derickson, Jeannette Armstrong and Ken Bryson recounted the event that took place ever so long ago.

This *captikxw* is also told by respected Okanagan story teller and knowledge keeper, Harry Robinson, who incidentally was one of Jeannette Armstrong's mentors. The story according to Robinson (1989:40-52) is called "Twins: White and Indian." In the Robinson

version, God or the Creator had four documents for the human beings, three he gave to the Chinese, Russians, and Hindus and had difficulty in deciding who was to have the last document that had written words. God placed a rock on the last document and went away to ponder his decision. In the meantime the younger twin, the white man, stole the document and when God returned he denied taking the document. God instructed the younger twin to take the document/book and brought him to a small body of water and told him to jump to the other side without stepping into the water. The younger twin did so and when he landed and turned around all he could see was a large body of water (the Atlantic Ocean).

God or the Creator then instructed the younger twin to use the knowledge within the document to find a way back across the large body of water to be reunited with his older brother, the Indian. According to Robinson the older twin was *Sn'klip* and after the younger twin was banished, *Sn'klip* was then instructed to walk the land and prepare for a time when the younger twin would return with the knowledge held within the document he had stolen. The knowledge of the younger twin is held within written words of the book (or papers) and he has been burdened with the weight of this knowledge over a long period of time during his absence from this land. Upon his return to this land he brought with him a series of laws that disregarded the natural laws of the world and in this region of North America it has become the responsibility of Coyote's people, the Indian, to remind and teach the younger twin the laws of the land. It is my belief and opinion that the younger twin has the ability to remember his ancient origin and will eventually come to the realization that the laws of this land were placed here for a reason.

In the "Twins" *captikxw* two acts occurred simultaneously, the younger twin being sent away and the older twin was instructed to walk about the land. In this *captikxw* the older twin, *Sn'klip* was burdened with the responsibility of preparing the land for his people and while on

this journey *Sn'klip* had gained immense knowledge of the land. This *captikxw* prophesized the return of the younger twin to this land and upon his return the book of laws has proven to be in direct conflict with the indigenous peoples customary law regime. According to Dr. Armstrong (2012) this *captikxw* is filled with post-contact responsibilities for Coyote's people and the following is a direct quote that reveals the importance of the teachings and laws embedded within:

In our stories, the newcomers are the little brother. It was water that separated us, them from us. Remember that, it just isn't physically the ocean in that story he told him to step across that little ditch and that little ditch separated us. The widest separation between our people and them is the water. In other words the lack of knowledge and the lack of laws related to the water is what separates us. They need to come across that divide and they need to be able to understand in order to learn from us to come back here as our little brother. So that is also is the story of how our little brother is going to come back to us across that water. We have to teach them the laws of the land. That's the story I think is really important.

The *captikxw* "Twins: White and Indian," is an important source of customary laws that are specific to water. Dr. Armstrong's contention that one of the most important knowledge systems that need conveying to "the younger twin" has to deal with water laws as understood by the *Syilx*. Armstrong (1993:1) mentioned earlier that in the past and present the *captikxw* were recognized to be living records of historical truths and contained the natural laws by which the *Syilx* developed their customary laws that in turn guided the harmonious and reciprocal interaction between humans and the land.

According to Dr. Armstrong's interpretation of the "Twins: White and Indian" it was the specific knowledge of the laws regarding water that separated the twins and it was then the responsibility of the Indian to teach the white man these laws of nature upon his return. Like many other *captikxw*, the "Twins: White and Indian" hold the laws of the *Syilx* and offer a telling or prophesying of future events. The little brother or twin has returned to this land and came

with little or no understanding of the natural laws that had been put into place by Coyote in the territory of the *Syilx*. This *captikxw* is place-based and offers specific insights (prophecies) of future events that will simultaneously occur throughout North America.

Harry Robinson (2005) tells the story “Coyote Makes a Deal With the King of England” wherein he makes a connection to the “Twins” *captikxw*. In this story Coyote received instructions from the Creator to travel to England and make a treaty with the King. The intent of the treaty was to ensure that the King’s people would stop waging war against Coyotes Indian people in North America. During the initial discussion between Coyote and the King of England, the King insisted on settling the issue of violence associated with the colonization of the Americas by having a war. Coyote used his powers to intimidate the King. Coyote instructs the King to go to the window and then describe what he sees outside the royal palace. The King approached the window and for as far as he could see, his view was filled with thousands of Indian warriors. The King then agreed to accommodate Coyote’s wishes, as obviously Coyote’s warriors were already present and poised to make war against the King.

Robinson (2005:70) indicates that Coyote told the King that “his children” were approximately “halfways” across his country. According to American history this event of Coyote’s visit to the King would have been somewhere around the middle of the eighteenth century. King George III is most probably the ruler of England with whom Coyote met with during his visit to England. Coyote informed the King that he was going to leave and it would be the King’s responsibility to write in a book the points Coyote mentioned, which included establishing a reserve system wherein his people and their rights (laws) would be protected. Robinson (2005:76) said that the King did not write this book of laws but it was his son that completed the book.

Keith Carlson (2005:27) mentions that this trip to London was specifically to address Native land rights and current Indian policy in Canada. Carlson (2005:27) also contends that the “law” as mentioned by Robinson was obligation and commitment of the British King to protect the aboriginal lands.

Another “holder of laws” *captikxw* deals with the manner in which Coyote broke the dam on the Lower Columbia River and brought salmon to the people. This *captikxw* also has many different versions and depending on the storyteller. It is also called by different names, for instance, Clara Moore (2007) in Guy Mora’s collection of *captikxw* in *Upper Columbia River Book of Legends*, refers to it as “Why Coyote Changed the Course of the Columbia River.” While recounting the same story, Suszen Timentwa (1938) refers to this *captikxw* as “Coyote Liberates Salmon” in Leslie Spiers book *The Sinkaietk or Southern Okanagan of Washington*. Okanagan author, Mourning Dove (1976) in her book *Tales of the Okanogans* calls this same *captikxw* “How Coyote Broke the Salmon Dam.”

Mourning Dove is Jeannette Armstrong’s great-aunt and has influenced a great many traditional indigenous storytellers to write and publish their versions of the *captikxw*. Dr. Armstrong was mentored by many of the well-respected and knowledgeable traditional elders of the Okanagan during her youth. Armstrong heard the different versions from Harry Robinson, Tommy Gregoirie, Marie Qualteer, Ned McDougal (*Quilquilsneena*) her uncles, Martin Louie, Sr. and Charlie Armstrong, her mother Lily Armstrong and her father, Willy Armstrong.

In Dr. Armstrong’s version, there were three bird sisters who hired the swallows to build a dam that would capture the salmon at a location on the lower Columbia River. Coyote heard of the dam and turned himself into a little baby and placed himself onto a piece of bark and floated down the river to where the women were swimming. The youngest sister took the boy from the

piece of bark and asked permission to keep the baby to be raised as their little brother. Coyote was then taken back to their camp and placed into a big basket. Other baskets held large collections of butterflies, flies, bees and other insects. The sisters gathered these to feed to the swallows as part of their remuneration for the work of building the dam. The first night the younger sister took the baby boy to her bed and spent the night giggling and making other pleasurable noises. In the morning the youngest sister remarked that the little boy “really knows how to use his hands.” The second oldest sister, said, “I will take him tonight.” The sister’s began passing the little boy back and forth each night from that point on. During the day the sister’s would go out and hunt the insects and upon returning would place their catch into the baskets. While the sisters were gone Coyote would go down to the river and began taking apart the dam from under the water where the sisters could not notice. One day Coyotes curiosity got the best of him and he wondered what was in the other large baskets and he uncovered the baskets and the insects flew away. The three sisters were out hunting and gathering and all of a sudden insects swarmed them. Realizing that something was amiss back at their camp, they hurried back and during their absence, Coyote turned himself back into a man and was almost completed with tearing down the dam. The sisters grabbed sticks and began hitting Coyote. Coyote took his spoon or ladle off his belt and placed it over his head so that the blows would not hurt him. Coyote finished breaking the dam and as he stood on the other side of the river he instructed the salmon to follow him upstream as he was going to distribute them to his people and inform of laws that he laid down as a result of the recent experiences. Coyote immediately informed the sisters that they were now his wives as he had his way with them and that this was to be a law and that he from that point forward would be responsible for them and their needs. The swallows and insects were freed and flew off once the waters behind the dam were let loose.

Dr. Armstrong continues to relate the following sequence of events once Coyote freed the salmon, swallows, insects and the water. Coyote stopped at all of the tributaries of the Columbia River and offered the people the gift of salmon. Some of the village chiefs offered Coyote a wife, while others refused. When a refusal by village chiefs took place Coyote put up a block in the river and instructed the salmon not to go up these river systems and told the people that from that point forward that they would have to engage in trade, if they wanted to eat salmon. In order to have the salmon these people would have to follow the laws of the chiefs that had given Coyote a wife and thus were given the right to have salmon. Coyote received a wife from the chiefs on the Okanagan River and was refused a wife from the Similkameen chief, as he indicated that they preferred to eat mountain goats and bighorn sheep. The Similkameen people from that point forward were required to trade for salmon and obligated to follow the management and governance laws of the chiefs who met Coyote's exchange protocols.

Within the different versions of this *captikxw*, for instance the Clara Moore (2007) version tells of four women who blocked the salmon at the present day site of Celio Falls on the lower Columbia River. Martin Louie (1991) concurs with Moore as he cites the blockage as also being at Celio Falls, but actually provides names for the four sisters, which are as follows: Seagull, Snipe, Killdeer and Kingfisher. In Suszen Timentwa's (1938) version of this *captikxw* there are two sisters that are identified as "small plovers," quite possibly referring to Killdeers. Mourning Dove (1976) in "How Coyote Broke the Salmon Dam" provides names for the two sisters that she identifies as Snipe (*Wewilwel*) and Little Snipe (*Stur-ek-kin*) (mud hen²)

In a collection of *captikxw* gathered by Rev. Joseph Obersinner, S.J., John E. Andrist, and Eileen Yanan entitled *Coyote and the Colville* (Andrist 1971) the story "Coyote and Salmon"

² Mourning Dove may not have known the correct English term for *Stur-ek-kin* which is the American Coot or more commonly referred to as the "Mud Hen" not the little snipe.

identifies five bird sisters who were small plovers. In 1975 Randy Bouchard completed his collection of legends entitled *Okanagan Legends* and in the *captikxw* “How Coyote Spread Fish” Coyote came across a fish dam that was built by four water-bird sisters. In *Folk-Tales of Salishan Tribes* (1917) James A. Teit included a section on Okanagan Tales in which his informant(s) tell the *captikxw* of “Introduction of the Salmon.” In this *captikxw* there are two sisters (*Wewiilwel*) who built and owned a weir that stopped the salmon from continuing up the Columbia River.

In the various versions, the sisters, whether two, three, four, or five are representative of clans or tribes with which these different Salish tribal groups had inter-regional social and political relations. The sisters represent matriarchal societies that predominates the territories on the western coastal region. The matriarchal system is clearly exhibited in the Martin Louie (1991) rendition of this *captikxw* as he identifies seagull as one of the sisters and it is common knowledge that seagulls primarily inhabit the open coastal waters. The reasons why the different versions had different numbers of sisters represent the relationships the separate tribal groups (i.e. Sanpoil, Chelan, etc...) had with coastal matriarchal societies. The ancient *captikxw* would have prophesized the relationships with the coastal societies and some of these groups would have been Salish speaking peoples.

When Coyote engaged in sexual relationships with the sisters it indicated that the political and social relationships would be held in place through marriage. These forms of political alliances were established through inter-tribal marriages between the chiefs who in many instances exchanged their daughters to solidify kinship ties with one another. For instance, Wendall George (2012:74) mentions that his grandfather, *Lahompt* (Koxit George), a Wenatchi chief married a granddaughter of Chief Seattle of the Suquamish tribe. This arranged marriage

solidified the trading exchanges between tribes that were separated by the Cascade Mountain range.

All of the chiefs of the Salish tribes in the Interior Plateau region had made such alliances with neighboring trading partners and it was a law as set down by Coyote to engage in such arrangements to maintain peaceful relationships that would allow trade practices to continue. These actions made it difficult to make war against neighboring tribes that were blood related, thus ensuring an ongoing peace. What also was accomplished is that the rule over water systems was clearly delineated and accesses to the natural resource wealth, in this case the salmon, continued to be that of the chief of that specific region.

In the story “Coyote breaks the Salmon Dam,” when Coyote traveled up the Columbia River and approached the chiefs of the various tributaries and requested a wife in exchange for the gift of salmon a similar protocol was established. For those chiefs who gave Coyote a wife they received salmon in their water systems and those few that refused had natural barriers put into place that did not allow the salmon to enter their water systems. The main law that accompanied the wife/salmon exchange were that the tribes had assumed political authority over the management of the salmon and with this responsibility came a set of laws that governed the escape, harvest and distribution of this important food resource.

The Salish tribes that held political authority over a great stretch of the Columbia River have carried the burden of Coyotes law for thousands of years. The rewards of alliance building with other tribal groups assisted in defending and protecting not only the food resources in this great water system but all of the other life forms of this watershed region. Coyote gave the rules and laws that were maintained by the management system to these tribes and according to Armstrong (2012) it was this system of governance that has its origins within this *capitkxw*. The

authority of Coyote and the chiefs of his people are held within a symbolic representation of the ladle or spoon (*klaktw*) that was made out of the horn of the bighorn sheep. Armstrong (2012) insists that when the sisters rained blows upon Coyote's head it was the *klaktw* that absorbed the blows and protected the authority of the chieftainship and the salmon laws up the Columbia River.

The *klaktw* represents the laws and authority that Coyote set down and it was only the chiefs that were allowed to carry the horn spoon on his belt. It is this story that clearly prescribes the authoritative powers and obligations bestowed upon the chiefs as they are representatives of our great teacher, Coyote. It is Coyote's laws that are the foundational basis of the laws governing the management of the salmon that migrate up the Columbia and enter into Okanagan territory.

The acknowledgment of the authority of the laws represented in this story has carried forward over many generations and how the *klaktw* is represented in this modern age remains embedded within ceremonies that are specific to the salmon. For instance, Clara Moore (2007:124) mentions that she witnessed a ceremony at Kettle Falls wherein the Salmon Chief and the people repeatedly acknowledged Coyote. Moore also states that because the Falls remain to be intact (despite being inundated by the backwaters of the Grand Coulee Dam) this represents that the laws must continue to be adhered to by the people (2007:124). Therefore, the symbolism of the *klaktw* remains alive today, as the descendants of *Knkannaxwa* continue to uphold these ceremonial responsibilities. They are the authority and it has been their duty to continue with the ceremonies at Kettle Falls wherein Coyote continues to be fed on an annual basis. And one might ask what does the symbolic act of feeding Coyote have to do with keeping the authority and law alive?

The *captikxw* “How Food Was Given” is of great importance in defining the customary laws of the *Syilx* is recounted in *Kou-Skelowh/We Are the People* (Okanagan Tribal Council 2012). In “How Food Was Given” the four chiefs, Black Bear, Spring Salmon, Bitterroot, and Saskatoon Berry are burdened with the task of deciding how they are to contribute to the People-To-Be (OTC 2012) so that they might survive when they come to share the earth with the plants and animals.

According to Armstrong (2010:144) this *captikxw* serves as a basis of understanding the worldview of the *Syilx* as it describes the relationship between humans and nature. Armstrong argues that the societal value systems of the *Syilx* are defined in this *captikxw* as an environmental ethic is established. In evaluation of “How Food Was Given” Black Bear is recognized as the “oldest and wisest” (OTC 2012:13), which in essence recognized and bestowed a supreme authority upon Black Bear. Therefore, very early in the telling of this *captikxw* it is made abundantly clear that Black Bear is the central figure based upon the recognition of having ancient knowledge. I argue that Black Bear needed to be situated in this position from the outset for the *captikxw* to develop along with a purposeful outcome wherein Black Bear was recognized as the highest authority. Black Bear then would have been considered as being the Chief of Chiefs in the plant and animal world. The *Syilx* have to take into consideration this fact in the modern era and it is a law that the *Syilx* continue to show Black Bear the respect and honor he deserves.

