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RESEARCH ARTICLE / ARTICLE DE RECHERCHE

Worldviews of Employment in Coast Salish Communities*

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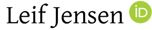

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Abstract

While Canadian law has started to seriously grapple with questions that relate to reconciliation with Indigenous communities and laws, much of the focus is on specific, often resource-based, projects. As a result, there has been relatively little attention paid to other aspects of reconciliation, such as how legal aspects of employment may be re-evaluated. Employment law is a useful place to start as employment is a fundamental aspect of a person's life, providing both financial support and a contributory role in society. This paper examines how different societal values impact employment law and in particular, how Coast Salish worldviews and law may impact, facilitate, and resist, the employment legislation in force in British Columbia.

Keywords: employment; Coast Salish; British Columbia; comparative law; Indigenous

Résumé

Bien que le droit canadien ait commencé à s'attaquer sérieusement aux questions liées à la réconciliation avec les communautés et les lois autochtones, le point de mire de ces changements se limite encore à des projets spécifiques qui sont souvent axés sur l'enjeu des ressources. Par voie de conséquence, relativement peu d'attention a été accordée aux autres aspects de la réconciliation, notamment la manière dont les aspects juridiques de l'emploi peuvent être réévalués. Le droit du travail est à cet égard un point de départ utile dans la mesure où l'emploi est un aspect fondamental de la vie d'une personne, apportant

*This paper was initially prepared for Dr Brian Thom. I would like to thank Dr Thom for his engaging class and his encouragement and support in the crafting of this paper. I want to acknowledge that I am neither Coast Salish nor Indigenous. As noted in the body of this paper, my intention is to explore a way in which Canadian legislation may be more explicitly shaped and influenced by Indigenous law, not to comment on Indigenous law. This paper relies on specific sources of specific communities' laws (as discussed further below) and does not purport to provide a complete outline of any community's perspective.

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à la fois un soutien financier et un rôle contributif à la société. Dans cette foulée, cet article examine l'impact de différentes valeurs sociétales sur le droit du travail et présente plus précisément comment les visions du monde et le droit des Salish de la côte peuvent influencer, faciliter et résister aux législations et aux réglementations en matière d'emploi qui sont en vigueur en Colombie-Britannique.

Mots-clés: emploi; Salish de la côte; Colombie-Britannique; droit comparé; autochtone

The question of Canadian law's becoming more responsive to Indigenous law arises acutely in conflicts involving pipelines and other megaprojects. While these cases are important, there is space to give greater attention to day-to-day aspects of life—such as employment. As the Supreme Court has stated, employment law governs "one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being."[1] With this in mind—and setting aside questions about whether employment ought to be as central to one's identity as the court states—it is worthwhile to consider employment in Canadian and Indigenous legal contexts. This includes identifying areas of overlap, divergence, and discretion. Areas of discretion are perhaps most interesting in that, for Canadian decision-makers, they provide an immediate opportunity to act in a way that is respectful of legal pluralism and responsive to Indigenous worldviews.

My approach to this task is to compare British Columbia (B.C.)'s employment legislation to the employment legislation that Coast Salish communities have enacted. Although this approach certainly prioritizes written law, I want to emphasize that worldviews—Indigenous and liberal—cannot be fully reduced to legislation and that these worldviews are important in interpreting legislation. Further, there is significant discussion within Indigenous and academic communities around the extent to which Indigenous law can, or should, be reduced to written law. This study is not meant to offer judgment, or even input, on these important questions. Instead, this article aims to explore one way in which formally enacted Indigenous legal norms[2] may be used to reinterpret and reconsider Canadian legislation.

I will first provide a very brief overview of Coast Salish views of employment, based on historical and modern trends, and an examination of the values reflected in contemporary Coast Salish legislation. I rely primarily on excerpts of legislation passed by Coast Salish communities and on anthropological works,

[1] *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313, at 91, 38 DLR (4th) 161; see also Henry Pennier, *Chiefly Indian* (Vancouver: Brock Webber Printing Co. Ltd, 1972).

[2] The Indigenous legislation examined in this paper is all recognized by external states (Canadian or American). This has the effect of setting aside important questions as to whether this authority is inherent or delegated by an external state. This is not to suggest that legislation that is passed by unrecognized communities should not be examined, although, given that Canadian administrative decision-makers' authority flows from Canadian law, it may be more difficult for such decision-makers to recognize laws that are established by unrecognized communities.

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including those of Bruce Granville Miller and Brian Thom.[3] Next, I will compare these values to those expressed in the *Employment Standards Act* ("*ESA*")[4] of B.C. This comparison is limited to three topics: the purposes of the legislation, the *ESA*'s conception of its own jurisdiction, and the concept of family.

As an initial comment, and though there are significant consistencies among Coast Salish communities as to how issues should be dealt with,[5] Coast Salish communities do not have a unified "law" to draw on, and do not historically have a concept of the "state."[6] There is no contemporary tribal code,[7] governing structure, or set of laws that can be said to represent all Coast Salish people,[8] and there are significant internal differences among Coast Salish accounts of the nature of justice.[9] While this article does begin to engage with the differences among different communities, the focus is on areas where there is relative consensus among communities.

Coast Salish Economies and Conceptualizations of Employment

Before discussing Coast Salish legislation, it is worthwhile to identify some key aspects of Coast Salish economies and employment that began before contact and continue (to varying degrees) today. A key concept is *ts'its'uwatul*, which can be literally translated as reciprocity, or as helping one another (although literal translations can be problematic) and has been described a "simple law" with significant implications.[10] Another key principle is respect, which can be shown in many ways, including by treating salmon and deer properly[11] (including by

[3] Bruce Granville Miller, *The Problem of Justice: Tradition and Law in the Coast Salish World*, Fourth World Rising (Lincoln: University of Nebraska Press, 2001); Brian Thom, "Encountering Indigenous Law in Canada," in *Oxford Handbook of Law and Anthropology*, ed. Marie-Claire Foblets et al. (Oxford: Oxford University Press, 2020).

[4] *Employment Standards Act*, *Revised Statutes of British Columbia*, 1996, c 113.

[5] Michael Graeme, "Swimming and Diving in Grandpa's River: A Promise of Help with Respect to Water on Halalt Territory," *Arbutus Review* 9, no. 1 (2018): 80–95.

[6] Miller, *Problem of Justice.*

[7] "Tribal Codes" refers to legislation enacted by communities in the United States (such as the Lummi Constitution: *Constitution and Bylaws of the Lummi Tribe of the Lummi Reservation, Washington*, Lummi Nation, signed 2016 ("Lummi Constitution") and "tribal legislation" refers to legislation enacted by communities in either the United States or Canada.

[8] Brian Thom, "The Anathema of Aggregation: Towards a 21st Century Self-Government in the Coast Salish World" *Canadian Anthropology Society* 52, no. 1 (2010): 33.

[9] Miller, *Problem of Justice.*

[10] Thom, "Indigenous Law"; see also Brian Thom, "Entanglements in Coast Salish Ancestral Territories," in *Entangled Territorialities: Indigenous Peoples from Canada and Australia in the 21st Century*, ed. Françoise Dussart and Sylvie Poirier (Toronto: University of Toronto Press, 2017), 156.

