Modern Treaty Implementation & Indigenous Law: An Exploratory Workshop, Sept 21-22, 2018

A collaboration of the Modern Treaty Implementation Partnership Agreement (SSHRC) and the Indigenous Law Research Unit, Faculty of Law, University of Victoria

INDIGENOUS LAW RESEARCH UNIT
AT THE UNIVERSITY OF VICTORIA

MODERN TREATY IMPLEMENTATION RESEARCH PROJECT

https://moderntreaties.tlicho.ca/

SUMMARY REPORT

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Report Contents

Introduction and Acknowledgments

The implementation of modern treaties requires more research in support of improved practices and outcomes. The SSHRC funded Modern Treaty Implementation Research: Strengthening Our Shared Future, a Partnership Grant with the Land Claims Agreement Coalition (Partnership Grant), is aimed at funding research that helps document implementation issues and guide new and better strategies for implementation. Research on the role of Indigenous law and its intersection with state law in the implementation of modern treaties is part of this research agenda.

The interaction of Indigenous law and legal actors with state law and institutions is a daily lived reality in treaty communities. Research that produces greater access to and reliance on Indigenous law in modern treaty contexts will serve treaty communities' aspirations for self-determination and well-being, and also potentially mitigate asymmetries that persist between the colonial state and Indigenous peoples in modern treaty contexts. However, this research is not without its challenges; the asymmetries that persist in the treaty environment, and that had a part in shaping the treaties themselves, render Indigenous traditions vulnerable to further erosion or distortion in these contexts. Research aimed at the application of Indigenous law within treaty contexts and with regard to its continual engagements with the state must be cautious to avoid harming treaty communities and relationships.

Research supporting a resurgence of Indigenous law is flourishing. However, the challenge of anticipating the implementation of such laws through treaty and/or Indigenous governance structures is a newer endeavour. Is implementation research distinctive from existing research on Indigenous law? Is implementation research in the modern treaty context distinctive from issues relating to the relationship between state law and Indigenous law and knowledge more generally? If so, how is it different? And how do these differences relate to the approach taken to research, and/or the subjects of research? More generally, what are the different approaches and issues arising in the course of Indigenous law research that can be applied in the context of modern treaty implementation?

These questions, among others, were the impetus for a workshop at the University of Victoria, September 21-22, 2018. The workshop was held to foster discussion and support research work to be carried out under the Partnership Grant in the future. Our aim was to develop a better understanding of how Indigenous law can contribute to improvements in treaty implementation for Indigenous parties, to identify principles and guidance for this research, and to identify potential limitations of proposed research programs. The workshop also aimed to situate the intended research relative to the growing body of Indigenous law research in Canada.

We (Kim Stanton and Janna Promislow, Co-Leads on the theme of Indigenous and Settler Legal Systems within the Partnership Grant) are grateful to the Indigenous Law Research Unit (ILRU) for their enthusiastic support and hosting of the workshop. Thanks are owed to Val Napoleon, Jessica Asch, and Simon Owen for their thoughtful contributions to the program and organizational support, and to Ruth Young (Manager, Indigenous Initiatives, University of Victoria Faculty of Law) for her excellent logistical

advice and help. We also would like to thank our student note-takers: David Gill (PhD Candidate, University of Victoria, Faculty of Law, who also was lead rapporteur in developing this report), Brittany Rousseau (JD student, Thompson Rivers University, Faculty of Law and assistant editor of this report), Liam McGuigan (ILRU Co-op and JD student, University of Victoria, Faculty of Law), and Christina Gray (LLM Candidate, University of Victoria, Faculty of Law). Last, but certainly not least, thanks to Genevieve Harrison (Administrator, Carleton Centre for Community Innovation, Carleton University) for her smooth and efficient administrative support.

Day 1, September 21, 2018

The workshop was structured to move back and forth between presentations on particular research and implementation experiences and discussion amongst participants, in small groups and as a group as a whole.