The four chiefs were informed that there were to be changes to the world as they knew it and that a new life form, what is described by the OTC (2012:10) as the people-to-be would be arriving soon and the chiefs were obliged to assist them in whatever manner they could. After meeting over a long period of time it was decided that in order for the people-to-be to survive

they needed to eat and it was then that Chief Black Bear decided to lay down his life and that his body would from that time forward to food for the people-to-be (OTC 2012:15). The decision made by Black Bear provided the other chiefs with an example from which to make their decisions as how they would also be able to contribute to the people-to-be.

The other chiefs, Spring Salmon, bitterroot, and Saskatoon Berry, followed Black Bears lead and likewise offered their bodies to also be used for food for the new arrivals to the world. We must understand the Spring Salmon is a water dependent life force, and while bitterroot and Saskatoon are land-based food resources their survival and proliferation is dependent on the natural water cycle. Water is also a vital resource for chief Black Bear and all of the animals that he represents that walk about the land and who will also become relied upon as food for the people-to-be.

What must be understood at this point is that Chief Bitterroot represents all food groups that grow under the ground. For the *Syilx*, many of the foods that they have used over the thousands of years of occupation this geographic region were told as being present through this *captikxw*. If we take a moment to reflect on exactly where the most recent glaciated fields extended to the south then we can begin to understand that the root foods grew in great abundances at the periphery of the ice fields. From my best understanding the glaciers extended southward to about the present day site of the Grand Coulee Dam on the Columbia River. From that region southward is the Columbia River Basin area and according to archaeological records the area was at that time (12,000 years before the present) similar in today's climate. Bitterroot and camas were the two of the most commonly harvested root foods that were then dried and stored for winter use by the *Syilx* and other tribal groups that cohabitated region.

Therefore this specific *captikxw* led to the understanding that under the ground there existed a food resource that could be utilized by the Salishan tribal groups that inhabited this area during the Pleistocene period. Emory Strong (1959:64) argues that during the Pleistocene period that there were small groups of primitive people who were subsisting on the available food resources at the edges of the retreating glaciers. This same area in the contemporary era continues to be a vital harvest region for the *Syilx* as the root foods are ready for harvest earlier in the spring than in other parts of the territory.

In similar fashion the foods that Chief Saskatoon Berry offered as food for the people-to-be, in part, included *Siya* (Saskatoon berry), huckleberries, black berries, Oregon grape, and gooseberries are but a few of the many berry families that come under the authority of Chief Saskatoon Berry.

Again it is clear that they are water dependent and their prolific abundances or scarcity depended on annual precipitation. All of the four Chiefs as mentioned in the *captikxw* have a song. What is the significance of song to the *Syilx* in regards to this *captikxw*? For the *Syilx* it is of great importance to continue the ancient ethics and protocols in regards to the harvest and preparation of these foods for human intake.

When the Four Chiefs offered their lives as food for the people-to-be, it served as a principle or law that needs further evaluation and consideration in both the ancient past and contemporary world. The worldview of indigenous peoples in particular the *Syilx* in this case, is determined by a reciprocal human/land relationship that has existed from the time or era of this *captikxw*. As mentioned earlier the time, according to Western science methods of time chronology, this era would have been hundreds of millions of years ago.

According to Armstrong (2010:144) this story underpins the cosmology of the *Syilx* and outlines the values related to the environment and natural resources and concurrently describes a social process wherein individuals freely achieve societal realizations. Laws embedded within the Four Foods *captikxw* guided the management of these natural resources.

According to *Syilx* elder and storyteller, Suszen Timentwa the natural laws of the Indian people were passed on from the animals when human beings were first created and placed upon this land (Cline 1938:177). Timentwa (Cline 1938:133) makes it abundantly clear that the original laws that governed the natural world occurred a very long time ago and that the Creator originally gave his power and breath to the animals, commanding them to give half of it to man. According to Timentwa the Creator's 'power and breath,' are the original laws or teachings bestowed upon the *Syilx* and are found within the *captikxw*.

In order to co-exist with other species in a specific geographical and environmental setting the indigenous people had to develop intricate relationships with the natural world. Armstrong (2008:67) describes this relationship in a simple and powerful statement, when she says:

Our understanding of the land is that it's not just that we're part of the land, it's not just that we're part of the vast system that operates on the land, but that the land is us...I'm from the land and that my body is the land.

The survival of indigenous cultures in the past was dependent on the ability to evolve through a series of adjustments that conformed to the changing environmental conditions of their natural world. Here in the Okanagan our ancient societies developed a subsistence culture that took advantage of the large amounts of salmon in the river and stream systems. The *Syilx* had to learn how to identify and harvest a great variety of roots, berries, and medicines that were found in the dry arid lowlands to the wet Alpine highlands. Therefore, the *captikxw* defines ancient

relationships and interactions with the natural world and provides a set of rules and principles that establish order within the social and political organization of the *Syilx*.

Chapter Seven

WATER RIGHTS OF INDIGENOUS PEOPLES

First, I will present, from a western historical perspective, western notions of aboriginal water rights in both Canada and the province of British Columbia. British Columbia has a unique history within Canada with respects to the setting aside of Indian water rights. What precisely constitutes uniqueness in the aboriginal water rights situation in BC? What exactly were Indian water rights historical? Did they exist at all? And if so, how was the province to determine the extent of these rights vs. those of the province and more importantly of its settler populations? When the Colony of British Columbia joined Confederation in 1870 the terms gave to the province ownership and jurisdiction over public lands and waters. Indian reserves could only be set apart by the federal government “upon agreement with the province.” Therefore, the timing of settlement in BC and the establishment of reserves had great influence on the water management regime in BC. Settler interests’ were given priority and the province was reluctant to recognize Indian water rights and its rightful allocation, especially if it meant taking away or restricting water resources of the settler populations.

Aboriginal water rights expert, Nigel Bankes (1991:221) notes that the issue of Indian water rights was expressly not included in the Terms of Union and a compromise to deal with the problem was to be remedied in 1875-76 under the reserve allocation process undertaken by the Joint Indian Reserve Commission (JIRC). Bankes (1991:221-222) contends that water rights were quietly not mentioned, yet this did not stop the IRC from making allocations that established priority requirements to fulfill its various uses and to protect lands from settlement and pre-emption, yet left water explicitly unprotected.

The existence of aboriginal priority water rights in British Columbia was recognized by the JIRC, yet settler needs and access were given precedence on all streams that flowed through reserve lands as the Province issued water licenses to settlers. Therefore, it appears that the JIRC intentionally precipitated these water license allocations to accommodate settler needs to Provincial water resources while concurrently disregarding the JIRC's recognition of aboriginal priority rights to these same resources. Water law expert, Derek Smith (1975:185) contends that priority rights are connected to land title and this is a subject area that needs legal definition although it has been determined that only the federal Minister (DIA) can give consent for any alterations to any treaty or provisions under the *Indian Act*.

Historian Cole Harris (2002:140) mentions that prior to the establishment of the JIRC, the chief commissioner of lands and works, Joseph Trutch noted that, "No provision had been made for irrigation water (which in British Columbia Natives were not allowed to record). In many areas, settlers had taken all available water." Therefore, the recognition or the allocation of water to aboriginal peoples of British Columbia had little or no legal standing because had water been available they would have been denied access in lieu of settler needs.

The *Syilx* have been alienated from their water resources since the 1870s reserve era and the political influence over this natural resource has been and continues to be under the authority of the provincial government, supposedly with the exception of on-reserve resources that fall under Federal jurisdiction. The Joint Indian Reserve Commission that was active from 1876 to 1878 recognized indigenous priority rights to water resources within the Penticton Indian Reserve. However, settler water licenses were given priority on all streams that flowed through reserve lands, despite the Commission's recognition of existing water rights. In the JIRC, Minutes of Decision report dated May 24, 1877 Sproat makes a notation that, "The prior right of

the Indians as the oldest owners or occupiers of the soil to all the water which they require or may require for irrigation or other purposes from the stream...or other water courses within or flowing through or touching their reserves, is, so far as the Commissioners have authority in the matter, declared and confirmed to them” (JIRC 1877). It should be made clear at this point that the Syilx water rights have not been abrogated and the 1877 Joint Indian Reserve Commission records acknowledge the existence of these rights prior to the first preemptions in the Okanagan Valley that occurred ten years prior.

Harris (2002:147) also notes that in G.M. Sproat’s opinion “the Crown disabled the Indian from themselves acquiring lands and water by ordinary methods and that reasonable access to these resources should be provided for their own and their children’s use, whether or not Native people asked for it.” Whether or not the water resources were available at that time seemingly does little to influence the decisions made over the access to available water resources and its future usage by descendants of the Indian peoples.

Despite this Joint Commission acknowledgment of aboriginal priority rights over water, the allotment of water for each reserve, according to Richard Bartlett (1988:48), “were made subject to the prior recorded rights of white settlers.” In her examination of aboriginal peoples and their rights associated with natural resources, Claudia Notzke (1994:12) declares that in response to the Commission’s acknowledgment of aboriginal priority rights and the subsequent allocation of water, the province disclaimed and discredited the allotments on the basis that the Commission did not have the authority to make such grants. Notzke (1994:12) proposes that the province took this position despite passing an Order-in-Council that approved the Minutes of Decision of the Commission in 1878, arguing that the approval “applied only to land grants and not to water allotments.”

Environmental law advocate Linda Nowlan (2004:23) maintains that it was the provincial laws that clearly allowed for the issuing of water licenses outside of the reserve boundaries that led to the over allocation of water resources which allowed unrestricted removal of groundwater along with unmonitored water diversion and water mining. Nowlan (2004:23) argues that it was the aboriginal water rights and record of riparian rights that protected some waters as these licenses were allocated on the 'first come first serve' basis.

In 1909 the Board of Investigation was created to review the claims of all persons that held water records and over the next decade Indian Affairs objected to the time of recording water claims by white settlers (Bankes 1991:227). The purpose of the Board of Investigation as a strategy to determine exactly who held priority rights to water was accomplished with little or no direct consultation with individual Indian bands. It is my opinion that the Province mandated the establishment of the Board of Investigation to make decisions that directly superceded and overlapped the reserved rights to water held by the aboriginal peoples of British Columbia to benefit the water requirements of white settlers.

The provincial requirement of the back-date priority system was one of the key issues that did not work in favor of the Indians of British Columbia. According to Nigel Bankes (1991:231, 241) the Indian records were only to be recognized if the actual records had been registered in Crown offices prior to 1884, and were further compromised by the province's refusal to recognize the JIRC allotments of water to the Indians. The effect of this priority loss was a substantial setback for the aboriginal tribal groups within the Province of British Columbia and was further compounded by the non-recognition of the Indian's reserved right to water.

What was becoming a mitigating factor during this time period was the manner in which aboriginal sovereignty in British Columbia was being diminished by the political position taken

by the provincial government's decision makers. John Borrows (2007:104-105) argues that the Aboriginal peoples in British Columbia were never conquered in an act of war, therefore their sovereign status should be recognized as being equal, even superior to that of the Crown. Borrow's perspective on the aboriginal sovereignty issue is a substantive reminder to both the provincial and federal legislative and judicial systems that sovereignty remains a key contemporary issue.

Linda Nowlan (2004:27) recognizes that the definition and recognition of the 'traditional usages' of water by indigenous peoples may become problematic between license owners as modern day aboriginal title or rights claims are launched at the provincial or federal levels of government. Settler-based rights and modern day international treaties between governments operating within the 'Free Trade' areas of North America pose a very real and serious threat to contemporary aboriginal claims.

The aboriginal reserved water rights issue in Canada was deeply impacted by water doctrines that were established in the arid western regions of the United States that were implemented to protect non-Indian water rights. According to indigenous environmental activist and Chairperson of the Upper Columbia Resource Council, Diana White Horse Capp (2002:132), it was during the middle of the nineteenth century that various states began depending on the Riparian Doctrine, Doctrine of Prior Appropriation, and California Doctrine to weaken the Reserved Rights Doctrine of rights held by Indian tribes.

Judith V. Royster (2011:88-89) makes it clear that under English common law, riparianism is defined as when the owner of land abutting a watercourse has a correlative right to the reasonable use of the water, while prior appropriation allows the first person to put the water to a beneficial to acquire prior rights. As a result of the western states' assertion of these

doctrines the Indians were confronted with legal challenges that arose in the Supreme Courts of the United States, therefore, placating and favoring the useful and beneficial needs of public and private interests. A host of others including, Borrows (2007), Gooding (1994), Bartlett (1988), and Getches (2002), provide valuable insight to the manner in which the presiding justices made their legal rulings in various cases dealing explicitly with the Indians “reserved rights to water.”

According to historian John Shurts (2000:6), the concept of Indian reserved rights to water were based on historical occupancy, intention, and agreement and not expressly on European concepts of diversion or beneficial usages for the private or public sectors. In modern Canada this is considered a favorable, yet very complex legal situation based upon recent Supreme Court decisions. It is difficult for the Province of British Columbia to make arguments based on the historical occupancy of its aboriginal peoples prior to European contact. Yet, it is equally difficult for the aboriginal peoples of British Columbia to collect and present oral historical evidence that can withstand the legal scrutiny of the Court’s ‘experts,’ whose primary role is to devalue and de-legitimize the oral historical evidence.

Yet as recently as 1973, in the Supreme Court of Canada’s decision in *Calder v. Attorney General of British Columbia* aboriginal title was recognized based upon the Indians’ historic occupation and possession of their lands. In *Calder*, Justices Judson, Martland and Ritchie concurred on the fact that “when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries (Bartlett 1988:7). So, in the discussion on whether or not aboriginal water rights existed prior to the establishment of Canada’s sovereignty, the answer is, a big YES. In the view of legal and constitutional law historians Hamar Foster and Benjamin Berger (2008:254) it was determined in the Court of Appeal in *Calder* that the Royal Proclamation of 1763 “did not apply” in BC, as the Court

determined that at the time of its issuance the province was *terra incognita* (unknown lands) and that Indian title had been lawfully extinguished.

The Supreme Courts of Canada have taken a lead role in attempting to devalue both the human rights and aboriginal rights of the indigenous peoples of British Columbia. In *Calder* (1973), Chief Justice Dickson recognized aboriginal title as not originating in the Royal Proclamation of 1763, but from the fact that the Indians were living in organized societies and occupying their ancestral lands when the settlers first arrived and this was the basis of their title (Asch and Bell 1997: 59; McNeil 1997: 135). Justices Dickson and Contra Hall argued in their conclusion that aboriginal title existed but not within the legal frameworks of this foreign system of law. Based on Justice Hall's conclusion that the Royal Proclamation did not apply to British Columbia, Bruce Clark (1990:133) arrives at a conclusion that the colonial government could not legislatively extinguish the Indian right or title.

According to Michael Asch (1984:49-50) Justice Judson took it a step further and argued that centuries of occupation meant that land title belonged to the Indians and thus, met the requirements of English law. I want to point out here to avoid any confusion; Justice Judson makes a definitive argument that "aboriginal title" is separate and distinct from the British requirement of "land title." Justice Judson also determined that when the colonial government of British Columbia attained sovereignty (1872), that BC had not begun to be a responsible government as it was subject to the provisions of the *British North America Act* of 1867 (Clark 1990:131). A leading aboriginal law authority, Thomas Issac (2004) argues that while aboriginal rights were recognized and affirmed as a constitutional right guaranteed in s. 91(24) of the *Constitution Act, 1867* (BNA, 1867) these rights are not absolute as Federal legislative powers

continue to uphold the right to legislate and intervene where justification and reconciliation is called for when any government infringes or denies the aboriginal rights.

Mohawk attorney Patricia Monture-Agnes (2002:34) maintains that s. 91(24) of Canada's Constitution supports the legal subordination of Indian people. It appears that the intent of Section 91(24) was to perpetuate the ideology that Indian Nations of Canada were not capable of upholding their own aboriginal rights and it then became the obligation of the government of Canada to undertake the legal responsibility and fiduciary obligation over Indians, their rights, and more importantly their lands and resources.