[11] Eric McLay et al., "'A'lhut tu tet Sul'hweentst [Respecting the Ancestors]: Understanding Hul'qumi'num Heritage Laws and Concerns for the Protection of Archaeological Heritage," in *First Nations Cultural Heritage and Law: Czase Studies, Voices and Perspectives*, ed. Catherine Bell and Val Napoleon (Vancouver, BC: UBC Press, 2004), 150; see also Bruce Granville Miller, "Homelessness and Coast Salish Spiritual Traditions: Cultural Resources for Programmatic Responses in British Columbia," in *Land of Stark Contrasts: Faith-Based Responses to Homelessness in the United States*, ed. Manuel Mejido Costoya (New York: Fordham University Press, 2021).

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not just treating them as "food").[12] As noted by Lee Maracle, Coast Salish people are "duty bound to feed our families with the least damage to other life save the one we are taking."[13] Kinship and family ties were related to resource access—territory was not simply an open commune.[14] A third key principle is the concept of greed: in Coast Salish communities, greed can be understood as a "state of alienation and the opposite of generosity; it isolates people from the community [...] to be greedy and hoard things is wasteful."[15] Instrumentally speaking, greedy hoarding prevents the flow of goods and services in a community, threatening relationships formed between community members.

Employment relationships are grounded in economic practices and concepts. Some historic Coast Salish practices resemble contemporary employment activities.[16] Individuals could be hired for mortuary and funeral services,[17] people could be "hired" to "do the work" at potlatches,[18] and Medicine Men could be hired for various spiritual and other services. Parallels with the notion of "debt" also existed, though it was more closely related to notions of collective responsibility than individual responsibility and so could be owed by the family group.[19] Goods were generally acquired via direct acquisition or trade (facilitated within a complex system of social networks).[20] Compensation for work was not universally based on set rates. For example, compensation for fishing incorporated how much net each person contributed and to practices that ensured that respect for the fish itself was demonstrated.[21] Medicine Men did not have set rates, but were compensated generously, partly for fear of repercussion[22] (although post-contact set rates were sometimes seen as "too much"[23]).

[12] *Assessment of the Trans Mountain Pipeline and Tanker Expansion Proposal*, Tsleil-Waututh Nation, 2016.

[13] Lee Maracle and Smaro Kamboureli, *Memory Serves: Oratories* (Edmonton: NeWest Press, 2015), 62.

[14] Brian Thom, "Reframing Indigenous Territories: Private Property, Human Rights, and Overlapping Claims," *American Indian Culture and Research Journal* 38, no. 4 (2014): 3.

[15] Miller, *Problem of Justice.*

[16] Parallel practices can lead to misunderstanding about underlying values—see, for example, McLay et al., "'A'lhut tu tet Sul'hweentst, 165; Mario Blaser, "Is Another Cosmopolitics Possible?" *Cultural Anthropology* 31, no. 4 (2016): 548, discussing the difference between caribou (as understood by the Canadian state) and atîku (as understood by Inuit peoples). This does not mean that Coast Salish worldviews have nothing to say about employment—Coast Salish worldviews can help in understanding social constructs that did not exist in pre-contact times (Miller, "Homelessness")—but a worldview must be understood in its own context, without simplistic parallels.

[17] McLay, "'A'lhut tu tet Sul'hweentst."

[18] Wilson Duff, *The Upper Stalo Indians of the Fraser Valley, British Columbia* (Victoria: British Columbia Provincial Museum, 1952).

[19] Claudia Lewis, *Indian Families of the Northwest Coast: The Impact of Change* (Chicago: University of Chicago Press, 1970).

[20] See, for example, Morgan Ritchie and Bruce G. Miller, "Social Networks and Stratagems of Nineteenth-Century Coast Salish Leaders," *Ethnohistory* 68, no. 2 (2021): 237.

[21] Bernhard Stern, *The Lummi Indians of Northwest Washington* (New York: Columbia University Press, 1934), 193.

[22] Ibid.

[23] Chris Arnett, *Two Houses Half-Buried in Sand: Oral Tradition of the Hul'q'umi'num' Coast Salish of Kuper Island and Vancouver Island by Beryl Mildred Cryer* (Vancouver, BC: Talonbooks, 2007).

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As immigration and colonization increased, relationships of production changed.[24] There continued (and continues) to be a strong connection to what, from a contemporary Western economic perspective, would be seen as the resources that served Coast Salish people historically[25] (including both cultural and intellectual property, with long-standing efforts to break non-Indigenous monopolies).[26] To some, salmon are "central to everything it means to be indigenous"[27] and individuals used their skills in canneries, as fishers, and in longshoring. In the early 1870s, "nearly all Fraser River fishermen were Native,"[28] though this representation reduced over time (due in large part to discrimination).[29]

While a relationship with natural resources was consistent, the family unit—the basic unit of the Coast Salish world—changed as a result of economic forces. Historically, a large household was needed to harvest and preserve resources for the coming year. As harvesting opportunities were reduced and replaced with (often seasonal) wage labour, large households were not needed and were difficult to support. Over sixty-three years, one Lekwungen community saw a reduction in household size—attributable to wage labour realities—from eight to ten people per household in 1847 to three people per household in 1860, and then to 2.3 people per household in 1910.[30]

The reduced family unit often worked together. In the late 1800s, "family-based production was [...] the norm" for Lekwungen field workers, and there was a high demand for "Indian fishermen [because] they bring their families around and you have Indian women and boys, and some of them men."[31] Family-based production continued in the 1960s when "knitting families" (producing Cowichan sweaters) would enlist "a mother and father, three or four participating children and possibly a grandparent, aunt or uncle."[32] Coast Salish families worked to keep their families together and some employers felt that it was

[24] While outside the scope of this paper, it should be noted that the imposition of a different settler-colonial approach to relationships of production is both a method of colonization as well as an impact of colonization.

[25] See also Pennier, *Chiefly Indian.*

[26] For example, Chief Richard Harry of Tsawout worked with hundreds of knitters in around 1956 to break the monopoly on Cowichan sweaters; see Sylvia V. Olsen, "We Indians Were Sure Hard Workers: A History of Coast Salish Wool Working" (PhD Thesis, University of Victoria, 1994), 92.

[27] Daniel L. Boxberger, "The Not So Common," in *Be of Good Minds: Essays on the Coast Salish*, ed. Bruce Granville Miller (Vancouver, BC: UBC Press, 2007), 57; See also Maracle and Kamboureli, *Memory Serves*, 45.

[28] Marjorie Mitchell and Anna Franklin, "When You Don't Know the Language, Listen to the Silence: An Historical Overview of Native Indian Women in B.C.," in *Just Pin Money Selected Essays on the History of Women's Work in British Columbia*, ed. Barbara Latham and Roberta Pazdro (Victoria: Camosun College, 1984), 26.

[29] John Lutz, "Gender and Work in Lekwammen Families, 1843–1970," in *Gendered Pasts Historical Essays in Femininity and Masculinity in Canada*, ed. Kathryn McPherson, Cecilia Morgan, and Nancy Forestell (Oxford: Oxford University Press, 1999), 80.

[30] Ibid., note 28.

[31] Ibid., 92; Mitchell and Franklin, "When You Don't Know the Language," 26.

[32] Olsen, "We Indians."

