

# Indigenous Laws as a Cornerstone for Concrete, Effective and Lasting Reconciliation:

Testimony for the Public Inquiry Commission on relations between Indigenous Peoples and certain public services in  
Québec – listening, reconciliation and progress



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# Testimony Overview

## Part I: Indigenous Legal Traditions Overview – Dec. 4<sup>th</sup>, A.M.

- Definitions, Importance, Challenges, Reframing

## Part II: The Work: Moving from a WHY to a HOW – Dec. 4<sup>th</sup>, A.M.

- Shifts, Sources, Resources, Methods, ILRU Method, Wahkohtowin

## Part III: Legitimacy, Legality & Lawfulness – Dec. 4<sup>th</sup>, P.M.

- Living Law, Gender and Vulnerability, Human Rights

## Part IV: Legal Education & Community-led Initiatives – Dec. 5<sup>th</sup>, A.M.

- Indigenous Laws in Law Schools, Community-led Initiatives

## Part V: Tough Questions & Future Directions – Dec. 6<sup>th</sup>, A.M.

- Reconciliation, Continual Issues, Recommendations

## **Part I: Indigenous Legal Traditions Overview – Dec. 4<sup>th</sup>, A.M.**

- 1. What are Indigenous legal traditions? Indigenous laws?**
- 2. TRC Calls to Action for Indigenous Laws**
- 3. Reframing Core Challenges as Opportunities for Respectful Relations:**
  - a. The Myth of Lawlessness <-> Logical Starting Points, Reasonable Working Assumptions
  - b. The Appearance of Lawlessness <-> Intergenerational Injustice v. Trauma, Need for Resources, Education and Enforcement

# 1. What are Indigenous Legal Traditions?

## Indigenous Laws?

Indigenous people's own legal traditions and laws, NOT state laws about Indigenous peoples



At one point, comprehensive legal orders with all the requirements to manage messy human life, NOT just restorative justice or even “Aboriginal justice” programs.

## 2. TRC Calls to Action for Indigenous Laws

- “Aboriginal peoples must be able to recover, learn, and practice their own, distinct, legal traditions.” – *TRC Final Report*, at 206.
- “Establishing Respectful Relations...requires the Revitalization of Indigenous Laws.” - *TRC Final Report*, at 213.

### **The TRC calls for:**

- Law schools and law societies to teach, a mandatory course on, among other things, Indigenous laws - *TRC Calls to Action #27 and #28*
- The recognition and implementation of Aboriginal justice system – *TRC Call to Action #42*.
- The establishment of Indigenous Law Institutes for “development, use and understanding” of Indigenous laws and access to justice – *TRC Call to Action #50*.

### **3. Reframing Core Challenges as Opportunities for Respectful Relations:**

#### **Core Challenges for Recognition of Indigenous Laws:**

- The Myth of Lawlessness
- The Appearance of Lawlessness

#### **Opportunities for Reconciliation:**

- Logical Starting Points, Reasonable Working Assumptions
- Intergenerational Injustice v. Trauma, Need for Resources, Education and Enforcement

# Core Challenges: The Myth of Lawlessness

1. European theorists, many who had never met an Indigenous person, wrote about Indigenous peoples as lawless/primitive/in a 'state of nature'. These tropes became 'background' that is often unquestioned. E.g. *Rousseau, Hobbes, Hart: Webber*. European myths about Indigenous peoples have enduring practical and legal consequences. E.g. "Doctrine of Discovery + *Terra nullis*"
2. Increasing European centralization and legal positivism traditions 'law as rule matched with sanction'. E.g. *Bentham, Austin, Hart* makes it hard to conceptualize decentralized horizontal legal orders (but possible – *Fuller, Postema*).
3. Primitivist Discourse –When pre-contact is imagined as **either** utopia **or** barbaria all arguments become a mug's game - *Waldram* If perfection or no law, what legal tradition would pass muster?

## Roots: A Logical Starting Point:

- For thousands of years prior to European contact or ‘effective control,’ Indigenous peoples lived here, in this place, in groups.
- We know that when groups of human beings live together, they have ways to manage themselves and all their affairs (*Fuller*). This task of coordination is “the most common of common denominators in law.” (*Webber*)
- Indigenous societies must have faced the inevitable and universal issues of human violence and vulnerability, a core aspect of any legal order (*Hart*), for millennia.
- Therefore, as a matter of logic alone, at some point, and for a very long time, Cree and other Indigenous peoples managed these universal human issues successfully enough to maintain civil societies (*Napoleon*).