What does this mean? In my opinion, if the province of British Columbia continues with the presumption that they have the legal right to negotiate "treaties" with aboriginal nations, then they are acknowledging that we are still in possession of aboriginal title to our lands. If the courts determine that the Royal Proclamation of 1763 does not apply in British Columbia, when it first attained sovereignty (1872), then the legal implication, if interpreted and applied correctly, justifies that aboriginal title did in fact exist prior to British Columbia entering Confederation.

As an indigenous person I argue that the indigenous people of Canada were guaranteed specific rights under the 1763 Royal Proclamation. These rights were never forfeited to the Canadian government or any other foreign government although it may be presumed so, solely on the fact these agreements and treaties do currently exist. Understanding two important factors, first; that the Okanagan peoples never did give away these rights, second; the Okanagan's were never defeated in war by the Dominion of Canada, these are two key elements in the determination of priority rights established in the Royal Proclamation of 1763. This was and continues to be a double-edged sword of contention for the courts: simply stated, a recognition

that aboriginal title and rights did in fact exist and must be recognized by this foreign imposed system of law.

Why did the Province of British Columbia not want to deal with the question or looming presence of the Royal Proclamation? It is my opinion that the guarantees made by British Monarchs ensured the nullification of indigenous peoples claims to land tenure and priority rights in the province of British Columbia. If this is true, then the entering into confederation with the Dominion of Canada was an illegal act under the foreign system of law based on the fact that the British Monarch (or his representatives) did not “negotiate and/or purchase” the Indian hunting grounds from the Indian people.

Armstrong et al. (1994:27) propose that it was at the British Board of Trade’s urging that King George III issued the Royal Proclamation in order to gain access to the west for settlement and trade. Armstrong et al. further attest that the Proclamation was established to serve as a legal tool from which to develop trade relations with aboriginal nations while setting boundaries to the trade territories that had come under British authority.

The complex nature of aboriginal water rights in British Columbia is very much different from the eastward lying provinces as our organized societies were never introduced to treaty-making with foreign nations, and the *Syilx* view themselves as “the oldest owner occupiers of the soil” of their traditional territory. Which, opens up the doors for arguments presented by Henderson, Benson, and Findlay (2000:152) that aboriginal land tenure continues to exist and was not extinguished by British land law and that the Proclamation was an affirmation of prerogative rights of aboriginal peoples that were legally enforceable.

Gordon Gibson (2009:24, 35) argues that under international law full title could only be achieved through conquest and he asserts that this did not occur in North America, rather the

Crown preferred making agreements, while in the province of British Columbia imperial writ was the method employed, meaning lands were simply taken. I argue that as a result of the implementation of racist policies soon after joining Confederation the “lands reserved for the Indians,” borrowing the wording used in the Royal Proclamation, were stolen under the blatant strategy of expropriation by the provincial government and its agents.

One of the Supreme Court decisions that in my opinion fast-tracked aboriginal rights in Canada is *R. v. Sparrow* (1990) 1 S.C.R. 1075 (S.C.C.) as aboriginal rights were recognized as a constitutional right and as Marie Battiste and James Henderson (2000:207) point out these rights “must be interpreted flexibly so as to permit their evolution over time.” Battiste and Henderson (2007:208, 210) add that the Supreme Court determined that “the Sovereign’s intention must be clear and plain if it is to extinguish an aboriginal right” and “that the constitutional rights of aboriginal peoples will be enforced like any other constitutional right.”

It is the opinion of Cole Harris (2002:91) that the Royal Proclamation defined a very large section of the interior of North America as “Indian territory” while establishing that the prior Native right to these lands could only be acquired “by the Crown” through “formal treaty, cession, or purchase.” Harris (2002:147) further mentions that when it was firmly established that the aboriginal peoples in British Columbia were not willingly going to compromise or place into jeopardy their rights to these lands the government’s strategy shifted to engage in an accommodation process that was to be negotiated on a case-by-case basis.

An expression of accommodation was underpinned in the final determination in *Delgamuukw* as aboriginal land tenure was stated as not being able to be extinguished by European concepts of property ownership. But, there always seems to be a win/lose situation as a result of *Delgamuukw*; it is now a requirement of aboriginal peoples to substantiate their claims

through proof of continuous use and occupancy in the regions of which the claims are being made.

The majority decision in *Delgamuukw* brought to light a number of interesting positions that must be adhered to by the province of British Columbia's water users. Linda Nowlan (2004:28) argues that the Supreme Court decision in *Haida Nation v. British Columbia (Minister of Forests)* (2002) made consultation compulsory and that the full consent of aboriginal nations must be given as they are now considered as bonafide "stakeholders" in the provinces natural resources. While Indigenous Peoples and Human Rights advocate, Alexandra Xanthaki (2007:250) maintains that aboriginal title includes rights to water and that there is more than adequate amounts of historical evidence showing that indigenous peoples 'excluded' other tribal peoples through "war and traditional law," while establishing recognizable territorial boundaries.

Xanthaki (2007:247) considers *Delgamuukw* as a positive step in the advancement of recognition of title and rights (which includes water) in non-treaty British Columbia, while noting that there concurrently exist negative components that put these rights at risk. As always the potential rewards of economic development projects continue to pose a threat to the aboriginal interests. Xanthaki (2007:247) lists outsider interests of agriculture, forestry, mining, and hydro-electric power as being accommodated by the province of British Columbia while concurrently infringing upon the rights of indigenous peoples and its own settler populations.

The 1997 *Delgamuukw v. British Columbia* Supreme Court decision is considered to be a landmark legal victory for aboriginal peoples. In this decision it was made clear that section 91(24) of the *Constitution Act, 1867* gave the federal government exclusive jurisdiction to make laws in relation to aboriginal tenure and rights in lands reserved for Indians. According to

Battiste and Henderson (2000:206) the provincial governments have no constitutional authority to make laws concerning lands reserved for Indians, instead the provincial governments may be lawfully delegated certain degrees of regulatory authority over Indians. There always seems to be what we understand as a “but, what if” clause in any such legislation. In this case it amounts to the fact that if a federal power does make a lawful delegation to act in a responsible manner as a representative of the federal authority, then it must do so without infringing on the constitutional rights under section 35 of the *Constitution Act, 1982*, and if there is a justifiable infringement then the court indicates that ‘fair compensation’ must be paid.

What is said here by the decision in *Delgamuukw* brings to the forefront another question that requires a careful and deep analysis to determine whether the provincial government and/or its representatives violated federal constitutional authority and infringed upon the aboriginal rights as they asserted authority and jurisdiction over aboriginal peoples and their lands and territories. As stewards over the lands and resources within the traditional territory of the Okanagan it must be clearly understood and questioned whether a ‘clear and plain’ intent has been made over the re-introduced salmon resources.

On the other hand the 1997 appeal ruling in *Delgamuukw* has enormous implications for the Okanagan as well as other indigenous peoples in British Columbia. The *Syilx* contend that their ancient laws are held within the *captikxw*. If we take into consideration the *Syilx* oral history that occurred a few centuries before contact until the present, it is this history that according to *Delgamuukw*, we must be able to prove that we occupied and defended our nation’s territory.

Henderson et al. (2006:6) take into consideration that *Delgamuukw* recognized that aboriginal land tenure systems as perpetually existing in North America and that both sovereigns

of Indigenous Nations and the Crown sought to reconcile the two separate and distinct land tenure systems by consensual treaties in the law of nations and British prerogative law, which recognized that unpurchased aboriginal tenure has not been extinguished or superceded by law. What are the specific impacts for the Okanagan as a result of *Delgamuukw*? The courts are saying that aboriginal title existed prior to the arrival of Europeans and the imposition of their systems of law. If there is to be a reconciliatory process to gain 'title,' which then would imply ownership for the province, then the aboriginal peoples must willingly engage in a negotiated treaty process wherein they "consent" to give these land entitlements to the province and then and only then can the aboriginal title be wilfully extinguished and then be subject to Dominion law.

It is very clear that aboriginal water rights is an issue that is embedded within many complex layers of rights; constitutional, aboriginal, pre-contact, pre-sovereignty (Canadian), legal, international, customary, natural world, etc...and rights to all or limitations on some and exclusion of others makes this discussion a problem that is mind boggling to say the least.

Aboriginal water rights, according to Claudia Notzke (1994:8) derive from three distinct sources:

First, they are an integral part of native people's aboriginal title to their ancestral lands. Second, Indian water rights result from the establishment of a reserve, either by treaty or by executive action (Order in Council). Third, native people enjoy riparian rights derived from their occupation of lands adjoining a body of water.

The Okanagan therefore have met the criteria as mentioned by Notzke. We have continuously maintained our obligations to the land and its natural resource abundances, while the JIRC indisputably recognized the existence of priority water rights, and that the Okanagan lived in the riparian areas of the water systems within our ancestral territories. Water rights are connected to the land rights issue in British Columbia and the language and analysis made by Chief Justices in

the recent Supreme Court decisions are expressly underpinned within the rights of aboriginal land title. The Province at this time is making a bold and decisive move to engage as many Indian bands throughout unceded British Columbia as possible to enter into the comprehensive treaty process so as to meet the requirement in *Delgamuukw*, that we consent to give these rights away through a consensual process of their making.

John Ralston Saul (2009:311) maintains that in *Delgamuukw* the intent of the Gitksan and Wet'suwet'en peoples was "to reclaim their land through acknowledgement of ownership, jurisdiction, and self-government of their traditional territories by the provincial and federal governments." Saul (2009:311) notes that despite the claim not being successful, the case will have far-reaching legal implications on policies and laws that could possibly affect future treaty negotiation processes based on the fact that *Delgamuukw* did confirm the existence of aboriginal title in British Columbia.

The Comprehensive Land Claims Policy (1986) is a deliberate intent to replace with certainty a settlement that answers the questions regarding aboriginal rights in the province of British Columbia. According to Michael Asch and Norman Zoltkin (1997:213) one of the primary objectives of the federal policy is to get aboriginal peoples to relinquish "undefined" aboriginal rights over lands and resources and be replaced with rights and benefits that are clearly defined and written into the agreements. The intent of this federal policy from my perspective is to persuade aboriginal peoples to submit to a broad and overarching agreement that extinguishes any future claims over the aboriginal right to lands and resources within their respective traditional territories. The legal ambiguities that surround and envelop the unanswered dilemma over aboriginal title and rights in the province of British Columbia would be answered and we then would witness an unprecedented level of resource development.

It is the conclusion of Asch and Zoltin (1997:213) that this federal policy is specifically designed to have aboriginal peoples of BC to relinquish their aboriginal rights to their lands and resources in lieu of a different set of rights and benefits that would be defined within a written agreement. Extinguishment of aboriginal title is the primary intent and goal of The Comprehensive Land Claims Policy, this is a fact that is very clear.

Acting as representatives on behalf of the Allied Indian Tribes of British Columbia Peter Kelly and J.A. Teit (1919:7, 13) were asked to prepare a statement for the Government of Canada, wherein they affirmed that the aboriginal rights to the use and benefit of land (of which water is connected) is set aside under Article 13 of the Terms of Union and Section 127 of the Land Act of British Columbia. Under Article 13 of the Confederation Act (1870) there is no express reference to water rights but it did suggest, in vague terms, that there was an obligation to appropriate tracts of land (which included water rights) to be held in trusteeship and management of “lands reserved for their use and benefit.” Article 13 opened avenues for the province and dominion to appropriate lands, called cut-off lands. As mentioned earlier, water upon these lands and the rights to this resource could then be held in trusteeship for the Indians under management of the federal government. In today’s reality the settler societies continue to be granted superior political and legal status in BC as they are being described as being legitimate stakeholders of water resources that originate within the specific watershed that they occupy.

Therefore, aboriginal water rights in North America remain steadfastly entrenched within assimilationist policies, acts and treaties of the Dominion federal governments of both the United States and Canada. James Tully (1994:177) claims that from the outset of the colonial period the Canadian Crown recognized the Indian Nations as having equal status with European nations and

understood that Indian lands could not be surrendered except through public negotiations that did not occur under duress. The infringement of water rights in British Columbia during the aftermath of Confederation followed the course taken in the United States. According to attorney Robert Dellwo (1971:222) a consideration was given to the special rights and status of Indians and their lands (including water) prior to the reservation era, a point that has carried forward into the Supreme Court decisions in Canada. It appears that property rights and land rights are connected to water rights. A deed to property, such as land, involves title, therefore a fixed amount of water 'should' be allocated to tribes based on tenure.

The 'quantification' theory must be seriously appraised when looking at the accommodation of water in the Okanagan. Judith Royster (2011) mentions that despite the precedent setting ruling in *Winters* that guaranteed priority water rights, the tribes of the Fort Belknap Reservation have not yet received the actual water allocations reserved for their specific uses.

As you can see the history of water rights in the Okanagan is very complex. In modern times the Okanagan are confronted with some very serious challenges in regards to the retention of our priority rights to water. It appears that a majority of the Okanagan bands are not willing to engage within the treaty and accommodation processes therefore the provincial government has mandated the municipalities, local water boards and other stakeholders such as forestry, mining, and agriculture to determine the water requirements of aboriginal peoples in British Columbia.

This mandate is totally politically and its outcomes are intended to appear as a wilful consultation process that accommodates aboriginal interests and finally, in my opinion, its main directive is to grant water to meet the needs of provincial stakeholders. Again the language and analysis of the methodology of these processes need to be clearly understood before any action is

taken. From what I understand, and this is my perspective and opinion, and in no way reflects the position taken by any of the bands or Okanagan Nation Alliance (ONA), that any such participation, whether for or against constitutes “consultation.”

It must be made clear that the term consultation has two entirely different meanings; depending on which side of the table you sit. From the aboriginal perspective it means that we have a voice in the decision-making process, for the government it simply is a session that is intended to inform us on decisions that have already been completed and in some instances already implemented.

Yet, from our perspective it is very simple. We have an obligation and responsibility to act as stewards over our lands and resources, nothing more, nothing less. How then do we move forward? Michael Asch and Norman Zlotkin quote Justice Hall in *Calder v. Attorney General of British Columbia*, as he writes “[aboriginal title] being a legal right, it could not thereafter be extinguished except by surrender to the Crown or by competent legislative authority and then only by specific legislation.” Justice Hall went on to state:

It would, accordingly, appear to be beyond question that the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and that intention must be ‘clear and plain.’

Asch and Zoltkin (1997:210) contend that there is no such proof in the case at bar and currently no legislation to that effect.

As in the modern era water is becoming a fast growing commodity on the local, provincial, national, and international market. It is my opinion that the *Calder* decision highlights a number of legal points that will carry enormous weight in future litigations and offer at the very least a starting point from which to base the aboriginal arguments for land title claims. In the discussion on aboriginal title it is clear that the legal decision in *Calder* opened many

doors for aboriginal peoples in British Columbia as aboriginal water rights and land title came to be understood as being inseparable.

Aboriginal title and rights are not separate and distinct. Aboriginal rights to water and other natural resources in British Columbia continue to be recognized by the province and federal government. There are a number of examples that prove the existence of aboriginal title and rights as in the modern and contemporary era the province has mandated the special interests groups or stakeholders to engage in a process where the 'clear and plain' intent is not above board and transparent. If these stakeholder groups are given the opportunity to determine the manner in which water quantification is to occur while meeting the needs of aboriginal peoples in the province of BC, then a question must be asked on how the government, acting as a sovereign, allows non-governmental entities to relieve aboriginal peoples of their rights to water?

Okanagan elder and traditional knowledge keeper, Joey Pierre made a statement that aboriginal title to lands and our water rights are connected and they cannot be discussed as a separate issue. In my current research it has been important to investigate the manner in which the government of Canada has mimicked the actions of the United States in their attempt to extinguish aboriginal water rights. One specific case that is very similar to what the Okanagans are confronted with in the present is based on the Treaty of Guadalupe Hidalgo, wherein the United States attempted to declare Pueblo water rights non-existent.