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economically advantageous to have cheap labour (and a variety of economic skills) available.[33]

While Coast Salish communities were subjected to massive displacement from land and other impacts of colonization, they have responded differently to different aspects of the employment framework that is central to Western life. Coast Salish communities, to varying degrees and at different times, have adapted to some aspects of the Western economic system (such as the wage market), rejected some (such as individual gain/material accumulation), and complicated others (including via culturally relevant valuation of goods, commodities, and actions).[34]

Today, most Coast Salish communities strongly support employment in general, prioritizing ownership of businesses. For instance, the Penelakut Community Plan includes a section on economic self-reliance, of which the first priority is job creation,[35] and the Cowichan Tribes Strategic Plan lists six objectives, the second of which is that all members are "gainfully employed in a manner of their choosing."[36] Some Coast Salish communities—perhaps, as discussed below, in response to concerns about discrimination—are more concerned with employment than surrounding non-Indigenous communities appear to be. The current Tsawwassen First Nation ("TFN") strategic plan lists meaningful employment opportunities and member-owned businesses as objectives. In contrast, the Tsawwassen (named after the TFN, which they neighbour) Area Plan does not contain the word "employment."[37]

Contemporary Coast Salish Tribal Codes and Other Legislation

Below, I provide an overview of the employment provisions outlined in Lummi, Suquamish, Swinomish, and Tulalip tribal codes, as well as that of the TFN. Except for the TFN, whose employment legislation is recent, all the communities discussed below are situated in the United States. I focus on communities situated in the United States, despite discussing Canadian legislation, for two reasons. First, to emphasize that, for the purpose of discussing Coast Salish values, the international border is a somewhat arbitrary imposition.[38] Second, Indigenous communities in the United States have a longer history of having respect shown for at least some of their institutions, such as tribal courts and codes.[39] As such, they have given more attention to developing tribal codes than have communities in Canada.

Tribal codes and other legislation may be passed to help clarify the issues that communities struggle with, to impact the behaviour of community members, or

[33] Lutz, "Gender and Work," 92; Mitchell and Franklin, "When You Don't Know the Language," 26.

[34] Olsen, "We Indians," 14, 80.

[35] Penelakut Tribe, *Community Comprehensive Plan: February 2020*, 19.

[36] Cowichan Tribes, "Strategic Plan: 2019–2024," https://www.cowichantribes.com, 10.

[37] Delta, "Official Community Plan (Schedule D—Tsawwassen)," 2005, https://www.delta.ca.

[38] Although not irrelevant—Coast Salish communities that are experiencing different forms of colonization respond in different ways. Over time, this can change values and priorities.

[39] See, for example, Miller, *Problem of Justice.*

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to help clarify a balance between individual and collective rights.[40] Legislation is often developed by tribal law committees, working with code writers (who may or may not be tribal members) to develop draft legislation that is presented with recommendations to a tribal council.[41] Tribal legislation typically incorporates so-called "folk law" (uncodified, lived law, previously in use or in use at the local level),[42] though methods of incorporation vary.

I will focus on Constitutions and their "purpose" statements as a means of outlining general values. Constitutions outline values, and purpose statements are often "the most direct and authoritative evidence of legislative purpose" and "give context for the entire Act."[43] While the focus of this article is on narrow aspects of legislation, legislation is only part (often a small, or even negligible, part) of Indigenous legal orders.[44] Other sources of Indigenous law are largely set aside in my approach. This should not be taken as a suggestion that other sources do not have value. If the approach used here has value, then it is in the fact that the nations discussed in this study created legislation and that legislation is worthy of respectful examination and consideration. It is suggested that this approach may be helpful in understanding how Canadian legislation sits in tension with Indigenous values, but it is not suggested that this methodology should—or could—be used as the exclusive way to identify that tension.

Lummi Nation[45]

The Lummi Constitution prioritizes making government more responsive, developing community resources, administering justice, protecting tribal interests, and promoting the social and economic welfare of "ourselves and our descendants, and to preserve our land base, culture, and identity."[46] Their Employment and Training Policy intends to "eradicate discrimination," an "integral part" of which is to "structure employment and training opportunities and to provide for

[40] Bruce Miller, "Contemporary Tribal Codes and Gender Issues," in *The Contemporary Coast Salish: Essays Bruce Granville Miller*, ed. Bruce Miller (Northwest Anthropology LLC, 2016), 180.

[41] Bruce Miller, "Folk Law and Contemporary Coast Salish Tribal Code," in Miller, *Contemporary Coast Salish*, 112.

[42] Ibid., 180.

[43] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Lexisnexis Canada Inc., 2014), 9.45

[44] See Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today," *McGill Law Journal* 61, no. 4 (2016): 847–84; John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) in particular in part 3, and the "Indigenous Law 101" infographic by Aftab Erfan, prepared for the "Indigenous Laws for Resource Stewardship: A Gathering of Nations," ilru.ca/publications.

[45] The Lummi Nation is the third-largest self-governing tribe in Washington state, with approximately 5,000 members (Lummi Nation, "About Us," accessed May 5, 2024, www.lummi-nsn.gov). Their reservation is situated next to Bellingham, near the Canadian border (while reservations are a bad indicator of a group's traditional territory, and a worse indicator of as to how that community understands the concept of territory, I provide the reservation location as a way to identify the location of their current seat of government).

[46] Lummi Constitution, *supra* note 7.

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the hiring of Native Americans who are qualified, and through training where there are no sufficient qualified Native Americans."[47]

The legislation creates a Director of the Employment Rights office to investigate violations, to hire and supervise staff, to establish training and advocacy services, and to assist native workers in finding jobs.[48] There are detailed requirements for some employers, including hiring preference (Lummi Nation veterans, Lummi Nation members, Native Americans who are parents or children of a Lummi Nation member, spouses of Lummi Nation members, children or grandchildren of Lummi Nation members, other local Native Americans, and non-local Native Americans)[49] and termination preference (the previous list in reverse).[50]

The legislation shows a desire for a government that is responsive and plays a significant role in society, with a long-reaching focus (with economic welfare thought of in terms of multiple generations) and an emphasis on social policy (including social welfare and the eradication of discrimination). Their set of hiring preferences puts veterans first and gives weight to the needs of families with children.

Suquamish Indian tribe[51]

The Suquamish Tribal Government's Constitution is meant to "develop our community resources, to administer justice and to promote the economic and social welfare of ourselves and our descendants" and notes a "beneficial ownership interest" of certain lands. The tribe's jurisdiction "shall not be inconsistent with applicable Federal and State law [but such law shall not] be construed as restricting the treaty hunting and fishing rights."[52]

Their employment legislation is divided into four parts—discrimination, medical leave, wages and hours, and enforcement.[53] Each part emphasizes the Suquamish's "sovereign authority." The discrimination section states that the tribe has a "primary interest in exercising its inherent sovereign authority to provide a fair and productive working environment" and that "as a sovereign government [...] it is in its own best interests to govern employment relations [...] to ensure fair and productive working environments, and, to that end, to protect against employment discrimination."[54] The family medical leave

[47] *Tribal Employment Rights Ordinance (TERO)*, Lummi Nation, Title 25 (Res. 2017–137) at 25.01.020).

[48] Ibid., 25.04.020.

[49] Ibid., 25.05.010.

[50] Ibid., 25.05.080.

[51] The Suquamish Tribal Government is "just a 30-minute ferry ride from downtown Seattle" (Suquamish Nation, "About Us / Frequently Asked Questions," accessed May 5, 2024, Suquamish.nsn.us). Interestingly, and perhaps because of this proximity, their website is much more oriented towards tourism than the websites of other communities reviewed for this paper, whereas their legislation emphasizes their sovereignty.

[52] *Constitution and Bylaws of the Suquamish Tribe*, Suquamish Nation, 1965.

