Crisis, Colonialism and Constitutional Habits: Indigenous jurisdiction in times of emergency

Emma Feltes, Jocelyn Stacey and the Tŝilhqot'in National Government*

Abstract

The Tŝilhqot'in Nation has had ample experience exercising its laws and jurisdiction to manage emergencies during record-breaking wildfires and the COVID-19 pandemic. Despite the Nation's unique opportunity to formally describe and advance its jurisdiction through its landmark Aboriginal title declaration and beyond, in these crises, Crown actors have defaulted to well-worn patterns of colonialism. Through a detailed analysis of recent Tŝilhqot'in experiences of emergency, we argue that provincial and federal responses to these extreme events reveal constitutional habits: patterns of decision-making that emerge in the immediate response to an emergency, so as to appear automatic. Crown emergency responses assume exhaustive Crown jurisdiction and its corollary erasure and dispossession of Tŝilhqot'in jurisdiction. Fortunately, however, habits can change. We show how Tŝilhqot'in responses to emergency reveal alternate constitutional possibilities: habits of coordination, which, through their attention to responsible relationships, build capacity to respond to emergencies and, more broadly, a changing world.

Keywords: Indigenous laws, Aboriginal law, Settler colonialism, Disaster studies, Constitutional law, Indigenous jurisdiction, Emergency

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Canadian Journal of Law and Society / Revue Canadienne Droit et Société, 2023, Volume 38, no. 1, pp. 1–22. doi:10.1017/cls.2023.2

Résumé

La nation Tŝilhqot'in possède une longue expérience dans l'exercice de ses lois et de ses compétences dans la gestion des urgences, notamment lors de la pandémie de la COVID-19 et durant les feux de forêt record des dernières années. Malgré l'occasion unique pour cette Nation de décrire officiellement ses compétences et de les faire progresser par le biais de sa déclaration historique de titre ancestral et au-delà, de telles crises ont permis aux acteurs de la Couronne de se rabattre sur les schémas usés du colonialisme. Grâce à une analyse détaillée des expériences récentes des Tŝilhqot'in en matière de gestion des urgences, nous soutenons que les réponses provinciales et fédérales à ces événements extrêmes révèlent des habitudes constitutionnelles, soit des modèles de prise de décision qui émergent dans la réponse immédiate à une urgence tel un automatisme. Les interventions de la Couronne en matière d'urgences supposent que cette dernière aurait la compétence unique sur ce type de situation et par conséquent dépossède la nation Tŝilhqot'in de ses compétences. Heureusement, les habitudes peuvent toutefois changer. Nous montrons dès lors comment les réponses des Tŝilhqot'in à la gestion des urgences révèlent des possibilités constitutionnelles alternatives : des habitudes de coordination qui, par leur attention aux relations responsables, renforcent la capacité de répondre aux urgences et plus largement à un monde en mutation.

Mots-clés: Lois autochtones, droit autochtone, colonialisme de peuplement, études sur les catastrophes, droit constitutionnel, juridiction autochtone, urgence

Introduction

In 2017, wildfires swept across the territories of the Tŝilhqot'in and other First Nations in the central interior of British Columbia. The largest wildfire surrounded three Tŝilhqot'in communities. British Columbia declared what was (at the time) the longest state of emergency in its history and issued evacuation orders across the region. The RCMP attempted to enforce this evacuation order in the Tŝilhqot'in community of Tle'tinqox. When Chief Joe Alphonse exercised inherent jurisdiction, and powers under the *Indian Act*, to resist this order and implement his own emergency response, he was met with threats of violence and child apprehension.

Over critical weeks of wildfire response, the RCMP staffed roadblocks on highways to enforce provincial evacuation orders. Time and again, Tŝilhqot'in fire crews, health staff, and community members were held up at these roadblocks because the RCMP would not acknowledge the exercise of Tŝilhqot'in jurisdiction that took a different approach than the Province. In Chief Alphonse's words, "the fires this summer were never a threat to our community. The bureaucracy and the governments… were [the] threat."[1]

Fast forward three years to spring 2020, to the first wave of the COVID-19 pandemic, which later dwarfed past emergencies to become the new longest state of emergency in British Columbia's history. A very different set of "roadblocks"

[1] House of Commons, Standing Committee on Indigenous and Northern Affairs, *Evidence,* 42-1, no 15 (23 November 2017) (Chair: MaryAnn Mihychuk) at 1110 (Chief Alphonse, Tŝilhqot'in National Government).

https://doi.org/10.1017/cls.2023.2 Published online by Cambridge University Press

were in place. They were the Tŝilhqot'in Nation's own checkpoints, deliberated and decided upon by Tŝilhqot'in Elders and leadership, staffed by Tŝilhqot'in citizens. These checkpoints served to educate Tŝilhqot'in and non-Tŝilhqot'in neighbours and visitors to the territory about travel restrictions and protective measures that the Nation had in place to protect its members from exposure to disease. Meanwhile, they monitored traffic onto and off of reserves. Every day, checkpoint staff explained the emergency measures, implored people to abide by them, and withstood verbal abuse. For months Tŝilhqot'in staff and leaders worked with provincial and federal governments to have these checkpoints recognized—*and funded*—as legitimate measures. Eight months into the pandemic and after countless hours of advocacy, the Province amended its policy to make First Nations' checkpoints an eligible emergency response expense under certain conditions. It was a welcome policy change, but one that came long after the Tŝilhqot'in had discontinued the checkpoints because of the mounting costs borne by the communities.

The Tŝilhqot'in Nation is comprised of six communities spread over a large swath of territory in central interior BC as well as a large off-reserve population. As a Nation, the Tŝilhqot'in exercise jurisdiction over their *nen*, which means the entirety of the Nation's traditional, unceded territory, including its land, water, and resources. In 2014, the Supreme Court of Canada declared Aboriginal title to a portion of this *nen* under section 35—a first in Canada.[2] The Tŝilhqot'in National Government (TNG) represents the Nation and advances its right to self-determination. TNG's co-authors are two white, settler academics—an anthropologist and a legal scholar—who have worked with TNG since the aftermath of the 2017 wildfires, when they were invited to support the Nation's efforts to document and analyze the jurisdictional challenges revealed in these instances of crisis. We have co-authored two reports for the Nation with Crystal Verhaeghe (ʔEsdilagh).[3] We continue to work in partnership with TNG to support its work to advance Tŝilhqot'in authority through crisis and beyond it.

Drawing on the research we have done across both of these reports and incorporating insights from critical Indigenous scholarship, we show how emergencies illuminate historic and evolving relationships between Crown governments and Indigenous Peoples in Canada. Specifically, our article is about the reactions of the Canadian state to the exercise of Tŝilhqot'in jurisdiction in times of crisis: the hidden and not-so-hidden policies and practices that emerge when British Columbia and Canada respond to extreme events; the contradictions between public and formal recognition of Tŝilhqot'in jurisdiction and the reality on the ground; and the implications of the jurisdictional questions left unanswered by section 35 of *The*

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

3 Crystal Verhaeghe, Emma Feltes, and Jocelyn Stacey, *Nagwediẑk'an gwaneŝ gangu ch'inidẑed ganexwilagh (The Fires Awakened Us)* (Williams Lake: Tŝilhqot'in National Government, 2019) http://www.tsilhqotin.ca/Portals/0/PDFs/2019_TheFiresAwakenedUs.pdf [Wildfire Report]; Emma Feltes, Jocelyn Stacey, and Crystal Verhaeghe, *Dada Nentsen Gha Yayastig/Tŝilhqot'in the time of COVID: Tŝilhqot'in Ways to Protect our People* (Williams Lake: Tŝilhqot'in National Government, 2019) available at: https://www.tsilhqotin.ca/wp-content/uploads/2021/03/TNG-COVID-REPORT-FINAL.pdf [Pandemic Report].

https://doi.org/10.1017/cls.2023.2 Published online by Cambridge University Press

Constitution Act, 1982. The RCMP's threats of child apprehension in the 2017 wildfires and the consternation in response to Indigenous checkpoints during the pandemic were national news—part of the shock and awe portrayal of emergencies as exceptional events. However, we argue, these are not exceptional responses. In fact, this article argues that these responses are revealing of deeply engrained assumptions about the Canadian state and its relationship with Indigenous Peoples. As we explain, emergencies highlight constitutional habits, the patterns of public decision-making that emerge in the immediate response to an emergency, so as to appear automatic.