The position taken by the federal government of the United States is that the Pueblos never did make a treaty with the United States therefore have no water rights guaranteed under a legitimate treaty process with their federal government. The Pueblos did not dispute this argument but instead claimed that their water rights were protected under Spanish and Mexican law (Dumars et al. 1984:27). The United States agreed to acknowledge the rights of Indians

under the Treaty of Guadalupe Hidalgo, so the Pueblo water rights continue to be recognized much in the same manner that Canadian aboriginal peoples rights are considered and this being *sui generis*.

The *Syilx* and other aboriginal nations of British Columbia find themselves in an eerily similar situation as the Pueblo Nation. We have not made a treaty with any sovereign that has claimed dominion over our ancestral lands. So then, how do we establish a right to water or any other natural resources within our traditional territories? The relevance of the Pueblo situation and the current situation in British Columbia should be argued as an infringement on water rights as they were violated when transboundary water treaties and agreements were made between the Federal and Dominion Governments of the United States and Canada. The Boundary Waters Treaty of 1909 and the 1961 Columbia River Treaty, and if we want to cite a major trade treaty, the North America Free Trade Agreement (NAFTA), were all negotiated and ratified without consultation and representation with aboriginal peoples of British Columbia.

In order to meet the water storage needs in the mid-Columbia River region, the United States and Dominion of Canada entered into another international treaty agreement with the United States. The Columbia River Treaty was signed in Washington, D.C., on January 17, 1961 and was ratified by the United States Senate in March of the same year; the ratification process took the Canadian Parliament until June 1964 (Government of Canada 1968:3).

It is James Huffman's (1983:262) opinion that the principles written into the framework of the Columbia River Treaty were intended to benefit the United States, as there are no articles existing in any section that allow Canadian authority to exert jurisdiction, south of the 49th Parallel. Huffman's position is supported by the Government of Canada (1964:18) as the jurisdictional authority in Canada is asserted in Section 1, Article XIII of the Treaty wherein the

implication is that Canada does not have the authority to “dam or divert” its own water resources without permission from the United States.

It is my opinion that the Federal government of the United States viewed the signing of this international treaty as a monumental victory as it secured storage of water over the duration of the treaty for its use and economic benefit and guaranteed in perpetuity jurisdictional authority within Canadian political boundaries. J. Owen Saunders (1998:70-71) alleges that the Canadian government failed to see the deficiencies of this treaty as the expected economic benefits that were proposed did not meet the projected expectations while allowing the United States to become dependent on Canadian water sources. Seeing beyond the obvious economic deficiencies of the treaty it became apparent that Canada compromised its jurisdictional authority over its own water resources while meeting its treaty obligations.

Susan Abs (1989:37-38) maintains that the province of B.C. has retained the authority to build a dam or create a water diversion on Provincial lands despite the inevitable or potential negative impacts on its citizens and acknowledges the unsettled issue that stems from whether or not the province can extend its jurisdiction to include Indian reserve lands which are protected under the constitution. Aboriginal peoples should consider the negotiation and ratification of this binding international treaty as a violation of the federal government’s fiduciary obligation and ask themselves the reasoning behind being totally excluded from participation. Yet, governmental sub-agency representatives of B.C. Hydro and the Bonneville Power Administration were included in framing the Columbia River Treaty.

According to Abs (1989:45) issues concerning aboriginal land title and allocation of resources on Indian reserves can only be settled or legislated under the Constitution by the federal government. Therefore, the preliminary discussions of the Columbia River Treaty were

led by the federal government of Canada and as a result of treaty implementation indigenous lands were inundated by the backwaters of the dams built on the Columbia River, which is clearly, under federal trust obligations, a violation of its fiduciary responsibilities. Clearly, the water storage facilities that were built on the Canadian side of the Columbia River were not negotiated or settled with the Indians or those federal representatives who under the Constitution were obligated to protect the lands, resources, and rights of aboriginal peoples of Canada.

John Krutilla (1967) argues that the terms in the Treaty provided the United States with large quantities of water storage in Canada that were used to generate hydroelectric power while holding back floodwaters. Krutilla (1967:101) notes that the Treaty was viewed by some as an example of international co-operation in river basin development and there was a concern that revolved around the flooding of arable land in British Columbia. While the concerns brought out by Krutilla are valid and worth mentioning there is no report or inclusion of the inundating of aboriginal ancestral burial sites or village sites or to take this issue a step further, no offers of financial compensation or land exchanges.

The United States government's energy and resource policy developments in the Far West were focused on addressing the economic needs of the public and the assertion of autonomous authority over lands and resources. The extent of environmental degradation and the social impacts experienced by the displaced indigenous and non-indigenous residents were not adequately taken into consideration. Rorke Bryan (1973:121) insists that the Columbia River Treaty advanced the ability of the United States to control and gain access to Canadian water resources and set the stage for other agreements that were to follow in subsequent years.

Under any treaty agreement both parties are believed to come away from the negotiation with varying degrees of benefits that contribute in some manner to furthering the economic,

social and often political needs of said country. As noted previously, the indigenous peoples priority water rights were totally ignored during the negotiation process by the federal governments of Canada and the United States. Not only were the existing priority water rights of the Okanagan peoples ignored but there was a clear violation of the aboriginal rights embedded within the Royal Proclamation of 1763 and the seniority of reserved rights as defined in the 1908 *Winters* decision. During the negotiation process of the treaty the federal government representatives and their legal counsel at no time approached the aboriginal peoples to request their participation or obtain their voluntary consent to the parameters of the treaty that would have direct impacts and consequences on aboriginal peoples and their land.

One of the arguments I made in my Masters of Arts thesis which was titled “Okanagan Water Systems: An Historical Retrospect of Control, Domination, and Change,” was that the development of water policies in the arid western region of the United States directly contributed to the international water disputes between the United States and Canada (Sam 2008). In order to resolve and mitigate a more desirable outcome over a potential international water dispute the Dominion of Canada and the United States entered into a treaty agreement to remedy the concerns over shared international water resources.

The scarce water resources in the arid American Far West and disputes over international waters led to the negotiation of an international treaty between the governments of Canada and the United States. The Dominion of Canada and the United States entered into a treaty agreement, the 1909 Boundary Waters Treaty, to remedy shared concerns over shared international water resources. The 1909 Boundary Waters Treaty had direct consequences that affected jurisdiction over this resource on both sides of the international boundary and created an imposed set of rules that infringed on the priority rights of Indian peoples. J.C. Day and Frank

Quinn (1992:24) maintain that the federal government of Canada's position is that the proprietary rights over water resources remain in their control and that aboriginal peoples are not considered to be a major stakeholder of this resource.

The exclusion of aboriginal peoples was intended to have a definite outcome which in my opinion was to make the statement that the aboriginal peoples of Canada did not have the right of participation because they were not considered to have any jurisdictional authority over this resource. As mentioned previously the Okanagan Nation has four transboundary rivers within their traditional territory that flow across the international boundary and it is my opinion that the Okanagan Nation are not stakeholders, instead they deserve the legal recognition of being priority and senior rights holders of this resource.

Derek Smith (1975:185) argues that priority rights are connected to land title and warrants an accepted legal definition so that prior to making any alterations to any treaty or provision of the Indian Act the Minister of the DIA can justifiably administer a determination of consent while staying within stipulated guidelines of the Act. According to Donald Fixico (2004:383) and Carl Waldman (1994:28) the trust responsibility of the federal government in the United States has become clouded as the federal authorities delegated the Bureau of Indian Affairs (BIA) as the prime controller, distributor and interpreter of these treaty rights.

While the Boundary Waters Treaty is not subjected to the authority of the DIA Minister, water as a resource is connected to the currently unresolved subject area of aboriginal title and rights in the province of British Columbia. The 1909 treaty has further complicated the manner in which the legislative and judicial branches of state and federal institutions in the United States deal with Indian priority rights.

It is clear that the passage of this international water treaty supplanted and compromised the rights of aboriginal peoples in both the United States and Canada. Fiduciary obligations and trust responsibilities granted to indigenous peoples of North America were totally ignored as federal authorities acting as representatives of the government of Canada and the United States failed despicably as being a trustee of indigenous rights and interests. According to the Government of Canada (1983:120) and others (Armstrong *et al.* 1994:27-28; Haring 2004:453-457) the colonial policy of the British clearly indicated that the indigenous peoples of Canada held a special relationship with the Crown wherein they were recognized as being nations and that the Crown was to protect and manage in the capacity of being a guardian or trustee of the Indian proprietary interests.

The exclusion of aboriginal peoples by the federal governments of Canada and the United States could be constituted as direct violations of the Royal Proclamation of 1763 and the 1776 U.S. Constitution. Indigenous sovereignty, fiduciary and trust obligations, and priority rights as recognized in the Constitutions of Canada and the United States were totally ignored with the ratification of the Boundary Waters Treaty. In Canada, this international water treaty has placed aboriginal and provincial water rights in jeopardy as in my opinion this treaty gave the United States a shared administrative role over international waters that originate in Canada.

The Government of Canada (1983:71) makes the following statement in response to an accusation launched indicating that the trust responsibility along with the proprietary interests in regards to the waters mentioned in the 1909 Treaty were violations of the Royal Proclamation of 1763, in that “only the Crown could obtain Indian lands and resources through a treaty-making process.” The treaty making between the sovereigns of Canada and the United States over

international waters that were shared between the two countries established a new direction of policy making that influenced contemporary water policy.

Charles Reich (1970:8) defines the evolution of policy development in the United States as shifting from the legislative powers of the U.S. Congress to federal and state authorities that deliberately began to ignore the interests of public stakeholders. The development of Congressional legislative powers in the United States initiated a swing in the politics of water as these initiatives prioritized the interests of multinational corporations at the expense of individual and public interests.

Furthermore, Charles Dumars, Marilyn O’Leary, and Albert E. Utton (1984:102) cite *Colville Confederated Tribes v. Walton* to demonstrate that water rights acquired through the purchase of land from an Indian allottee does not amount to a recognizable reserved right for its non-Indian owner. Therefore, in this case, once the Indian allottee sold the land, the reserved water right did not automatically transfer to its new owner (Walton) and as mentioned by Titus (1982:238-239) the Ninth Circuit court recognized that the Indian allottee retained his reserve water right despite non-use while rejecting the defendant’s claim that the State of Washington controlled the water permits within the reservation boundaries.

On the Colville Indian Reservation in Washington State a case arose over water use by a non-tribal member who owned property within the boundaries of the reservation. The case is referred to as the *Walton* case and Jeffrey Titus (1982:238-239) lists the following as the primary arguments presented in the Ninth Circuit court:

First, the number of “irrigable acres” the allottee owns determines the maximum amount of water the non-Indian has a right to. Second, the priority date of that right determines the value of the allottee’s right. Third, the Indian retains his reserved water right despite non-use; the non-Indian does not... The Ninth Circuit rejected the defendant’s argument that the state of Washington controlled the force or effect of water permits within the reservation. In support, the court

determined that the creation of the reservation pre-empted the state's authority over the land.

In *Walton* the plaintiff argued that the State of Washington had jurisdiction over the allocation and licensing of water within federal reservation boundaries and that the General Allotment Act of 1887 allowed non-Indian purchasers of reservation lands "to acquire more extensive rights to reserved water than were held by the Indian seller (Trelease and Gould 1986:771, 773).

United States Supreme Court decisions have in the past and in the current era effectively influenced the legal decisions in the Canadian courts. What is important about the *Walton* case is that barring the obvious social and political effects of the international boundary, this case has taken place within the traditional boundaries of the *Syilx*. This is an important case because it determined that a deliberate infringement on water quantification took place based upon an assumption, or better worded, a presumption that the State of Washington had certain levels of authority within a federally protected Indian reservation. aboriginal water rights in Canada obviously are dictated by legislation and agreements made between aboriginal peoples and the Canadian and provincial governments, yet as with any other court, US judicial rulings may have a ripple effect wherever aboriginal/indigenous water rights become an issue.

It is important to note that the Colville Confederated Tribes did not engage in treaty making processes with the United States government. According to Frank Trelease and George Gould (1986:769) the Colville reservation, which is located in north central Washington State was created in 1871 by an executive order issued by President Grant. Trelease and Gould (1986:771) contend that the reserved water rights extended back to 1871 when the reservation was created and a question needing answers in *Walton* revolved around the issue of the Congressional authority to allot reserved water rights to the individual Indians and whether or not these water allotment were transferable to non-Indians.

While the Colville Indian Reservation was established by executive order the federal government continued to assert its jurisdiction within the reservation boundaries. While in the *Winters* decision it stated clearly that the water rights were extended to the time previous to the creation of the reservation, it did not specify whether or not the rights in question were connected “only” to reservations created by the treaty process. I believe that the Supreme Court decisions in *Winters* and *Walton* are similar in nature, especially in determining specific amounts of water allocation to meet reservation requirements, yet have failed miserably in assuring that the federally protected entities (Indians) actually received what has been previously described as “wet water.”

The U.S. Supreme Court decision that became known as *Walton* has ramifications on the aboriginal water rights in Canada in a similar manner that the 1908 *Winters* decision had as it is often cited by the High Courts of colonizing nation-states as they rule on aboriginal rights that deal with property tenure and resource access and use. A central argument deals with sovereignty and its connection to property rights and as *Walton* demonstrated land ownership does not guarantee an absolute and unrestricted right to use water as the right is not transferable with the change in ownership. Furthermore, what was not determined in *Walton* was the amount of federally protected reserved water the non-Indian purchaser has access to while ensuring adequate amounts of flow for salmon spawning needs at critical times. Trelease and Gould (1986:744) note that the Courts allocations for the Tribe and Walton, which totaled 1136.4 acre feet per year, surpassed the actual flow of No Name Creek which was 1000 acre feet per year.

Contemporary Canadian societies view aboriginal water rights through a lens of a “new discovery” while Jean Sorensen (2008:5) considers the provincial government’s right of ownership and jurisdiction over forest lands within Okanagan Nation territory as a challenging

task to prove. Sorensen (2008:5) cites attorney, Louise Mandell as she predicts that *HMTQ BC v. Wilson* (the Okanagan Indian Band et al.) will become a landmark case based on the rights that flow from s. 35 of Canada's Constitution. This case is more commonly known as "*the Wilson*" case and according to Sorensen (2008:15) questions the validity of the government of British Columbia's claim of ownership and jurisdiction over provincial lands and resources.

Grand chief of the Okanagan Nation and President of the Union of British Columbia Indian Chiefs (UBCIC), Stewart Phillip (2011), consistently questions the provincial government representatives to provide evidence of how it came into title of Okanagan lands. To date the provincial government of British Columbia does not have in its possession, a deed, bill of sale, or treaty that relinquished land entitlement or evidentiary documentation that allowed unrestricted resource extraction from within the traditional territory of the Okanagan. Grand chief Stewart Phillip's (2011) question is similar to what Sorensen (2008:15) brought forward as it was clearly stated by the Supreme Court of Canada in *Delgamuukw* and *Calder* that aboriginal title was "not" extinguished and asked the Crown how it came into control of the aboriginal lands in question.

Again, it is my opinion that aboriginal water rights are central to any and all challenges that revolve around jurisdictional issues over this natural resource within the province of British Columbia. Rob de Loe and Reid Kreutzwiser (2007:89) contend that water governance in Canada and the power and control entrusted and assigned to local and non-state actors shows that national states continue to retreat from functions that provide protections, especially from the threats of globalization. The de Loe and Kreutzwiser (2007:88) argument leans towards proving that the province of British Columbia is shifting its political directives in order to prioritize the

needs of local stakeholders and water users while granting these groups the authority to accommodate the water quantification needs of aboriginal peoples.