The first day began with a welcome to the Lukwengun territories by Elder Dr. Skip Dick (Songhees). Participants then introduced themselves and offered comments on Indigenous law and treaties, as they relate to their work. The introductions confirmed a wealth of experience and knowledge in the room (see participant list in Appendix 5 to this report), with participants immediately identifying important issues and points for discussion. Amongst these were:

- Treaties define a way of relating between two legal orders, two nations, that allow each to maintain who they are. Problems with treaties arise because it is not always possible to determine when treaties have been made and sustained in a lawful manner. Changes in the treaties, and their interpretation and implementation can undermine their proper purpose.
- Indigenous law and treaty relationships include relationships with earth systems as well as humans; for example, the Mi'kmaq principle of netukulimk or sustainability. How do we work out good treaty relationships not just with other individuals but with the Earth?
- Transitions from the Indian Act to treaty governance are difficult, with many practical and other issues arising. Research at the local level is essential to defend positions of the Indigenous parties in setting out new governance structures, in working with federal and territorial governments, and to inform high-level discussions behind treaty implementation, collaboration and policy development. Such research is also critical during (and before) treaty negotiations.
- Can and how can state frameworks (legislation) be used to promote and enact Indigenous law in a manner that stays true to Indigenous law? Will government models allow nations to live in a way that is in accordance with Indigenous laws? How do we create better lives for our communities within existing frameworks? And how do we bring understandings of treaty in Indigenous law alive within our own communities, to bring into treaty negotiations? How do we get governments to recognize and respect Indigenous law in ongoing treaty relationships and the implementation of modern treaties?
- How do modern treaties create spaces of "informal imperialism?" How do we make space for the exercise of agency, both individual and collective, in Indigenous communities? Can we/how can we modernize historical treaties to express their relational rather than transactional nature?

- Treaties, if negotiated and implemented in good faith, can have the effect of transforming Canadian law and not just Indigenous legal orders. Indigenous law institutions (that are legitimate under Indigenous law) will change the relationship between Canada and Indigenous peoples by their very existence. We need to better understand the conceptual relationship between historical and modern treaties, and get to a place of taking up political, social, and economic space. How can Indigenous law and the research and study of it inform transformation of the state in treaty relationships rather than the other way around?

i. Morning Presentations

Tłı̨chǫ Rights and Title Through History: John B. Zoe, Senior Advisor, Tłı̨chǫ Government

See also the diagram created by John with his presentation, reproduced in the picture on the next page.

Pre-contact Tłı̨chǫ society is the source of Indigenous rights and title. How can we bring forth these rights from their source into the present day? Where are these drawn down into the current context? There are many intervening stories and impacts through the historical periods following European contact. These stories began with European "explorers." Then early trade began, as Europeans negotiated for provisions and access to natural resources. Early treaties with the British Crown followed in the period between 1763 and 1867. More treaties followed from 1867-1920. In the 1980s, treaty negotiations were conducted with the Crown in right of Canada, not the British Crown. Canada and the Tłı̨chǫ eventually signed comprehensive claims agreements. How are all these stories drawn down into the present?

Pre-contact Indigenous laws, especially those that relate to the land, are recorded on the landscape and our relationships with the animals that inhabit it. The land is divided into four areas, each with their own sub-ecologies. The original place names within these areas reflect the pre-contact state of our land and laws. The original trails through the territories connect the pre-contact place names and the original way of life in the territories. New place names reflect the stories of contact and the influence of explorers, trade, and treaties. In the colonial period, the different areas of the territories were drawn down into the jurisdiction of various Crown entities. The territorial government and the Canadian government took over management of the land through representative bodies and government departments. The Canadian government removed the Tłı̨chǫ from management of their territory through residential schools and the Department of Indian Affairs. Tłı̨chǫ rights and governance were limited by the constraints of the Indian Act.

The goal of the Tłı̨chǫ modern claims process was to get out of this structure and reclaim jurisdiction of their territories, resources, laws and rights that were drawn down into British, Canadian and territorial jurisdiction. The 1921 treaty is the basis for the modern comprehensive claims. How do we build on this treaty relationship? How do we fill the space to keep other jurisdictions at bay? The modern claims agreement is a way to get out from under the Indian Act and demand recognition and representation for Tłı̨chǫ law and governance. The original source of pre-contact law and jurisdiction has gone through a

gauntlet of colonial systems and can emerge in the space created by modern treaty jurisdiction. The Tłı̨chǫ have inherited everything that has survived the conflict and arrived on the other side intact. New agreements allow us to escape the threat of colonial power and to regain control.