We argue that these experiences of the Tŝilhqot'in Nation during the wildfires and pandemic reveal the assumption of Crown jurisdiction as an enduring constitutional habit. While headway is being made through policy and negotiation to advance Tŝilhqot'in laws and authority, these have yet to become engrained in the institutional practices of the Canadian state. When crisis strikes, Crown actors default to the well-worn habit of colonialism—specifically the assumption of the Crown's exhaustive jurisdiction and corollary dispossession of Indigenous jurisdiction—by failing to grasp and even thwarting Tŝilhqot'in governance over emergency response.

Part I of this article introduces the idea of constitutional habit and shows how it flows from a range of existing critical literatures on emergency law and governance, including perspectives of Indigenous scholars writing from different Indigenous legal traditions. Part II focuses on the assumption of Crown jurisdiction as the specific constitutional habit at hand, tracking the habitual erasure of Tŝilhqot'in expressions of jurisdiction. Part III identifies a range of ways in which the habit of colonialism is revealed through the Tŝilhqot'in Nation's recent experiences of emergency, and Tŝilhqot'in efforts to exercise their own jurisdiction despite it. The article concludes with an observation about the mutability of habits (even constitutional ones) as we identify glimmers of a different set of practices revealed in these emergencies. It is these alternative habits—habits of coordination—that resonate with Indigenous scholars who emphasize how cultivating responsible relationships of coordination builds capacity to respond not only to emergencies, but also to a changing world.

I. Crisis and Constitutional Habits

Constitutional scholars have long been concerned with the constitutionality of government responses to emergency. Constitutional literatures tend to fixate on and contest the definitional and temporal distinctions between emergency and normalcy.[4] Often underlying these legal and political debates is the sense that crises reveal what has always been there, whether it is the fragility of a polity's commitment to governance under the rule of law or the systemic oppression that has been perpetuated through the state all along.

[4] Karin Loevy, *Emergencies in Public Law: The Legal Politics of Containment* (Cambridge: University of Cambridge Press, 2016).

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Complementing existing notions of "constitutional moments"[5] and "constitutional stories,"[6] this article offers *constitutional habit* as a way of understanding the broader implications of governing in times of crisis. By constitutional habit, we mean the patterns of public decision-making that emerge in the immediate response to an emergency, so as to appear automatic. We will see that this concept of constitutional habit resonates with existing literatures on emergency, including critical Indigenous studies, and speaks directly to the governance relationship between ordinary and extraordinary times.

The definitional question of what is an emergency is one that bedevils constitutional scholars, in spite of reams of research and analysis in emergency management and disaster studies that address this question.[7] The emergencies that are the subject of this article—the 2017 wildfires and the first wave of the COVID-19 pandemic—are conventional emergencies. They have inciting events that pose serious threats to life, livelihoods, and property and which necessitate rapid and coordinated responses to end or mitigate those threats.[8] Moreover, responses to conventional emergencies typically require specific measures that may impinge on individual rights and freedoms, for instance, by restricting travel and the movement of people into regions facing the threat or by appropriating private resources to assist in the emergency response. These are often seen as acceptable because, once the threat recedes, emergency measures are expected to be rescinded, inviting a return to normalcy as their presumed end goal.

These events challenge constitutional scholars to articulate core constitutional commitments and basic constitutional architecture that address the range of potential threats, necessary responses, and opportunities for abuse of power.[9] Decisions to act must be made quickly, often without full information and without the normal channels of deliberation; emergency measures risk eroding the fabric of human rights protection; and, threats can be exploited by those in power either in declaring what constitutes an emergency or by maintaining emergency powers long past when the threat has subsided.

Criticism of these assumptions of exceptionality and temporality in emergency governance comes from many fronts. Indigenous scholars strongly resist what Kyle

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5 Bruce Ackerman, *We the People*, *Volume 1: Foundations* (Cambridge: Harvard University Press, 1991). In addition to Ackerman's work, see Sujit Choudhry, "Ackerman's higher lawmaking in comparative constitutional perspective: Constitutional moments as constitutional failures?" *International Journal of Constitutional Law* 6, no. 2 (2008) 193.

6 Eric M. Adams, "Constitutional Stories: Japanese Canadians and the Constitution of Canada," *Australasian Canadian Studies* 35 (2018) 1–22.

7 See, for example, Loevy, *supra* note 4 at 57–121 (who reviews this literature in detail). Threats such as terrorism and climate change push the boundaries of debate over what is an emergency: Literature on 9/11 and post-9/11 national security threats is voluminous. For one example see Miriam Gani and Penelope Mathew, eds, *Fresh Perspectives on the 'War on Terror'* (Canberra: Australia National University Press, 2008). On climate change, see Jocelyn Stacey, "The Public Law Paradoxes of Climate Emergency Declarations," *Transnational Environmental Law* 11, no. 2 (2022) 291.

8 Craig Forcese and Leah West, *National Security Law*, 2nd ed (Toronto: Irwin Law, 2020), 363.

9 See, e.g., David Dyzenhaus, *The Constitution of Law*: *Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006), John Ferejohn and Pasquale Pasquino, "The Law of Exception: A Typology of Emergency Powers," *International Journal of Constitutional Law* 2 (2004): 210.

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Whyte calls "crisis epistemology."[10] He points to the assumptions of "unprecedentedness" and "urgency" as what drive crisis epistemology: decision-makers justify exceptional and harmful decisions on the basis that action must be taken urgently. Whyte writes, "The presumption of unprecedentedness makes it possible to willfully forget certain previous instances or lessons related to a crisis" and the presumption of urgency means that "certain harmful consequences of actions to humans or any other beings, entities, or systems are considered to be unfortunate, but acceptable."[11] Indigenous scholars further document how settler governments use crisis to perpetuate colonialism by ignoring past relationships (to Indigenous Peoples and land) and treating colonial harms as necessary, minimal sacrifices. For instance, historic and contemporary energy crises have been used to justify the construction of major dams in North America, displacing Indigenous Peoples.[12]

Robert YELḰÁTŦE Clifford reminds us that Indigenous Peoples have their own conceptions of disaster harm and their own responses to emergency, emanating from distinct relationships to land.[13] Whyte highlights a similar relationality, describing how, instead of crisis, Indigenous knowledge emphasizes an "epistemology of coordination [which] refers to ways of knowing the world that emphasize the importance of moral bonds—or kinship relationships—for generating the (responsible) capacity to respond to constant change."[14] He argues that coordination is just as focused on addressing potential crises as settler responses, highlighting, for instance how urban clan mothers cultivate kinship networks providing housing, food, ceremony and a measure of stability amidst dynamic and changing urban Indigenous communities.[15] For Whyte, coordination emphasizes the ongoing work of developing, maintaining and strengthening kinship relations at all times. Through this ongoing work, instances of crisis are then guided by an existing epistemology which sustains—and does not exceptionally depart from—these relational responsibilities.

Other literatures also criticize assumptions of exceptionality and urgency baked into persistent conceptions of emergency (albeit from perspectives that presume state authority and ignore Indigenous jurisdiction). For instance, emergency management scholarship emphasizes that, at a technical and operational level, prevention, mitigation and preparedness are essential aspects of disaster management.[16] These stages of disaster management are continual, occurring outside of

[10] Kyle Whyte, "Against Crisis Epistemology," in *Routledge Handbook of Critical Indigenous Studies*, ed. Brendan Hokowhitu *et al.* (London: Routledge, 2020), 54–55.

[11] *Ibid.* at 55.

[12] *Ibid.* at 56 (speaking about the Dalles dam in Oregon and Kinzua dam in Pennsylvania). See also: Sarah Cox, *Breaching the Peace: the Site C Dam and a Valley's Stand Against Big Hydro* (Vancouver: On Point Press, 2018) (on Site C Dam in northern British Columbia).