Therefore, while the *Wilson* case is stemming from a resource use challenge issued by the Okanagan Indian Band, a much greater question arises when taking into consideration the position of *Syilx* elder, Joe Pierre (2009), that the aboriginal right to land and water are not separate. It is my determination that the existence of customary indigenous laws obligates the *Syilx* to issue challenges that question the legality of domestic or foreign resource development and the subsequent extraction without just compensation being paid to the bands. Aboriginal peoples in British Columbia have argued this unresolved issue for a few decades and it appears that the provincial authorities use the uncertainty of aboriginal title to its advantage.

The province of British Columbia continues to use the courts as a mechanism of disruption aimed at allowing the continuance of resource development and extraction. It is my opinion that the province is intent on settling the comprehensive land claims process to gain unfettered access to these resources, of which water is included. The legal frameworks seemingly are intended to dispel the historic claims of aboriginal peoples of this province by asserting principles of the United States 1830s “Jacksonian Democracy.” I say this as legal precedents, whether U.S. or Canadian, continue to ignore or make invisible the undeniable and justifiable rights that were recognized within these legal regimes.

For example, *Winters v. United States* (1908) and *Arizona v. California* (1963) recognized the existence of pre-treaty rights and guarantees to meet water quantification needs for agriculture purposes, yet, although considered victories for aboriginal peoples, very little was gained in the form of “wet water.” A similar situation arose after Canada’s Supreme Court decision in *Delgamuukw v. British Columbia 2* (1997), which recognized that aboriginal title

existed prior to Canadian Confederation, yet actual rights are continually challenged, as the unresolved issue of defining aboriginal title in British Columbia remains to be contested by the provincial authorities.

It is my contention that settler populations in British Columbia, which include what the provincial authorities have designated as stakeholder groups, are being led to believe that they have equal rights and access to resources within the unceded territories of aboriginal peoples. To date the province has been unable to provide any historical documentation or legal evidence to show how of how it gained title, instead, the province has taken the position that it has the right to take aboriginal title through a consensual comprehensive treaty process.

Therefore, it is in the best interests of those that are not engaged in negotiations with the province to continue to step back from these proceedings and continue to maintain their stand that they are unwilling to compromise or give away their title and rights to these unceded territories. Aboriginal peoples of this province should continue to simply reject the province's mandate to entice poverty stricken Indian bands into the comprehensive treaty process by throwing millions of taxpayer's dollars on the laps of Indian band councils. Aboriginal bands in British Columbia are enticed with the immediate financial gains when they enter into negotiations with the representatives of the treaty process and soon discover that the millions of dollars they are paid are considered to be advanced loans for research and legal fees on the final agreements and are 100% repayable. Therefore, in the end, these bands are left with very little financial compensation for what they have given away or sold to the province.

For those who have withstood the pressures of government to engage in these processes, they must be clear in the understanding that they can only lose these rights if they consent to give them away through a consensual negotiation process. It is my opinion that aboriginal peoples,

most assuredly in the Okanagan, that we are not seeking what I call ‘sympathetic justice’ but instead the rights afforded to a sovereign entity that has existed on this land for thousands of years before foreign colonizers could even call themselves a civilized peoples.

Since first European contact reaching to the contemporary era a state of political uncertainty exists in the Canadian province of British Columbia. Historian Cole Harris (2002:167) argues that a 1913 inquiry into decisions regarding the development of a reserve list by a joint dominion-provincial royal commission made assurances to the natives of this province that their reserves “would not” be altered without their consent. Douglas Harris (2008:41) contends that in 1877 the Dominion commissioner A.C. Anderson made the argument that native fishing sites were considered to be native settlements, and therefore could not be occupied and the lands illegally occupied by white settlers should be returned to its rightful owners.

The assurances made to the aboriginal peoples of British Columbia concerning the size and number of reserves in the province were voiced by W.E. Ditchburn, Chief Inspector of Indian Affairs for British Columbia, while provincial representative, J.W. Clark called for a reduction in numbers and size of reserves (Harris 2008: 181, 183). According to Douglas Harris (2008:183) in response to the 1923 McKenna-McBride Commission, which supported and instituted a province wide reduction of the size of reserves, the Native leaders insisted that title to their lands be a central part of this discussion. What became clear at this juncture in provincial politics regarding the rights of the Native people was that this process was not a negotiation but simply a ruling that was to be made by provincially appointed officials that ensured Dominion and provincial land title rights were protected.

The Indians water rights doctrine was formally recognized in the United States Supreme Court in the decision rendered in *Winters v. United States* (1908). As a result of *Winters* it is

Nigel Bankes (1991:228) determination that under this precedent setting water doctrine, priority was established by the date of the reservation's creation and that sufficient quantity of water would be allocated to irrigate reservation lands. Indian environmental and natural resource law expert, Judith Royster (2011:82) makes the argument that despite the guarantees of water rights in the precedent setting Supreme Court ruling in *Winters*, the tribes of the Fort Belknap Reservation have not yet received the actual water.

Richard Bartlett (1988:50) contends that the controversy over the water rights of 'Indians' as found in treaty, agreement or executive appropriation during this period was problematic for non-Indian water-dependent users as these rights, according to the decision rendered in *Winters*, were deemed as being more substantial than riparian rights. The impact on aboriginal water rights in Canada was influenced by the *Winters* decision despite these rights deriving from different origins. In theory these rights are legally secure, as according to Claudia Notzke (1994:31), "they have not been effectively abrogated by legislation."

James Tully (1994:177) argues that from the outset of the colonial period the Canadian Crown recognized the Indian Nations as having equal status with European nations and with understanding that Indian lands could not be ceded by the Indians except by means of public negotiations that "did not take place under duress."

Indigenous water governance in the Okanagan Valley is extremely restricted and inhibited despite legal and inherent rights as defined in s.35 of the 1982 Canada Act or going further back to the 1763 Royal Proclamation. Provincial laws were framed in such a manner as to place limitations on the ability of indigenous societies to exert or simply claim their aboriginal rights to water resources. North America is a diverse social and cultural entity that has in many ways continued and built upon the propagation of the centuries-old European ideology of control

and domination of the natural world, and is continually driven by cultural assumptions based on a frontier mentality.

James Tully (2003:281) maintains that European societies attained their sixteenth century international trade status primarily by the settlement and exploitation of North American indigenous lands and resources. The rapid deployment of capitalist based trade economies initiated the transformation of the North American ecosystems along with the social and cultural institutions of the indigenous societies. Coincidentally the indigenous economies were based on traditional natural resource management regime that existed for a few millennia.

Problems associated with recognition of indigenous rights on the national and international level have led the colonizing nations to resort to the process of accommodation as it is viewed as being a consensual practice. According to the following statement by Ivan Head (1996:11):

Accommodation is most successful if it precedes conflict rather than follow it. Not only are the energies and resources conserved and utilized to positive advantage, so too is their greater likelihood that novel applications may be embraced and innovative formulae accepted.

Head (1996:14-15) points out that accommodation has been used as a method of intervention for centuries to settle societal conflicts. Currently government representatives of the Province of British Columbia are engaged in accommodation processes with aboriginal peoples in the attempt to settle issues that include water rights, resource use, and land entitlement.

The Water Act Modernization (WAM) has been in negotiation since 2009 and many representatives of aboriginal groups throughout British Columbia have been active participants. These meetings and workshops were attended by 60 aboriginal nations and 25 aboriginal organizations (citation). The WAM calls upon numerous water dependent users such as cattle

ranchers, mining and forestry interests, agriculturists, municipalities and “First Nations”³ to contribute to potential alterations to the 1909 Water Act. The aforementioned special interest groups are being petitioned to engage in the discussions that will reform the current Water Act to meet current and future water needs of B.C.’s population. The strategy and the ongoing discussions are inclusive of the “First Nations” traditional knowledge in water stewardship and decision making, yet there is no mention of inherent or priority rights to water as held by the indigenous peoples of British Columbia.

It is abundantly clear from the aboriginal perspective that they are the senior holders of water rights in British Columbia. I see that the indigenous peoples are put into an extremely compromising situation as representatives are attempting to develop strategies wherein indigenous communities are unknowingly conceding their “senior priority rights” to water in accommodation processes that give way to settler rights. Another point that does not sit well with me is that indigenous planners and participants of these strategies are starting from a position wherein they accept that they are speaking from a ‘limited capacity.’ Under the accommodation process of the WAM the aboriginal peoples are provided equal status along with other water dependent users such as agriculturists, miners, foresters, and municipalities.

The UBCIC position on water rights revolved around the jurisdiction issue, which of course should revolve around the theory that since the unceded territories of BC are yet unresolved it is meaningless to proceed with such actions until this unsettled issued is resolved. Recognition and accommodation of aboriginal rights is highlighted in the language but if this recognition is intended to eliminate or lessen these rights then aboriginal peoples must stay away

³ The term *First Nation* is used informally in Canada to replace a less politically correct although legal definition of *Indian Bands* under the Indian Act.

from the table as then they are being consulted and the actions then will proceed because the province, with your willing participation, has met at least one of the Court's stipulations.

Chapter Eight

CONCLUSION

Going back to the four research questions that served as a guide in this inquiry, I begin by providing answers to those questions in numerical order as placed within the introduction. The first question: “How have colonial and contemporary water management policies, legislation and legal decisions affected the ability of indigenous peoples in Canada to exercise their rights to water?”

The *Syilx* and other tribal peoples in North America and more specifically here in the Dominion of Canada have been identified through social, cultural, and political methodologies that are intended to place individuals and entire tribal groups into isolation.

Aboriginal societies in British Columbia are entangled in a web of European-based laws that are presupposed to have gained their authority from numerous principles that are embedded within racist ideologies and doctrines. To begin the process of untangling ourselves from the repressive effects of forced colonization by European nations, it is my opinion that we must understand the historical development of economic globalization. In chronological order, I have attempted to present the growth of economic globalization that could have only succeeded with aggression. According to Held et al. and John C. Mohawk the aggressive behavior associated with globalization began as early as 800 B.C. and has persevered since that era to this very day. Economic globalization has evolved into a global trade network that is becoming ever more dependent on shrinking available natural resources while the continuance of the unabated levels of exploitation are having negative consequences on human populations and the global environment.

The Europeans had over two millennia to develop and refine the methods of economic globalization prior to bringing it to the Americas and other countries in the western hemisphere. As European explorers advanced into indigenous peoples' territories they discovered the presence of precious and semi-precious metals and upon return to their mother countries fabricated wild fantasies of cities of gold being present in the New World. Economic globalization spread across the Atlantic and was fueled by the natural resource wealth of the Americas at a time when semi-precious and precious metals were needed to make coins to meet the demands of the inter-regional trade networks.

It appears that the European nation-states that had the capacity to launch ocean-crossing expeditions did so with an unprecedented intensity to engage in further resource discovery and extraction. With the potential for economic growth in a period when warfare was putting immense economic pressures on the European sovereigns the timing of "the discovery" of the New World came at an opportune time.

Indigenous peoples of the Americas were confronted with Eurocentric ideologies of control and domination of peoples and territories and with symbolic acts of possession, such as the planting of flags, or the muttering of words that the 'Indians' would not have understood had they even heard these words. As a result of these symbolic acts that had no meaning to the native inhabitants of the New World the European sovereigns made claim to these lands under the principles and rights of the doctrine of discovery.

The European colonial settlers used the principle of *terra nullius* to vilify and concurrently ignore the human existence and rights of the indigenous peoples of North America. As the European settlers asserted political authority, through the exertion of military might, it was then that these wayward societies were able to further the developmental processes of social

organization and cultural growth. The North American colonial societies were unique in various ways and their development was greatly influenced by the current state of global economics, the transformation of social and cultural ideologies, along with the ability and freedom to assert authority through its political governance system. With the emergence of a system of authority that took the form of quasi-independent state governance systems the settlers and new state governments began to challenge the sovereignty over the lands that were in their illegitimate possession. It was not long before the state courts began to use the Doctrine of Discovery to justify the assertion of the principles which bestowed upon the colonial states exclusive land entitlement by the virtues of European discovery.

John Borrows (2010:132) contends that when non-aboriginal peoples arrived in North America they came across peoples whose well-organized societies were functioning under a system of laws that defined land and resource usage and began to follow and abide by these same customs and laws. Borrows (2010:134) maintains that after the initial submission to the indigenous legal orders the first European settlers willingly adopted the traditional legal traditions that included following the protocols of trade exchanges.

While the Europeans found a way to justify the taking of Indigenous lands in the New World these same lands were ancient holdings that more than likely changed ownership over a great period of time. It is a non-contentious issue that most indigenous groups won and lost political control and governance over these lands through periodic warfare. The various European settler societies engaged in war against each other with the victor maintaining the right to assert their control and domination over the North American continent. The original inhabitants of this land were swept up in acts of violence associated with a war that originated across the Atlantic Ocean.

The concept of *terra nullius* was used by the European colonizers to underpin the ideology of the Doctrine of Discovery, which I argue was a deliberate philosophy that vilified aboriginal peoples while concurrently ignoring the existence the indigenous peoples of North America. As European settlers scattered along the eastern seaboard of colonial America they began to develop new cultures and political institutions while the colonies began to claim title to Indian lands that were in their illegitimate possession. It was not long before their own courts and justices began to use principles of the doctrine of discovery to justify the taking of indigenous lands and claiming exclusive title by the virtues of discovery.

By the time of the discovery of the Americas the economic systems in Europe and the Mediterranean were being maintained, in some manner, by the presence of large militaries. The political stability during this era was totally dependent on the natural resource wealth that was injected into the local economy from distant colonized lands. According to Saskia Sassen (2006:83) there was an estimated 18,000 tons of gold and silver extracted and transferred from the Americas to Spain.

As the Europeans were colonizing the New World they were continually developing the justification of the taking of indigenous lands and resources. Indigenous peoples of the New World had well-organized governance structures that ruled over the social, cultural, and political institutions far in advance of European intrusion. The European settler societies willingly engaged in war efforts for the right to assert their control and domination over the inhabitants and resources found in the New World. The inhabitants of the New World were viewed as obstacles that stemmed the tide of development and according to Paul Havemann (1987:83) the colonial pacification occurred in military phases as an attempt to assert social control in the New World.

This pacification argument is a credible position as the Church with its violent crusade history clearly provides evidence of secular intimidation through the usage of armed military forces. It is only too clear that in order to colonize the Americas the first order of business for Europeans was to place the indigenous peoples into a subservient position. In doing so, with the overwhelming show of military force the Europeans crushed the indigenous societies and began the process of taking ownership of lands and resources. And to this day there has not been any recorded documentation of an indigenous society being able to recover and re-establish their pre-colonial social, cultural, and political institutions.

The pacification of indigenous peoples was idealized as a legitimate Church sanctioned action as it set in place and promoted the first wave of assimilation and acculturation policies or tactics imposed by the States that acted under the auspices of the Papacy directives. Since the Church imposed crusades swept across Europe and the Mediterranean regions it was clear that the ability to raise, supply, and maintain a large and mobile military force would pay immense dividends to those that could claim such authority.

After the initial landing in the Americas, the ability of Europeans to expand their presence in North America was influenced by a number of factors. During the early colonization period it became a policy directive to convert the Indigenous peoples to the Christian faith with the intent to pacify, assimilate, and acculturate.

The Europeans came and settled, this is a historical fact and over the next two and a half centuries the settler populations firmly established themselves in North America and implanted many sets of European values and customs, and of course, laws. It was clear that at the earliest periods of European settlement there existed an Indian policy; whether or not it was a written document, is not important. The intent of the European colonizers was to attain and assemble the

natural resource wealth in North America and deliver these material goods across the Atlantic to the colonizing states. Therefore the initial policy was to treat the Indians as partners with whom to exchange goods, which in the earliest period did consist of furs and hides of animals.

The expansion of European economic globalization necessitated the need to establish a set of rules and guidelines that was a continuation of church and state driven doctrines of discovery. While the doctrine of discovery is only one segment in the history of colonization of North America it is clear that the United States government used principles within the Discovery Doctrine to gain legal and political ‘ownership’ of the New World, and now shows its displeasure with the assertion of customary international law as it may have the potential to force the United States to take two, or more, steps backwards. In the United States the rights of its citizens are based on the colonization principles embedded within the Doctrine of Discovery and this has obligated the federal government to adhere to legal and constitutional principles that were developed and implemented during the colonial era.