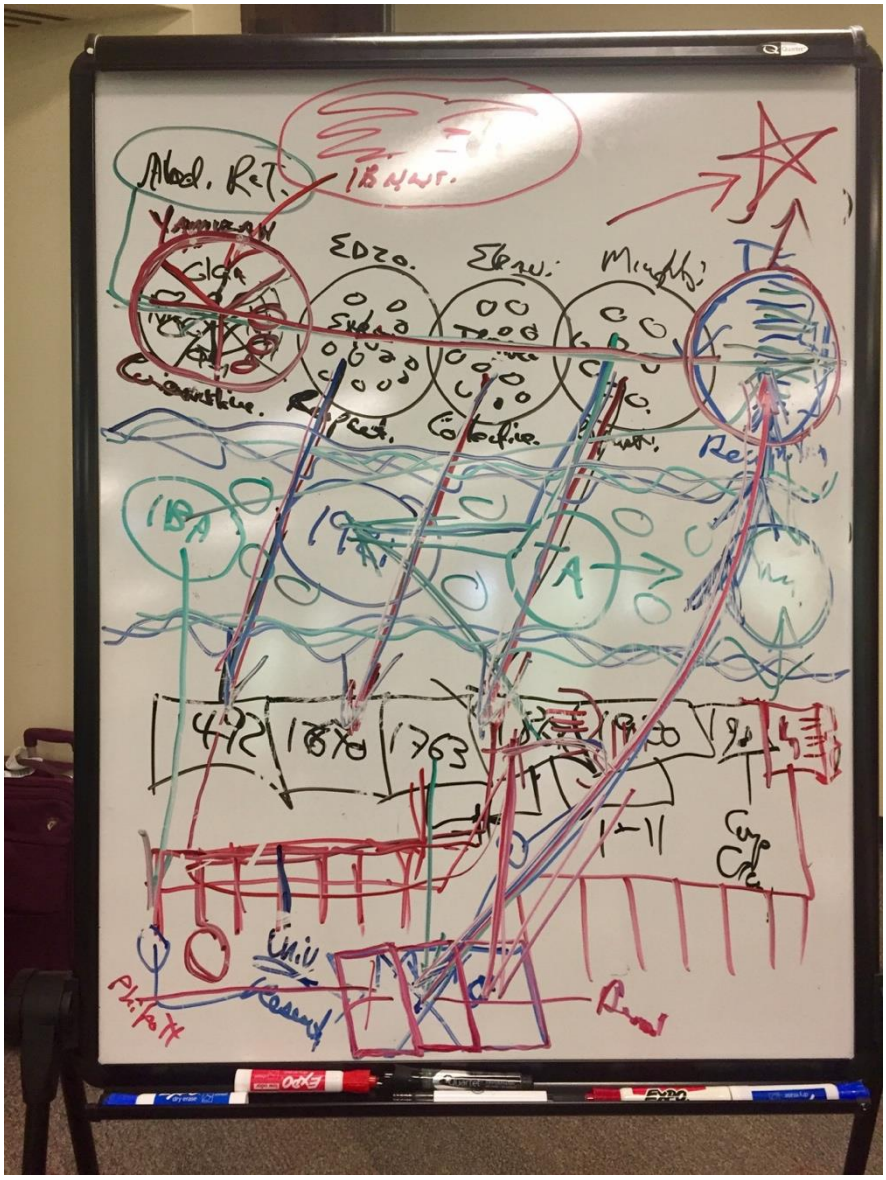


Figure 1: Diagram created by John B. Zoe, animating his talk

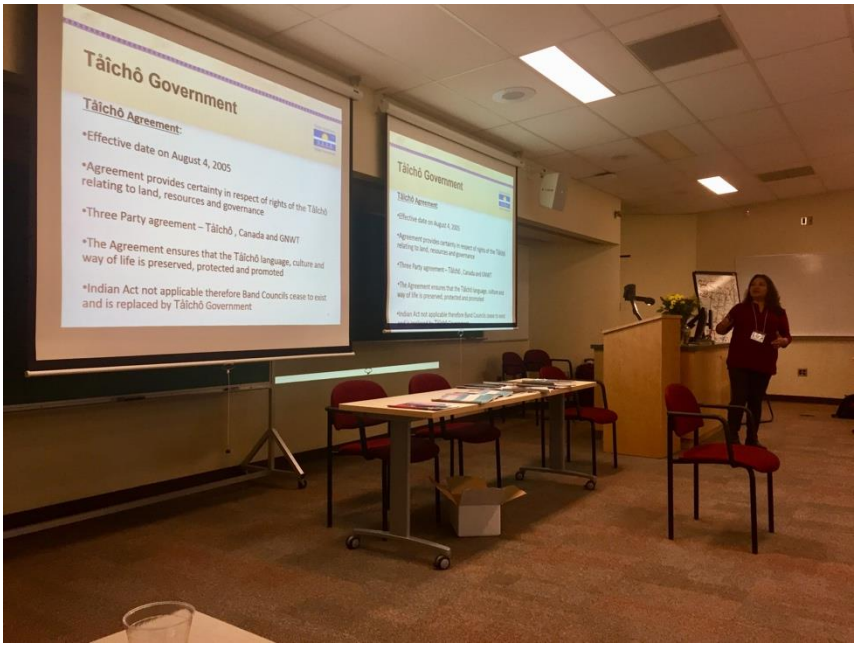
Previously, colonial governments and industry assumed First Nations in the North West Territories were assimilated into Canadian society. This was not their self-understanding, and so they created the Indian Brotherhood of the North, to speak as one voice, in the same way that people and animals used to speak with one voice. The challenge now is to educate our communities, colonial governments, and industry about the drawdowns that have happened throughout the colonial period [referring to the arrows moving downwards from the Tłı̨chǫ eras at the top of the diagram reproduced below]. They have to realize that these drawdowns have occurred, and that things have not always been as they are now. The drawdown arrows are now going the other way, returning jurisdiction to the Tłı̨chǫ. Rights, title and law are now returning. They have always been there, but now they are returning. We need to continue research and scholarship around our laws and way of doing things in order to bring forth what has been there since colonization but has been ignored. Previously, treaty was a way of keeping us corralled, out of the way, without a voice. We must ensure that in implementing modern treaties, we reverse that trend. What we do now will have an impact for seven generations. As long as the sun rises and the river of dialogue flows, we can move forward, and there is a chance at reconciliation.

Tłı̨chǫ Self-Government After the Modern Treaty: Bertha Rabesca Zoe, Counsel and Laws Guardian, Tłı̨chǫ Government

See also the slides provided by Bertha with her presentation, in Appendix 2 following the report.

Modern Tłı̨chǫ self-governance is based on the principles of traditional governance from time immemorial. The Tłı̨chǫ Constitution and flag are based on words of Chief Monfwi when he signed the 1921 treaty, saying: "as long as the sun rises, the river flows, and the land does not move, we will not be restricted