[13] Robert YELḰÁTŦE Clifford, "W̱SÁNEĆ Legal Theory and the Fuel Spill at SELEĸTEŁ (Goldstream River)" (2016) 61:4 McGill Law Journal 755.

[14] Whyte, *supra* note 10 at 53.

[15] *Ibid.* at 58 citing to Susan Lobo, "Urban Clan Mothers: Key Households in Cities," *American Indian Quarterly* 27 (2003): 505–522.

[16] Jocelyn Stacey, "Vulnerability, Canadian Disaster Law, and the Beast," *Alberta Law Review*, 55, no. 4 (2018): 853.

https://doi.org/10.1017/cls.2023.2 Published online by Cambridge University Press

immediate emergency response, where planning, training and rehearsal for the next event are key. Moreover, modern disaster management focuses on "mainstreaming" risk reduction—the practices, policies and resources that reduce individual and community vulnerability to harm.[17] Relatedly, critical scholars emphasize the ways in which emergency events only amplify the "permanent disaster" of the accumulation of daily hazards experienced by those living under conditions of structural oppression.[18] Eliminating individual and systemic racism in the health care system could be understood as disaster risk reduction because racism exacerbates the harm to Indigenous Peoples and racialized individuals during extreme events.

Legal and political philosophers also resist and complicate distinctions between normalcy and emergency. David Dyzenhaus, for instance, rejects the exceptionality paradigm. In his view, conceding that a substantive notion of the rule of law cannot or should not govern emergencies means ceding the moral resources needed to make the rule of law relevant again when the emergency subsides and an emboldened government continues to assert newfound powers.[19] The emergency, in Dyzenhaus's view, can and must be governed by substantive rule-of-law protections, which must be well-established through formal laws and public institutions long before instances of crisis so that they can guide the responses to it.

Philosopher Elaine Scarry, too, confronts assumptions about exceptional action in moments of crisis. Countering this assumption, she brings a useful analytical frame: *habit*.[20] Responses to extreme events or threats, she argues, are guided by thinking, deliberation, and practice. It is just that this work happens long before the acute emergency response, such that the response appears automatic, habitual.[21] In this way, the response to an emergency is not unique or exceptional, but rather is connected to—indeed, almost predetermined by—what has come before.[22] Scarry emphasizes how habit directs our attention to the minutiae of daily life. This level of specificity is where emergency response plays out: the attention to detail (or lack thereof) right down to who is responsible for each specific tool—the sharpening of the fire axe, the filing of the emergency plan.[23] It is the rehearsal of the specific, the

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17 *UNGA, Sendai Framework for Disaster Risk Reduction 2015–2030,* GA Res 69/283, UNGAOR, 69th Sess, Supp No 19(c), UN Doc A/RES/69/283, (2015). For a historical account of how disaster management is of a piece with state formation see Saptarishi Bandopadhyay, *All is Well: Catastrophe and the Making of the Normal State* (Oxford: Oxford University Press, 2022).

18 Rachel E. Luft, "Governing Disaster: The Politics of Tribal Sovereignty in the Context of (Un) Natural Disaster," *Ethnic and Racial Studies* 39, no. 5 (2016): 803. See also: Susan L. Cutter, "Vulnerability to Environmental Disasters," *Progress in Human Geography* 20, no. 4 (1996): 529. (It is worth noting, however, that in engaging with structural oppression, disaster scholarship tends to position Indigenous Peoples alongside other racialized, marginalized or minority groups as inequitably-served subjects of the state.)

19 Dyzenhaus, *supra* note 9.

20 Elaine Scarry, *Thinking in an Emergency* (New York: W.W. Norton & Co, 2011).

21 *Ibid.* at 81–82. In this way, the habits revealed in emergency resonate with Mackey's metaphor of "settled expectations," which she describes as "the taken-for-granted settler frameworks" or "embedded, unconscious expectations [of settlers] of how the world will work": Eva Mackey, *Unsettled Expectations: Uncertainty, Land and Settler Decolonization* (Halifax & Winnipeg: Fernwood Publishing, 2016), 11.

22 See also Mackey, *supra* note 21 at 17–18 (emphasizing that settler reactions to Indigenous land claims should not be seen as extreme or unusual).

23 Scarry, *supra* note 20 at 42, 54, 108.

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cultivation of particular practices that resurface in times of crisis. The only question is which habits are engrained in advance of the crisis?

Habit, invoked by Scarry to analyze state emergency governance, has some resonance with Indigenous scholars on revitalizing Indigenous laws. Reflecting on the teachings of a Nuu-chah-nulth leader, Johnny Mack writes, "One central theme in Wickaninnish's message … is *practice:* 'Do it again and again. Ingrain it deeper and deeper.' This is a common theme among our people, who tend to understand the world as a series of relationships between performative agents. We understand things through what they do rather than identifying any particular essences of their being."[24]

In the Nuu-chah-nulth legal tradition, practice is needed to reclaim Indigenous stories and entrench Indigenous laws. In the Tŝilhqot'in context, we also saw how it is this actual practice of Indigenous law that the state appears incapable of recognizing *as law*. It is the Crown, then, who needs "practice" in order to comprehend Indigenous law, and to supplant old (colonial) habits with new ones.

The next two parts identify how constitutional habits are framed through formal legal instruments and rehearsed through myriad informal engagements between Indigenous Peoples and the Crown. We call these constitutional habits because they are constitutive of ongoing legal relationships between Peoples and how these relationships play out on the ground. As we will see, section 35 and its judicial interpretation may help to frame and shift constitutional practice. But as Darlene Johnston writes, "Perhaps the biggest adjustment required [by section 35] is one of attitude. Many government officials have to unlearn the attitudes fostered by the old stories of assimilation and substitution. In providing constitutional protection for treaty and aboriginal rights, albeit protection that is limited and uneven, section 35 has created a space for aboriginal stories within the Canadian constitutional story."[25]

Identifying colonial habits helps us to see the ways in which section 35, forty years on, may have created the space for cultivating new and different ones.

II. Tŝilhqot'in Jurisdiction: Kicking the Colonial Habit

The constitutional "habit" to which we have thus far alluded is the colonial practice of dispossessing Indigenous jurisdiction, while shoring up that of the Crown. This part will further establish this habit, engrained long before the 2017 wildfires and COVID-19 pandemic, and persisting—albeit in modified form—through the patriation of the Canadian Constitution and the *Tsilhqot'in* title case. It will also examine how Tŝilhqot'in expressions of authority have consistently pushed against such habit, offering a different constitutional relationship with the Crown.

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[24] Johnny Mack, "Hoquotist: Reorienting through Storied Practice," in *Storied Communities: Narratives of Contact and Arrival in Constituting Political Community*, ed. Hester Lessard, Rebecca Johnson, and Jeremy Webber (Vancouver: UBC Press, 2011), 304.

[25] Darlene Johnston, "Aboriginal Rights and the Constitution: A Story within a Story?" in *Canadian Constitutional Dilemmas*, ed. Denis N. Magnusson and Daniel A. Soberman (Kingston: Institute of Intergovernmental Relations, 1997), 145.

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1. Colonialism as Constitutional Habit

Describing colonialism as constitutional habit is not to imply that the "story"[26] of Canada's Constitution is wholly colonial. Indeed, Indigenous legal and political literatures point to plural constitutional histories and narratives that inform, underlie, and/or bust through Canada's legal foundation.[27] This includes anti-colonial legal traditions where Crown jurisdiction was not necessarily a given, including constitutive treaty relationships.[28]

Instead, we mean a proclivity enabled by the enactment of Part VI of the *British North America Act* (now *The Constitution Act, 1867)*, on the presumption that legislative powers were exhaustively assigned to Parliament and the provinces. Here the term "habit" is especially appropriate, as it was in the application of these sections,[29] that the dispossession of Indigenous jurisdiction became normalized. By the late nineteenth century, the broad vestment of "Indians and lands reserved for Indians" in Parliament under section 91(24) took a distinctly oppressive turn, as Canada expanded the *Indian Act* while usurping "Indian authority over territory"[30] to provincial benefit.