**Indigenous people are reasoning people in reasonable legal orders.**

# Indigenous Reasonable Person: Logical Working Assumptions

If our logical starting point is Indigenous people are reasoning people in reasonable legal orders, more logical working assumptions follow:

- Decentralized, horizontal legal orders are possible (interactional, interpretivist, international legal theories helpful, e.g. *Fuller, Dworkin, Brunnee and Toope*).
- There are Indigenous legal principles for reasoning through universal human and social issues.
- There are Indigenous processes and procedures that legitimate public reasoned decisions.
- **Our question becomes: How do we access, understand and apply Indigenous laws today?**

# Core Challenges: The Appearance of Lawlessness

- Lack of books, scholarly articles, legal databases, continuing legal education (*Zuni-Cruz, Sekaquaptewa*) .
- Invisibility of decision-making and decision-making processes.
- Indigenous laws are not publicly and formally taught, resourced or enforced like the Civil law and the Common-law are.
- Social disorder, social suffering, unprecedented levels of violence and victimization (*Turpel-Lafond*).
- Spaces of lawlessness (*Razek, Santos*):  
*I think there always was law, but probably a period when people just didn't regard it anymore and didn't care and a lot of it came when they stopped fearing and stopped respecting the leadership and the Chief, and it seemed lawless, but there is a law but all of a sudden it is not being enforced anymore:*

# Intergenerational Trauma v. Intergenerational Injustice

- Reasonable Indigenous people, reasoning through Indigenous legal principles, constantly facing tragic choices, only unreasonable alternatives available (*Dershowitz*).
- Recognizing **intergenerational injustices**: not just historical, and not just intergenerational traumas from historical injustices.
- **Cumulative impacts** of intergenerational injustice.
- **Deep Absences** : Indigenous people's moral agency, intellectual capacity, and legal reasoning have been systemically devalued or dismissed by the dominant settler society for so long (*Ross, Santos*).
- **Generations of damage** to and destruction of Indigenous legal institutions, Indigenous legal pedagogies and Indigenous legal resources
- Lack of access to resources for education and enforcement mechanisms.
- **Silence and virtual impunity** are conditions where abuse and abusers flourish. Where all laws lack effectiveness and legitimacy, lawlessness flourishes.

**Indigenous people are reasoning people in reasonable legal orders, struggling with impacts of intergenerational injustices and lack of resources.**

# Opportunities –Restoring Respectful Relations:

**IF:** Indigenous peoples are reasoning people in reasonable legal orders, who are:

- struggling with intergenerational injustice and
- lack of resources to educate, resource and enforce Indigenous laws.

**THEN:**

- Recognizing the truth that Indigenous laws existed and continue to exist, despite damage, is as important as recognizing the truth of historic and continuing injustices.
- Rectifying *continuing* injustices will make a difference to social suffering.
- Revitalizing Indigenous laws requires serious and sustained resources devoted to Indigenous laws being publicly learned, taught, practiced and enforced.
- The goal is not utopia, but to restore and maintain more respectful and symmetrical relations within and between legal traditions and communities.

## Part II: The Work: Moving from a WHY to a *HOW*:

1. Reconciling Historical and Contemporary Legal Institutions
2. Engaging with Indigenous Laws as *Laws*
3. Application Example: Sioux Woman
4. Meta-Principles, Example: Wahkohtowin



# 1. Reconciling Historic and Contemporary Legal Institutions: Gitksan hereditary chief, *Xhliimlaxha* (English name: Martha Brown)



“Why not ask if you can use it? I said to them. They said, but their grandmother used it. Yes, I said, lots of people have used it, but we own it. If you just ask me, you can use it. I will even tell you where you can set your net. By marrying into our House they had the right to use it in the past. But those marriage ties died out long ago, and they were told, right in the feast, that they could not use it any more.”

What can we learn from *Xhliimlaxha*? In this interaction, *Xhliimlaxha* sets out a number of key legal concepts.

- Lack of understanding about the laws governing access and ownership of land and resources, and the breaking of those laws on the part of some younger Gitksan, by non-Indigenous peoples, and by the state, undermines the integrity of Gitksan law and their land ownership.
- When combined with an uncertainty about the authority and applicability of the Gitksan legal order in the present day, conflicts such as that which faced *Xhliimlaxha* are created.
- Martha Brown (*Xhliimlaxha*) quoted in Richard Daly, *Our Box was Full: An Ethnography for the Delgamuukw Plaintiffs* (Vancouver: UBC Press, 2005).

# 1. Reconciling Historic and Contemporary Legal Institutions

Here is one way to conceptualize this apparent institutional conflict within Gitksan governance and law, but similar conflicts are taking place elsewhere:

<b>Historic Legal Institutions and Law</b>	<b>← Colonial History →</b> 	<b>Present-Day Legal Institutions and Law</b>
<p><b>Non-state, horizontal and “from the bottom-up” political, economic, and legal orders</b></p> <p><b>Leaders speak and act only on what their members tell needs to be done or spoken to</b></p>	<p>State law and legal benchmarks</p>	<p>Political reorientation from horizontal and bottom-up to vertical and top-down</p> <p>e.g., generally, variations of a command and control model</p>
<p><b>Decentralized authorities allocated through institutional forms – kinship lineages, chiefs’ names</b></p>	<p>Federal authority, Indian Act</p>	<p>Elected band councils, Society Act tribal council organizations, centralized decision-making</p>