from our way of life." The modern treaty is seen as an extension of the original treaty. The modern treaty, between the Tłı̨chǫ, Canada, and the territorial government, came into effect in 2005. It is a unique treaty, in that land claims and self-government were dealt with together in a comprehensive agreement. Section 7 of the agreement gives the Tłı̨chǫ the power to enact laws and exercise rights in their territory. These law-making powers include jurisdiction over social assistance and child and family services, but the Tłı̨chǫ have not yet exercised those particular powers.

Tłı̨chǫ territory includes three geographical areas. This territory is the Tłı̨chǫ traditional territory, and includes four Tłı̨chǫ communities. It is a large territory, between the Great Slave Lake and the Great Bear Lake. The territory overlaps with surrounding communities, and there are agreements with those communities to manage the overlapping areas. The Tłı̨chǫ have fee simple title to the territory, and they have both surface and sub-surface ownership of their lands.



The Tłı̨chǫ Constitution is the highest law. It provides for the establishment of government bodies, the duties, composition, membership and procedures of Tłı̨chǫ governance, political and financial accountability, and protection of Tłı̨chǫ citizens. It was designed in conversation with a working group of Tłı̨chǫ Elders to work in the best interests of the Tłı̨chǫ and promote the Tłı̨chǫ way of life for all time. There are two bodies of Tłı̨chǫ government—the traditional government, under Tłı̨chǫ law, and the public government, under Canadian and territorial law. The traditional government begins with the Tłı̨chǫ Annual Gathering, with canoe trips along the "trails of our ancestors." The Gathering is an open forum for citizens to ask questions. It is a time for the government to report to the people and listen to

their concerns. During the Gathering, the people nominate a Grand Chief, who is the successor of Chief Monfwi. The Grand Chief has a community director and two cultural forepersons.