[53] *Suquamish Tribe Employment Discrimination Ordinance*, Suquamish Nation, Res 2016–163, Chapter 18.1 (2016).

[54] Ibid., 18.1.2.

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legislation adds that it is important to "provide job security, in accordance with the unique public policy values of the Tribe, for those employees who must take time off from work as a result of" their own health, a family member's health, the birth or adoption of a child, or to care for certain service members.[55]

In sum, the legislation emphasizes Suquamish sovereign authority and gives attention to the division of powers between the Suquamish and the United States. This affirms the continuity of Suquamish authority notwithstanding settler-colonial histories and political structures. Chief Seattle was Suquamish and the Suquamish once had a winter village in what is now downtown Seattle. As with the Lummi, there is attention to ending discrimination and social policy, with a more specific focus on health.

Swinomish Indian tribal community[56]

The Swinomish Constitution functions to "establish a more perfect tribal organization, promote the general welfare, encourage educational progress, conserve and develop our lands and resources, and secure to ourselves and our posterity the power to exercise certain rights of home rule in accordance with and by the act of Congress of June 18, 1934."[57] The links to the United States are notable: there is a clear reference to Congress, and the language of a "more perfect" tribal organization reflects the US Constitution. Their employment legislation[58] states in its preamble that they have "suffered discrimination [...] continue to be excluded from the employment market; continue to suffer poverty and high unemployment rates" and that there are other adverse consequences including "alcohol and drug abuse, school drop-out, domestic violence and other crimes, that affect not only the unemployed individual and his or her family, but the entire Reservation community."[59]

Swinomish legislation states that it is "vital" to extend employment "to spouses of Swinomish tribal members. By keeping families together, Swinomish families grow stronger and provide nurturing homes for future generations."[60] Overall, the Swinomish show significant attention to social policy and specific social concerns. Employment is framed as a means to end listed social concerns,

[55] *Suquamish Tribe Family Medical Leave Ordinance*, Suquamish Nation, Res. 2016–163, Chapter 18.2., (2016) at 18.2.2.

[56] The Swinomish are situated on an island between Bellingham and Seattle, approximately due east of Victoria. Their website emphasizes that their modern nation is made up of four major groups who signed a historic treaty (Swinomish Indian Tribal Community, "The Swinomish People," accessed May 5, 2024, Swinomish-nsn.gov).

[57] *Constitution and By-Laws for the Swinomish Indian Tribal Community*, Swinomish Indian Tribal Community (1935, amended 2017).

[58] *Swinomish Tribal Employment Rights Ordinance*, Title 14, Swinomish Indian Tribal Community, Ord. 189 2003 at 14–01.020).

[59] *Swinomish Tribal Employment Rights Ordinance*, Title 14, Swinomish Indian Tribal Community, Ord. 189 2003 at 14–01.020).

[60] Ibid.

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rather than a stand-alone "fundamental aspect" of a person's life (as the Canadian Supreme Court describes it).

Tulalip tribe of Indians[61]

The Tulalip Constitution indicates that they seek to establish a "more perfect tribal organization, promote the general welfare, encourage educational progress, conserve and develop our lands and resources, and secure to ourselves and our posterity the power to exercise certain rights of home rule not inconsistent with the Federal, State, and local laws."[62] The Tulalip also have general rules for all matters which state that "We gathered at Tulalip are one people. We govern ourselves. We will arrive when each and every person has become most capable."[63] Their stated values include respect for elders, respect for the teachings that come from our ancestors, speaking truth, working to uphold and serve the people, and to "always try to do our best."[64] The general rules also create a procedural right of elders to address the court "in all proceedings, should time allow," in order to share their beliefs or recommendations.[65]

The sections that are specific to employment state that "employment discrimination against Native Americans persists" and jobs on or near the reservation are "important resources to which Natives have unique preferential rights."[66] The purposes of the employment legislation include outlining laws for employment and contracting within tribal jurisdiction, compliance of the same, and the provision of a "fair, enforceable, and effective system" for work that may be performed on the reservation.[67] The code outlines preferential employment for enrolled Tulalip tribe members, their spouses/parents/children/guardians, other natives/Indians, spouses of federally recognized Native Americans, and others.[68] The code contains an entire chapter entitled "Right to Work," which is intended to encourage employment, provide public services, and maintain peace and good order, though the impact of the legislation is anti-union (for example, barring a requirement to pay dues to a union and banning striking).

The Tulalip legislation has a greater emphasis on what success will look like, rights for elders, and specific broad rules to live by (such as trying to do our best and speaking the truth). As with other communities, there are preferential hiring processes and a concern with ending discrimination.

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[61] The Tulalip are south of the Swinomish, just north of Seattle. Like the Swinomish, they emphasize that they are made up of a group of bands who were signatories to a historic treaty. There are just over 5,000 Tulalip members, over half of whom live on the Tulalip Indian Reservation (Tulalip Tribes, "We Are Tulalip," accessed May 5, 2024, tulaliptribes-nsn.gov).

[62] *Constitution and Bylaws for the Tulalip Tribes of Washington*, Tulalip Nation, 1936.

[63] *Tulalip Tribal Court Rules*, Tulalip Nation, 2.1.2.

[64] Ibid., 2.1.3.

[65] Ibid., 2.1.3.

[66] *TERO[Tribal Employment Rights Office] Code*, Tulalip Nation, 2022, Chapter 9.05, 9.05.030.

[67] Ibid.

[68] Ibid., 9.05.100.

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Tsawwassen First Nation

The TFN is situated in Canada, close to the Canada/US border.[69] In 2009, the TFN passed the *Government Employees Act*,[70] which governs TFN employees. This *Act* states that employees are hired based on merit, and hiring must facilitate the development of an efficient and effective workforce that is representative of TFN membership, the long-term employment of Tsawwassen members, and the long-term career development and advancement of employees. Hiring priorities are given to Tsawwassen members, then to their spouses, and then to members of other First Nations.

The TFN defines "spouse" in at least two ways. In the *Membership Act*,[71] a "spouse" is someone who has married another person. In the employment legislation, a "spouse" includes both a marriage and someone in a marriage-like relationship, if they have a child together. Since the only use of the "spouse" provision in the employment legislation is to give spouses second priority in hiring (behind members and in front of members of other First Nations), it is likely that this definition is meant to support the children of TFN members.

All new employees, other than short-term employees, must participate in an affirmation ceremony or oath. The purpose is to ensure that they: understand their commitment to the TFN; honour and respect Tsawwassen members, history, and culture; understand the importance of confidentiality; have a working knowledge of the TFN governance structure, community, history, and culture; and have basic information (such as legislation and policies) related to their employment. Thus, the TFN legislation, like the tribal codes, gives attention to preferential hiring processes and an emphasis on history, culture, and family, though it differs in some ways (such as its explicit emphasis on "merit-based" hiring).

Summary of tribal legislation

The tribal constitutions are broad, with a fairly consistent focus on the development of resources, government, and economic and social resources. The tribal codes are all explicitly concerned with eradicating discrimination. They cover both individuals employed directly by the tribe as well as businesses and contractors that operate on tribal property (though they sometimes distinguish between the two).