Sustainability as an environmental concept cannot stand on its own verity as it needs support from those individuals or groups who are actively engaged in acts of conservation, and in my opinion, protection under aboriginal/indigenous rights. The following statement is quoted by James Henderson (2008:34) from section 11 of the Environmental Protection of the “Declaration of Principles” for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere, September 21-22, 1977 as delivered to the Legal Commission of the International NGO Conference on discrimination towards indigenous populations in the Americas, Geneva, Switzerland.

It shall be unlawful for any state to take or permit any action or course of conduct with respect to the territories of an indigenous nation or group which will directly or indirectly result in the destruction or deterioration of an indigenous nation or group through the effects of pollution of earth, air, or water, or which in any way

damages, displaces or destroys any natural resource or other resources under the dominion of or vital to the livelihood of an indigenous nation or group.

The opportunity to address such a forum as a bone fide NGO was a historic moment for indigenous peoples. There were 13 principles put forward by representatives of Indigenous America which evolved into a more comprehensive United Nations Declaration of Rights for Indigenous Peoples (UNDRIP). The UNDRIP was adopted by the General Assembly Resolution 61/295 on September 13, 2007.

According to former Madam Chairperson of the UN Permanent Forum, Victoria Tauli-Corpuz (2006:16), “the term sustainable development has come to mean sustainability of the global market economy, not environmental sustainability or the sustainability of communities.” However, this description does not apply to the concepts developed by the western mind. Sustainable development is linked to capitalism and making an economic profit from a ‘sustainable’ product or by product.

According to former World Bank economist, Herman Daly (1996:3), “Population growth and production growth must not push us beyond the sustainable environmental capacities of resource regeneration and waste absorption.” Daly’s perspective on the steady-state economy is concurrently acknowledged and ignored in the Okanagan Valley as population growth and economic development has decades ago surpassed the “natural carrying capacity” of the fragile ecosystem and has essentially destroyed any hope of natural regeneration. Daly (1996:28) further attests that the whole idea of sustainable development is that the economic subsystem must not grow beyond the scale at which it can be permanently sustained or supported by the containing ecosystem.

We must look at the material inputs and outputs at the local level. It appears that there is a constant outward flow of natural resources and agricultural goods from the valley, these

resources are not being replenished or restored. On the flip side, inputs are increasing as human population growth continues to add ecosystem stress within the Okanagan Valley; however, this growth may have reached a temporary stalling point due to the global economic crisis. If population growth stabilized and remained at its current levels, the available natural resources, especially fresh water resources, would soon be extended to limits that will not allow for natural replenishment or restoration.

The conceptual framework of sustainable development is based on cultural values that are tied to economic growth for special interest groups, municipalities, foreign investors and individuals. Settler societies have yet to come to the understanding that the pre-contact bounty of nature existed as a result of hundreds if not thousands of years of careful management by indigenous societies. Since the mid-to-late 19th century the introduction of foreign herbivores, advancements in technology, and growing populations have radically transformed the Okanagan ecosystems from the valley bottoms to the alpine regions in the highlands.

The second research question guiding my research is: “To what extent do indigenous oral narratives, *Syilx* narratives in particular, provide evidence of indigenous customary law in respect to water resources?” I argue that embedded within oral narratives of the *Syilx* are ancient customary laws that have acted as constant reminders of roles and responsibilities over the people, land, and resources for thousands of years. I begin answering this question with a quote from *Syilx* knowledge keeper, Joe Pierre (2009) as he states, “We have no control...they forget that our water rights are connected to land rights.”

According to the western perspective the history of North America began when the first Europeans “discovered” and claimed the lands and resources for the sovereign cross-ocean monarchies they were representing. Over the past five centuries, since the early explorers

planted their flags of discovery upon the lands in the western hemisphere, this written history has documented the taking of lands and resources that belonged to the original inhabitants of this continent. While this study is intended to be a broad-brush approach to the study of aboriginal water rights in Canada, an important part of this inquiry is to detail the original customary laws of the *Syilx* that are specifically related to water.

European settler societies have occupied the Okanagan for approximately the past one hundred and fifty years; the *Syilx* maintain that they have occupied this region for at least the past 10,000 years, a fact that is corroborated by western science. Over this period of occupation the *Syilx* were given instructions from their great teacher “*Sn'klip*” on how to live upon this land while giving the upmost respect to the “*timxw*.” Over these thousands of years the laws that guided the reciprocal interactions between the *Syilx* and the *timxw* were transmitted from generation to generation through the *captikxw*.

It is my opinion that human, land, and water rights are interconnected through a harmonious web of intricate reciprocal relationships. Amongst the *Syilx* it is said that the laws of the natural world are in us, because we are the land. Granted, due to the impacts of acculturation, and assimilation policies of European colonization many of these ethical human/land relationships have been eroded. Yet, the principles remain, although in an altered state of existence. Our contemporary role as protectors of the land is linked to responsibilities to the land and all living things.

According to our oral tradition the *Syilx* clearly understood that the settler population were to arrive within our traditional territory. The oral tradition also provided instructions that the *Syilx* were to work in collaboration with these foreigners, indicating that a reciprocal sharing of knowledge was to occur. The *Syilx* know their local ecosystems better than the greatest

western scientist. The plants and animals, the weather, the seasons, the sun, and the moon share critical information with the *Syilx*, because we understand how to ‘read’ and comprehend the natural world messages. This ecosystem knowledge has accumulated over at least ten thousand years of human/land interaction.

It is my argument that that *Syilx* have been functioning as an organized and civilized society for thousands of years and have been responsible caretakers of their traditional territory, which includes water. In the Harry Robinson (1989:31) version of the *captikxw* “The First People” the reciprocal relationship between water, the sun, and the human being was laid down as the original law. While this *captikxw* recounts an event that took place a couple billion years ago it serves as the origin of what civilized societies refer to as law. And yes, this is from an aboriginal perspective that the cosmology of the earth was dependent on its relationship with the sun, which is a matter of scientific fact, and the basis of what was constituted as natural law.

The interviewees in this study Armstrong, Derickson, Jules, Arnouse, and Ignace provided valuable personal and ancestral knowledge on what they considered to be important stories that are directly connected to water. The Supreme Court of Canada has determined that the onus of proof of pre-contact use and occupation of what aboriginal societies are claiming as their traditional territories must be proven. The legitimacy of these claims must be able to withstand the scrutiny of the courts and without a doubt these courts will rely on evidence provided by their historical and archaeological experts. Therefore it is of utmost importance that it be clearly understood the *captikxw* has had a great influence on the manner in which the *Syilx* and other Salish peoples have interacted with their natural world environment over the past ten thousand years.

According to the *Syilx* the *captikxw* serve as the oral documentation of the manner in which their ancient and contemporary societies were to coexist with their natural environment. Embedded within the *captikxw* are the protocols for their interactions with the sacred life forces that surrounded them along with a responsibility to act in the capacity of stewards of the territory which had been bestowed upon them by *Sn'klip*. In the Four Foods *captikxw* the four chiefs provided the framework for a governance system that was based upon collaboration, fairness, and equality.

The *captikxw* of the Okanagan (*Syilx*) hold the original or customary laws and remain, in this contemporary era, as the basis of *Syilx* interaction with the natural world and its bounty. The oral traditions of indigenous peoples remain alive in spite of the assimilation and acculturation policies of European colonization. The first laws of the *Syilx* concerning the rights associated with the natural resource of water are discussed in this inquiry but are not all fully described; privileged and guarded perspectives were deliberately excluded. I argue that since the colonization of North America the customary laws of the indigenous inhabitants have transformed to adjust to the dramatic social, political, and environmental realities.

The third research question is: “How might indigenous narratives and customary law in respect to water inform the process by which indigenous water rights can gain legal recognition in Canada?” I argue that indigenous systems of law worked very well for a very long time prior to the arrival of Europeans in this region of North America. It is my opinion that legal space has been achieved in the Supreme Courts of Canada in regards to indigenous/aboriginal water rights. Yet, it remains unanswered as to how much recognition will be “granted” by the courts and to what extent this legal recognition of aboriginal rights will be accepted by the provincial governments of Canada.

The aboriginal right to water in Canada has been in existence for thousands of years and will continue to exist in perpetuity until such time as aboriginal peoples themselves consent to give these rights away or are defeated in an act of war. In North America there has been a well thought out and conspicuous manoeuvring to use language specifically to appropriate aboriginal rights with terms such as “existing.” Bruce Clark (1990:27) pointed out that “existing aboriginal rights” has been used by the governments of Canada and the United States to place these rights into a category that reflects a status that had weakened through the passage of time.

Since the laws and customs of the settler populations have been given legal space and recognition under Lord Sankey’s ‘Living Tree’ doctrine, this same recognition should be applied to the customary laws of indigenous peoples. The indigenous peoples of Canada understand that the ancient laws that were alive during the pre-contact era have been severely compromised and in many instances have been disregarded by the settler’s legal systems.

The oral narratives that specifically are identified by indigenous peoples as being holders of customary laws should be given adequate space within what Clark (1990) determined as “existing aboriginal rights,” a point that is strengthened under Sankey’s concept of “the Living Tree doctrine.”

The written colonization history of Canada and the United States has underlying events that are intentionally ignored, forgotten, or blocked from the memory of the settler society. It is not my intent to deliberately make the descendants of Europeans immigrants feel guilt or shame for the actions of their ancestors as they settled and ‘civilized’ this land. Tucked away in this inquiry are events that, if the *Syilx* chose to respond and react in an aggressive manner, the history of settler occupation in this province would have taken an entirely different path.

The *captikxw* “The Twins” prophesized the return of the younger twin to this land and nowhere in the *captikxw* did it mention that the older brother was to make war against him. I can only speculate that if ancient and traditional protocols were followed the decision makers at this time would have been the war leaders, while the chiefs’ role would have been limited to that of an advisor. It is my determination that when the allied forces of the Shuswap and Okanagan warriors decided not to join the war efforts of the Sahaptin and Salish tribes in the United States this decision influenced the JIRC land allocations in the Interior of British Columbia.

In British Columbia’s history it is clear that there were no peace and friendship treaties or negotiations with either the Shuswap or Okanagan Nations as the JIRC established the interior reserves. The JIRC made larger land allocations for the interior reserves of the Shuswap and Okanagan Nations. During the initial stages of the establishing lands reserved for Indians in the interior the water rights were recognized as existing by the JIRC.

The fact that the JIRC recognized aboriginal water rights during the establishment of the interior reserves provides British Columbia’s aboriginal peoples with a legal position on the existence of water rights prior to the declaration of Canada’s sovereignty.

“How might the recognition of indigenous water rights contribute to the improvement of water management regimes for the general Canadian population?” is the final question guiding my research. Section 35 in the Canadian Constitution specifically refers to existing aboriginal and treaty rights, which in turn underpin some of the most fundamental ethical and legal problems associated with globalization. A key to understanding section 35 is that the words themselves do not profess to be the sole source of aboriginal rights, although the document that contains them describes itself as the country’s “supreme law.” What section 35 affirms, according to Anthony Hall (2005:34) is a recognition of pre-existing aboriginal rights that were

in place for thousands of years prior to the arrival of Canadian law. It is my opinion that the aboriginal legal systems that governed societal interactions and responsibilities to the land and resources were practiced and adhered to by aboriginal societies prior to the establishment of sovereignty claims by Europeans.

The *En'owkinwixw* is a *Syilx* epistemology which is reliant on the integration of diverse theoretical approaches and perspectives based on data accumulated from the youth, elders, mothers and fathers to collectively arrive at the best solution to a given problem (Armstrong and Cardinal 1991:70,102). The *En'owkinwixw* approach maintains that existing life forms in the natural world have status, rights and privileges that are equal to humans and all those benefits must be recognized and protected. Therefore, the *En'owkinwixw* epistemological approach, as applied in this research, is dependent on the inclusion of diverse theoretical worldviews and the development of an integrated systems approach that benefits the human population and the ecosystem as a whole.

The *En'owkinwixw* approach has been practiced for thousands of years and continues to be a foundation that recognizes rights from an egalitarian perspective. The equal voice is inclusive and includes the “younger twin” and it is the *Syilx* who must uphold this recognition that the “younger twin” shares the rights to the “existing” water supplies. Within this approach the “younger twin” is to be given adequate voice, but with the understanding that he will then share in the responsibility to protect the water for 'all' water-dependent species.

What is not told is that aboriginal societies (speaking for the *Syilx*) had known for centuries or millennia that the white man was going to make his presence felt in our lands. This is evident in the *captikxw* of “The Twins,” as it was foretold by *Sn'klip* that the younger twin would return with a document or book. It was understood that at this time the *Syilx* would share

in the knowledge provided by the younger twin. Therefore, a reciprocal sharing of knowledge would be undertaken between the two twins (Indian and white man). As a result of the analysis of the Twins *captikxw*, I have come to the conclusion that the younger twin would bring knowledge and a system of laws that could possibly be used by indigenous peoples to slow down the degradation of our local environment through a collaborative process.

I argue that the non-recognition of the indigenous legal regime by the Canadian courts will continue until such time as the indigenous peoples conduct the research and present it as evidence within the Canadian judicial system. Indigenous laws could have a significant and positive influence on the development of sustainable water management practices in Canada. As mentioned previously, the prior rights pertaining to water were recognized by the JIRC, and the acknowledgment of these rights by the commissioners should serve as the basis of defining the existence of aboriginal water rights not only in the Province of British Columbia but should include water rights within Canada.

In the century following the *Winters* decision the aboriginal rights to water in the United States was devalued through the lack of state and federal adjudications of water supplies granted to reservations under this precedent setting legal decision. In Canada a similar political decision-making process that includes water is currently ongoing. The provincial government of British Columbia is attempting to further erode the rights of our people under the auspices of developing a shared and sustainable water management practice.

The provincial government of British Columbia has mandated non-aboriginal stakeholder groups the authority and jurisdiction to negotiate and settle the water quantification needs of aboriginal peoples. I believe this is a political maneuver that puts into jeopardy the sovereign status of aboriginal peoples in British Columbia and the federal government is shirking its

fiduciary responsibility by not intervening, which constitutes a violation of constitutional responsibility.

Environmentalist Lucy Moore (2005:66) warns that when a tribe or aboriginal group enters into a negotiation process with a lesser authority there is a possibility that tribal sovereignty may be jeopardized. Although Moore is basing her arguments and warnings on water negotiation processes in the United States, it is evident that the Province of British Columbia has implemented this model as it recognizing lesser authorities such as the cattlemen's association, agriculturists, miners, forestry, and municipalities as being stakeholders of the water resources.

The aboriginal peoples of British Columbia should be clear in determining exactly who is being invited to negotiate on behalf of the stakeholder groups with a clear understanding that they are entering into negotiations with individuals that hold no authority to be making decisions that affect their aboriginal rights. For example, the B.C. Cattleman's Association is 'not' a recognized political entity within the Province of British Columbia.

I argue that decisions about the allocation of water resources by stakeholder groups in the Province of British Columbia are illegal accommodation processes and violations of Canada's Constitution. The stakeholder groups that are being sanctioned by the Province of British Columbia are intentionally being asked by the province to commit illegal acts by their participation in this decision-making process.

In spite of this wrongdoing the *Syilx* understand that we have a responsibility to work with the settler populations to be caretakers and managers of the natural resources within the territory that was bestowed upon the *Syilx* by our great teacher, Coyote (*Sn'klip*). The burden of this responsibility is compounded by the inability of the majority of the residents of our Valley to

understand that we all share in the same fate. What does this specifically mean? We hear of thousands of people dying every day because of contaminated water supplies, or simply the lack of this precious resource. Drought stricken parts of the world deal with this reality. Resource developments that contaminate the water supplies are ongoing throughout the world. The earth has a limited amount of fresh water supplies and humans are responsible for polluting and making these waters unfit for consumption.