The Tłı̨chǫ traditional government includes the Tłı̨chǫ Assembly and the Chiefs' Executive Council. The Tłı̨chǫ Assembly consists of four chiefs and eight councillors from individual municipal communities, and the Grand Chief. The Assembly is the legislative body of the traditional government. The Chiefs' Executive Council includes the four chiefs and the Grand Chief. The Executive Council is the administrative body of the traditional government. The chiefs and councillors are drawn from the Tłı̨chǫ public municipal governments under Canadian jurisdiction. The chiefs and councillors have to wear two hats, as they have governance roles and powers derived from Canadian and territorial law in their individual communities, but they have governance roles and powers derived from Tłı̨chǫ law and treaty when they sit as members of the traditional government. This new governance arrangement has required a generational change as people and leaders change their mindset from Indian Act governance to self-government based on the Tłı̨chǫ agreement. To this end, the agreement is part of the high school curriculum.

There have been two cases wherein Canadian courts judicially reviewed the actions of the Tłı̨chǫ traditional government. In *Lafferty v. Tlicho Government,* 2009 NWTSC 35 (CanLII), the Assembly had passed Tłı̨chǫ law suspending the Executive Council meetings and exercised full governance powers. Three chiefs challenged the validity of the law. The court recognized the Tłı̨chǫ government as an order of government in Canada, and ruled that the court must defer to the Tłı̨chǫ Constitution. The court ruled that the chiefs had to follow the process for challenging the validity of the law as set out in the Tłı̨chǫ Constitution.

In *Mantla v. Tlicho Government,* 2016 NWTSC 54 (CanLII), the plaintiff argued that the Tłı̨chǫ government had violated his rights under the Tłı̨chǫ Constitution and wanted new requirements imposed that Rules of Order be approved by three annual gatherings before they come into force. The court refused to impose arbitrary requirements that were not in the Tłı̨chǫ Constitution. They also found that the suit was an abuse of process, as Mantla had not exhausted the internal processes of Tłı̨chǫ law.

The courts have generally been deferential to Tłı̨chǫ governance processes and have not yet interfered in the operation of Tłı̨chǫ traditional governance.

ii. Group Reflections on Morning Presentations

These discussions are paraphrased from notes taken during the workshop. They are not verbatim transcripts. They have been edited for clarity.

There were questions and discussions regarding how to "get the arrow going the other way" (referring to John B. Zoe's diagram, suggesting that instead of state institutions and law "drawing down" from Tłı̨chǫ jurisdiction and law, the arrows need to move to recognition and reinforcement of Tłı̨chǫ jurisdiction and law, and to finding a greater balance in the middle, in the meeting of the two systems).

What is happening to support these changes of directions, and sustainable, growing exercise of Tłı̨chǫ powers? How are youth engaged?

Bertha and John responded regarding current initiatives in Tłı̨chǫ territory, including curriculum in Aurora College on Tłı̨chǫ cosmology, the Tłı̨chǫ constitution and the Tłı̨chǫ agreement. The Tłı̨chǫ have a Lands, Culture and Language Department and schools (elementary and high school) engaged in cultural activities and courses on the agreement. One program takes twenty Tłı̨chǫ youth on the land for three months. There are also courses for Tłı̨chǫ Government employees, so that they know who they are working for, and for leaders, so that they know who they are leading. Education requires details. If you know your own history, you can imagine a future.

There were also questions and discussions about how the Tłı̨chǫ conduct their governance business at the Assembly and the response and management of "dissenters", present in all communities, such as Mr. Mantla (mentioned in Bertha's presentation). In the absence of Indigenous civic tradition and laws, some communities have defaulted to Roberts Rules. How do the rules of order work in Tłı̨chǫ governance? Are they grounded in tradition?

Bertha and John responded regarding Tłı̨chǫ efforts and processes. They rely on strong public communications to make government work transparent, maintaining a very strong website, broadcasting all assemblies online, and through radio. All reports are published in advance. The rules of order are only for meetings and are straightforward. It is always hard to deal with dissenters. When dealing with challenging people, you have to be careful. You don't know what is going on in a person's mind. There is a need to control without escalating.

There were also questions and discussions about the meeting of traditional governance and treaty/state institutions. Are there pieces that are harder to work through? Is there anything in the agreements that is restrictive? What helps to move forward? What are the hurdles?