# 1. Reconciling Historic and Contemporary Legal Institutions

Historic Legal Institutions and Law	←Colonial History→ ↓	Present-Day Legal Institutions and Law
<b>Temporal – over time, Indigenous societies incorporated other societies – they were not homogenous</b>	Classification of peoples – for the purposes of federal control and benefits	Was - Indians, Métis, Inuit  Now – Cree, Gitksan, Dené, etc.
<b>Political, economic, and legal relationships that matter – internally within Indigenous society and externally with other peoples – were horizontal from the bottom up</b>	Political, legal, and economic activities went underground to avoid prosecution	Small geographically pinned communities – relationships that matter are vertical internally within community, and external with the state
<b>Legal order extended over all Indigenous territories (e.g., for the Gitksan 25,000 square miles)</b>	<b>Fracturing of larger legal order and cross cutting system of accountability</b>	<b>Authority extends to reserve boundaries (e.g., for the Gitksan 44 square miles)</b>
<b>Public legal institutions, public legal archives, legal pedagogies, authority to enforce, public presentation and witnessing of decisions</b>	Undermining of entirety of Gitksan law and legal pedagogy	Fewer feasts/public – most relating to succession  Some Indigenous peoples with an incomplete understanding of their legal traditions

# 1. Reconciling Historic and Contemporary Legal Institutions

<b>Historic Legal Institutions and Law</b>	<b>←Colonial History→</b> 	<b>Present-Day Legal Institutions and Law</b>
<p>Sources of law: human interaction, natural law, sacred, customary, deliberative, and positive</p> <p>The proxy of all sources is deliberative law since law does not interpret itself (Borrows)</p>	<p>People look for law that resembles state law</p> <p>Law as “thing” not process, must be authentic and uncorrupted by colonialism, and capable of “harmony”</p>	<p>Sources of law: centralized, formal state processes and handed down for citizens to follow</p>
<p>Gitksan example: Xhliimlaxha is informed by the above frame for her authority and legal decisions</p>	<p>Incomplete Indigenous law, need internal reconciliation, not a matter of recognition but of rebuilding</p>	<p>Gitksan Example: Young people are informed by the above frame</p>

## 2. Engaging with Indigenous Laws as *Laws*



# Recovering, Learning and Practising Indigenous Laws Today:

American Tribal Court Judges say there is a pressing need:

- To “locate methods of finding, analyzing, and applying [Indigenous] law.” – *Mathew Fletcher*
- For “useful theories or at least guidelines for working with [Indigenous law].” – *Pat Sekaquaptewa*
- For an approach that “represents a serious respect for [Indigenous] law”. – *Christine Zuni Cruz*

## Shifts: Common Beliefs about Indigenous Laws:



Indigenous people were lawless.

Indigenous laws as custom.

Indigenous laws are perfect or sacred.

# Shifts: Useful Beliefs about Indigenous Law:



## Indigenous laws are *laws*.

- Tools for social ordering, problem-solving and dispute resolution
- Diverse and adaptable
- Complex, imperfect and collaborative
- Meaningful, messy and in practice.

## Indigenous laws:

- Are not fully intact, visible or evenly functioning today.
- Are capable of being recovered and revitalized even after immense loss and damages.
- Require hard work and serious, sustained engagement to recover, learn, practise.



## **Substantive rights**

- Safety and protection
- To help when incapable or vulnerable

## **Procedural rights**

- To have case corroborated by evidence and observation
- To be heard
- Open, collective decision making guided by appropriate consultation

# Shifts in our Assumptions and Questions

The first shift is a shift in assumptions: To move past stereotypes.

**1.Reasoning and Reasonable:** Indigenous peoples were and are reasoning people with reasonable social and legal orders.

**2.Present Tense:** Use present tense to talk about and consider indigenous law – not relegated to the past

**3.Particular:** Think about indigenous laws as a particular response to universal human issues

**The second shift is a shift in our QUESTIONS: To go from General to Specific:**

<b>INDIGENOUS LAWS</b>	
<b>From:</b>	<b>To:</b>
What is aboriginal justice?	What are the legal concepts and categories within this legal tradition?
What are the cultural values?	What are the legal principles?
What are the “culturally appropriate” or “traditional” dispute resolution forms?	What are the legitimate procedures for collective decision-making?
<b>Overall Shift</b>	
What are the rules? What are the answers?	What are the legal principles and legal processes for reasoning through issues?

# Sources of Law (Borrows)



# Challenges (Borrows, Fletcher & Napoleon)

1. Accessibility
2. Intelligibility
3. Legitimacy
4. Equality and Human Rights
5. Distorting Stereotypes (positive or negative)
6. Applicability
7. Relevance and Utility

