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Exposé/Outline

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Economic and Legal Uncertainty caused by the non-implementation of Economic Indigenous Rights

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1. INTRODUCTION AND INITIAL DESCRIPTION OF THE RESEARCH TOPICS

Indigenous Peoples in the Interior of British Columbia, Canada, have historically controlled and sustainably used their territories. The Interior of British Columbia encompasses diverse ecosystems and bioclimatic zones, ranging from the river valleys with important salmon runs, to the alpine unit, with important foods and medicines, that are harvested according to the seasons[1]. On this basis Indigenous Peoples in the Interior of British Columbia have developed mixed use economies in large territories to sustain their people. Similar to the wealth-creation economies in the Pacific Northwest[2], salmon is an important element in their indigenous economies and a cultural keystone species[3]. The management and use of their land and resources is regulated by indigenous laws which also form the essence of indigenous rights recognized today. The history of colonization in the Interior of British Columbia is recent, with the assertion of British sovereignty over those territories being claimed in 1846 under the Oregon Boundary Treaty, a treaty that did not involve Indigenous Peoples. Indigenous Peoples in the Interior of British Columbia have never signed treaties with the British Crown or Canada and have never ceded, surrendered or released their land.

The territory of the Secwepemc (Shuswap), on whom this thesis will focus, is the largest territory in British Columbia, where historically no treaties have been signed. It borders on the territories of the Okanagan, St'at'imc, and Nlaka'pamux, all also Interior Salish speaking peoples in the South Central Interior, and on the territories of the Carrier people in the North and the Tsilhqot'in the West, in whose territory the Supreme Court of Canada recently granted the first declaration of Aboriginal Title in Canadian history. These nations recognized each others' boundaries and also worked together to seek recognition and implementation of their land rights, as early as 1910 when they signed the memorial to the then federal Prime Minister Sir Wilfrid Laurier[4].

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[1] Elias, P. (1999) Land Traditions of the Neskonlith and Adams Lake Shuswap, Perisor Research Services, unpublished report.

[2] Campbell, S. K., and V. L. Butler. 2010. Archaeological evidence for resilience of Pacific Northwest salmon populations and the socio-ecological system over the last ~7,500 years. *Ecology and Society* 15(1): p. 2

[3] Garibaldi, A. and Turner, N. (2004) Cultural Keystone Species: Implications for Ecological Conservation and Restoration, Ecology and Society 9(3): p.1

[4] Chiefs of the Shuswap, Okanagan and Couteau Tribes of British Colombia. (1910). *Memorial to Sir Wilfrid Laurier, Premier of the Dominion of Canada.* Retrieved from http://www.secwepemc.org/files/memorial.pdf.

Canada was created as a federal state in 1867, with the British North America Act constituting the country's first constitution, which sets out amongst other things the division of powers between the federal and provincial governments, but fails to recognize Indigenous rights and jurisdiction. British Columbia joined confederation in 1871 and the conflict between Indigenous Peoples and the provincial government over allocation of lands and resources continued, with the province claiming exclusive control over land management throughout the province, imposing legislation such as the Forestry Act and Mining Act, to this date without taking into account indigenous rights to lands and resources. Policies and legislation, such as the Indian Act and the Fisheries Act, were strategically used to displace indigenous land and resource uses and economies. For example in 1888 Indigenous Peoples in British Columbia were prohibited from selling fish[5] this despite the fact that salmon was central to their indigenous economies and Indigenous Peoples had dominated the trade in salmon. Professor Douglas Harris explained the effect in his expert report on The Recognition and Regulation of Aboriginal Fraser River Sockeye Salmon Fisheries to 1982 to the Canadian federal Cohen Commission of Inquiry into the Decline of the Fraser River Sockeye Salmon:

> Aboriginal people also had access to a separately identified and regulated food fishery. The “Indian food fishery” was a category constructed in law that, while providing some limited protection for Aboriginal fishing, operated to marginalize whatever prior claim Aboriginal peoples had to the fisheries by virtue of their long history of fishing. In effect, the Indian food fishery performed the same role in the fisheries as the Indian reserve did on land; both were designed to contain the Aboriginal presence, opening a resource and territory to immigrants.

