

Thinking about Indigenous Legal Orders¹

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Indigenous law can be hard to see when we are used to seeing law as something the Canadian government or police make or do. Some people may even have been taught that Indigenous people did not have law before white people came here. This is a lie. Law can be found in how groups deal with safety, how they make decisions and solve problems together, and what we expect people “should” do in certain situations (their *obligations*). . . . They are often practiced and passed down through individuals, families, and ceremonies. This is why many still survive, after all the government’s efforts to stop them and sneer at them. Because of the presence of Canadian law, and the lies and efforts to stop Indigenous law, some Indigenous laws are sleeping. It is time to awaken them.²

Introduction

One of my Indigenous students said to me, “Just because something has ‘always been done that way’ does not make it law.” This is certainly a valid observation, but his actual concern was whether Cree law could be considered real law or whether it is merely habit. The student’s skepticism is not uncommon, and he was simply drawing from his recent reading of western legal theory. There, he had encountered widely held assumptions about Indigenous legal orders and law that too often remain unchallenged. To fully appreciate the implications of the student’s statement for Indigenous peoples requires some careful analysis. This paper is about analysing and challenging this statement and other gross simplifications about Indigenous legal orders and law.

There are many ways to think about law. Basically, how we think about law is shaped by our experiences and history. As Indigenous peoples, much of our current understanding of law derives from our experiences with the western legal system in Canada. We know this system through its courts, legislation, and enforcement, and by its treatment of our peoples, lands, and resources. Given this, many Indigenous peoples have come to associate “law” with power, punishment, hierarchy, and bureaucracy. In the case of my student, “real” law was clearly associated with formal, centralized state processes of determining what law is and how to apply it.

¹ This article has been revised from the original version and is forthcoming in Colleen Shepard & Kirsten Anker, eds., *Dialogues on Human Rights and Legal Pluralism*, 2012 Springer Press’ Seriesm, *Ius Gentium: Comparative Perspectives on Law and Justice*. which was written for the National Centre for First Nations Governance and published in 2007 online at <http://fngovernance.org>. The ideas contained herein were reworked and substantially developed in Val Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (PhD Dissertation, University of Victoria, 2009) [unpublished]. This dissertation is available online at <http://dspace.library.uvic.ca>.

² Hadley Louise Friedland, *The Wetiko (Windigo) Legal Principles: Responding to Harmful People in Cree, Anishinabek and Saulteaux Societies – Past, Present and Future Uses, with a Focus on Contemporary Violence and Child Victimization Concerns*. (LLM Thesis, University of Alberta, 2009) [unpublished] 15-16 [Friedland] [footnotes omitted].

There is a broader and more useful way to think about law, including Indigenous law, beyond what we have come to know as western law. In this paper, I will describe how we might think about law so that it is more helpful to Indigenous peoples' work generally. Such a discussion includes asking questions about the sources of Indigenous law³ and what its functions are. Thinking about law also raises questions about its legitimacy and authority, and how law changes over time. Such rigorous critical thinking about law can support the building of non-colonial relationships among Indigenous peoples and between Indigenous peoples and Canada.

Indigenous peoples have many intellectual resources, legal and political, that are available to us from our own histories and societies and that are needed for reasoning through today's complex struggles. Indigenous law is a crucial resource for Indigenous peoples. It is integrally connected with how we imagine and manage ourselves both collectively and individually. In other words, law and all it entails is a fundamental aspect of being collectively and individually self-determining as peoples. Indigenous law is about building citizenship, responsibility and governance, challenging internal and external oppressions, safety and protection, lands and resources, and external political relations with other Indigenous peoples and the state.

I use the term Indigenous legal traditions when referring to Indigenous legal protocols and laws. Legal traditions are deeply rooted and comprise "historically conditioned attitudes about the nature of law, role of law in the society and the polity, about the proper organization and operation of the legal system, and about the ways law is or should be made, applied, studied, perfected, and taught".⁴ Of course, it is usually preferable to use Indigenous peoples' own language when referring to law and legal concepts. For example, the Gitksan people's word for law is *ayook*, which means law, custom, or precedent.

I use the term "legal system" to describe state-centred legal systems in which law is managed by legal professionals in legal institutions that are separate from other social and political institutions. For example, Canada and other nation states have such central legal systems. In contrast, I use the term "legal order" to describe law that is embedded in non-state social, political, economic, and spiritual institutions.⁵ For example, Gitksan, Cree, and Dunne za peoples have legal orders. Indigenous law is a part of and derives from an Indigenous legal order. By distinguishing between legal systems and legal orders, I hope to avoid imposing western legal ideas onto Indigenous societies.

³ For a wonderful discussion on the sources of Indigenous law, see John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) [Borrows] 23-58.

⁴ J.H. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford: Stanford University Press, 1985) 1.

⁵ Harold J. Berman, *Law and Revolution* (Cambridge: Harvard University Press, 1983) at 49-50.