# Categories of Indigenous Legal Resources

## **1. Resources that require deep inherent knowledge and full cultural immersion,**

- Perceived as most ideal/legitimate
- Least available and accessible

## **2. Resources that require some community connection or access, and**

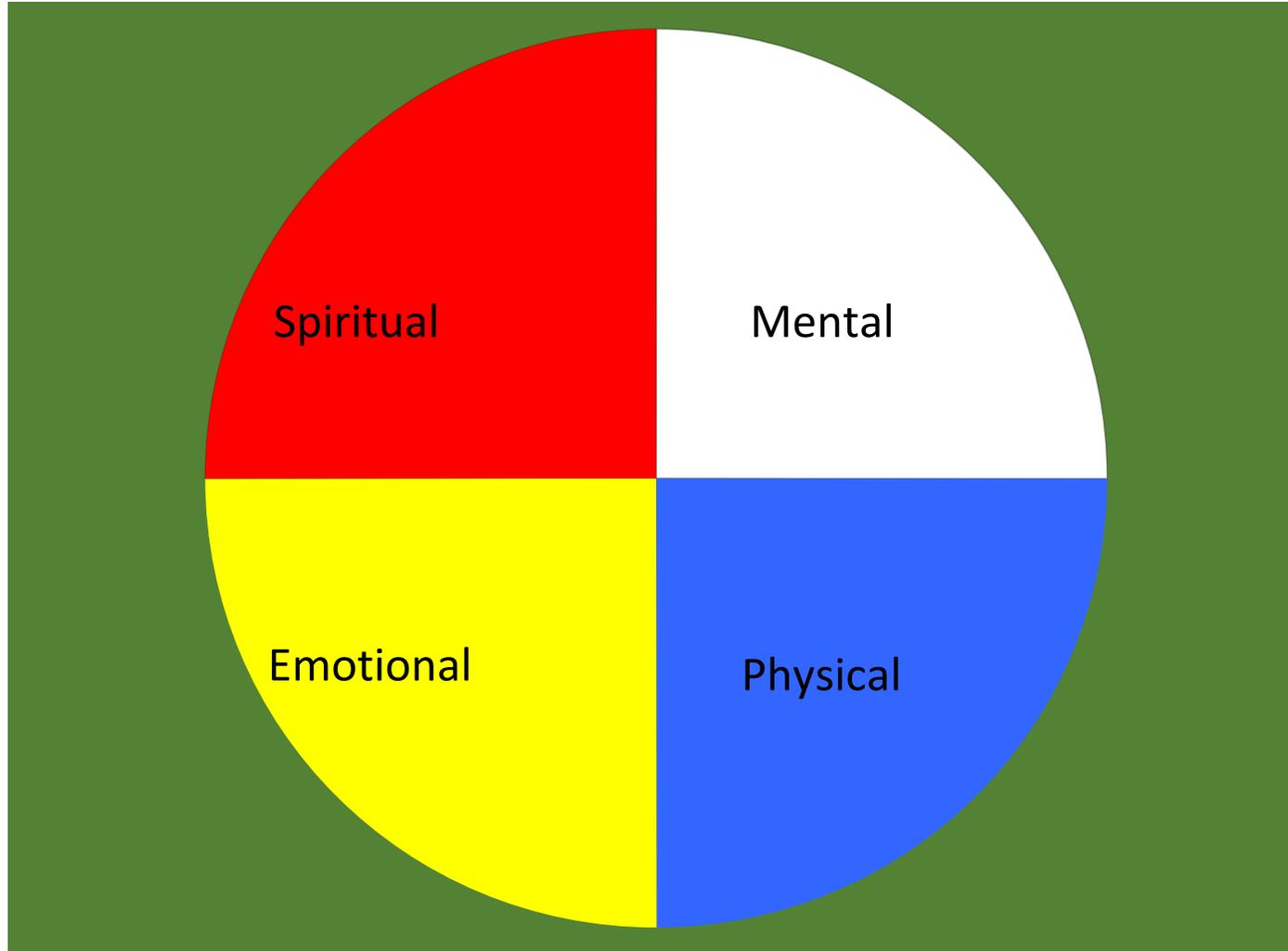
- Perceived as next best ideal/legitimate
- Limited availability and accessibility, challenges

## **3. Resources that are publically available**

- Perceived as least ideal/legitimate
- Most available and accessible

*How do we work productively and legitimately with non-ideal resources in the non-ideal present? Next step: Methods*

# Medicine Wheel Teachings – Engaging with Indigenous Legal Traditions using our Whole Selves:



Recovering Intellectual Resources. Reinvigorating Intellectual Traditions.

# Some of the methods identified and used by Indigenous legal scholars are:

- Community Embedded Method – Making Implicit Explicit (Napoleon et al, Sandy, Young)
- Land-based Learning (Borrows, Littlechild, Morales)
- Art, beading, shawls (Bluesky, Kennedy, Napoleon)
- Spiritual ceremonies, sweat lodges, vision quests, dreams (Borrows, Bird, Lindberg, Kennedy, Mills, Boisselle)
  
- The Linguistic Method (Fletcher, young)
- Interviewing elders and knowledge-holders (All, Zuni-Cruz, Craft)
- Story-based Learning (Borrows, Bird, Drake, Napoleon & Friedland)
  
- The Sources of Law Method (Borrows)
- The Single-Case/Story Analysis Method (Borrows)
- The Multi-Case/Story Analysis and Legal Theory Method (Napoleon)
- ILRU Method: Legal Analysis and Synthesis in conversation with communities (Friedland & Napoleon)
- Critical and Gendered Analysis (Lindberg, Napoleon, Snyder)

# Linguistic Method:

- Default method in practice

## Process (Fletcher):

- First, the tribal court judge must “identify an important and fundamental value identified by a word or phrase in the tribal language” (a primary rule).
- E.g. *hazho’ogo*
- Next, that primary rule is applied by the judge to the Anglo-American or intertribal secondary rule “as necessary to harmonize these outside rules to the tribe’s customs and traditions.”