Today Indian Reserves in British Columbia amount to less than 0.38% of the land mass of the province, most of which remains under claim by Indigenous Peoples who maintain they have Aboriginal Title to their territories. The only way the federal government is ready to deal with these matters is under its so-called Comprehensive Claims Policy, which does not recognize Aboriginal Title, but instead requires that Indigenous Peoples release their claims in return for limited settlement lands and delegated jurisdiction over specific matters being granted in final

5 Fishery Regulations for the Province of British Columbia, s. 1, Order in Council, November 26, 1888, Canada Gazette, Vol. 22, p.956, Exhibit 1135, p. 18, footnote 48

agreements[6]. Canada's land rights policy has been found in violation of international human rights standards, with UN human rights bodies finding that it continues to aim at the *de facto* extinguishment of indigenous land rights[7]. The non-recognition and non-implementation of indigenous land rights does not only violate international law, it also violates the Canadian Constitution which in s. 35 recognized the existing Aboriginal and Treaty Rights of the Aboriginal Peoples of Canada[8].

2. RESEARCH ISSUES AND STATUS OF RESEARCH

Indigenous Rights, especially Aboriginal Title, do not just have social, cultural and environmental dimensions, they also have an "inescapable economic component" as recognized by the Supreme Court in the Delgamuukw Decision[9], that unanimously recognized that Aboriginal Title had not been extinguished as argued by the federal and provincial government, but continued as an indigenous proprietary interest in land. Aboriginal Title is a *sui generis* proprietary interest, which is collectively held by the Indigenous Peoples of the respective nation, its essence is defined by the respective indigenous laws. It also includes a jurisdictional element, since the proper Aboriginal Title holders can make decisions regarding their lands, which is an integral part of Indigenous Peoples right to self-determination, Along with the right to determine their own economic systems or maintain indigenous economies, which are deeply connected to the land.

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[6] For more information on the terms on the basis of which Canada negotiates Comprehensive Claims see: Indian and Northern Affairs, Comprehensive Claims http://www.aadnc-aandc.gc.ca/eng/1100100030577/1100100030578

[7] For example the UN Committee on Economic Social and Cultural Rights (CESCR) inscribed their concerns in their concluding observations on Canada in 2006:

> 16. The Committee, while noting that the State party has withdrawn, since 1998, the requirement for an express reference to extinguishment of Aboriginal rights and titles either in a comprehensive claim agreement or in the settlement legislation ratifying the agreement, remains concerned that the new approaches, namely the "modified rights model" and the "non-assertion model", do not differ much from the extinguishment and surrender approach. It further regrets not having received detailed information on other approaches based on recognition and coexistence of rights, which are currently under study."

[8] *Canadian Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 s. 35

[9] *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 [Delgamuukw], para 166

This thesis will further delve into the inescapable economic component of Aboriginal Title and rights, which has to date been insufficiently considered in the literature and by the courts, who seem to mainly bring in economic considerations, when conducting the justification analysis, which enables governments to justify infringements of Aboriginal Title and rights, based on a number of criteria, including a compelling and substantive legislative objective. Although compensation can be a consideration in this analysis, we often see economic arguments used against Indigenous Peoples and often the economic dimension of indigenous rights and the losses in terms of land uses and indigenous economies that Indigenous Peoples suffer are not taken into account.

Following the Delgamuukw Decision, the federal and provincial government in British Columbia failed to make any changes to their legislation, e.g.: in regard to forestry and mining; or their policies, like the Comprehensive Claims Policy, based on the recognition of Aboriginal Title. They continued what the court later termed their *business as usual* strategy issuing logging and mining permits to proponents without taking into account indigenous rights. In turn the Supreme Court of Canada ruled that the honour of the Crown requires that Indigenous Peoples are consulted when developments could potentially impact their asserted Aboriginal Title and Rights[10]. In addition we have seen that failure to recognize and implement Aboriginal and Treaty rights causes both legal and economic uncertainty for investors in British Columbia, where the land rights question is deemed to be unresolved and Indigenous Peoples have never released their proprietary interests in the land. Failure to consult and increasingly to seek the consent of Indigenous Peoples to developments in their territories can lead to provincial or federal permits of the proposed developments being quashed.