Bertha and John responded regarding intergovernmental relations and current political climate and challenges. They were positive about the current environment, in which they see Canada shifting and supporting Indigenous peoples in the mission of self-governance. In the last year and a half, the colonial box has begun to break up. Challenges remain, especially negotiations around devolution and financing. For example, when creating a water board, the (previous) federal government wanted to create a single

board. NWT didn't care too much about single board, but the federal government demanded it in order to agree to devolve powers to the NWT. In addition, not all self-governments have financing agreements. The government originally rolled out a Fiscal Harmonization Policy that was just like an Indian Act Band structure—it was based on band membership, not citizenship. Now there is a new fiscal agreement to finance the Tłı̨chǫ government. Trust between the Tłı̨chǫ and Canadian governments is always a challenge, and it varies with the character of individual governments.

iii. Small-Group Discussions

The participants were divided into three small groups. The small group discussions were intended to dig into the motivating questions for the workshop, although the questions were in no way intended to restrict the conversation. They instead served as points to jump start discussion, if needed.

Questions posed to the groups included:

- Are the starting points for Indigenous law research the same in modern treaty environments (as between treaty/non-treaty, modern treaty/historical treaty, and as between different modern treaty environments)?
- What differentiates modern treaty environments, if anything?

The discussions reported below were summarized and paraphrased from notes taken during the workshop. They are not verbatim transcripts.

Group 1:

Discussion in Group 1 centred on the differences between modern and historical treaties and treaty contexts. While some view the modern treaties as providing advantages, such as clearly defined governance institutions, policies and law, and having constitutional protection that provides for more explicit and better protections in implementation, others view some of the historical treaties as having the advantages of having been made through processes more grounded in Indigenous laws and traditions (e.g., Niagara treaty), and reflecting intentions of sharing land and maintaining distinct Canadian and Indigenous jurisdictions (although interpreted differently in Canadian law…). Historical treaties were often made at a time where Indigenous parties had greater connection and power vis-à-vis settler interests and governments.

Agreements are not locked in a box, but change over time bit by bit. In the north, most have negotiated a comprehensive land claim. The Assembly of First Nations caters more to reserves, and not self-governing bodies, so now the Land Claims Agreement Coalition is trying to make a run for it themselves—they are not supported by the AFN and are beyond the range of the AFN we need a different model. Canada has been grappling with it, and a shift is happening.

A second focus was on Indigenous law, and how/whether it informs treaty negotiations and implementation as well as the role for Indigenous law research in these treaty contexts. What research should we be doing on Indigenous law, and why? For whom? What pieces are useful for treaty? To whom should we be applying Indigenous law, and for what purpose? How does attention (or lack of attention) to Indigenous law related to problems in the implementation of treaties? Do Indigenous people want their law to live, for example, in legislation? In the Coast Salish family law context, courts are building relationships with Indigenous nations without the provincial or federal government authority. Does the community see it as transforming the law? Indigenous law makers are working with judges, social workers, and so forth to find solutions to legal issues.

A cautionary experience was shared regarding dispute resolution processes relying on Elders and structures to uphold Indigenous legal traditions. In the process of addressing issues from oil and gas, the process changed to address more technical knowledge required by the companies using the process, and Elders lost their voices in the process. Concerns were raised that First Nations have their laws in good shape before negotiations of modern treaties, that governments need to back off to allow this internal work to happen and ensure that new agreements are nation-to-nation. Views were expressed that there is internal work to do within communities as well as for non-Indigenous (or non-citizen) researchers to support the internal work and state capacity/understanding.

There was further discussion of how Indigenous law can be expressed in legislation and the practical pressures to codify law – that it is difficult to take up jurisdictional space without codification. Cautions were expressed about legislating Indigenous law. Internally, the identity, language, and Indigenous way of life is important and has been operating underground for a long time. This is not something that should be legislated. The old way was to keep saying the same things until you drop, and then someone else will pick it up and say them. Writing into law is a new way of decision making. What do you take into consideration? How the laws are enforced also needs to be considered. Under modern treaties, the only way of enforcing this is internal tribunals, and then up through colonial system. We need to make internal decisions that anticipate an appeal—do we have our story straight? There is also a recognition problem. Rights can be ignored without a remedy, and these remedies vary across the country.

Purpose and interpretive provisions were suggested as places within codes or legislation that Indigenous law can exist and inform. Caution was expressed about the limits of text for accessing values and laws. Values are implicit in society. Canada is always a background to the text from the settler side, but an Indigenous counterpart is not always known or recognized. The values encoded in Canada are ever-present, known by both parties and inform the text of the treaty. However, the values that inform an

Indigenous understanding of the treaty are not known to both parties — for e.g., the values expressed at and through gatherings, feasts and so forth that are a part of the treaty. Further cautions were discussed regarding wariness around documenting of Indigenous law, and concerns that some concepts from Indigenous law cannot/should not be translated into legislative language and related institutions. If an Elder says "this is not our way," what can be the response? It's all about process. We have to find a way that is the way. Land is law.