# Community Embedded Method: Making the Implicit, Explicit:

## Napoleon et al: Identifying “local law”:

- “Indigenous laws and legal orders may continue to function and flourish just beneath the visible surface...at an implicit and informal level.”
  - Unpacking “a way of life” or “the way things are. ”
  - Local law “locates law in the on-the-ground, day-to-day self-governance performed by Aboriginal people according to Aboriginal laws.”
1. Identify day to day expressions of local law in the community – examine “what gives those practices meaning” and ask about the reasons behind people’s actions – how people make decisions, conduct themselves, obligations, aspirations, critiques, conflicts etc.
  2. Extrapolate how local legal principles and obligations may be applied elsewhere – local governance, other issues or conflicts.
  3. Initiate critical and rigorous internal discussions about local laws, as laws.



## Engaging with Indigenous Laws as *Laws*: The ILRU Method

**Phase 1:** Starting with a Specific Research Question

**Phase 2:** Case Analysis – Bringing the Research Question to available resources: Stories, Descriptive accounts, Interviews, Practices

**Phase 3:** Creating a Framework –Synthesis

**Phase 4:** Implementation, Application and Critical Evaluation

# Case Analysis: CASE BRIEF

**Problem (Issue):** *What is the main human problem that the story focuses on?*

**Facts (Relevant):** *What facts matter?*

**Decision/Resolution:** *What is decided or how is the issue resolved?*

**Reason (Ground/ Ratio):** *What is the reason behind the decision or resolution? Is there an explanation in the story? Said? Unsaid?*

**Bracket** [*What do you need bracket for yourself in the case? Some things will be beyond your terms of reference but are not necessary to the case analysis.*]

# Analytical Framework: Human and Social Issues

1. **Legal Processes:** Characteristics of legitimate decision-making/ problem-solving processes
  - **Final Decision makers:** *Who had the final say?*
  - **Procedural Steps:** *What were the steps involved in determining a response or action?*
2. **Legal Responses and Resolutions:** *What principles govern appropriate responses to legal/ human issue?*
3. **Legal Obligations:** *What principles govern individual and collective responsibilities? Where are the “shoulds”?*
4. **Legal Rights:** *What should people be able to expect from others?*
  - **Substantive**
  - **Procedural**
5. **General Underlying Principles:** *What underlying or recurrent themes emerge in the stories that might not be fully captured above?*

# Outcome Example: Summary of Cree Legal Principles: Violence, Harm, Conflict

## **Cree Meta-Principles** (*Reclaiming Language of Law*):

e.g. Wahkotowin (Relationality & Interdependence)

e.g. Education, Guidance and Support

e.g. Case by Case Reasoning

## **Cree Legal Response Principles** (*AJR Cree Legal Traditions Report & Wetiko Legal Principles*):

1. Healing
2. Separation or Avoidance (Temporary or permanent)
3. Supervision
4. Natural and Spiritual Consequences
5. Acknowledging responsibility
6. Reintegration
7. Incapacitation
8. Retribution (rare)

### 3. Application Example: Sioux Woman

#### Sioux Woman:

An old Cree man who was a powerful Shaman heard Sioux Woman laughing one day. He got mad because he thought she was making fun of him. He cursed her, and although she did not hear him, she became “sick and crazy” before Christmas, and began to turn into a *wetiko*. Her children grew scared of her.

When Sioux Woman’s mother saw she was beginning to become a *wetiko*, she attempted to cure her daughter. While she worked to heal her, “all the children were taken away, and some of the grown people went away too. Only a few stayed there to watch her.” When her daughter is cured “her grandchildren all came home, and they lived happily after that”. The Shaman died within four days of the Sioux Woman being cured, and everyone was relieved.

(Ruth Landes, 1983b, pp. 194-95), and cited in: Morton Teicher, “Windigo Psychosis: A Study of a Relationship between Belief and Behavior among the Indians of Northeastern Canada” in Verne F. Ray, ed., *Proceedings of the 1960 Annual Spring Meeting of the American Ethnological Society* (Seattle: University of Washington, 1960) at 58.