It is my conclusion, based on the evidence provided that the provincial government's mandate of accommodating aboriginal water needs by asking the aboriginal tribes to sit as equals with stakeholder groups is a direct violation of the 1867 British North America Act and the 1982 Constitution of Canada. Solely based on the fact that the reserved rights to water are guaranteed, protected and subject to federal authority and obligation under Canada's Constitution whether it be the 1867 or 1982 versions.

The future of indigenous water rights in Canada is uncertain and with each passing day these rights are slowly being eroded and infringed upon by European laws that are being manipulated and transformed to meet the needs of domestic and trans-national resource developers. It is my conclusion that the water rights of indigenous peoples, especially in the unceded territory of British Columbia, should be considered and upheld as the last line of defence against the water degrading practices of large resource developments.

It is my conclusion that a dialogue between "The Twins" is inevitable and that the history and laws of the *Syilx* will prove beneficial to human societies and the natural world environment. European systems of law appears to be inflexible when aboriginal rights are mentioned, yet it is my conclusion that there is hope for the future as a greater understanding and realization of the

importance of a collaborative approach in the preservation and maintenance of “our” water resource is an imperative for the survival of our future generations.

Here in Canada the general populations are led to believe that we are rich with fresh water resources. At some point the settler populations will come to the understanding that they really do not have any water rights on which they can depend on to protect this natural resource within their given water shed regions. It is my concluding argument that in the future, *Sn'klip's* younger twin, the white man, will have to depend on the indigenous water rights of the older twin (*Sn'klip's* people) in order to protect the water for future generations. It was prophesized that at some point in time in the very near future that the white man, black man, yellow man, and red man, must work hand in hand to ensure that mankind and all life as we know it, would survive.

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APPENDICES

Appendix A

Syilx Creation story as told by Martin Louie and transcribed by Delphine Baptiste

Martin Louie of Inchelium, Washington is *swolielph*, meaning southern Okanagan speaking. Martin Louie was born in the year of 1906. His Okanagan name is *snpakcin* (breaking of dawn). He later acquired another Okanagan name *n'xol kulawh*. Martin Louie is the great grandson of the "Salmon Chief" *knkankaxwa*. Martin Louie is recognized today as one of the leading authorities concerning the culture, medicine, language and legends of the Colville Okanagan People. He has the insights and in depth knowledge to the spiritual ways of the Okanagan People. He also has the higher level of language that only a select few have knowledge of. The following is an account of a creation story recorded by Martin Louie on June 26, 1981. The preliminary note and transcription is by Delphine Baptiste.

Before I go into transcribing from the tape I will jot a few things down so maybe "you" the reader will have a better idea of what took place within these legends.

When we as people were first put here on earth by our cel me whom creator, we were told that there were chip-chop-tikilxwh (that is history passed on verbally from generation to generation) that is passed on to us.

The term chip-chop-tikilxwh, alone describes mineral, plant and animal worlds that passed before. The creation of man. Within the contents of the legends there are a number of lessons and laws that changed the worlds from that of minerals

and plants to animals then to humans and finally to the Unknown in developmental states. These stages being set out as follows:

1. Chip-chop-tikilxuh-mineral, plant and animal worlds.
2. St'elaqilx-primary physical life form of humans.
3. X at-ma-sqilxw-first thinking humans.
4. Out-ma-sqilxw-present day humans.
5. K'wa-sitch-the unknown beyond present day humans.

Now I will go into transcribing from Martin Louie's tape and I hope you will be able to understand for you see this is going to be a Creation story.

Martin Louie doesn't remember every detail that took place in this story but he'll tell it to the best of his knowledge. The Eel-me'-whem the creator gave each animal a duty to fulfill. This was before the human world.

They were told by the Eel-me'-whem to prepare the world so it will be suitable for humans to live and survive. For you see before the changes from plant and animal world the world wasn't fit for humans to live or be able to survive.

I will give you a list of what each animal was responsible for and their duties.

- a. Ts'ekts'k'am Thunder storm was told by Eel-me'-whem the creator to go up in the mountains, this is where you will live. Ts'ekts'k'am Thunder storm, you live there until you see the land getting too much grass or too many trees. When you see the trees are too thick and bad, you cause the lightning storm and start a fire burn the grass and trees. While you're up

in the mountains, if you see that the trees are too thick for the animals or people hit with lightning on old dead trees and burn the trees. After the thick trees are burned the animals and people can travel.

- b. Skmist, Black Bear was the great chief, so he gave the order to pass the law within the animal world. He passed it so that all the four footed animals be the meat for the coming people.
- c. Kw'lhtmin Wolverine was given the ability to carry anything that needed to be carried, no matter how difficult how big or heavy. As the Eel-me-whem was telling kw'lhtmin what his duties and responsibilities were in helping prepare the world.
- d. Sinka-leep coyote jumps up and tells the animals "When we separate from this gathering and return to the mountain. When the skilxq t'ilxweelx yi-stil skilwh (primary physical life form of humans) we didn't give them anything to work with. We were just concerned with preparing the world and providing food for them. What about something for the people to work with. Something to give them strength and guidance throughout life."

The Eel-me-whem, creator tells coyote, "what are we to give the stil-skilxwh?"

Coyote says, "alright all of you animal people that are gathered here now, the ones that have a kind heart, take pity onto the people, especially a young boy or young girl. In due time you tell the rest of the animal people; that they are all responsible for taking pity onto a certain individual and each animal giving that

person the strength and spiritual power that person may need. Each animal communicate with the individual and gives that individual certain kind of strength and spiritual power. That is why since that time on, people acquire “shoo-mesk” Spiritual power and vision. Coyote passed these laws and also said: “While the people sleep they will have dreams and from these dreams and visions they will know exactly what to do and how to do it.” So the “stil-skilxwh” were giving “shoo-mesk” Spiritual power and dreams or visions.

Black bear said that it was good, so he passed the law within the animal world and told animal people that’s the way it will pass.

Black bear told the animal people whenever you see a pitiful young girl or young boy seeking for spiritual power, it is your duty to give the spiritual power, to the boy or girl. Because when this young boy or girl becomes an adult and wants to be successful in whatever field he or she chooses, “you” one of you animal people will be responsible to fulfill that something she or he will be good at. Whether it is doctor, gambler, fast runner or whatever the child develops to be.

The animal people said “alright” that is good. The Eel-me-whem asked how is the stil-skilwh going to come? How is that going to happen? “Yilc-weelx” “yi skilxwi”.

Coyote said “alright” as he pointed at a woman (in those days when referring to a lady another term was used. Sku whrn this (Okanagan name:) woman’s child is born, I will help make the first people. “Tilx-weelx yi skilxw”. So this woman moved up in the mountain and when the child was born Coyote went up there. Coyote said to the woman when he arrived” “You watch me do what I have to do and

you have to step over what I'm to prepare." And after you step over what I've prepared it will develop into skilxw person. In the meantime this woman's child is crying all the time. The woman complained that the baby made too much noise and Coyote said "that its meant to be like that." Coyote gathered bunch grass, (st iyi) brush berries and everything else and put it in a pile. He piled up all these things that he gathered and he shaped the body of a human he placed the hands, body, head, legs and feet. He made a hole where the brain is located and he placed a white pitch in this hole and he said that will be the thinking area of the human. This will be his knowledge, this is how he'll develop his knowledge and learn. That is how the thinking came to be. After he finished with the brain he made two holes and said this is the eyes with these eyes the human will be able to hunt and see everthing. Where the nose area is located Coyote made two holes and said "with this the human will have the sense of smell." The human will be able to smell everything. Below the nose Coyote made a larger hole and he made the hole right through to the inside of the human. (The stomach and digestive system). He made the mouth, stomach and digestive system for the human. He said food will go into this hole (mouth) and travel right through and out the other end. This will keep the human alive. Coyote split the wooden material and said this is your fingers and with these hands and fingers you will be able to work. Coyote split the wooden material where the feet is located and said "this is your legs, feet and toes with these you will be able to travel anywhere you want to go. But where I placed the brain this is where your thinking and movements will be centralized. Coyote also placed a certain kind of material where the heart is located and said, this will be your heart. The human will be

controlled by two important parts: the brain and the heart. After Coyote placed the heart in the human the human came alive and stood up. The human body contains all of these things that Coyote gathered and piled up. These materials are all the grass all the berries and all the edible materials. That's the first human body that was created. After Coyote created the first human the woman was standing there looking at Coyote, "The human body that you created standing here, but he's all alone till the end of the world. What are you going to do about increasing the human? Coyote said, "Alright, I never thought of that." Coyote took mud and rolled three of these into a ball and he placed the three rolls of mud down on the ground. After Coyote placed three three rolls of mud on the ground he stuck sticks into the balls and said to the woman, Coyote said alright from the beginning of time when the world was first created nobody shall have knowledge of who my parents are. The people will never know who my mother or father was. The people will only remember me "Coyote." Today right now this is 1981, you can try to research where did Coyote come from? Nobody will ever be able to tell you. It is meant to be from the beginning of time till now. Nobody knows who Coyote's mother and father is.

I'll continue with Coyote now. One day Coyote had a dream. His dream was the Eel-me-whem (creator) was to arrive and he was going to have white skin. The Eel-me-whem that was going to come will have a beard with long red hair. The Eel-me-whem that was arriving is the one that hold the whole world in his hands. So that was Jesus Christ. And when Jesus arrived he told the people "I want to see your Eel-me-whem creator." Cougar stepped up and said, "I'm the Eel-me-whem even though people make fun of him but he's the Eel-me-whem. He is the one I want to see."

The people discussed the matter among themselves and said it is “Coyote” he wants to see. So Coyote stepped up and said to the fair skinned person “Greetings younger brother you have come.” The fair skinned person said to Coyote, “I’m the one in full control of everything this world and all. Your knowledge wisdom and capability to do all that you have done I gave to you. I gave you the power to be able to destroy all the monsters and prepare this earth so that it will be suitable for the people to live and survive. Coyote said, “No” my power is greater than yours. It just so happens that “they” Coyote and Jesus Christ were standing on the shore of the Ocean. Coyote said to Jesus, “I’ll prove my power to you, by walking on the top of the water.” Jesus said, “Alright, I’ll watch you walk on top of the water.” So Coyote walked out on top of the water. He walked a ways and then he walked back. Coyote said to Jesus, “It is your turn to walk on top of the water.” So Jesus walked on top of the water like Coyote he walked a ways out and back. The he said to Coyote, “Try it again, let’s see you.” So Coyote walked out on top of the water again but this time he started to sink. Jesus said to Coyote, “You see it was my wish that you walked on top of the water.” Coyote believed him (Jesus). So Jesus said to Coyote all that you have done is good. But one thing, the method of gathering food, the weapon that will be used by the people. When you go up to (Kumkoneca) this certain place and come to a bunch of young Saskatoon trees, at the end of this certain place even today as you travel to Kettle Falls, present day Kettle Falls, not the Kettle Falls of long ago. But the Kettle Falls today you will see “Kum-koneca” with Sparrow hawk setting on top of his head. When you’re in Kettle Falls town today if you happen to be at

Freddy's tavern or hotel, look north from there and you will see this form of "Kum-koneca" with Sparrow Hawk sitting on his head.

In the early days when people travelled along this point of land, they would get eaten up by kum-koneca (Blanket made of horns). There was only one trail that went that way. Kum-koneca would eat the people that would be travelling on this trail after he would eat the people he'd throw the bones away. One day Coyote was on this trail, dancing along and as he neared the end of the trail Kum-koneca reached down and grabbed Coyote. As Kum-koneca lifted Coyote and started to put Coyote in his mouth Coyote yells and says what a horrible smell. So Kum-koneca strangled Coyote and threw him over the bank from that day onward this place was called snoxaymten (graveyard). Anyway Coyote must have been laying there for days when along came his older brother Fox. Fox as he was walking along smelled something and he said, "mmm, it smells like Coyote." So Fox started looking around that area and then he found Coyote lying there dead. So Fox stepped over Coyote. As Coyote came back to life he jumps up and yawns. As Coyote yawns he tells fox, "I just laid down here for a few minutes to rest and I guess I overslept." Fox tells Coyote you know that isn't true, look over there, that Kum-koneca resting on top of that land. He stands guard over the weapons that is needed for the people's hunting and food gathering. The young Saskatoon berry bushes. Fox told Coyote, "If you're unable to destroy Kum-koneca the people won't have weapons to hunt and gather food. The people will have real hard times without the proper weapons. Coyote said to Fox, "Alright, I understand." Fox continued on his way.

Coyote studied Kum-koneca and Sparrow Hawk's movements for awhile. Coyote noticed that Kum-koneca would fall asleep and Sparrow Hawk would also get sleepy, but Sparrow Hawk would never completely sleep. Sparrow Hawk would sleep with one eye open. Coyote would try to sneak past but Sparrow Hawk would make so much noise that he'd wake Kum-koneca and Coyote would run back. Coyote thought about it for awhile. After a few more attempts at getting past Kum-koneca finally he thought to himself, "I'll use my power. After a bit of discussion with his power he told them that he wanted to turn into rain drops and each of the powers took on something to do. One would cause the rain drops the other would cause sleep, the other said, "I will take you over to get the weapons for the people." After they made it clear what each would do Coyote agreed and said alright. He, Coyote, made a kind of shelter to sit under. After he made this lean to shelter he sat under it. It started to rain night and day and it rained and rained. It rained for four nights and four days. As it was raining of course Sparrow Hawk and Kum-koneca were getting soaked and cold by the rain. Sparrow Hawk was so cold he had to stick his head under his wing and kind of curl up to try and keep warm. Sparrow Hawk of course fell asleep and wasn't on guard for Kum-koneca. Since Sparrow Hawk and Kum-koneca fell asleep Coyote ran up to Sparrow Hawk and picked him up and threw him. As Coyote threw Sparrow Hawk he passed the law within the law of nature and said, "from this day forth you'll only be a small Sparrow Hawk. You won't stand guard for Kum-koneca anymore. When the people come they will not see you as you were except that this incident will be told to the people. Coyote, also destroyed Kum-koneca and passed the law within the law of nature and said: "You

wre never real anymore.” Coyote started breaking the young Saskatoon berry bushes and he picked out four sticks. He threw the sticks in the direction of Okanagans and he said from this day on this place will be called snxt xt as tn, breaking of sticks area. Today that place is known as Winfield, B.C. and just west of Winfield is a little valley or gulley this place was called snxt xt-as-tn. Coyote scattered the little young Saskatoon berry sticks that he broke up all over the earth and passed the law within the law of nature that from that day on there would be Saskatoon berry bushes for the people to pick berries from. These Saskatoon berry bushes will grow all over the world and provide berries for the people. And today on a very hot day and you’ll see smoke up in the high mountains, you’ll see smoke and remember that is only pi pks Martin. Martin uses his mouth. He bites this certain kind of wood and it will burn, even today Martin still does it. That is the story of Kum-koneca and pi pks Martin.

During this early changes and developments of the earth that the Eel-me-whem, creator passed the law of the symbol of four. Everything will always have four within. The earth has four seasons: fall, winter, spring and summer. There are four directions also: west, north, south and east. The four foods: meat, fish, berries and roots. Everything has the four within. Even the person has four within the body: two eyes, mouth, nose and ears. The parts of the body: two arms and two legs, that is four. That’s the way it was meant to be. Coyote already knew that the white skinned person was coming. Coyote said, “When the white skinned person comes he will come four times. The first time he arrives he will develop iron material. This will keep the Indians alive.