1. Locating Myself

By way of establishing my own experience with these issues, my family is from Sauteau First Nation located in northeast British Columbia's *Treaty 8* area. I am of Cree and Dunne za heritage.⁶ For over twenty-five years my work was mainly with Gitksan and Wet'suwet'en peoples in northwest BC and included community activism and support for the *Delgamuukw*⁷ legal action. I am an adopted member of the Gitanyow (Gitksan) house of Luuxhon. When I became a grandmother, I went to law school and I was called to the BC bar in 2002. In 2009, I completed a PhD with the Faculty of Law at the University of Victoria. Currently, I am an associate professor with the Faculty of Law at the University of Victoria. In the course of my research, I work with Aboriginal peoples locally and regionally. Both inside and outside my work at the university, I advocate for academic and political diversity among Aboriginal peoples, and for ongoing gender analysis of all aspects of the larger Indigenous political project.

2. Seeing Indigenous Law

This paper is not intended to be a prescription for all Indigenous peoples' legal traditions. Rather, it draws on my experience with non-state, decentralized societies such as the Gitksan, Wet'suwet'en, Tsimshian, Cree, Dunne za, and Carrier peoples. It offers a way to think about law in a theoretical framework that can be shaped according to different cultures, experiences, and histories. It is intended to relate more specifically to Indigenous peoples in western Canada. It definitely is not intended to represent or describe all Indigenous legal traditions in Canada or beyond.

Indigenous peoples were and are reasonable and reasoning peoples,⁸ and law is one of the ways we govern ourselves. It is law that enables large groups of people to collectively manage themselves "against a backdrop of deep-seated normative disagreement" and to fashion "collective positions out of the welter of disagreement".⁹ Law is a process, not a thing, and it is something that people actually do. Indigenous peoples applied law to harvesting fish and game, access to and the distribution of berries, the management of rivers, and the management of all other aspects of political, economic, and social life. Since our legal orders and law are entirely created within our cultures, it can be difficult to see and understand law in other cultures. In other words, law is

⁶ Sauteau First Nation located in northeast British Columbia. This region is covered by *Treaty 8*, one of the numbered treaties, which also covers northern Alberta and part of the Northwest Territories. Northeast BC is the homeland of the Dunneza peoples. By 1911, a group of Sauteaux peoples had moved into Dunneza territories. In 1914, the Sauteaux were "admitted" into *Treaty 8* without the usual negotiated admission process. In 1918, the Sauteaux took up residence at the eastern end of Moberly Lake where a reserve was set out for them. This community prefers the spelling, "Sauteau".

⁷ *Delgamuukw v. The Queen* (March 8, 1991) Smithers 0843 (BCSC); *Delgamuukw v. British Columbia* (1993), 104 DLR (4th) 470 (B.C.C.A.); and *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010.

⁸ Friedland, *supra* note 2 at 45.

⁹ Jeremy Webber, "Naturalism and Agency in the Living Law" in Marc Hertogh, ed., *Living Law: Reconsidering Eugen Ehrlich*, Oñati International Series in Law and Society (Portland, OR: Hart, 2009) 201 at 202 [Webber, "Naturalism"]. Webber defines a normative order as "a natural dimension of any human interaction, generated through the day-to-day business of human life, perhaps even definitional of the existence of society" (at 201).

societally bound – it is only law within the society that created it. Gitksan law is not law to Cree peoples, and vice versa.

I am referring to culture in the broadest sense – that which forms our horizon in the world and which includes politics, law, economics, and social orders. We can learn how to see law across cultures and societies, and we can agree to recognize other people’s law through our various international arrangements. To do this we must pay attention to our own cultural biases so that we recognize them in our expectations, responses, and judgments of other peoples.¹⁰ We have to take the time to understand how law makes sense in that other society.¹¹

Law is never static, but rather, lives in each new context. In fact, one of the most important things to understand about any law is how it changes. And it has to change in order to be an effective part of governance – it has to be appropriate to new contexts and circumstances or it simply will not work. It also has to be appropriate to the experiences of the people or it will have no meaning or legitimacy. Rules are only a part of law. It is the thinking and reasoning processes that make law. Law is the intellectual process of deliberating and reasoning to apply rules according to the context. This was part of what my student was missing when he was questioning the validity of Cree law.

2.1 Sources of Law

It is helpful to think of different kinds of law as a spectrum. Where we place law on the spectrum is determined by where we think law comes from – the sources of law. It would look like this:¹²

Law from Central Processes of Enactment	Law from Social Interaction	Law from the Divine or from Outside Human Beings
Known as Positive Law (Legal Positivism)	Known as Customary Law	Known as Natural Law
Law comes from a central authority through a formal process.	Law comes from the interaction between human beings that enables people to generally predict behaviours in a group.	Law comes from a divine authority or from basic human characteristics. ¹³
(E.g., Canadian Constitutions, <i>Indian Act</i> , etc.)	(E.g., Resource-management law of decentralized peoples)	(E.g., Ecclesiastical law, etc.)

Another way to think about sources of law is provided by John Borrows who argues that Indigenous societies have at least five sources of law: sacred, deliberative, custom, positive, and natural.¹⁴ Borrows cautions against treating these sources as

¹⁰ William Alford, “On the Limits of ‘Grand Theory’ in Comparative Law” (1986) 61 Wash L Rev 945.

¹¹ See generally, William Ewald, “Comparative Jurisprudence (I): What was it Like to Try a Rat?” (1994-95) 143 U Pa L Rev at 1889-1905, 1912-16, 1924-25, 1936-43.