## 4. Meta-Principles – Example: *Wahkohtowin*: Laws for a Society of Relationships



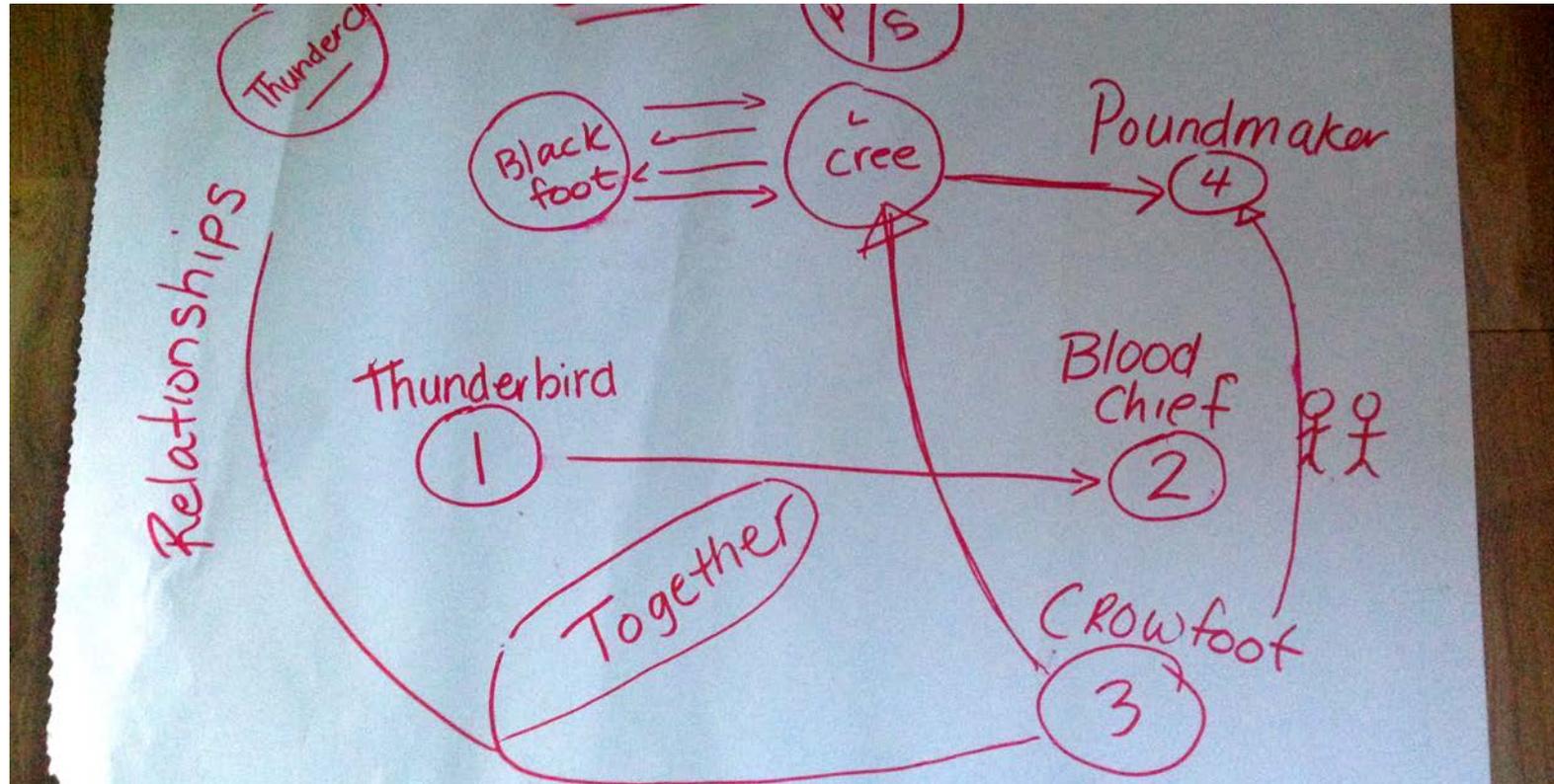
Myles and Marie McDonald Memorial Round dance, August, 2017

Photo by Brad Moberly

# Wahkohtowin – A Fundamental Cree Doctrine of Law (Harold Cardinal)

- “Laws governing relationships” (74)
- “These laws establish the principles that govern the conduct and behaviour of individuals within their family environments, within their communities, and with others outside their communities.” (74)
- “It is one of the most comprehensive doctrines of law among the Cree people and contains a whole myriad of subsets of laws defining the individual and collective relationships of the Cree people (75).

# Wahkohtowin – to live in relationship, to recognize our relatedness



Drawing by Doreen Delorme

“We all exist within larger relationships and these relationships are the foundation of everything else.” –

David MacPhee, in *Creating New Stories*

# Testimony Recap: Monday, Dec 4<sup>th</sup>, AM

## Part I: Indigenous Legal Traditions Overview:

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Monday Afternoon  
December 4

## **Part III: Legitimacy, Legality & Lawfulness**

1. Historic Debates: Law as an Intergenerational Conversation
2. Legitimacy and Legalities
3. Gender, Sexuality and Vulnerability
4. Human Rights
5. Accountability, Transparency and Scale

# Historic Debates: Law as Intergenerational Conversation

<b>Europe</b>	<b>Canada (and elsewhere)</b>
<p>Widespread moral crisis, uncertainty, insecurity, and an unraveling of medieval institutions.</p>	<p>Indigenous peoples experienced this kind of profound disorientation wrought by the unravelling of their social, political, and legal institutions.</p>
<p>There was the wide spread rise of modernity, commercial development, and the rise of the modern state.</p>	<p>State players organized themselves as unified powers, and collaborated with each other to exploit the rest of the world.</p> <p>For Indigenous peoples, this was experienced as the face of colonialism, including trade and treaties.</p>

<b>Europe</b>	<b>Canada (and elsewhere)</b>
Law became the most powerful instrument for the sovereign.	Law was and is the primary state instrument for Indigenous displacement from land.
The expectation was that law could establish and maintain social unity and rational, collective order.	For Indigenous peoples, this was experienced as political reorganization, reorientation, and classification.