Tribal legislation tends to prioritize rights of nation members, followed by those close to the nation, though specifics vary. The Lummi prioritize veteran members above all others and prioritize local Native Americans over non-local Native Americans, whereas the Tulalip make no distinction between veteran or non-veteran members and local or non-local Native Americans.[72]

[69] Their traditional territory includes land on both sides of the border, and TFN members currently live in both Canada and the United States: see Tsawwassen First Nation, "Who We Are," tsawwassenfirstnation.com/about-tfn/our-nation, stating that there are 491 members, with 215 in Tsawwassen and others living in B.C. and in Bellingham (Washington).

[70] *Government Employees Act*, Tsawwassen First Nation, 2009.

[71] *Membership Act*, Tsawwassen First Nation, 2009.

[72] These provisions are often gendered, and more important to women (who are more likely to work at tribal and band offices); Miller, "Contemporary Tribal Codes," 189.

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There are differences between the way in which legislation relates to other jurisdictions. The Suquamish repeatedly assert their own sovereignty and self-government, by emphasizing, for instance, that neither federal nor state laws can infringe on hunting and fishing rights. The Tulalip Constitution explicitly limits its own jurisdiction to that which is "not inconsistent" with the federal or state power, and the Swinomish reference the United States Congress and Constitution. The TFN legislation is grounded in treaty.

Tribal legislation places a greater emphasis on resource rights than is typically found in Canadian legislation. These rights are granted to individuals[73] but based on community priorities. Communities differ as to whether non-tribal members can exercise tribal fishing rights for the purpose of providing support to family members who are tribal members—a divide that is sometimes gendered, with women arguing in favour of non-members' fishing rights and men opposed.[74] This divide may point to a greater concern among men for keeping resources in the community and a greater concern among women for providing for children. The Lummi, TFN, and Tulalip have each legislated in a way that places non-members with (member) children ahead of other Native Americans but behind members, suggesting an intention to facilitate support for children.

Several communities have not passed employment legislation (concerned with individual workers) but have passed labour legislation (concerned with unionization). The Port Gamble S'Klallam Tribe passed legislation that, for their "health, welfare, and integrity," bans strikes.[75] Unions can exist, but cannot require membership fees as a condition of employment.[76] Nooksack also bans union dues as a condition of employment.[77] Meanwhile, in Canada, laws of "general application," such as the *ESA*,[78] are applied to Indigenous communities[79] without regard to their law. The following section will explore the existing framework for employment standards in B.C. and its tension with the Coast Salish worldview and law.

Employment Standards Legislation in British Columbia

Canada's constitution lists two "heads of power": federal (including "Indians") and provincial. Employment is not listed under either section, but is presumptively provincial,[80] sometimes federal.[81] In a 2010 case involving NIŁ TU,O (a group of Coast Salish nations that, in this case, was an employer), the Supreme Court of Canada held that employment was governed by the province[82] and did

[73] Ibid., 119.
[74] Ibid., 184.
[75] *Labor Organizations and Collective Bargaining*, Port Gamble S'Kallam Tribe, Title 27, 2011, 27.01.01.
[76] Ibid., 27.03.03.
[77] *Labor Organization*, Nooksack Indian Tribe, Title 71, 71.16.060.
[78] *Supra*, note 4.
[79] See *Indian Act*, 1985 RSC, c I-5, s 88.
[80] *NIL/TU,O Child and Family Services Society v B.C. Government and Service Employees' Union*, 2010 SCC 45, [2010] 2 SCR 696, at 11 ("*NIŁ TU,O*"); note that "NIŁ TU,O" is the proper spelling.
[81] Peter Hogg, *Constitutional Law of Canada* (Toronto: Thomson Reuters, 2007), 28.1(b).
[82] *NIŁ TU,O*, *supra* note 80.

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not engage with the notion that the NIŁ TU,O might have its own jurisdiction.[83] The court treated NIŁ TU,O under the same framework as any other employer,[84] meaning that the employment of Indigenous people by Indigenous nations on Indigenous land is under the jurisdiction of the province (unless, as with the TFN, other arrangements exist).

B.C. governs employment primarily through the *ESA* and the *Employment Standards Regulation.*[85] Employment is also governed by common law, although this is largely outside the scope of the present study.[86] Other regulations include the *Family Member Regulation* (the "*FMR*").[87] The *ESA* creates an agency (Employment Standards Branch, "ESB"), which can make a binding decision or facilitate mediation, and an interpretation guide to the *ESA* (the "Guide"). The ESB is primarily complaint-driven but can investigate matters on its own initiative. Appeals are made to the Employment Standards Tribunal (the "Tribunal").

ESB employees have sworn the B.C. Government Employees' Oath. The TFN oath and the B.C. Government Employees' Oath overlap in some ways (around the importance of confidentiality and general statements to do the best one can do). There are also differences: B.C.'s oath contains references to "impartiality" and "objective evidence"—terms that purportedly capture universal values but in fact reflect a specific and contingent cultural perspective. While there are hints of similar concepts in the Tsawwassen oath (which references "universally held principles of responsible government"), Tsawwassen's context statement also suggests that other worldviews may inform their employment relations, including an emphasis on "affirmation ceremony," on legal pluralism (with "self-government" where "two worlds can co-exist"), and with reference to practices that go back "countless generations." Furthermore, the *ESA* does not define "employment" precisely but does provide definitions of "employee" and "employer," which ultimately results in a very broad definition of "employment."

There are six purposes listed in the *ESA*: to ensure that employees receive at least basic standards of compensation and conditions of employment; to promote fair treatment of employees and employers; to encourage open communication between employers and employees; to provide fair and efficient procedures for dispute resolution; to foster the development of a productive and efficient labour force that can contribute fully to the prosperity of B.C.; and to contribute in assisting employees to meet work and family responsibilities.[88]

[83] This was argued—unsuccessfully—in earlier proceedings: see *NIL/TU,O Child and Family Services Society (Re)*, [2006] BCLRBD No. 72, 122 CLRBR (2d) 174.

[84] Naomi Metallic persuasively argues that the court could have recognized the NIŁ TU,O's jurisdiction: Naomi Metallic, "NIL/TU,O and Native Child v BCGSEU and CEPUC," *Canadian Native Law Reporter*, [2020] CNLR Special Edition.

[85] *Employment Standards Regulation*, B.C. Reg 396/1995.

[86] See Geoffrey England, *Individual Employment Law*, 2nd ed. (Toronto: Irwin Law, 2008), chapters 4 and 5.

[87] *Family Member Regulation*, B.C. Reg 137/2019.

[88] *ESA*, *supra* note 4, s 2.

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Comparing Tribal Legislation and British Columbia's Legislation

Any number of comparisons may be made between the Coast Salish legislation and the statutory scheme in B.C. I focus on three that help to elucidate the broader, normative orientations to the laws: the way each statutory scheme approaches its own purpose, the way that B.C.'s legislation approaches its own jurisdiction, and the way each statutory scheme defines family and obligations to one's family.

Although an examination of the relationship between Coast Salish legislation and union movements warrants its own study, two observations may be made for present purposes about the "right to work" provisions found in some of the tribal codes. First, this sort of legislation may reflect the normative impact of distinct political, cultural, and legal practices on either side of the Canada/US border.[89] In Canada, the Supreme Court has constitutionalized the right to strike[90] whereas the right-to-work discourse is alive and well in the United States. While there have been claims that counter union interests (defined narrowly) by Coast Salish organizations in Canada,[91] it is not clear that this is necessarily an anti-union position. Second, this could be a situation in which there are differences between, and within, the communities as to the nature of Indigenous law. In some Indigenous communities, leadership has taken the position that unionization is inconsistent with Indigenous law. Other voices disagree, accusing leadership of creating a "false front of [anti-union] nationalism as a red herring to maintain their power over labour relations"[92] or stating that "Indigenous elite want to maintain full access to and control over allocations of streams of revenue."[93] The approach taken in the present study is not calibrated to examine intercommunity disputes of this sort, as this approach focuses on legislation—which can only be created by those in power. While I maintain that this approach nonetheless has value, this important limitation must be kept in mind.[94]

Purposes

One difference between the *ESA* and tribal legislation is obvious at a glance: tribal legislation's enumeration of purposes is more extensive than B.C.'s. For example, the Swinomish's purposes statement is almost three times longer than B.C.'s.