¹² This is an extremely brief outline. There are volumes written about each area of law.

¹³ But see the extensive work of John Finnis, *Natural Law and Natural Rights*, Clarendon Law Series (Oxford: Clarendon Press, 1980).

¹⁴ Borrows, *supra* note 3 at 23.

separate or artificially watertight because, in actuality, “Indigenous legal traditions usually involve the interaction of two or more . . . sources”.¹⁵ Arguably, all sources of law require interpretive choices and deliberation; it is in the articulation of these processes that one can create the necessary intellectual space to critically examine norms, power, and assumptions – as a part of the healthy exercise of agency and citizenship.

Since law is a cultural institution, societies that are organized centrally will have centralized processes for enacting law. This is the case for Canada, which is centrally organized as a nation state with hierarchical levels of law-making authority and adjudication. However, decentralized societies do not have formal, centralized processes for enacting law. For example, the Gitksan are a decentralized society made up of kinship groups known as “Houses”.¹⁶ The House is the basic political unit of Gitksan society, and each one is closely interrelated with other Houses through kinship, marriage, and other relationships. All the Houses are part of the four larger clans.¹⁷ While each Gitksan person is born into the mother’s House, there are many reciprocal obligations to the father’s House, spouse’s House, and so on. Territories are held in trust by the House chiefs on behalf of the House members. This is a decentralized system because there is no big boss of all the Houses.

If historically there was no centralized Gitksan society, there was no centralized or official Gitksan enactment of law. However, the Gitksan did and do have law, the *ayook*, decentralized law which derives from the long-term social, economic, and political interactions of the members, House groups, and clans, and their interactions with non-Gitksan peoples. Gitksan peoples had collective ways of formalizing the law that derived from such social interactions over time. These explicit legal teachings are part of how Gitksan peoples managed themselves historically, and arguably, they are still reflected in contemporary governance functions. The main point here is that how we structure law reflects how we structure our societies. Indigenous societies that were more centrally organized will likely have more centralized legal orders, and so on.

Turning to natural law and sacred law: some Indigenous peoples equate their own laws with the laws of the natural world and so describe their law as “natural law”.¹⁸ Other

¹⁵ *Ibid.* at 55.

¹⁶ Each Gitksan person is born into his or her mother’s House, a matrilineal kinship group of about 150 persons who share a common ancestry. It is the House (*wilp*) that is the territory- and fishing site-owning entity. The term House originates from the historic longhouses, although members of the same House did not actually live under the one roof. Rather, House members were and are widely scattered by marriage and occupation. House members have rights and responsibilities in other Houses by virtue of their roles as spouses and clan members. See Richard Daly and Val Napoleon, “A Dialogue on the Effects of Aboriginal Rights Litigation and Activism on Aboriginal Communities in Northwestern British Columbia” (2003) 47:3 Social Analysis, *The International Journal of Cultural and Social Practice* 108.

¹⁷ Each Gitksan House belongs to one of the four larger clans (*pteex*), which share a broader history – the *Ganeda* (Frog), *Gisgahast* (Fireweed), *Lax Gibuu* (Wolf), and *Lax Skiik* (Eagle).

¹⁸ There are a number of theories about natural law, each with different perspectives on morality, authority of legal norms, and beliefs about human beings. For example, in one school of thought, the term “natural law” is about the laws of nature such as the law of gravity. Another school of thought holds that the organization of centralized states is a natural extension of natural individual rights. See generally,

Indigenous peoples believe that their laws come from the Creator, and therefore consider them to be sacred.¹⁹ However, since laws have to be interpreted by human beings, and law is not just rules, the conception of law as being natural or sacred needs further consideration and discussion. What are the consequences of law being sacred or natural? Who gets to say whether the law has been broken? How can people disagree with sacred law or natural law? Can sacred laws change? Can natural laws change?

There is an important difference between, on the one hand, believing that the laws themselves are spiritual and sacred, and outside human control, and on the other hand, understanding that all law, including western law, is founded on a world view of one sort or another (i.e., how we see human beings, non-human life forms, and the spirits and the universe). It is hard to perceive this in western law because it is always described as “normal” and “rational”. But all law, including western law, is based on a formative societal understanding of humans (e.g., individual, competitive, communal, etc.) and of the larger world (i.e., how humans relate to non-human life forms).

So if we understand law as being founded on our world views, including our norms and morals, and our relationship with the spirit world, then human beings are responsible for the interpretation, reasoning, and application of law. However, if we believe laws are sacred, our understanding about the responsibility of human beings can become reduced to following rules. It should be noted that just as there is great diversity among Indigenous peoples, there is also diversity within Indigenous communities. In any given community, there is a range of beliefs and resultant behaviours. Furthermore, these norms, or understandings of right and wrong, are contested at every level on which human beings live with one another – as they should be.

For instance, this critical question relates to the trend of creating hierarchies and turning elders into priest-like beings that are also sacred. What are the consequences of treating elders as if they were priests? Does this allow elders to admit when they do not know something? How does this reconcile with the high incidence of elder abuse in our communities? How does this reconcile with elders who are abusive? Can we disagree with elders? Is it a form of fundamentalism? Is this good governance? These are serious questions that require fearless on-the-ground exploration and much, much more discussion.