While it is beyond our scope to survey the next century of policy and statute, it is fair to say that this habit would be rehearsed and engrained in government institutions over time, even when the political landscape turned from one of outright oppression to seemingly more liberal forms of assimilation and accommodation. For example, Peter Kulchyski[31] and Sally Weaver[32] respectively argued

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[26] Using a term shared by Johnston and Adams to describe the narratives that give constitutional tenets meaning.

[27] John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016); James (Sákéj) Youngblood Henderson, Marjorie Benson, and Isobel Findlay, Aboriginal Tenure in the Constitution of Canada (Saskatoon: Purich Publishing, 2000); Keira L. Ladner and Michael McCrossan, "The Road Not Taken: Aboriginal Rights after the Re-Imagining of the Canadian Constitutional Order," in *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms*, ed. James B. Kelly and Christopher P. Manfredi (Vancouver: UBC Press, 2010), 263–283.

[28] Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014); Aimée Craft, *Breathing Life into the Stone Fort Treaty: An Anishnabe Understanding of Treaty One* (Vancouver: UBC Press, 2013); Emma Feltes and Sharon H. Venne, "Decolonization, Not Patriation: The Constitution Express at the Russell Tribunal," *BC Studies* 212 (2022): 65–102; Heidi Kiiwetinepinesiik Stark, "Changing the Treaty Question: Remedying the Right(s) Relationship," in *The Right Relationship; Reimagining the Implementation of Historical Treaties*, ed. John Borrows and Michael Coyle (Toronto: University of Toronto Press, 2017), 248–276.

[29] Some have argued section 91(24) was meant only to assign to Parliament administration of the Crown's duty to protect Indigenous consent from provincial incursion, per the Royal Proclamation of 1763; see Marie Smallface Marule, ed., *First Nations, States of Canada & United Kingdom: Patriation of the Canadian Constitution* (Lethbridge: World Council of Indigenous Peoples (1981: report commissioned by Constitutional Committee of the Chiefs of Alberta)); Emma Feltes, *We Don't Need Your Constitution: Patriation and Indigenous Self-determination in British Columbia* (PhD Dissertation, University of British Columbia, 2021).

[30] Marule, *supra* note 29.

[31] Peter Kulchyski, "Anthropology in the Service of the State: Diamond Jenness and Canadian Indian Policy," *Journal of Canadian Studies* 28, no. 2 (1993): 21–50.

[32] Sally Weaver, "The Hawthorn Report: Its Use in the Making of Canadian Indian Policy," in *Anthropology, Public Policy and Native Peoples in Canada*, ed. Noel Dyck and James B. Waldram (Kingston: McGill-Queens University Press, 1993), 75–97.

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that post-war shifts towards social and economic equality only served to tighten the governments' control over Indigenous life, though this time through service *provision* rather than alienation—a tactic that came to a head in the infamous White Paper of 1969.[33]

By the time patriation came to monopolize the ambitions of Prime Minister Pierre Elliott Trudeau in the late 1970s, Indigenous Peoples, including many Tŝilhqot'in, were more than ready to break this habit of Canada's to assume blanket authority over their lands and lives. Indeed, the issue of jurisdiction (referred to variously as self-government, self-determination, consent, etc.) became a crux in their opposition to patriation between 1978 and 1982.[34]

Trudeau's 1978 proposal, "A Time for Action," appeared to consolidate jurisdiction within the existing federalist structure, while Indigenous rights, treaties, and jurisdiction were unceremoniously erased by omission.[35] The response was swift. Indigenous Peoples in British Columbia, for example, declared their own "state of emergency"[36] under the auspices of the Union of British Columbia Indian Chiefs (UBCIC). It was a soundless emergency, borne not of stated policy but of casual, habitual exclusion, "so subtly hidden within Trudeau's proposal that only under close scrutiny can the threat be seen."[37]

Not to be swept under the rug, UBCIC chartered two trains from Vancouver to Ottawa, on a ride that came to be known as the "Constitution Express." A large contingent of Tŝilhqot'in Chiefs, Elders, and families travelled by bus from Williams Lake to Jasper to join the train for its cross-country trek. Patriation, those on the Express argued, could not proceed without the consent of Indigenous Nations, on top of whose self-determination Canadian sovereignty was superimposed.

By the time the *Constitution Act, 1982*, arrived in Canada, it included a new clause—section 35—which "recognized and affirmed" aboriginal and treaty rights. Whether this open-ended rights clause included a right to self-government, or had any capacity to curb Canada's habitual denial of Indigenous Peoples' jurisdiction, was the very question section 35 left unaddressed—a topic shelved for future definition under section 37. When Canada failed to shake this habit over four First Ministers Conferences between 1983 and 1987, the question was further deferred. To this day such questions are a legacy of patriation that continue to unfold, sometimes through watershed Supreme Court decisions and sometimes, we will see, in the depths of emergency response.

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33 *Statement of the Government of Canada on Indian Policy* (Ottawa: Government of Canada, 1969), https://epe.lac-bac.gc.ca/100/200/301/inac-ainc/indian_policy-e/cp1969_e.pdf.

34 Feltes, *supra* note 29.

35 Canada, Minister of Supply and Services, *A Time for Action: Toward the Renewal of the Canadian Federation*, by Pierre Elliott Trudeau (Ottawa: Minister of Supply and Services, 1978).

36 Sarah A. Nickel, *Assembling Unity: Indigenous Politics, Gender, and the Union of BC Indian Chiefs* (Vancouver: UBC Press, 2019), 151; *Indian World* "State of Emergency," 3, no. 7 (October 1980), Union of BC Indian Chiefs Constitution Express Digital Collection, available at: http://constitution.ubcic.bc.ca/node/2.

37 Union of British Columbia Indian Chiefs, UBCIC 1980, ii (*Indian Nations; Self-Determination or Termination* Union of BC Indian Chiefs Constitution Express Digital Collection http://constitution.ubcic.bc.ca/node/122).

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2. *Tŝilhqot'in Expressions of Jurisdiction*

The Tŝilhqot'in, of course, have their own constitutional habits, and a long history of advocating, asserting, and offering these as the basis of a different constitutional relationship with British Columbia and Canada. Within these, section 35 plays a part, albeit sometimes a small one.

One year after patriation, British Columbia issued a licence to Carrier Lumber to clearcut a swath of Tŝilhqot'in *nen* particularly significant to the community of Xeni Gwet'in. Shortly after, the General Assembly of the Chilcotin Nation released a Declaration of Sovereignty. Tracing how Tŝilhqot'in sovereignty was encroached and jurisdiction ignored, the Declaration affirmed plans to re-establish Tŝilhqot'in authority to govern both "our territory and our people."[38] Committing to clear the *nen* of "the laws enacted by Canada and British Columbia," it was nonetheless generous, extending an invitation to Canada to negotiate new "terms of union."[39]

This opportunity to break from colonial habit would go unanswered. Instead, after a series of blockades and unsuccessful negotiations with the Province, by 1989 Xeni Gwet'in brought forward the "Nemiah Trapline Action" to the British Columbia Supreme Court, to prohibit commercial logging and prove Aboriginal rights and, eventually, title. At this point, section 35 litigation was still in its infancy.[40]

In parallel to the litigation, the community prepared to enact its own inherent laws in the form of the Nemiah Declaration. While banning logging and mining and limiting flooding and dam construction, the Nemiah Declaration also explicitly described the ways in which the community was prepared to manage and conserve the land for the purposes of *sharing* it with "non-natives."[41] This would include an extensive permitting system, subject to Tŝilhqot'in conservation law, for activities like hunting, fishing, camping, and other forms of visitation to the territory. The Nemiah Declaration again invited a change in habit on the part of the Crown.