At the same time Indigenous Peoples from the Interior of British Columbia took the position that the exploitation of their lands and resources cannot continue without taking into account their indigenous rights. Their territories yield most of the softwood lumber that Canada exports, making it one of the largest trade items between Canada and the United States. The Softwood Lumber Dispute is a long-standing international trade dispute between these two trading

[10] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511

partners, where the US claims that Canada does not collect fair market value for the lumber harvested in its forests and thereby provides a subsidy to the integrated wood processing corporations harvesting the timber. Over 90% of the land base and most of the forests in British Columbia are not in private hands, but they are subject to Aboriginal Title and Rights, yet Indigenous Peoples receive no remuneration from the timber harvested in their territories. So a number of Indigenous Peoples from the Interior of British Columbia joined together as the Interior Alliance and became the first indigenous nations ever to directly make a submission to international trade tribunals in the Softwood Lumber Dispute both before the World Trade Organization (WTO) and the North American Free Trade Agreement (NAFTA). They argued that the non-recognition of the proprietary rights of Indigenous Peoples in their lands and resources constituted a subsidy provided by way of the federal Comprehensive Claims policy which fails to recognize Aboriginal Title and does not require industry to remunerate Indigenous Peoples for the resources taken from their territories. Their amicus curiae submissions were officially accepted by WTO tribunal, the one on the preliminary countervailing duty determination, even circulated it to all parties and third parties for comment, an unprecedented step in the handling of amicus curiae submissions by WTO tribunals[11]. Similarly the NAFTA tribunal in the Softwood Lumber Dispute, officially accepted the indigenous submissions, despite a substantive submission filed by Canada urging that it not be accepted[12].

The candidate drafted the submissions of the Indigenous Nations to the NAFTA and WTO tribunals and has access to primary sources and information regarding the disputes which are not in the public domain, positioning her well to analyze this specific case and the interrelationship between indigenous rights and international trade law which is generally under-researched.

[11] WTO United States - Preliminary Determinations with Respect to Certain Softwood Lumber from Canada, WT/DS 236, April 15, 2002;
WTO United States- Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, WT/DS257/4, January 21st, 2003;

[12] Weil, Gotshal & Manges LLP, Washington, D.C., Joint Opposition of Canadian Parties to the Motions of the Indigenous Network on Economies and Trade and the Natural Resources Defense Council for Leave to Participate as Amicus Curiae, November 25, 2002

3. ARISING ISSUES

On June 26, 2014 the Supreme Court of Canada issued the first ever declaration of Aboriginal Title in Canadian history in the Tsilhqot'in case[13]. It is a precedent setting case which applies a territorial concept of Aboriginal Title, finding that indigenous law and land uses have to be taken into account along with the nature of the land and its ability to provide for respective populations. In the decision the court struggles to conceptualize how Aboriginal Title land will be managed in the future and how resources will be allocated. It makes it clear that[14]:

> [76] The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders. If the Aboriginal group does not consent to the use, the government's only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the *Constitution Act,* 1982.

The court repeatedly refers to obtaining the consent of Indigenous Peoples regarding proposed developments in their territories as the only way of avoiding legal and economic uncertainty. This sets a new paradigm for development in indigenous territories, Indigenous Peoples land rights and their knowledge will have to be taken into account both on a legal and economic level and can help ensure more environmentally, culturally and economically sustainable development. To implement the decision on the ground, indigenous laws and jurisdiction will have to be implemented. International standards in regard to self-determination, prior informed consent and access and benefit-sharing can further help guide this implementation process. The candidate represented Indigenous Nations from the Interior of British Columbia who intervened before the Supreme Court of Canada in the *Tsilhqot'in* case. She is now working together with other academics on developing the concept of indigenous territorial authority which can help Indigenous Peoples and especially the Tsilqot'in secure the implementation of the decision on the ground. The proposed thesis sets out not only to document how non-recognition of indigenous land rights violates Canadian constitutional and international law, including international trade law, but also aims to chart ways how these challenges can be overcome, thereby addressing emerging legal issues.

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[13] Tsilhqot'in Nation v. British Columbia (Tsilhqot'in) 2014 SCC 44

[14] supra para 76

3. PRELIMINARY TABLE OF CONTENTS

Chapter I. Indigenous Peoples in the Interior of British Columbia: Their Territories, Laws, Governance and Economies

Chapter II: Impact of Provincial and Federal Regulation in Displacing Indigenous land uses and Economies.

Chapter III: Recognition of Aboriginal Title and Rights

Chapter IV: Economic Uncertainty arising from the failure to implement indigenous rights

Chapter V: Indigenous Participation in the US Canada Softwood Lumber Dispute and how the non-recognition of indigenous rights can violate international trade law

Chapter VI: Possible ways to implement Indigenous Rights to land and resources on the Ground - Indigenous Territorial Authority

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