2.2 Kinds of Law

Law may be described as “a language of interaction” that is necessary for people’s social behaviour to be meaningful and predictable.²⁰ It is this language of interaction that makes possible social settings where people’s behaviours generally fall within expected or

Wikipedia, The Free Encyclopedia, online: Wikipedia http://en.wikipedia.org/wiki/Natural_law and online: *Internet Encyclopedia of Philosophy* <http://www.iep.utm.edu/n/natlaw.htm>.

¹⁹ See generally, Harold Cardinal & Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000).

²⁰ Lon L. Fuller, “Human Interaction and the Law” (1969) 14 Am J Juris 1 at 1.

known patterns.²¹ Citizens can manage their lives within this interactive framework. They know what to expect from one another – at least generally.

Law still functions as law whether it is centralized or decentralized. So what is it that law does? The basic characteristic of law is that it lays down general rules or baselines that people figure out how to interpret and apply.²² Decentralized Indigenous legal orders fulfill the basic functions of law and enable people to manage themselves.

As with any legal tradition, some Indigenous law is implicit, or unsaid.²³ In other words, many Indigenous peoples are not aware of the law they know – they just take it for granted and they act on their legal obligations without talking about it. Indigenous societies also have explicit law that is explained and talked about, recorded and recalled, and deliberated upon. However, sometimes Indigenous peoples think that their laws have to look like western laws and so they try to describe them in western terms. Other times, like my law student, they fail to see Indigenous law as real law. This is not to suggest that Indigenous societies do not also centrally enact law today in the fulfilment of governance responsibilities.

2.3 Legal Reasoning

So what is the reasoning process that enables people to collectively make rules into law? Why does this reasoning process matter? In the common law, which we follow in Canada (except in Quebec), legal reasoning is sometimes called “artificial reasoning”. This is because its form and structure are designed for a public forum where the reasoning is open to challenge. The actual reasoning is the result of practical experience that people collectively reflect on through an agreed structure and process. This is different from the individual reasoning that we do every day.²⁴

Take, for example, how a historic Gitksan crest dispute is resolved. This process contains all the legal reasoning elements of law.²⁵ The Gitksan chiefs consider Gitksan law, past cases, circumstances, and histories. The reasoning and interpreting process of the Chiefs is known to the participants because it is conducted through both formal and informal public gatherings. Numbers of people are involved – those with direct interests, those with related interests, and those who could be considered neutral. These Gitksan reasoning processes occur within the context of Gitksan culture, institutions, history, and

²¹ *Ibid.* at 2.

²² *Ibid.* at 23.

²³ See Gerald Postema, “Implicit Law” in Willem Witteveen & Wibren van der Burg, eds., *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam: Amsterdam University Press, 1999) 255.

²⁴ Gerald J. Postema, “Classical Common Law Jurisprudence (Part II)” (2003) 3:1 *OUCLJ* 1 at 10. Postema contends that the reason common law is artificial is that “it is the disciplined practice of argument and disputation in a public forum – an art that had been called *ratio artificialis* long before Coke gave it currency in common law jurisprudence”.

²⁵ Val Napoleon, “Living Together: Gitksan Legal Reasoning as a Foundation for Consent” in Jeremy Webber & Colin McLeod, eds., *Challenges of Consent: Consent as the Foundation of Political Community in Indigenous/Non-Indigenous Contexts* (Vancouver: UBC Press, 2009) 45 [Napoleon].

experiences. In other words, appreciating the wisdom of Gitksan law “lies in recognition of the internal point of view of participants in the legal system”.²⁶

Other Indigenous peoples also have processes by which legal reasoning and deliberation takes place. The challenge is to learn to recognize these processes because they can be implicit, informal, and decentralized. And it is critical to consider these laws from within their cultural and historical perspective so that they make sense as part of governance. We can comprehend and explore these processes by looking at both historic and contemporary conflicts, agreements, and ongoing arrangements between people. It is also important to consider interactions and conflicts over time so that we can recognize overall patterns and roles.²⁷ For instance, there is a current dispute regarding the southern boundary of *Treaty 8* in British Columbia.²⁸ The community of Lheidli T’enneh negotiated a modern treaty under the British Columbia Treaty Commission, but its proposed boundary overlaps that of *Treaty 8*. One way to resolve this dispute would be to explore the historic relationships between the Lheidli T’enneh peoples and the *Treaty 8* peoples. What created the overlap and how did people manage the overlap area in the past? What were the trade and intermarriage arrangements? What were the land tenure laws that applied to the disputed lands? How might these former conflicts and arrangements inform today’s dispute?