Despite these clear expressions of Tŝilhqot'in authority, it would take the Supreme Court of Canada (SCC) another twenty-five years to consider whether the Tŝilhqot'in had any right, within Canadian law, to decide how the *nen* is used and whether Canada's and BC's laws should continue to have effect where Tŝilhqot'in title is declared. By the time the *Tsilhqot'in*[42] case came before the SCC, an extensive body of jurisprudence had evolved. Building on the precedent laid by the Gitxsan and Wet'suwet'en establishing the test for Aboriginal title in *Delgamuukw*, the Tŝilhqot'in were the first Nation to meet it, gaining a declaration to 1,750 km^2 of their *nen*, and rights that would apply to an even larger area. And yet, despite

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[38] General Assembly of the Chilcotin Nation, *A Declaration of Sovereignty,* 10 December 1983, https://www.tsilhqotin.ca/wp-content/uploads/2020/12/1983_Agreement_GeneralAsseblyofTN_DeclarationSovereignty.pdf.

[39] *Ibid.*

[40] *R v Sparrow* [1990] 1 SCR 1075, 1990 CanLII 104 (SCC), the first decision to apply s 35, was rendered the following year.

[41] Tŝilhqot'in Nation, "Affirmation of the Nemiah Declaration," (19 March 2015), https://www.tsilhqotin.ca/wp-content/uploads/2020/11/Nemiah-Declaration_English_Signed.pdf at 2.

[42] *Tŝilhqot'in, supra* note 2.

https://doi.org/10.1017/cls.2023.2 Published online by Cambridge University Press

coming more than three decades after the battle over patriation, section 35 litigation had still scarcely addressed Indigenous jurisdiction.[43]

In the *Tsilhqot'in* decision—notably a title, not a rights, decision—the SCC again skirted the issue of jurisdiction. On the one hand, the Court found that Aboriginal title meant more than mere use and occupation, including the right to decide how the land is used.[44] Confoundingly, however, Crown title would remain underlying, but not as a beneficial interest.[45] If the trees, then, were no longer "Crown timber,"[46] the provincial *Forest Act* could have no bearing in managing them, appearing to leave the Tŝilhqot'in to hold the jurisdictional cards.

However, in some particularly telling statements, perhaps reflective of the hold of constitutional habit, the Court defended the application of provincial legislation right up to the very moment that Aboriginal title was declared. For "to proceed otherwise," McLachlin C.J. wrote for the majority, "would have left *no one in charge* of the forests,"[47] leaving them "wholly unregulated."[48] Conjuring allusions to *terra nullius*, the effect of such statements is to forget that Tŝilhqot'in jurisdiction was already present all along, in parallel to the Province.[49] It was present in 1983, when the Chiefs described the terms of their sovereignty, and it was present in 1989, when Xeni Gwet'in prepared to operationalize their authority in the Nemiah Declaration. But, falling back into the habit of assumed Crown jurisdiction, the SCC presumed provincial exclusivity (under s. 92) until the Court itself deemed otherwise. By this logic, Indigenous jurisdiction can only materialize at the moment of Crown recognition.[50] Notably, this recognition is defined not by the substantive, inherent, or continuous[51] aspect of the Nation's own laws and traditions. Rather, it is defined as a vacuum[52]—the negative space that opens up when Crown authority is subtracted from the land.[53] Only then, having been emptied of provincial legislation, could Indigenous jurisdiction be given content.[54]

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43 In the one case that expressly addressed the right to self-government, the Supreme Court shrunk this right to its smallest irreducible unit—the specific activity over which jurisdiction was being exercised—thus avoiding what it deemed to be the "excessive generality" of "a broad right to manage the use of… reserve lands": *R v Pamajewon*, [1996] 2 SCR 821, 1996 CanLII 161 (SCC) at para 37.

44 *Tŝilhqot'in, supra* note 2.

45 Exactly how it came to be underlying is a question the Courts have avoided. Michael Asch and Patrick Macklem "Aboriginal Rights and Canadian Sovereignty," *Alberta Law Review* 29, no. 2 (1991): 498 have pointed out that this argument relies on some version of *terra nullius.*

46 *Tŝilhqot'in, supra* note 2 at para 116.

47 *Ibid.* at para 114 (emphasis ours).

48 *Ibid.* at para 115.

49 See Gordon Christie, "Who Makes Decisions over Aboriginal Title Lands?" *UBC Law Review* 48, no. 3 (2015): 743 for a similar argument.

50 See John Borrows, "The Durability of Terra Nullius: Tsilhqot'in Nation v British Columbia," *UBC Law Review* 48, no. 3 (2015): 701.

51 To use the Court's own language.

52 Kent McNeil, "Aboriginal Title and the Provinces after Tsilhqot'in Nation," *Supreme Court Law Review* 71 (2015): 67 writes about this logic of the Court as serving to protect the Province's past actions from liability.

53 This is a strange reversal of the Court's definition of Crown title as "what is left when Aboriginal title is subtracted from it" (para 70), a point touched on by Kent McNeil, "Indigenous Law and Aboriginal Title," *Osgoode Legal Studies Research* (2016): 183.

54 It remains possible for federal and provincial governments to "justifiably" infringe title (*Tsilhqot'in*, *supra* note 2 at para 76–78)

https://doi.org/10.1017/cls.2023.2 Published online by Cambridge University Press

In the wake of the decision, the Tŝilhqot'in Nation stared into this perceived vacuum, and set about filling it, again spelling out their jurisdiction throughout their *nen* for Canadian and British Columbia governments. Without the financial resources to immediately take over administration of the title lands, the Nation nevertheless began to plan a transition towards its full management and control. A review of some of the key milestones to come after the SCC decision helps to trace the kinds of discussion that began amongst Tŝilhqot'in, provincial, and federal governments, and whether these established the kind of habit-breaking structures and relationships needed to support Tŝilhqot'in jurisdiction.

In September of 2014, shortly after the SCC decision, Xeni Gwet'in and the TNG signed a Letter of Understanding with British Columbia outlining initial steps to transition the title area to Tŝilhqot'in management, with buy-in from senior-level bureaucrats, Ministers, and staff. Two years later, they signed the *Nenqay Deni Accord*, a document both more sweeping and more telling of the kinds of tensions at play, aspiring to reduce and resolve jurisdictional "conflict."[55] Both parties committed to a vision in which the "Tŝilhqot'in Nation governs itself… pursuant to Tŝilhqot'in governance structures, laws and values… including matters of Tŝilhqot'in culture, heritage, identity, language and institutions; and… with respect to lands and resources."[56] Moreover, this was not constrained to the title lands. British Columbia agreed to identifying additional areas of *nen*—beyond the title area and reserve lands—"to be under the ownership, control and management of the Tŝilhqot'in Nation."[57] The structures of colonial habit, at least, were beginning to be disassembled.

By January 2017, Canada was also brought into the fold, signing a new Letter of Understanding with the Nation. Appearing to prioritize adaptability over entrenched habits, this one would commit to "a flexible and solutions-based approach to develop opportunities and arrangements… even if they differ from, or do not fit easily into, existing regimes, laws, programs, policies, or structures."[58] This was perhaps Canada's most explicit promise to break from existing practice in its attitude towards Indigenous jurisdiction.

On the brink of the 2017 wildfires, new ground was being laid—in principle, at least—to supplant colonial habits with a new constitutional relationship between all three governments.

III. Disaster Colonialism: Back in the Habit

When wildfire struck British Columbia on July 7, 2017, provincial and federal governments mobilized swiftly, with an equally swift snap back into old colonial

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55 "Nenqay Deni Accord," *Agreement Between Her Majesty the Queen in the Right of the Province of British Columbia and The Tŝilhqot'in Nation,* 11 February 2016, https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/other-docs/nenqay_deni_accord.pdf at 2.

56 *Ibid.* at 7–8.

57 *Ibid.* at 2.

58 *Letter of Understanding Between The Tŝilhqot'in Nation and Her Majesty the Queen in Right of Canada,* 27 January 2017, https://www.rcaanc-cirnac.gc.ca/eng/1493905807283/1529500971080, at item 11.

https://doi.org/10.1017/cls.2023.2 Published online by Cambridge University Press

habit. In conducting research with Tŝilhqot'in communities through two disasters —the fires, and later the first wave of the COVID-19 pandemic—we were each time stunned by the mechanical way officials reverted to their own jurisdiction. To buttress it, they trotted out old colonial tools: threatening child apprehension and withholding services, funding, and information. The first part of this section focuses on our observations of this phenomenon in Tŝilhqot'in territory over two crises. That this was the case even for the Tŝilhqot'in—a Nation who, unlike many others, has had the unique opportunity to formally describe and advance its jurisdiction over several years—is particularly telling. And yet, pushing against these old constitutional habits, we end by highlighting the power of the Tŝilhqot'in to cultivate new habits of coordination, creating, even out of disaster, novel opportunities to assert their own law and political authority.