<b>Europe</b>	<b>Canada (and elsewhere)</b>
<p>There were opposing ideas about social ordering and divergent conceptions about the nature of law.</p>	<p>The establishment of centralized colonial legal powers and legal benchmarks</p>
<p>From within this upheaval, people who cared about their world were duking it out.</p> <p>These were not abstract theoretical questions. People were trying to maintain civility, order, and social cohesion in a time of change.</p>	<p>Indigenous peoples survived colonization – pragmatically, strategically, and sometimes accidentally.</p> <p>Indigenous law did not go anywhere, but it is scarred and is incomplete.</p>

<b>Europe</b>	<b>Canada (and elsewhere)</b>
<p>Many historic dynamics remain in tension, playing out variously over the year.</p>	<p>In the resurgence and rebuilding of Indigenous law, we can see many similar dynamics as have occurred in western law.</p>
<p>Currently, there is an awakening to the reality of multijuridicalism, but no consensus of how to respond to or proceed with Indigenous law.</p>	<p>Indigenous law raises many of the same legal debates as happened in European 17<sup>th</sup> century.</p>

# Legitimacy

- What makes legal processes and decisions legitimate for each society?
- What are the societal aspirations, internal logic and legal perspectives, and ways people create meaning?
- What are the surrounding struggles and history?
- 



# Legalities: What makes law law?

Lon Fuller: eight distinct standards by legality may be tested

- (1) established rules,
- (2) adequate publication of the rules,
- (3) limited retroactivity of laws,
- (4) clarity of laws,
- (5) congruence of laws,
- (6) legal obligations are within the power of the affected party,
- (7) constancy of the law through time, and
- (8) congruence between official action and declared rule.



Kirsten Rundel

- Dignity
- Agency – not obedience
- Constituting and constitutive – law as a distinct mode of governance



# H.L.A. Hart

**Primary rules:** limit of expand liberty, substantive law and legal obligations

**Secondary rules:**

- Know what the law is (rule of recognition)
- Know when to change the law (power to create law – includes legislation)
- Know when the law is broken (power to adjudicate)

# Indigenous Legalities

- Gender, sexuality and vulnerability
- Human rights as integral to self-government and citizenship





# Indigenous Gender, Sexuality, and Vulnerability

- Indigenous Law on Demand – Law, Gender, and Sexuality
- Missing and murdered Indigenous women and girls as legal agents
- How respond when distortions of Indigenous law are advanced as representations of Indigenous law?

◀◀Spectrum▶▶

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Missing and  
murdered  
Indigenous  
women and  
girls

Every day  
decisions with  
material  
consequences

Reification of  
Indigenous  
women,  
idealization of  
the past

# Shifts: Gender, Sexuality, And Sexual Orientation

**Moving from general questions about:**

To asking specific questions about:

**What are “traditional” gender roles?**

How do our understandings about gender and sexuality shape our legal interpretations ?

**What are the cultural values concerning gender, sexuality, and sexual orientation?**

What legal principles help guide our decisions about gender, sexuality, and sexual orientation? For example, these could include principles of fairness, safety, and participation.

**What are “culturally appropriate” definitions of gender and sexuality?  
What are the “culturally appropriate” ways to treat women, sexuality, and sexual orientation?**

What assumptions are being made about the ways that gendered legal subjects engage with law?

What assumptions underlie how Indigenous law defines and treats gender, sexuality, and sexual orientation?



## Overall Shift

**What are the laws about gender, sexual orientation, and sexuality?**

How are Indigenous laws gendered?

**How can Indigenous people recreate gender balance, and restore historic sexuality and sexual orientation?**

How can a deliberative approach to Indigenous law help to promote anti-oppressive and anti-colonial legal relations for everyone?



# Indigenous Legal Feminist Analysis

**Story:** \_\_\_\_\_

**Source:** \_\_\_\_\_

**Legal Process:** What are the characteristics of legitimate decision-making processes? Who is included? How is this gendered? Who are the authoritative decision makers?

**Legal Responses and Resolutions:** What are the responses? Do these responses have different implications for women and men?

**Legal Rights:** What should people and other beings be able to expect from others? Are certain rights overlooked?

**General gender dynamics:** Are both women and men present in the material? What are they doing or saying? In what contexts do women and men appear?

# Sally Engle Merry

Gender violence is a highly variable phenomenon that takes shape within particular social arrangements.