Indigenous law is not stuck in the past. Rather, despite the damage to our legal orders, Indigenous peoples continue to act on historic legal obligations in modern forms wherever they can. For example, it is arguable that the work that many people do at the community level with various Aboriginal justice initiatives is rooted in their historic legal obligations in their own legal orders.²⁹

2.4 Legitimacy

All peoples have to believe that the legal order and law is legitimate before they will countenance it; if they do not, the decisions will have no meaning. This does not mean that all parties involved in a decision will get what they want, but that even when they do not get their way, they will still abide by the decision. After all, as Jeremy Webber has pointed out, “all law – non-state law as well as state law – is inherently non-consensual, [and] is always to some extent preemptory and imposed, establishing a collective position against a backdrop of deep-seated normative disagreement”.³⁰ What is important then, is to focus on the “means by which contestation is settled”.³¹

²⁶ Gerald J. Postema, “Classical Common Law Jurisprudence (Part I)” (2002) 2:2 OJLJ 155 at 155.

²⁷ See generally, Roderick Macdonald, *Lessons for Everyday Law* (Montreal: McGill University Press, 2002).

²⁸ Val Napoleon, *Indigenous Legal Lodge Proposal for Treaty 8*, (2008) [unpublished, archived with author].

²⁹ Val Napoleon, Angela Cameron, Colette Arcand, & Dahti Scott, “Where is the Law in Restorative Justice” in Yale Belanger, ed., *Aboriginal Self-Government* (Purich, 2008) 348.

³⁰ Webber, “Naturalism”, *supra* note 9 at 202.

³¹ Napoleon, *supra* note 25 generally.

This becomes another piece of the work involved with Indigenous legal orders and law. What makes the legal order and law legitimate? This question is complicated because in recent times, Indigenous laws have been broken without consequences (e.g., alienation of land and resources, violence, failed kinship obligations, etc.). When laws are broken with no recourse, the legal order begins to break down, and this has been the experience of Indigenous peoples. This is one of the reasons that western courts and lawmakers are so concerned with actions that might bring western law into "disrepute". If the law looks ridiculous, it fails as a governance function. It no longer enables groups of people to manage themselves.

This does not make working with Indigenous legal orders and law impossible. It is simply another factor in the work. It is a reality that our legal institutions have been damaged, so we can consider the extent of the damage and start from there. And given that there is no pure, static law anyway, this is not a problem. We can learn from the present while drawing what is useful from the past.

For the Gitksan, the legitimization of the Gitksan legal order and law takes place horizontally among the members on a decentralized basis, and not vertically as when the government is centralized. Gitksan law was effectively approved and integrated into a body of law, and into people's daily lives. Also, approval of Gitksan law is evidenced in the ongoing management and resolution of disputes.³² The nature of this consent, and therefore the authority of Gitksan law, is that Gitksan people agreed to live with how the disputes are handled and with the outcomes. The major agreements continue to be affirmed in the Feast hall through time and are witnessed in formal public processes.³³ That is, we know it exists because we can see it at work.

This becomes much more complicated when the various contemporary governing structures represent band and tribal organizations rather than kinship systems. The challenge is to effectively reconcile the modern and historic forms of governance and law making authorities at the local level.

Many behaviours that create conflict today observe historical ethics regarding authority and legitimacy. For example, the Innu in Labrador practiced conflict avoidance. This worked well with small highly mobile groups of people that were able to travel across a large territory. However, since the establishment of settled communities, the

³² *Ibid.* at 24.

³³ On this point, I agree with Jeremy Webber's scepticism as to the adequacy of the language of consent and whether consent can actually be deliberately and explicitly provided to form the political basis of societies. See Jeremy Webber, "Challenges of Consent" (Paper prepared for the Inaugural 2004 Conference of the Consortium on Democratic Constitutionalism: "Consent as the Foundation for Political Community"), online: University of Victoria http://www.law.uvic.ca/demcon/2004_program.htm at 2. According to Webber, dialogic theories of consent conceptualize "a community's legitimacy as a function of the quality of its interactions, rather than of an historic (and indeed generally mythical) act of adherence" (at 22).

cultural practice of conflict avoidance no longer works. In fact, when people are living close together, the practice of conflict avoidance actually makes the conflict worse.³⁴

Among the Gitksan, this historical cultural ethic of decentralization still operates in the form of individual and collective resistance to hierarchy and centralization.³⁵ While these cultural ethics are powerful forces, for the most part they remain unexamined. This means that part of the work necessary for understanding Indigenous legal orders and laws is to identify underlying cultural ethics so that they can be discussed. People will have to explore the original purpose of the behaviour and decide how to change or reconcile cultural ethics in present-day circumstances. It may be that some of the behaviours are no longer appropriate, but first people have to “see” them and talk about them. Otherwise, the cultural ethics may be causing people to unknowingly react by sabotaging well-intentioned political efforts and organizations.

All peoples have conflict. Conflict in and of itself is not the problem. The challenge is not preventing conflict, but managing it effectively so that it does not paralyze people. This is one of the functions of law – including Indigenous law. Damage to Indigenous peoples’ conflict management systems and law has resulted in increased conflict that is destructive. The result is that many people no longer know how to constructively deal with conflict.³⁶

3. Where Is Indigenous Law Recorded?

Some people say Indigenous laws can be found in stories, dreams, dances, art, in the world around us and in how we live our lives. Some people say they are “written on our hearts”.³⁷

³⁴ Hedda Schuurman suggests that the current conception of “community” does not derive from Innu language or culture, and the experience of living within a fixed settlement is entirely foreign. Historically, Innu lived in small, mobile social units with a dynamic pattern of social organization and coherent identities, but with shifting social and geographic boundaries. One of the consequences of 1960s settlements has been a social stratification of subgroups that were created by contact – external privileging according to the degree of acculturation or isolation of the subgroups. This hierarchy now determines status, social positions, and political leadership. For the Innu, settlement has meant individual households, a cash economy and dependence, changes to Innu economic and social practices, breakdown of social relationships, centralized schools, and increased conflict. According to Schuurman, settlement has resulted in an anti-community consciousness that raises particular difficulties for leadership and the implementation of self-government. See Hedda Schuurman, “The Concept of Community and the Challenge for Self-Government” in Colin Scott, ed., *Aboriginal Autonomy and Development in Northern Quebec and Labrador* (Vancouver: UBC Press, 2001) 379.