1. *Crisis and Colonial Habit*

The night the wildfires began, the Cariboo Regional District activated its Emergency Operations Centre (EOC), bringing with it a bevy of bureaucrats and firefighters new to the territory. When then Yunesit'in Chief Russell Myers Ross showed up at the EOC that evening, he found himself surrounded by state-of-the-art communications equipment projecting images of more than thirty-five fires that had sprung up within an hour's time.[59] "I realized that we weren't going to be a priority, and that's the biggest thing I got out of that night."[60] To manage their citizens' needs, Tŝilhqot'in communities most affected by the fires also mobilized swiftly, converting band offices into their own "emergency ops" centres.[61] TNG also activated its EOC to coordinate response across the Nation. However, getting these recognized and resourced was a different story. Proving that old habits die hard, Tŝilhqot'in jurisdiction was made to disappear once again, buried under new bureaucratic process, policy, and personnel, seemingly self-assured in their own overriding authority.

The Province announced a state of emergency, effectively clearing the land of "ordinary" (i.e. non-emergency) laws, while empowering the Lieutenant Governor in Council (provincial Cabinet) or Attorney General to assume jurisdiction over police and firefighting services,[62] the Minister to enact special emergency measures,[63] and service providers to move unhindered by normal government process. Under these sweeping powers, the Province issued a series of ever-expanding evacuation orders for the region and established roadblocks to enforce them, staffed by RCMP.

For the Tŝilhqot'in, however, this clearing the land of laws held echoes of *terra nullius*. Provincial emergency powers exercised under the *Emergency Program Act*

[59] This number would grow to 176 within 48 hours: BC Wildfire Service, "2017 Wildfire Season Summary", https://www2.gov.bc.ca/gov/content/safety/wildfire-status/about-bcws/wildfire-history/wildfire-season-summary.
[60] Russell Myers Ross, interview by Emma Feltes, 11 July 2017.
[61] Dwayne Emerson, interview by Emma Feltes, 12 July 2017.
[62] *Emergency Program Management Regulation*, BC Reg 477/94, s 9.
[63] *Emergency Program Act*, RSBC 1996, c 111, s 10.

https://doi.org/10.1017/cls.2023.2 Published online by Cambridge University Press

were implemented in a manner that utterly ignored the complex web of overlapping jurisdiction in Tŝilhqot'in *nen*, whether Tŝilhqot'in laws, section 35 rights and title, or Band Council authority under the federal *Indian Act*.[64] This included Tŝilhqot'in knowledge and stewardship of its *nen*, and traditional practices of wildfire management, often summarily ignored on the fire line. Tensions flared between outsider fire crews, the communities' fire crews, and their provincial overseers—incident commanders who rotated in from elsewhere every two weeks. This resulted in avoidable damage to wildlife, medicinal plants, culturally significant sites, cabins, and burial grounds.[65] Indeed, impacts to section 35 rights—affirmed in the *Tsilhqot'in* case—seemed to have little bearing on the province's response to the emergency.

Even the recognition of federal jurisdiction proved challenging. Provincial evacuation orders do not automatically apply to reserve lands, which in Canadian law are federal jurisdiction. Under the federal *Indian Act*, each community issued a band council resolution (BCR) declaring its own state of emergency, "just to get the money to start flowing" to cover their most immediate needs.[66] When the community of Tl'etinqox opted not to include an evacuation order, breaking from the Province's course of action, this threw off officials, eventually resulting in open conflict with the RCMP.

Tl'etinqox Chief Alphonse, working under both Tŝilhqot'in authority and the *Indian Act*, put in place a relocation order for vulnerable citizens—a clear demonstration of the community's plans to protect children.[67] But, seemingly unaware of Canada's own laws (not to mention Tŝilhqot'in ones, and commitments made in the Nenqay Deni Accord[68]), the RCMP snapped back to the assumption of provincial jurisdiction, threatening to apprehend children as a way to force the community's full evacuation. This was not an empty threat, as officers misled a Band Councilor into identifying where children resided, physically marking those houses. This manipulation of presumed vulnerability erased Tŝilhqot'in jurisdiction and reinforced provincial authority by brandishing the ultimate colonial tool: apprehending Indigenous children.[69] The battle between Chief Alphonse and the RCMP escalated, with each threatening dueling roadblocks—one intended to clear community members out, and the other to keep RCMP from coming in.

The erasure of Tŝilhqot'in jurisdiction was accompanied by the erasure of Tŝilhqot'in people, many of whom stayed in community to fight fires, protect vital

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64 Kirk helpfully characterizes this lack of rights recognition as the "obligation gap" in emergency management: Courtney Kirk, *The Sound of Silence: First Nations and British Columbia Emergency Management* (LLM Thesis, University of Saskatchewan, 2015) [unpublished], 12–13.

65 Wildfire Report, *supra* note 3 at 32.

66 Russell Myers Ross, interview by Emma Feltes, 11 July 2017.

67 Wildfire Report, *supra* note 3 at 100.

68 In which the Province commits to provide "adequate support for Tŝilhqot'in children and families, delivered and managed by Tŝilhqot'in Communities, in accordance with Tŝilhqot'in laws and values…": "Nenqay Deni Accord," *supra* note 55 at 9.

69 Apprehending Indigenous children perpetuates the legacies of residential schools and the sixties scoop, assimilative practices that have since been described as cultural genocide by the Truth and Reconciliation Commission, the Pope and others.

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infrastructure, and support those doing so. As health care and other services were pulled without notice, RCMP roadblock staff prevented communities from filling this gap themselves, stopping supplies, medications, equipment, and band staff from getting through. Chief Myers Ross found himself engaged in an incessant jurisdictional negotiation, creating from scratch authorization forms, permits, and ultimately spending hours on the phone to "double verify" their legitimacy—even the community's fire crew. "I couldn't believe the RCMP were turning down fire crews. People that legitimately had the uniforms on, equipment in their truck, ready to go fight fires, and you have RCMP turning them back."[70]

This contrasted with the promises made directly by Carolyn Bennett, then Minister of Indigenous and Northern Affairs, who assured Myers Ross personally that "funding will not be an issue, if you need fire crews on reserve, build the team that you need, get the equipment that you need."[71] Further proving the disjuncture between senior lawmakers and habitual, on-the-ground practice, not only were Tŝilhqot'in staff questioned at roadblocks, but the communities' expense sheets were scrutinized by at least four different government agencies, generating disputes that took years to resolve.

However, the high-profile jurisdictional issues raised during the 2017 wildfires, and TNG's refusal to let them drop, resulted in significant progress post-fire. In 2018, TNG negotiated a first-of-its-kind tripartite *Collaborative Emergency Management Agreement* (CEMA) with British Columbia and Canada,[72] precipitating province-wide agreements in recognition of First Nations leadership.[73] CEMA facilitates ongoing tripartite conversations that support Tŝilhqot'in leadership in coordinated emergency management. It has the potential to be a framework for cultivating new constitutional habits of cooperation and coordination. Unfortunately, despite this progress, the coming of the COVID-19 pandemic proved that these changes had yet to become habitual, with colonial habit re-emerging during the first wave of the pandemic.

In March 2020, TNG again activated its EOC and began a coordinated response to the COVID-19 pandemic. As staff and leadership worked steadily to implement precautionary measures to protect Elders, vulnerable community members, and all Tŝilhqot'in, an early "scare" underscored the necessity of proper support and coordination from federal and provincial partners. The release of an incarcerated Tŝilhqot'in citizen from the Mission Institution, which at the time was experiencing

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70 Russell Myers Ross, interview by Emma Feltes, 11 July 2017.