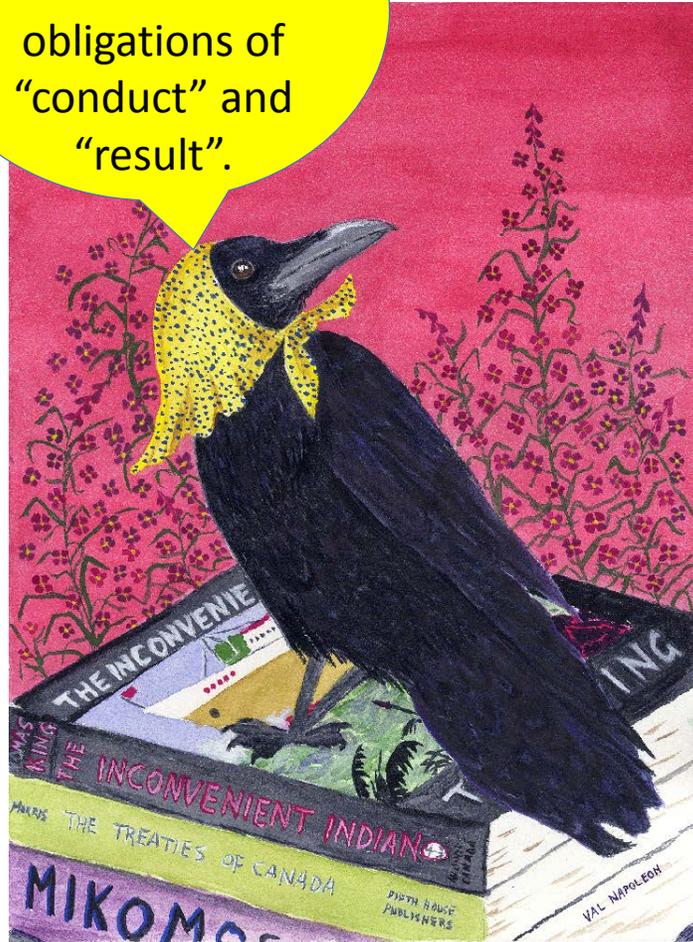
It is never distinct from larger systems of social inequality and power based on race, class, and strength, nor is it distinct from other forms of violence such as warfare, state oppression, racism, or caste differentiation.

The identification of any act of violence or threat as gender violence is always a matter of interpretation within a particular social and cultural context.

# Indigenous Human Rights

- Gitksan example (Raven's Garden)
- Sally Engle Merry (Rights consciousness and rights bearers)
- Indigenous Human Rights CMU Course – (First Nations Caring Society case and MMIWGI)

Indigenous governments have both obligations of “conduct” and “result”.



*Conduct* – action reasonably expected to realize the enjoyment of human rights.

*Result* – setting and achieving specific human rights targets to meet a substantive standard (e.g., single mothers to be housed).

	Fact-based or objective	Judgment-based or subjective
Qualitative	<p>An indicator articulated as a narrative, and based on information about facts or events that are directly observable and verifiable.</p> <p><i>Examples:</i></p> <ul style="list-style-type: none"> <li>• Status of human rights legislation or policy.</li> <li>• Descriptions of acts of physical violence or violent events.</li> </ul>	<p>Narrative based on perception, opinion, assessment or judgment.</p> <p><i>Examples:</i></p> <ul style="list-style-type: none"> <li>• Assessment of judicial fairness.</li> <li>• Right to food guaranteed and in practice.</li> </ul>
Quantitative	<p>Indicators in quantitative form about facts or events that are observable and verifiable.</p> <p><i>Examples:</i></p> <ul style="list-style-type: none"> <li>• Number of single mothers awarded the family home upon separation.</li> <li>• Levels/statistics of violence, kinds of violence.</li> </ul>	<p>Indicators in quantifiable form based on information that is a perception, opinion, assessment, or judgment.</p> <p><i>Examples:</i></p> <ul style="list-style-type: none"> <li>• Number of people who feel safe walking at night.</li> <li>• Number of people who feel safe expressing their views publicly.</li> </ul>



Kinds of indictors:

- *Structural indicators* (legislation, institutions, public reasons, simple and reliable, etc.)

## Indicator Model

<b>Indicator #1</b>	<b>Example, number of complaints received about discrimination for housing.</b>
<b>Definition</b>	Example, how is discrimination defined? Which housing is referred to?
<b>Rationale</b>	What will this indicator show and why was it selected?
<b>Source</b>	Where will the information come from?
<b>Computation</b>	How will complaints be recorded?
<b>Periodicity</b>	When will this indicator be updated?
<b>Comments and limitations</b>	



# Accountability, Transparency, and Scale

- Inter-community relations/inter-group relations
- Assumptions, power, racialization, language (e.g., culture, tradition)
- Legal order scale versus small community
- Hierarchy and centralization: deeply held ethics

# Recap of Testimony Part III: Legitimacy, Legality & Lawfulness

1. Historic Debates: Law as an Intergenerational Conversation
2. Legitimacy and Legalities
3. Gender, Sexuality and Vulnerability
4. Human Rights
5. Accountability, Transparency and Scale