³⁵ Richard Daly, *Our Box Was Full: An Ethnography for the Delgamuukw Plaintiffs* (Vancouver: UBC Press, 2005) at 202.

³⁶ For example, Adrian Tanner explains that since settlement, the Innu have experienced an epidemic of general dysfunction and social breakdown. The former practice for dealing with disputes was primarily avoidance; when a dispute occurred, hunting groups split up. However, once people settled in villages, this conflict avoidance was no longer possible. According to Tanner, while self-government offers the Innu a way to address their problems, a new conception of community must be developed that is based on Innu values and that is acceptable to the larger Canadian society. See Adrian Tanner, “The Double Bind of Aboriginal Self-Government” in Colin Scott, ed., *Aboriginal Autonomy and Development in Northern Quebec and Labrador* (Vancouver: UBC Press, 2001) 397.

³⁷ Friedland, *supra* note 2 at 16.

How, then, do people in oral societies record their laws? The law of the Tlicho Nation is recorded in the place names.³⁸ The names are a record of the historic events that took place and are tied to the oral narratives. From listening to the name of a site, a Tlicho person is able to learn what happened at that place, who was involved, how it was resolved or dealt with, what was important in the event, and how this information applies to his or her own behaviour.³⁹ The place names also provide important information about the land itself, such as the type of vegetation, water and resources, and other conditions necessary to living and surviving on the land.

Indigenous peoples' law is also recorded in our traditions and practices.⁴⁰ Sometimes it takes more thinking to see the usefulness and practical application of these traditions – or, for that matter, their uselessness. And sometimes looking at traditions can be a little confusing. For example, I was told the following story: A dispute arose in a school regarding the keeping of sweet grass. Some of the community members were angry at what they saw as disrespectful treatment of sweet grass because it was left out on a desk. They argued that the sweet grass was supposed to be kept in a jar and put away in an enclosed place. An old person with a long memory was consulted. This person explained that it was because of the church and the Indian agent's disapproval that it became "wrong" to have sweet grass out in the open. In response to this, people put the sweet grass in jars so that the priests and Indian agent could not smell it, and they hid it away so the priests and Indian agent could not see it. Now it is a different time and it is no longer necessary to hide the sweet grass. So in this case, it was important to recall the original purpose of hiding the sweet grass. Traditions have to have a useful purpose, and to figure whether this is still the case, the practices have to be discussed. If the practice no longer has a useful purpose, then people need to think about changing it.⁴¹

Then what is the goal of a tradition? What is its effect? For example, what is the effect of celebrating the first saskatoon berry or the first spring salmon? What is the effect of making an offering of food to the spirits before eating at a feast? In part, this is about being grateful for the food, sharing the food, acknowledging the enormity of the universe and our place in it, and understanding our own place within the world. There is more, but this a start to drawing out some of the principles contained in the traditions that support Indigenous laws. We must be critical and rigorous about this. There is no room for romantic notions or idealism. Romanticism will not enable us to govern ourselves and

³⁸ John B. Zoe, Chief Executive Officer of the Tlicho Nation, spoke at a public gathering in Edmonton at the University of Alberta on 20 March 2006.

³⁹ See "The Habitat of Dogrib Traditional Territory: Place Names as Indicators of Bio-geographical Knowledge", online: West Kitikmeot Slave Study http://www.wkss.nt.ca/HTML/08_ProjectsReports/08_habitat/08_habDogribTT.htm.

⁴⁰ See generally, H. Patrick Glenn, *Legal Traditions of the World, Sustainable Diversity in Law*, 2nd ed (Oxford: Oxford University Press, 2004).

⁴¹ This incident was shared by Matthew Wildcat during a class discussion at the University of Alberta (spring term, 2006). It was related to Matthew by his father, Brian Wildcat. According to Matthew, the reason that this elderly person was so forthright was that he was not forced into a position of defending a cultural practice against imposed change. Rather, the issue was dealt with as a community education matter in which community members' experiences and ideas were valued.

relate to others on the power of our own ability to govern ourselves. We must apply the same critical thought to our Indigenous legal orders and laws as we do to western law.