71 *Ibid.*

72 *Collaborative Emergency Management Agreement between the Tŝilhqot'in Nation and Her Majesty the Queen in Right of Canada,* 19 February 2018, https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/tng_collaborative_emergency_management_agreement_signed.pdf and *Collaborative Emergency Management Agreement between the Tŝilhqot'in Nation and Her Majesty the Queen in Right of Canada,* 19 February 2022, https://www.tsilhqotin.ca/wp-content/uploads/2022/07/2022_Collaborative_Emergency_Management_Agreement.pdf.

73 British Columbia Assembly of First Nations, News Release, "Canada, British Columbia and First Nations Leadership Council Sign Tripartite Memorandum of Understanding to Improve Emergency Management Services for B.C. First Nations" (27 April 2019), https://www.bcafn.ca/emergency-management-MOU.

https://doi.org/10.1017/cls.2023.2 Published online by Cambridge University Press

the largest outbreak in the province, resulted in exposure scares in a number of Tŝilhqot'in communities.[74]

The lack of communication or any notification to Tŝilhqot'in leadership about the release of this individual exemplified broader issues around the Province's control of COVID data that dragged through the first waves of the pandemic. Unlike other provinces, British Columbia would not provide local case counts,[75] which Indigenous leaders argued were vital for making informed decisions to exercise their jurisdiction and implement pandemic protections. Writing in the *Globe and Mail*, leaders of a number of Central Coast First Nations criticized this paternalism: "Ultimately, holding back potentially life-saving information only maintains a colonial relationship. Non-disclosure to Indigenous governments perpetuates the historic social and legal stigma that Indigenous peoples, societies and legal orders are illegitimate."[76]

It is worth noting just how directly the Province's approach shut out the possibility of Tŝilhqot'in laws and jurisdiction over data management. One of the primary justifications for the Province withholding localized data was the stated need to protect individual privacy rights. Yet the balance between individual privacy and community protection from disease may have been struck differently under Tŝilhqot'in law. Speaking about this balance, Chief Alphonse observed that, in addition to privacy, "if they are Tŝilhqot'in descendants, then those individuals have a responsibility to the community they are from; they have to honour their citizenship rights and responsibilities."[77] The Province's data control dispossessed the Tŝilhqot'in of this jurisdiction to determine the appropriate course of action under Tŝilhqot'in law, and the rights (both individual and collective) which flow from it.

Operating "blindfolded"[78] without this data, Tŝilhqot'in leadership determined —with the support of the Women's Council and Elders—that checkpoints to monitor and educate on travel to and from the communities were the safest measures. The EOC coordinated with leadership and health staff in all six communities to devise and implement checkpoints and appropriate protocols, accounting for the unique geographies and vulnerabilities of each.[79] In most instances, checkpoint staff monitored essential travel onto and off of reserve, provided information about COVID safety protocols, and advised all non-essential visitors to stay away to protect the communities from exposure.

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74 Pandemic Report, *supra* note 3 at 43–44.

75 Not until much later in the pandemic, and after a complaint was filed with the Office of the Information and Privacy Commissioner, did the BC CDC start releasing localized data to the public weekly: Nathan Griffiths, "Health Authorities Release Neighbourhood-Level COVID-19 Data for the First Time," *The Vancouver Sun* (12 May 2021), https://vancouversun.com/news/health-authorities-release-neighbourhood-level-covid-19-data-for-the-first-time.

76 Roxanne Robinson, Danielle Shaw, Marilyn Slett and Wally Webber, "How BC Health Authorities are Undermining Indigenous Governments," *The Globe and Mail,* 8 May 2020, updated 12 May 2020, https://www.theglobeandmail.com/opinion/article-how-bc-health-authorities-are-undermining-indigenous-governments/.

77 Chief Joe Alphonse, interview by Crystal Verhaeghe, 13 November 2020.

78 Robinson et al., *supra* note 76.

79 Pandemic Report, *supra* note 3 at 58.

https://doi.org/10.1017/cls.2023.2 Published online by Cambridge University Press

When asked about Indigenous checkpoints and travel advisories at press conferences, Dr. Bonnie Henry, British Columbia's Provincial Health Officer, was consistently positive, affirming Indigenous jurisdiction and asking British Columbians and travelers to respect measures put in place by Indigenous communities. Behind the scenes, however, finding provincial funding support for these checkpoints was described to us as "a dominant theme"[80] in which initial conversations with provincial officials "went around in circles."[81] The Province's default position—that checkpoints were ineligible for funding—seemed to be driven by doubts about their cost–benefit analysis, hand wringing over extending a benefit to First Nations beyond those provided to local governments (i.e. municipalities), and worries about backlash from non-Indigenous people.[82] Here it is hard not to draw parallels, even tacit and deeply systemic, to racist perceptions of Indigenous communities being a drain on public funds, casting any deviation from western policy or funding models as "special treatment" and an affront to liberal equality. While this attitude, we observed in Part II, was honed in the post-war period, it has taken on new life through the false equivalency between First Nations and municipalities,[83] a phenomenon that provincial officials told us limited the kinds of solutions they were able to provide Indigenous governments through disaster.[84] In other words, deep in the minutiae—the details of an emergency expense policy—we see the work performed by the long-rehearsed constitutional habit of colonialism to assume Crown jurisdiction. The funding precarity that resulted undermined the implementation of a measure determined by the Nation to protect communities from the pandemic.

In the face of these colonial habits, the Tŝilhqot'in Nation set out again asserting and negotiating its jurisdiction with provincial officials, all the while simultaneously supporting its members through the early waves of the pandemic. Fortunately, as we will see, habits can change. And while these emergencies revealed the way in which Crown actors snap back to colonial habits, our work with the Nation also reveals positive developments through intentional and concerted effort by all sides applied to post-wildfire collaboration, data sharing, and funding eligibility. As we suggest below, these efforts to cultivate responsible relations are consistent with a range of Indigenous perspectives about how to respond to emergencies.

2. *Cultivating Habits of Coordination*

Drawing on predominantly Anishinaabe and Haudenosaunee intellectual traditions, Whyte's "epistemologies of coordination," introduced in Part I, describe a different basis for crisis response. On this view, relations of reciprocity, consent, and kinship compel those in a shared territory to act "responsibly" together to

[80] Russell Myers Ross, interview by Emma Feltes, 10 July 2020.
[81] Jay Nelson, interview by Crystal Verheaghe and Jocelyn Stacey, 22 July 2020.
[82] Pandemic Report, *supra* note 3 at 60–61.
[83] Jeremy J. Schmidt, "Dispossession by municipalization: property, pipelines, and divisions of power in settler colonial Canada" (2022) *Environment and Planning C: Politics and Space,* https://dro.dur.ac.uk/35243/.
[84] Pandemic Report, *supra* note 3 at 61.

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address crisis.[85] Drawing on a similar premise in W̱SÁNEĆ law, Clifford also emphasizes that emergency management is not only about addressing specific issues of jurisdiction, but about understanding and enacting responsible relations to each other and to the land that transcend any singular event or narrow legal conflict.[86] It is these habits of coordination—fulfilling mutual responsibilities to one another—that Whyte describes as allowing Indigenous Peoples to be responsive to change. Emergencies, then, are but one instance of intense change to be governed by the same relational responsibilities that guide actions at all times.

In our research, we learned about multifarious ways Tŝilhqot'in people also emphasized coordination and responsible relations as central to crisis response. We saw this within the Nation, where kinship and unity were central to fending off both fire and disease; beyond the Nation, through alliance with other Indigenous communities; and even in relations with Crown governments, where consistent advocacy and collaboration led to incremental policy change. Indeed, the strongest message we heard, was that the ongoing work to build sustained relationships *between* crises holds the most promise to shift constitutional habit from one of automatic and assumed Crown authority to one of coordination, foregrounding Indigenous jurisdiction.