[89] See Bruce Miller, "An Ethnographic View of Legal Entanglements on the Salish Sea Borderlands," *UBCLR* 47, no. 3 (2014): 991.

[90] *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, [2015] 1 SCR 245. This may not apply to Coast Salish governments if work law is a matter of "Indigenous difference" as contemplated in *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10.

[91] The *NIŁ TU,O* case involved a claim that unionization, at least as practiced by one union, was inconsistent with Indigenous goals: see *supra*, note 83, at 51.

[92] Brock Pitawanakwat, "Indigenous Labour Organization in Saskatchewan: Red Baiting and Red Herrings," *New Socialist* 58: 32.

[93] Lynne Fernandez and Jim Silver, "Indigenous People, Wage Labour, and Trade Unions: The Historical Experience in Canada," Errol Black Chair in Labour Issues (Winnipeg: CCPA, 2017), 3.

[94] For more on Indigenous unionism, see also Brad Morse, "Aboriginal People and Labour Relations," *Revue Générale de droit* 17, no. 4 (1987): 665; Craig Mazerolle, "Crafting an Aboriginal Labour Law," *U.T. Fac. L. Rev.* 74, no. 1 (2016): 5.

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There are at least two explanations. First, B.C.'s legislation is generally more detailed than tribal legislation. Since specific direction is laid out in more detail by B.C., there are fewer cases requiring a purposeful interpretation. B.C.'s approach suggests a preference for consistency over discretion.

Another explanation is that B.C.'s legislation is built within a liberal worldview. Those interpreting its legislation will be well versed in that worldview.[95] Conversely, legislation that seeks to operate, at least in part, outside of the liberal framework must establish the framework within which it wishes to operate. It is necessary to make the framework more explicit, especially for situations in which the legislation encounters liberal decision-makers. For example, the *ESA* is individualistic, with community-oriented goals limited to the creation of a productive and efficient labour force. Contrary to an individualistic view, the Swinomish legislation addresses "a myriad of social problems, including alcohol and drug use, school drop-out, domestic violence and other crimes, that affect not only the unemployed individual and his or her family, *but the entire Reservation community*" (emphasis added). Through legislation, each nation moves towards its own concept of "employment" and "economy," away from colonial definitions.

Underlying values matter. To take a common situation, the *ESA* allows an employee to be terminated without notice for minor misconduct over time or for one incident of severe misconduct. Minor misconduct is based on a test that includes whether the employer's standard of performance is reasonable. Underlying values ultimately define what is "reasonable." A ban on intoxication, particularly outside of working hours, is likely to be seen as unreasonable by Employment Standards,[96] whose lifeworld emphasizes liberty and individuality.[97] For the Swinomish, for example, employment relationships are a means to address social problems related to alcohol and drug abuse. With this different basis for understanding employment, it possible that the Swinomish would take a different approach to policies against intoxication. Similarly, domestic violence at home is not a "standard of performance" in the employment context.[98] Legislation that is grounded in the consideration of social problems and the community may be more permissive for employers who are considering requiring employees to reduce alcohol consumption or take steps to prevent social problems in the community.

[95] Mills, "Lifeworlds of Law," 865; Harold Johnson, *Peace and Good Order: The Case for Indigenous Justice in Canada*, (Toronto: McClelland & Stewart, 2019), 20.

[96] In *Paladin*, the Tribunal stated that one instance of going to work while intoxicated is an illness, not grounds for termination (1999, 6). The Guide only lists intoxication as grounds for immediate dismissal if a motor vehicle is involved (s 63). There is one case that involved alleged intoxication at the Dze L K'Ant Friendship Center—it did not engage with any Indigenous law context, though it is unclear whether this is because it was not raised or because the Tribunal did not feel it was relevant (the employer had not proven that the employee was intoxicated and so owed compensation).

[97] Mills, "Lifeworlds of Law," 853.

[98] The *ESA*'s recent amendments allow time off work for victims of domestic violence but do not allow employers to impose workplace consequences for perpetrators of domestic violence (*ESA*, *supra* note 4, s 52.5).

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The legislative purposes treat discrimination in very different ways. The referenced tribal codes cite the eradication of discrimination as a central purpose. Not only does the *ESA* not expressly refer to discrimination (beyond a comment about "fair treatment"), but it also blocks Employment Standards from applying the *Human Rights Code.*[99] As a result, someone who is paid severance but terminated for racist reasons will have no remedy under Employment Standards. One can imagine a situation in which someone is terminated by a racist employer, applies to Employment Standards, and is ultimately unable to file a human rights complaint.[100] Tribal legislation does not directly engage with these problems—it tends to create labour pools or legislate terms of tribal employment rather than govern details of an employment agreement—but it does seem to prioritize ending discrimination over concerns around inconsistency in administrative decisions.

Employment Standards' jurisdiction

Two situations in which Employment Standards' jurisdiction may become problematic (in addition to the constitutional question, briefly discussed above) are: when Employment Standards takes jurisdiction over a matter that is not, in a Coast Salish worldview, within the jurisdiction of Employment Standards; and when Employment Standards takes jurisdiction over a matter that has, in the Coast Salish worldview, been resolved. The first example requires considering *ts'its'uwatul* (that foundational ethic of reciprocity in Coast Salish law). Application of this concept varies, although it could include labour or services that are often performed by an employee—and thus could be found to be "work," and therefore evidence of an employment relationship, within the meaning of the *ESA*.

The 2006 decision in *Grewal*[101] offers an illustration of the Tribunal's applying this kind of logic. Here, Employment Standards visited a farm (on its own initiative) and observed people who were harvesting raspberries. They were told that the harvesters were "not employees but relatives and friends of Balwinder Grewal" and that:

> in our Indian culture [that is, the subcontinent of India] it is a common tradition, that stems back centuries, that when help or assistance is needed, relatives and friends band together collectively to lend a helping hand. This is called "Aawat". There is absolutely no discussion of compensation whether it is monetary or anything of that nature for this assistance that family and friends provide from time to time [...] it is an issue of respect and cultural commandment.

[99] Ibid., s 86.2. This is probably to ensure that different administrative bodies do not interpret the same provision differently—again, suggesting a preference for consistency.

[100] Particularly given the ESB wait times that exceed the human rights limitation period: Maryse Zeidler, "Wait Times for Worker Complaints in B.C. Unacceptable, Advocates Say," *CBC*, January 16, 2021, www.cbc.ca; *Human Rights Code*, RSBC 1996 C 210, s 22.

[101] *Balwinder Grewal and Harvinder Grewal o/a P&M Farms* ("*P&M*"), BC EST #D019/06, (2005), at para 9.