Many Indigenous peoples recorded their laws in their oral histories and oral traditions. In the case of the Gitksan, it is the *adaawk* (owned, formal, collective oral histories) that preserves the identity and history of a House with its owned territories, crests, songs, names, major events, and relationships with other Houses. As Richard Overstall writes, this is a legal order of embedded law:

The Gitksan legal order has evolved as the result of people observing the consequences of their behaviour over time. When the behaviour is disrespectful of spirits, animals, and others, the consequences are dire and are often recorded in *adaawk*, especially if the behaviour alters a lineage's relationship with its territory. The *adaawk* thus have a role as legal precedents that inform later conduct.⁴²

The Cheyenne,⁴³ Tlicho, Navajo, and many, many other Indigenous peoples recorded their law in their oral histories. Again, the work involves developing a careful perspective from inside the culture to identify and examine the legal precedents, principles, and content of the laws.

Finally, Indigenous law was often recorded inside peoples' relationships with one another. Turning again to the Gitksan: it is in the roles and relationships that peoples' legal obligations are found. Wherever one is within the Gitksan kinship network, there are definite roles and reciprocal obligations to others through that network. An individual's responsibility extends to the members in their mother's House and closely aligned Houses, father's House, grandparents' Houses on both sides, and spouse's House. Practically, this means that one is responsible for addressing injuries caused by others, education, providing access to land and resources, and so on. And since these are reciprocal obligations, there are obligations through these networks back to the individual.

The Cree also have reciprocal legal responsibilities and obligations that are contained within the kinship networks. Described as a Cree law, the doctrine of *wâhkôhtwowin* guides the conduct and behaviour that must be maintained in all types of relationships.⁴⁴ These relationships include mother and child, cousins and other relatives, and unrelated persons. All one has to know is where one fits, and the surrounding relationships determine what one has to do in order to fulfill their responsibilities in that society.⁴⁵ Similarly, the larger group, whether organized into matrilineal or into patrilineal kinship networks, will know their obligations to the individual. In considering

⁴² Richard Overstall, "Encountering the Spirit in the Land: 'Property' in a Kinship-Based Legal Order" in John McLaren, ed., *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005) 22 at 40. Also see M. Jane Smith, *Placing Gitksan Stories in Text: Returning the Feathers. Guuxs Mak'am Mik'Aax* (PhD Dissertation, UBC Faculty of Education, 2004) [unpublished, archived with the author].

⁴³ See generally, K.N. Llewellyn & E. Adamson Hoebel, *The Cheyenne Way* (Norman: University of Oklahoma Press, 1941).

⁴⁴ Cardinal & Hildebrandt, *supra* note 19 at 34.

⁴⁵ Conversation between the author and Wes Fineday, March 2005, Saskatoon, Sask.

social relationships and practices as a source of law, we must ask what people recognize and treat as law.⁴⁶

4. Territory – How Far Does the Legal Order Go?

External boundaries have always been sites of ongoing negotiations in accordance with each Indigenous group's laws and political structures. At the most basic level, each group's legal order extends over their territory, and at its farthest reaches, another group's territory begins.⁴⁷ Historically, each Indigenous group's territory was the area they could defend both physically and legally according to their Indigenous legal orders. International Indigenous laws and protocols enabled each group of people to maintain and protect their relationships with other peoples through time.

The discussion about resources and land raises three critical questions: Who is included in the Indigenous legal order? What territory does the legal order extend to? How does the law relate to other peoples' law at the farthest reaches of the territory? For the most part, these questions require Indigenous peoples to go beyond band structures in order to consider scale, the concepts of the public good and personal interests, accountability, and the full extent of the relationships and responsibilities within the society. The reserve boundaries created by the *Indian Act*,⁴⁸ which divided and grouped Indigenous peoples into bands, cut across the Indigenous legal orders. This division of Indigenous peoples and lands has undermined the management of the larger legal orders and the application of Indigenous laws. At the band level, the larger legal order becomes unworkable because it is disconnected, and some co-operative arrangements must be established to enable bands to draw upon broader-based relationships at a national level to more effectively implement their laws.

As an example, Tsimshian people are divided into seven bands with a number of small reserves. Many Tsimshian people live off reserve. The Tsimshian legal order operates along kinship lines. In Tsimshian society, the legal obligations for dealing with a Tsimshian person's injuries are with his or her father's House. Members of the father's House can live anywhere, on or off reserve. If only the band membership is considered in the case of an injury to a Tsimshian band member, then all the other Tsimshian people, either living on other reserves or off reserve, that have obligations in the kinship system are excluded from fulfilling their responsibilities. The Tsimshian legal order extends throughout Tsimshian territory and cannot work if its orientation is only at the band level. So people should ask, who does the legal order apply to and how far does it extend? What happens at the edge of the territory with other peoples' laws?

⁴⁶ See Brian Z. Tamanaha, "A Non-Essentialist Version of Legal Pluralism" (2000) 27:2 J L & Soc'y 296 at 319. According to Tamanaha, "[L]egal pluralists currently tend to see law in far more places than general social practices would support" (at 320).

⁴⁷ This is not to suggest that there could only be one system of law in a physical or geographic space. The reality is always much more complicated. Trade and other ways of establishing and maintaining international relationships meant that people were constantly negotiating different legal orders in the same space.

⁴⁸ *Indian Act*, RSC 1985, c. I-5.