"One thing with the Tŝilhqot'in people is they really unite in the leadership during those times of crisis, and they all support each other," TNG Executive Director Jenny Philbrick reflected.[87] For example, within the Nation, astonishing feats of coordination were pulled off at the start of the pandemic. Nutrition was a central worry, as many meal programs were suspended, grocery shopping in the city meant risking exposure, and low-income families couldn't stockpile food for isolation. Certain traditional food staples—moose[88] and salmon[89]—were inaccessible, in part because of past environmental emergencies. This lack, Philbrick told us, was felt not just in terms of "sustenance" but "mentally, physically, and spiritually," too.[90] As in many Indigenous communities, feasting has a particular significance for the Tŝilhqot'in. Mirroring Philbrick's comments, though from the Nuu-chah-nulth perspective, Mack describes feasting as "not simply a means of sustenance," but a "social institution"—one that aids "resistance to hegemony" by bringing sustenance to the collective.[91]

So, TNG began arranging food delivery to each community. They struck partnerships with commercial food distributors, local cattle ranchers, and coastal First Nations.[92] Meanwhile, TNG also ran photo contests, drawing hundreds of

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85 Whyte, *supra* note 10 at 58.
86 Clifford, *supra* note 13.
87 Jenny Philbrick, interview by Emma Feltes, 8 October 2020.
88 Tŝilhqot'in Nation, *Emergency Moose Protection Dechen Ts'ededilhtan*, 27 August 2018, https://www.tsilhqotin.ca/wp-content/uploads/2020/11/Law_2018_09_05TsilhqotinEmergencyMooseProtectionLaw.pdf.
89 "First Nations Leadership Council Calls for Immediate State of Emergency over Big Bear Landslide," *CBC News British Columbia,* 9 December 2019, https://www.cbc.ca/news/canada/british-columbia/big-bar-landslide-state-of-emergency-1.5390044.
90 Jenny Philbrick, interview by Emma Feltes, 8 October 2020.
91 Mack, *supra* note 24 at 304.
92 Pandemic Report, *supra* note 3 at 24.

https://doi.org/10.1017/cls.2023.2 Published online by Cambridge University Press

entries depicting families out on the land, hunting for the first time, skinning deer, and making bannock. In these initiatives, they found a way to coordinate and rebuild connection between kin across the Nation, while implementing Tŝilhqot'in jurisdiction throughout isolation.

However, this kind of coordination was not limited to the Nation. "We stick to our silos, but there were so many people doing great things," Philbrick said, citing instances of sharing knowledge with other communities.[93] This was visible in the partnership TNG forged with the Heiltsuk Tribal Council and Nuu-chah-nulth Tribal Council to collectively advocate for data sharing agreements with British Columbia. After months of regular conversation with provincial officials, British Columbia agreed to supply more data, more frequently to each of the Nations. While these data sharing agreements only partially provide the kind of information needed to facilitate Indigenous decision-making, it was the partnership with other Indigenous Nations that proved to be particularly meaningful in this case. Whyte relies on the work of Seneca scholar Mishuana Goeman to describe similar ways that moral bonds between Nations are renewed in the face of crisis. Such a propensity, writes Goeman, "comes from thousands of years of experience living on this continent together."[94]

The newest parties to these territories—the colonial governments of Canada and British Columbia—are less versed in such coordination and mutual-support, having instead hung their constitutional hat on their combined jurisdictional exclusivity. Nevertheless, just as they had many times before, the Tŝilhqot'in provided ample opportunity for both governments to learn this different, relational way of weathering change. One example of this was the collaborative implementation of the Tŝilhqot'in mushroom regulation arising from the wildfires.[95]

Morels flourish in the aftermath of fire. The record-breaking fires in the summer of 2017 foreshadowed a bounty of morels the following spring. The Tŝilhqot'in Nation anticipated an influx of mushroom harvesters, along with their potential harmful impacts on sensitive ecosystems and cultural sites within the *nen*. Seeing the absence of a provincial plan to manage this aspect of wildfire recovery on Crown land, the Tŝilhqot'in Nation filled this jurisdictional gap with their own regulatory system.[96] Anyone who wished to harvest mushrooms from designated areas or who wanted to purchase mushrooms from harvesters needed to first obtain a permit from TNG. The Tŝilhqot'in mushroom regulation was supported by the Ministry of Forests, Lands, Natural Resource Operations and Rural Development, as well as Conservation Officers, Natural Resource Officers, and the RCMP, who played a supporting role in the implementation of the regulation led by Tŝilhqot'in Land Rangers. Ultimately, Tŝilhqot'in leadership heralded the management of the

[93] Russell Myers Ross, interview by Emma Feltes, 11 July 2017.
[94] Mishuana Goeman, "Notes Towards a Native Feminism's Spatial Practice," *Wicazo Sa Review* 24 (2009): 175 (quoted in Whyte, *supra* note 10 at 58).
[95] Wildfire Report, *supra* note 3 at 40–41.
[96] For clarity, the mushroom regulation applied to Crown lands outside of the declared title area, as title lands did not burn during the 2017 fire season.

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mushroom season as defined by a "spirit of collaboration."[97] And as a result, dozens of non-Tŝilhqot'in people were exposed to and abided by Tŝilhqot'in law and jurisdiction on a daily basis through the permitting process—an ambition of the 1989 Nemiah Declaration finally fulfilled.

While the mushroom harvest was a significant achievement in its own right, no singular policy initiative alone can shift constitutional habit. The necessity of sustained, ongoing relations of coordination was one of the strongest messages we heard across both research projects. The Tŝilhqot'in point to the good relationships that continue to be worked on now,[98] particularly at the CEMA table, where Tŝilhqot'in priorities and needs—articulated by the Nation in its two reports—frame both the governance structure and implementation of CEMA commitments.[99]

Conclusion

Section 35 changed Canadian constitutional law, as has the *Tsilhqot'in* title decision. And yet, our work uncovers ways in which constitutional practice—revealed through habitual responses in the moments when Canadian governments are most pressed—remains grounded in colonialism. The habitual reaction of Crown actors in times of crisis is to double-down on assumed Crown jurisdiction—through strong-arm enforcement of inapplicable evacuation orders and tight-gripped control of COVID case numbers—ignoring and obstructing Tŝilhqot'in emergency laws and jurisdiction. One senior staff member remarked on how quickly institutions snap back to command and control. With each emergency, he described, "the institutions we thought we had made progress with go back to square one." They "forget the relationship building [with the Nation] that has come before."[100]

Though seemingly engrained and systemic, the good thing about habits (even constitutional ones) is their mutability—made and unmade in both grand policy structures and in quotidian, everyday practice. Indeed, one of the heartening aspects of this work has been to see efforts to change made by emergency officials each time they encounter and are engaged by the Tŝilhqot'in. Fueling this change, though, are the sustained relationships that continue to develop in the periods between disasters. That this longer-term relationship building is beginning to take effect in Tŝilhqot'in territory further supports Whyte's critique of the current, presentist epistemology of crisis as the only response available. For the Tŝilhqot'in, and for others for whom mutual coordination is both an epistemological and jurisdictional norm, embracing constant change and employing a *relational* approach to preparing for it is habitual. For Canada and British Columbia, there are glimmers, at least, that this can yet be learned, becoming part of the

[97] Tŝilhqot'in Nation, News Release, "Tŝilhqot'in Nation Celebrates Success in 2018 Mushroom Harvest Management," 8 August 2018, https://nationtalk.ca/story/tsilhqotin-nation-celebrates-success-in-2018-mushroom-harvest-management.

[98] Jay Nelson, personal communication, 24 March 2022.

[99] Crystal Verheaghe, personal communication, 21 March 2022.

[100] Jay Nelson, interview by Crystal Verheaghe and Jocelyn Stacey, 22 July 2020. Nelson also described, as we noted above, how the "snap back" was never the end point. Rather, on key issues, government partners always came to the table and worked towards a mutual understanding of the issues.

https://doi.org/10.1017/cls.2023.2 Published online by Cambridge University Press

constitutional story. This is especially promising in that it refutes the presumption that the goal of crisis response is necessarily a speedy return to the old state of affairs. *Better* habits for "normal" times can be forged out of crisis—potentially even anti-colonial ones.

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https://doi.org/10.1017/cls.2023.2 Published online by Cambridge University Press