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The Tribunal upheld Employment Standards' finding that the berry pickers were employees, that Mr Grewal's company was an employer, and that "harvesting raspberries is an activity one would normally expect an employee engaged in farm work to perform."[102] That the "employees" may have been "relatives and friends lending a helping hand" was insufficient to show that Employment Standards erred in finding that they were employees. The Tribunal held that, even if there was no intention to establish an employment relationship, "the existence of an employment relationship is not dependent on the intentions of the parties."[103]

The decision does not provide sufficient information to compare *ts'its'uwatul* to *aawat*, though there is a surface-level similarity. While it is certainly possible that Mr Grewal was disingenuous in claiming *aawat*, the crucial issue is that Employment Standards fundamentally views this practice as subservient to the rights outlined in the *ESA.* Coast Salish individuals interested in working together outside of an employer/employee relationship may be particularly concerned because Employment Standards did not receive a complaint, but began an investigation on its own initiative and appears to have concluded that community agreement on a form of practice does not displace Employment Standards' involvement.[104]

Turning to the second example, namely dispute resolution, the *ESA* states[105] that complaints must be investigated unless certain requirements (such as timely filing) are not met. Employment Standards can stop investigating, or refuse to investigate, if the proceeding has also been commenced "before a court, a tribunal, an arbitrator or a mediator," if a court, tribunal, or arbitrator has rendered a decision, or the matter has been resolved (presumably, this includes successful mediation).[106] "Court, tribunal, arbitrator, and mediator" are not specifically defined, though the Guide provides two examples: "a human rights complaint or a court case."

It is unclear what this means for disputes that are resolved via Coast Salish practices.[107] The *ESA* implicitly limits "decisions" to courts, tribunals, or arbitrators. Such actors are very much a part of the Canadian legal system. The *ESA* does not make space for Coast Salish decision-making, meaning that Employment Standards cannot uphold such a decision unless it is categorized as mediation (or by ignoring the issue). While mediation does empower the integration of Coast Salish law, this approach is a denial of the governing power, and sovereignty, claimed by Coast Salish government. It means that, in the domain of employment, traditional dispute-resolution mechanisms and Coast Salish political authority are presumptively irrelevant. One can see the legislative difference in the stark contrast between the silence towards traditional dispute-resolution

[102] Ibid., 20.

[103] Ibid., 21.

[104] Community agreement can be very complex, pitting rights against freedoms: see, for example, *Thomas v Norris*, [1992] 2 CNLR 139.

[105] Section 76(1).

[106] Section 76(3).

[107] See a comparison of dispute-resolution processes in Miller, *Problem of Justice.*

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mechanisms in the *ESA* and the great respect for elders in the Tulalip legislation.[108]

Another issue is that the *ESA* speaks in the language of money. It is very specific about wages: they are to be paid, to employees, in Canadian currency. The *ESA* (likely concerned about exploitation of workers) does not recognize knowledge, resources, or anything other than Canadian currency as wages. Although Coast Salish dispute resolution could include financial consequences (see, for example, shame potlatching),[109] Coast Salish dispute resolution could involve less financial compensation, or on different timelines, than the *ESA* requires. Similarly, the *ESA*'s liberal grounding takes the "anthropocentric view that only humans are persons,"[110] making it extremely difficult for Employment Standards to determine whether a termination caused by lack of respect to a fish, tree, or deer was reasonable. The *ESA*'s illiteracy when it comes to reading how such values[111] inform the practices within a Coast Salish community makes it poorly suited to determining whether to claim jurisdiction over the matter or how to proceed with a matter. Further complicating this is that many relationships cannot be reduced to an "employment" relationship and complicated disputes (with an employment component) may not be properly resolved outside of a formal ritual setting—the sort that Employment Standards is unlikely to participate in, even if invited.

A further complication arises when the First Nation (or community) is the employer. It may be proper for Employment Standards to be wary of an employer's statement that a matter has been resolved, but Employment Standards is not particularly well equipped to determine whether there has been a reasonable application of Coast Salish dispute-resolution processes. While a full exploration of this difficult topic is outside the scope of the present study, one possible resolution would be to use the doctrine of collateral attack to respect the jurisdiction of the nation and find that a decision has been made.[112] The complainant, if they disagree with the nation's decision, should appeal that decision (internally, if such a process exists,[113] or in court) instead of attempting to relitigate it elsewhere. Given the emphasis on relationship-mending in dispute resolution,[114] one can but hope that this issue will not come up and that people will simply not make complaints to Employment Standards. However, as the *Grewal* decision shows, Employment Standards can assert jurisdiction without a complainant.

[108] This lack of respect is not limited to the *ESA*—as Dr Napoleon notes, courts sometimes struggle to refrain from interrupting elders (Val Napoleon, "Delgamuukw: A Legal Straightjacket for Oral Histories?" *CJLS* 123 (2005): 139.

[109] Bruce Miller, "Bringing Culture In: Community Responses to Apology, Reconciliation, and Reparations," in Miller, *Contemporary Coast Salish*, 129.

[110] Mills, "Lifeworlds of Law," 865.

[111] See Léonid Sirota, "Unholy Trinity: The Failure of Administrative Constitutionalism in Canada," *Journal of Commonwealth Law* 2 (2020): 35.

[112] This proposal leads to other complex questions, including the definition of "nation."

[113] Discussion as to what an internal appeal mechanism might look like is outside the scope of this paper.

[114] Miller, *Problem of Justice.*

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Family

The Coast Salish worldview is based in large part on the family, as opposed to the individual.[115] The definition of family is critical "because tribal political life is conducted along family lines and in the idiom of kinship"[116] and family can seen as "the most significant of all traditional institutions."[117] As outlined in Table 1, there are varying concepts of what is included in a 'family,' for the purposes of employment. Family is not always explicitly referenced in legislation, although the Swinomish include "foster[ing] strong family ties" in describing the purpose of its legislation. The *ESA* states that employment is in part to "contribute in assisting employees to meet work and family responsibilities." B.C.'s legislation puts work and family responsibility on an equal footing, whereas the Swinomish (and others) see work as a means to foster a strong family relationship.

Family definitions in tribal legislation often contain an "other" category that may include the "immediate household,"[118] "others raised or residing in the home and considered by the Tribal community to be part of the immediate family,"[119] or relations by "blood, marriage, or adoption."[120] The Swinomish legislation does not define "family," but does have definitions in other legislation, including in their Juvenile Code (which explicitly includes second and third cousins, and the spouse of the youths' great grandparents, along with "any person who is recognized as an extended family member by tribal custom").[121] There are diverse ways in which "family" is defined, with narrower economic definitions and broader youth/custody definitions.[122] For example, the Tulalip legislation defines family very broadly, but narrows the definition in the context of hiring preferences, and further narrows it in the context of qualifying for medical leave.

The *ESA* has a broad definition of "immediate family," which includes spouses, children, parents, siblings, grandparents, and grandchildren, as well as in-laws and stepchildren. The *Regulations* expand the family (including aunts and uncles, nieces and nephews, and siblings-in-law) but—as with the Swinomish and Tulalip legislation—different definitions of "family" apply to different situations. For COVID-19 leave, "family" can even include someone who is "like a close relative [...] but not related by blood, adoption, or partnership." Similarly, an employee could take time off work to care for someone who "considers the employee to be" a close relative.

For a narrower definition of "family," one can look to bereavement leave under the *ESA*. Bereavement leave only allows three days of leave, and only for "immediate family." To compare, some Coast Salish Tribal Codes allow youth to

[115] As one of many examples, the Lummi had at least thirty-five words for close family members (Stern, *Lummi Indians*, 124) and the Stó:lō have thirty-nine (Duff, *Upper Stalo Indians*, 75).