5. Power and Gender

I came to [Cree] *wetiko* law wanting help with a particular issue: How to respond to the violence and child victimization today in a principled and effective way? I have concluded that the *wetiko* can be seen as a legal concept, that the thinking and theorizing about *wetiko* dynamics is similar to the current thinking and theorizing about offenders and child victimization dynamics, and that there are several identifiable legal principles in the *wetiko* stories and accounts.⁴⁹

....

... I think *wetiko* law is a meaningful and useful resource for facing the violence and victimization in some communities. We need something that teaches us how to protect those we love, from those we love.⁵⁰

There are a couple of common arguments made against Indigenous law: First, that Indigenous law is incapable of dealing with complex present-day issues. Second, that Indigenous law will allow Indigenous peoples to violate human rights.

It is true that, historically, life was hard, but Indigenous peoples did not have to deal with the pervasiveness of violence, crime, and addictions found in some Indigenous communities today. (In fact, had these terrible conditions existed pre-contact, Canada would very likely have been truly *terra nullius*.) However, sorting out Indigenous legal traditions does not mean trying to return to the past. Rather, it is about drawing on the strengths and principles of Indigenous legal orders to deal with contemporary issues – including complex social dysfunctions as Hadley Friedland so effectively argues.⁵¹ Such efforts should be developed in light of current problems as well as the western legal system. Again, if we understand law to be collaborative and to be a function of governance, then that could be a helpful basis for our responses to difficult social dysfunction.

Internal oppression and power imbalances present another reality that all Indigenous people – like anyone else – have to consciously guard against. Sexism is a reality. Homophobia is a reality. Ageism (despite the rhetoric) is a reality. Many of our communities are not safe places for our children and other vulnerable individuals.⁵² Law is one way to deal with questions of oppression and the abuse of power. If we understand law as an intellectual process that all citizens engage in, then we can use that process to enable people to tackle the uncomfortable issues in our communities. In order to remain alive, Indigenous legal orders and law must be able to withstand internal challenges and change. It is this ongoing challenge to norms that keeps a culture alive and vital – and ensures continued relevance for younger people.⁵³ Otherwise, Indigenous law will fail to

⁴⁹ Friedland, *supra* note 2 at 123.

⁵⁰ *Ibid.* at 126.

⁵¹ *Ibid.* generally.

⁵² For the latest in the grim statistics on Aboriginal victims and offenders, see online: Statistics Canada www.statcan.ca/daily-quotedien/060606/dq060606b-eng.htm.

⁵³ For a very interesting critique of how harmony is used to stifle internal conflict and challenges to the status quo, see Laura Nader, *Harmony Ideology: Justice and Control in a Zapotec Mountain Village* (Stanford, Cal.: Stanford University Press, 1990).

be useful in today's world, and if it is not useful, there is no point in teaching or practicing it. Our young people will continue to turn away in spite of our rhetoric.

On the subject of gender: one of the key issues is the inclusion of Indigenous women. If one examines the Aboriginal rights and title case law and discussion, it appears that Indigenous women have been erased from both the geographical and the legal landscape.⁵⁴ It is as if women did not have an important and active presence on the land. The literature and images of Indigenous peoples focus almost entirely on males and their activities – hunting, fishing, and trapping. In this colonial mythology, women's role is restricted to dealing with what the men bring home from the hunt.⁵⁵

These issues are real and current, and it is our responsibility to deal with the tough stuff and ensure that our legal orders and law are up to the task. Since power dynamics are always a part of social relationships, we need to ask whose power is preserved through oppressive cultural, legal, or social norms. Whose voices are excluded? We have to be fearless in looking at our own cultural institutions too – not just those modelled on western governance. When an oppressive cultural practice is identified, determine what the goal of the practice is, then work out how to meet that goal without oppression.

Summing Up

I have proposed here that Indigenous legal orders and law should be understood as a necessary part of governance, including the safety and protection of those who are marginalized within Indigenous societies. It is not about trying to go back in time, but about drawing on the strengths and principles of the past to deal with modern-day problems and situations. A deeper and more critical understanding of Indigenous legal traditions can strengthen today's governance structures and functions.

The theory underlying this paper is that it is possible to develop a flexible, overall legal framework that Indigenous peoples might use to express and describe their legal orders and laws so that they can be applied to present-day problems. This framework must be able to: (i) reflect the legal orders and laws of decentralized (i.e., non-state) Indigenous peoples, and (ii) allow for the diverse way that each society is reflected in their legal orders and laws. In turn, this framework will allow each society to draw on a deeper understanding of how their own legal traditions might be used to resolve contemporary conflicts, complex social injustices, and human rights violations.

The Canadian state is not going away and the past cannot be undone. This means that Indigenous peoples must figure out how to reconcile former decentralized legal orders and law with a centralized state and legal system. Any process of reconciliation must include political deliberation on the part of an informed and involved Indigenous

⁵⁴ Gerdine Van Woudenberg, "Placing Gender in the Mediation of Aboriginal Resource Claims and Conflicts" (2004) 34:3 *Recherches Amérindiennes au Québec*.

⁵⁵ Christine Miller & Patricia Chuchryk, eds., *Women of the First Nations* (Winnipeg: University of Manitoba, 1996).

citizenry. Rethinking Indigenous legal traditions is fundamentally about rebuilding citizenship. We have to answer the question, "Who are we beyond colonialism?"