That is what you call money today. The second thing that the white person brought with him is his food, the beef. The third food that the white skinned person brought with him is the root, potatoes, carrots, onions, etc. The fourth thing they brought is the different methods of preserving fish, canning fish. The white skinned people has brought with him the four foods: meat, fish, roots and berries.” Coyote was well aware of all these things. Coyote knew that when the white skinned people come they are going to try to teach the Indians and scare them into believing in the white man’s beliefs. The white skinned people will tell the Indians about two things. The first one was about heaven above and hell below, about the fire in hell. I guess that was the missionaries or the priests. They are the ones responsible for taking the Indians ways away. Once a person dies he doesn’t come back to life. A long time ago before the white man came, an Indian would die and the rest of the Indians would take the dead person up the mountain or near water and leave him there. The dead person would be left over night usually. And the next day the people would go back and check on the dead person and he would be alive again. When the world first developed all this was prepared by Coyote so when people died they could come back to life again. Coyote has a sweat lodge at Soap Lake. Go to Soap Lake town today and when you come to the end of the town going north. You turn and go towards Spokane and just on the other side of the road you will see Coyote’s sweathouse. From Coyote’s sweathouse he distributed the medicine for the people. If you got right up to it you would see that it is a sweat house but it is all rock. There is a hollow inside the rock or Coyote’s sweathouse. If a person was sick or had bad

luck and can't do anything or get anything done the person that is sick or has bad luck all the time goes to Coyote's sweathouse.

When you go there pray that your luck might change or that you might get better as you are praying talk to Coyote's sweathouse and mention Coyote's Indian name sima ym and you pick whatever kind of lining you're going to use for the inside of the sweathouse so when you're finished in the sweathouse you take the lining out again. You take this lining with you and go to Soap Lake. You go where the town is located now. Go towards the north end the last street. This street is in line like if you go towards the lake it should take you straight there. There is a piece of land that stretches out into a point onto the lake. On the edge of this point of land is Coyote's swimming hole and at this swimming hole you throw the lining of the sweathouse and pray for better health or luck. But now it is all town in that area, so we can't use it like we used to. The people from that area are supposed to come to some kind of agreement concerning the use of it today. They are going to make kind of a tunnel. Coyote was responsible for the preparation of the earth and destroying certain monsters and made changes so the world would be suitable for people to live. The English speaking people will describe Coyote as our second "God" Creator of all things. And you see I have seen where Coyote destroyed the devil. I actually seen this place called Devil's Tower. You see in Coyote's days the devil stood on this rock and told the people not to believe in good things. He told the people to do certain things which weren't acceptable or good things of course. So Coyote was at Kettle Falls when he heard about the devil misleading the people. When he heard he started on his way over to where the devil was. He went to Yomin, this is where the

Devil's Tower is located. If you seen this rock today it resembles a stump. Coyote took him (the devil) off this tower that he was standing on. This old person that told me about the devil and his tower I wished I had a tape recorder. If I had a tape recorder I would've gotten the full story of it. This was about twelve years ago when I was travelling down there. This old man said at that time before Coyote destroyed the devil the people were pitiful. And when Coyote first brought the salmon up the river his first wife in t a tk. Here in Penticton now the road that goes to Keremeos was where a rock stood. This rock was Coyote and the white people destroyed this rock. I'm very angry about it. I told a few people that it should be looked into because that rock represents the story of Coyote. But nobody did anything about it.

Anyway getting back to the story of Coyote bringing the salmon up the river. During the time Coyote was bringing the salmon up and when he came by Okanagan Falls there were two animal people living on the banks of the river. You can see the rocks today. These rocks were homes for the "tsr tups" fisher. When Coyote arrived at Okanagan Falls fisher already knew about his coming. On his way up Coyote did many things. So when Coyote arrived where Okanagan Falls is today, he was the one who made those Falls. Coyote was travelling along the shore of Okanagan Falls when he came upon the fish trap of the old man. Now and then the old man would find a sucker fish caught in his trap. Then him and his two daughters would eat it. (This was fisher that had two daughters). As Coyote passed the fish trap of the old man fisher's, he placed two salmon, one male and female. And he continued up till he reached the old man's place and he walked in. The old man welcomed Coyote and told him to sit down, "Your wives are out picking berries."

Finally the two daughters came home from picking berries. Their dad told them to start cooking, "You cook for you husband (meaning Coyote)." Coyote told the old man to go check his fish trap so the old man went to check his fish trap. When the old man got to his fish trap he saw the two salmon. He took the two salmon. Ever since that day onward that is why there are Saskatoon berry bushes at Okanagan Falls. And people can go pick the berries from there. The next day Coyotes left Okanagan Falls and came up river to Penticton and the chief in Penticton already knew of his coming. So the people from Penticton sent a lady to meet Coyote. This woman they sent to meet Coyote had a slight limp. This woman walked to the junction of Penticton and Keremeos as you see it today. Where the rock used to stand which the white people destroyed. Anyway, Coyote was sitting at this junction when the woman with the limp arrived. Coyote wasn't happy with the choice that the Penticton people were giving him so Coyote took the fin of the salmon and threw that in the direction of Penticton and sent the woman back to her people. Coyote passed the law that in the Penticton area there would only be kekni available. So that is why we get kekni in Penticton instead of salmon.

A long time ago before I even set eyes on Penticton Martin hear this story about Coyote. Coyote was that rock setting on the east side of the junction of Penticton, Oliver and Keremeos. There are a lot of things that a person could dig up that Coyote has done if a person wanted to.

Back in Inchelium, back at Martin's country a place not too far from Inchelium which is called burning tops. Just below Inchelium you'll see a hill with a pointed top. On the westside of this hill with a pointed top is a hole. Coyote made

this hole and he used it as a cooler. Coyote would hang his carcass of deer in this cooler. Even today a person could walk into this hole in the hillside and go about 20 feet and you'd see icicles hanging down. Right today you can still see the icicles inside this hole.

That goes to prove that the legends has to be true. Everything that he did back then can still be seen today.

In Inchelium a place called Hall Creek this Hall Creek goes toward Republic Washington. This area in Republic they used to call a place with plenty of horns.

From the "x at ma skilxwh" period this story has been passed on. This is a place where the people usually got their deer. If you went there today you would see plenty of horns lying there some are quite decayed though. You will see a small bluff, on this bluff is a picture of Coyote. "kin kal piasxn" is the name of this bluff with Coyote's picture on it.

Southeast of this place is where Coyote met up with another Coyote. When Coyote met up this other coyote, Coyote greeted him and called him "sinkalip" but the other said "no" you're "sinkalip" and I'm "naks," the other said "no" you're "sinkalip" and the other continued to say "no." His partner had two bags of power and he also had two. They continued to argue for awhile finally Coyote told his partner let's place a bet. I'll bet you my power against your power; you see those people around the bend from here. I will suggest that you go and run along the hillside through the clearing. And as you are running along the hillside listen to what they are going to say about you. So both Coyotes set their bags down, bag for bag.

When the first Coyote started out on the hillside the people below were just sitting down to eat, when they saw the Coyote running along the hillside. The people exclaimed saying, “there goes a Coyote! Look a Coyote!” When the first Coyote went out of sight he stopped in a gulley. The second Coyote started out on the hillside and the people referred to him as: look at “Naks.” That is how Coyote got all four powers. That picture can still be seen today on that rock. If you went down to Buck Horn Creek in Inchelium today you can see the picture of Coyote. The background colour of the rock is black and the picture of Coyote is yellowish.

Sucker fish bones represent all the animals. If you caught sucker fish right now and cooked it and if I ate it I’d identify each piece and the name of the animal. [Martin Louie provided the Victoria Provincial Museum with this sucker fish bones. It is on display right now in a display case with each bone identified.] On the meaty part of the sucker fish there is a forked bone, this bone split in half that way back in the animal world. During the chip-chop-tikilxwh time the animals traveled to the upper world. This manner of travel was called “ko ta t a pas ket.” The people at that time shot the arrows up into the sky to make a ladder. So the people climbed up this ladder to the upper world. When they went up to the upper world they were going to bring fire back. So when they arrived they saw a river and across this river were the people. They could see smoke from the fires. So the people started selecting who should go. Finally it was decided that “kek-wap” with “minic” dog and shit were selected to go and get fire. The people told them to do the best they can and steal the fire away from the people. The people below the upper world has to have fire. So dog and shit started out on their mission. They swam across the river. When they

reached the other side, shit laid down in the front of the dog. After they were there awhile dog smelled something that he liked, so he started licking at shit and shit told dog to stop, but dog kept right on licking at shit, till there was nothing left of shit. Dog started back and when he got back to the people they asked him, “Where is your partner shit?” Dog would just look at his stomach. He kept repeating this one word: “chin min” “chin min.” The people finally understood what dog was saying. They said dog said that he ate his partner. So the people had to select another two people to go get fire. Finally the two were selected from the group Frog and Water Snake.

So Frog and Water Snake started out. When they reached the other side of the river Frog laid down Water Snake started licking at Frog’s legs. Frog tried to stop Water Snake but Water Snake just wouldn’t stop. Finally Water Snake swallowed Frog. Water Snake returned back to the people and the people asked him “Where’s your partner?” Water Snake would only look in the direction of his stomach. The people looked at his stomach and noticed that his stomach was very large so the people said well, he must have swallowed his partner. So again the people had to select another two to send to get fire. Eagle and Beaver were selected to go across the river. Beaver said alright here is the plan, I’ll pretend I’m dead and lay on the shore. When the people find me they will take me and skin me. They will skin my whole body and when they reach my head I will make my jaw rigid so they will take longer to skin. In the meantime you Eagle fly over to this tree and land on it and the people will all rush over there and start shooting you.

Beaver and Eagle were to go across the river and get the fire. So Beaver started across the river. He did as planned; he pretended to be dead.

The people found him and they took him. The people took Beaver over to the chief that was looking after the fire.

They told the chief here is what we found at the shore. The chief took his knife and started to skin Beaver; in the meantime Eagle was nearby watching and waiting for the signal for his move. Beaver did as he planned. When the skinner got to his head and jaw part, Beaver made his jaw rigid so they couldn't skin any further. Eagle flew and landed on a nearby tree. The people got excited. They started shooting arrows at Eagle, but Eagle would make the arrows miss him.

In the meantime the chief that was skinning Beaver couldn't go any further. Finally he gave up skinning any further. He too grabbed his bow and arrows. As he rushed out he threw the skin back on Beaver.

The chief that looked after the fire, joined the people shooting at Eagle.

In the meantime because Beaver was supposed to be dead; he was left with the fire. Beaver jumped up and took fire. Beaver swam back across the river to his people with fire.

When he got back across he told his people here is the fire. The people told him "you look after the fire."

The arrows that the animal people used, were all the animals shot into the sky to make the ladder, the last arrow was the bottom part of the ladder. This ladder of animals went up into the upper world. So one of the animals ripped off what grizzly bear was carrying on his back. What he was carrying was what is called cow cabbage today. When this was ripped off it left a big gap in the ladder. When Beaver returned to the animal people with the fire they rushed back to the ladder to

go back down to the bottom world. They noticed the big gap. Some of the animal people jumped down. All the animal people jumped down except for two old ladies with fawn rugs.

The first old lady took her fawn rug sat in the centre hung onto the corner and jumped down. As she jumped she became the bat that is seen today.

The second old lady took her fawn rug and wrapped it around her shoulders and jumped down. As she went down she became the flying squirrel you see today.

All the animals went flying down and then when it was time for cougar he hung by his tail. As he went down he stretched his tail, that is why he has such a long tail today.

All the animals went flying down and then when it was time for cougar he hung by his tail. As he went down she became the flying squirrel you see today.

All the animals went flying down and then when it was time for cougar he hung by his tail. As he went down he stretched his tail that is why he has such a long tail today.

Then it was time for Coyote to go down. As he went down he would get frightened and call to his power to help. He'd ask to be turned into a pine cone that didn't do so he'd ask to be a leaf. Then he'd end up floating upward. After much difficulty he finally got back down to the earth below. That is when it was Squaw Fish's turn to go down. As he jumped he tried to aim for the lake but he missed and landed on dry land. Squaw Fish got stuck into the ground that is why today Squaw Fish has eight jaw bones. He tried to pull himself out eight times on the eighth try he pulled.

Then it was Sucker Fish's turn to jump down as he jumped he missed the lake also and fell on rocks. Sucker Fish bones in his body was all broken and he died. As Sucker Fish lay there dead the chief told the people we will all give him a part of our bones from our bodies. Each animal in turn gave sucker fish a bone. They got to Sucker Fish's head and this one lady was carrying a baby on her back so she gave him their bones. That is why today located at the base of Sucker Fish's head in the back the bone is still in the shape of a woman carrying a baby on her back. After all the animals gave Sucker Fish a bone to give him back bones in his body they tried to put him in the water and revive him but he wouldn't come back to life. Sucker Fish had a sister-in-law. She was beautiful and she was watching the people trying to bring Sucker Fish back to life. The people asked Sucker Fish why can't you swim? When we put you in the water you can't seem to be able to swim? Sucker Fish replies, "I need help in moving my tail fin, maybe if my sister-in-law would put her tail fin next to mine and she can face opposite me." The people asked if the lady would agree to help Sucker Fish get going. He said he'd let the lady go after he gets going all he needed was some help to get moving. So the lady agreed to help him. But once Sucker Fish got going he ran off with his sister-in-law so ever since that time till today at Sucker Fish's tail the tail bone is in the shape of a woman with two feathers on her head. The two feathers in our culture represent the wedding ring.

In earlier days whenever you see a man or woman with two feathers in their hair that means they belong to someone. But if a man or woman is wearing one feather that means they are single. So that is why today if you ate Sucker Fish and looked at the bones very careful you will recognize all the animals. You will

recognize Coyote and berries. I told the Victoria museum about this story they've got my story and the bones there today.

It is really something for this fish to have all the bones. You will see the bones in a form of ears and nose that is coyote even butterfly. You take the two cheek bones of Sucker Fish and put it together and you will see that it is butterfly. The moose horn is located in the Sucker Fish also. I told this story about the Sucker Fish with Bennett among the group. When I finished the story Bennett stood up and said, "And now say the Indians are ignorant, don't know nothing. That record will stay with the world. It will never burn. It will never get lost. The wind will never blow it away because the fish will always be there. The Indians have a better record than we have."

Whenever I'm in Victoria this one time I asked to go see this display of the Sucker Fish bones and this person said to me, "You know there is only one Indian left that knows about this." "Ha, ha." I just laughed. They were talking about me. I don't know if they realized it. Randy Bouchard would explain to the museum person and introduce him to me.

The Sweathouse model that I made was taken to the museum also. I remember quite a few years ago, a priest came over to your dad's house asking, "Where is Willie Armstrong?" I answered, "He's around here somewhere." The priest, "He should take these kids to church." I kind of was disgusted with him we argued back and forth. Finally I told him we got a church of our own. The priest says, "That I'd like to see." So I took him to our sweathouse and said, "There it is." I told him when you enter your church you don't swim. Us, when we go in there to

ask for forgiveness to the lord. We have to clean our body first. The priest stood there looking at the sweathouse and never said anything. Father Walter was the priest's name.

One time quite a few years after that time I seen him, Father Walter, in Vernon, he was happy to see me. Well as far as religion is concerned you can't believe any of them you got to have it in you. And right in the bible it says, "Thou shalt not have any other God." There is only one God. Why is that? They have Catholics, Protestants and Methodists. When you walk out of one church you might meet up with someone and that person will tell you "Don't believe in that church, come to mine." That is what I discussed with Father Walter, "Why is there so many religions?" We all believe in one God. We do, us Indians, we believe, we say our prayer but it is a little different.

We give thanks to the Lord when the sun comes up. When the sun goes down we have a certain prayer, Indian prayer and when we eat, we raise our food to the sun where the sun comes up and we take the water, you are supposed to take water, before you eat and before you retire. When you get up in the morning you take water and drink before anything else. That's an Indian belief, I guess I'm the only one that does that yet. Because water is very important. If it weren't for water nothing would live. The smallest insect needs water to live and the meanest biggest grizzly and others have to have water. No matter how a big shot you may be, you need water to live. The plants, everything has to have water in order to live. So my grandfather used to tell me that you pray to the water and you pray to the sun. The sun gives you the heat, light and help in growth of berries and everything. But it has

to have water. We were taught not just to go to the water and drink without remembering to pray.

When I was in Spokane when the nurse would set a glass of water in front of me I would say the prayer before I took a drink. And the nurse asked me if I was praying. I said, “yes.” So whenever she’d bring the water she’d stand there respectfully while I prayed. If it weren’t for water nothing would be there.