[116] Miller, "Contemporary Tribal Codes," 113.

[117] Ibid., 118.

[118] *TERO Code*, Tulalip Nation, Chapter 9.05, 9.05.020.

[119] *TERO Code*, Tulalip Nation, Chapter 9.05, 9.05.030.

[120] *Tribal Employment Rights Ordinance (TERO)*, Lummi Nation, Title 25 (Res. 2017–137), 25.02.010.

[121] *Juvenile Code*, Title 8, Swinomish Indian Tribal Community Ord. 170 2003, 8–01.050.

[122] Miller, "Contemporary Tribal Codes," 113.

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Table 1. Definitions of Family

	Spouse/ partner	Children	Parents/ guardian	Siblings	Niece/ nephew	Grandparents	Grandparents-in-law	Grandchildren	Aunts/ uncles	Step/foster children	Wards	First cousins	Parents-in-law	Siblings-in-law	Others
Lummi*	X	x	x	x	x	x	x	x	x	x	x	x	x	x	
Swinomish (juveniles)	X	x	x	x	x	x	x	x	x	x	x	x	x	x	x
Tulalip (Tribal Employment Rights Ordinance (TERO) code)*	x	x	x	x		x		x							x
Tulalip (Employment Code)	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
B.C. (Act)*	x	x	x	x		x		x		x			x		x
B.C. (Regulation)					x				x		x			x	x

Note: *Legislation refers to "immediate family," as opposed to "family" or "extended family."

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leave prison (far more significant than a couple of unpaid days off work) "to attend the funeral *and any related activities* for his parent, guardian, custodian, or any member of his extended family"[123] (emphasis added). The Coast Salish legislative scheme provides a more significant right to bereavement leave (and associated activity) than the *ESA* contemplates, suggesting a greater emphasis on the role of mourning and end-of-life ceremonies.

A few conclusions can be drawn from how "family" is treated. First, while there are some differing family rights in Coast Salish legislation, it is more common in Employment Standards. Again, there appears to be a preference for consistency over discretion in the *ESA.* Second, the *ESA* largely treats employment and business as an inherent good, whereas Coast Salish legislation often implicitly or expressly frames employment as a means to a stronger community. This difference has significant implications—it may help explain why B.C. gave relatively expansive rights to COVID-19 leave (reducing the risk of contracting COVID-19 at work was seen as good for business) and relatively weak rights to bereavement leave (which has no economic benefit). B.C.'s Minister of Labour, when implementing the amendment that provided COVID-19 leave, started by saying that "many workers wake up in the morning with a sore throat and a difficult choice."[124] This choice is only difficult where employment and family (or community) are on similar footing. If community health is the ultimate goal, a sore throat (when it is a symptom of a contagious, potentially lethal virus amid a pandemic) does not give rise to a particularly difficult choice.

Perspective also matters. B.C. provided COVID-19 leave if the person who was sick saw the employee as family or the employee saw them as a close relative. Elsewhere, the *ESA* refers to "any person who lives with an employee as a member of the employee's family," prioritizing individuals who live under the same roof (the Guide provides the example of "an exchange student residing with the employee's family"). This approach is individualistic in that the analysis is based on individual perspectives. In contrast, the Tulalip Employment Code asks whether the parties are "considered by the Tribal community" to be family. The Swinomish Juvenile Code asks whether the person is "recognized as an extended family member by tribal custom." These are community-oriented approaches, reflecting a recognition of shared norms over individual assertion. The Tulalip use the phrase "immediate household" in their Tribal Employment Rights Ordinance (TERO) code and "raised or residing in the home" in their Employment Code, suggesting that (past or present) accommodation may be as important as blood relations.

Perhaps the most explicit difference is the role of children as providers. Some tribal legislation contemplates underage people who work to support their family. The Tulalip do not allow minors (under fifteen years old) to fish without

[123] Ibid., 118; comparable Canadian legislation (*Correctional and Conditional Release Act*, S.C. 1992, c 20, s 17) does allow temporary absences in compassionate circumstances, though not as of right, and youth are underrepresented in obtaining temporary absence (Office of the Correctional Investigator, *Missed Opportunities* (Canada, 2017), 47).

[124] British Columbia. *Legislative Assembly Debates (Hansard)*, 42nd Parl, 2nd Sess, No. 68 (12 May, 2021), 1769 (Hon H. Bains).

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an adult, "unless he or she is the head of the household, or unless there is a showing of extreme hardship."[125] These rights—along with the possibility of emancipation—are in part to allow adolescent parents to provide for their children.[126] In contrast, recent amendment to the *ESA* requires government approval for any work done by those under fourteen years old[127] or anything other than "light work" for those aged fourteen to fifteen.

Conclusion

B.C. has established an employment framework that applies to Coast Salish peoples but is not reflective of Coast Salish worldviews. This legislation significantly impacts the ability of Employment Standards to respect Coast Salish worldviews. Nonetheless, the legislation does allow decision-makers to exercise some discretion. This discretion can be exercised in ways that are—or are not—relatively harmonious with Coast Salish worldviews. The Coast Salish legislation that does exist—largely in the American context—shows both consistency and difference among communities. There are differences in how resources are allocated and the weight given to sovereignty and veterans' rights. Similarities include a view that employment is best understood as a means to end discrimination and increase social welfare, as opposed to being a good in and of itself.

To the extent that the approach in this study is useful, it is very likely that similar analysis could be done with almost any Indigenous group, in almost any Canadian jurisdiction, on a variety of issues. It would be helpful for different administrative agencies to consider places in which decision-makers may use discretion in ways that are respectful to the communities that are impacted. This approach requires that administrative agencies be willing to exercise their discretion in ways that are unusual, and even inconsistent with the way in which they typically exercise their discretion. This does not mean that Indigenous worldviews will win every time,[128] but real engagement is required. The sort of approach in *Grewal*, with extremely limited analysis of the role of *aawat*, should be avoided. Of course, it would be more helpful for legislators to consider what sorts of amendments may be helpful in furthering reconciliation. Where it exists, tribal legislation can offer some insight into these principles and worldviews, and should receive greater attention from decision-makers and legislators. Similarly, Law Reform and similar institutes should consider this sort of approach in their work. A recent report on the *ESA* contained only a single reference to Indigenous people. This reference was the result of consultation, not with an Indigenous group, but with a public sector union.[129] More can be done.

[125] *Fishing*, Tulalip Nation, Chapter 8.05, 8.05.050.

[126] Miller, "Contemporary Tribal Codes," 184.

[127] Section 9.

[128] Admittedly, Canada's historical and present approach to Indigenous law and worldview gives little reason to think that this is a concern.

[129] British Columbia Law Institute, "Report on the Employment Standards Act," BCLI Report no. 84 (December 2018), 167.

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Whether tribal legislation should continue to evolve—and whether more Indigenous communities in B.C. should implement employment legislation—is a question for each community. Of course, these decisions are not made in a vacuum. The development of employment legislation may not be a priority and reconciliation requires that, when the legal system considers the pressing needs of Indigenous governments, it must do so from their perspectives.[130] However, it can be said that there are benefits to expressing community values through legislation and that there is a role for administrative decision-makers to consider this legislation when considering how to use their discretion.

[130] *Anderson v Alberta*, 2022 SCC 6, at 44.

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