Another focus was on the lack of understanding of Indigenous law and treaties on the part of Canadian governments and the need for and responsibility of Canadian governments to shift, transform and learn. If Indigenous law is relied on in intergovernmental work, how will that impact and transform the state and state law? Can there be/how can there be state/western law for dealing with secret knowledge and oral history? A different research question is how can we shift other parties, like Canada, to respond to this legal process.

Group 2:

Discussions in Group 2 raised questions and addressed the relationship between governance structures under modern treaties and Indigenous law. Questions included how Indigenous law informs/should inform government department decisions, work by committees under the treaties, and the authority of co-management bodies in relation to Indigenous governments, and colonial government. A related question was whether agreements (treaties and sub-agreements) provide a basis for reviewing state governments actions and decisions, based on Indigenous law. Consultation was identified as an area where there is more room for Indigenous law. Modern treaty environments were noted as providing helpful resources for research on Indigenous law, including government funding to support the research process. However, it was also noted that government funding might color the research process and so there are pros and cons to independent research as compared to government-supported processes.

Questions and comments were also made about the character of Indigenous law and its place within treaty contexts. Indigenous law is embedded in the language, culture and way of life. Settler governance institutions were commented on as a practical need, and that the rules of these governance institutions (e.g., parliamentary privilege, immunity) do not apply to Indigenous governments. There is a role for lawyers to incorporate settler institutions into Indigenous ways of life, not the other way around. It was further commented that it is difficult to fit Indigenous law into administrative processes, and that Canadian administrative law and rules can't be avoided. Judicial review of governance decisions by Indigenous communities need to be anticipated.

These comments prompted several other questions and comments. One comment was that the process of determining the forms of governance and research into Indigenous law needs to be based on community conversations about what the community wants and needs. These conversations contribute to the reconciling of historical and contemporary forms of governance and law. Another comment was that if law is in language, culture and land, articulation of Indigenous law is part of a larger rebuilding process, recovering from dispossessions and losses of language and culture. Concerns raised included

whether adopting western legal strategy co-opts Indigenous law and governance, and the consequent fall out for Indigenous legal orders. Responses included that adopting institutions and law from the state does not mean subservience of the Indigenous legal order. Indigenous equality and jurisdiction is asserted in all negotiations, intergovernmental contexts. It is important to ensure new generations can bring this grounded sense of Indigenous language, culture and cosmology forward. It also takes work to convince other governments to accept our equality.

Group 2 also discussed the practical issues in occupying jurisdictions under treaties. Treaty nations may take some time to use authorities recognized by treaties, such as education or health, because the funding and other resources required to develop and implement programs are expensive, and capacity needs to be built. Bilateral agreements with colonial governments are made to implement and maintain government service areas (e.g., health and education) in the meantime. Bureaucracy involved with the governments makes these programs more expensive. Funding questions are different for different Indigenous groups. Research is required to have a clearer picture of the current situation.

Group 3:

The conversation for Group 3 discussed the nature of historical and modern treaties, and differences between them, and whether and how Indigenous law informs the making of treaties. One comment was that historical treaties engaged Indigenous laws and practices as evidenced by the language of kinship, but such language and drawing on Indigenous law has been made invisible in modern treaties. That there was a pipe ceremony in the creation of Treaty 6 but not in the creation of Treaty 4 was noted as an example of the engagement of Indigenous law, albeit unevenly. Others did not view the historic treaties as that different, commenting that text does not define the treaties or the differences between them. One comment was the importance of oral components of historical treaties, and noting that there was always a difference in power, with colonial views of historical treaties as one-off things while First Nations saw (and see) treaties as based in relationships, as frameworks to build upon.

There were comments that the power imbalances of historical treaties were not just present in the interface of colonial governments and First Nations, but that there were other things going on. There was a breakdown of relationships between nations as well, impacting the nature of Indigenous laws and their authority. Another comment was made that Indigenous law might be differently situated in relation to different treaties, depending on whether ratification reflects Indigenous processes.

Avoiding the language of authenticity around Indigenous law was raised as an important caution and concern. People at treaty tables are doing their best based on legal obligations. The question is: does it maintain and restore legal order or does it undermine it? These are not simple matters. One response was that the tension between adaptability and the internal legality of entering into an interface with the state, whether through a treaty or another agreement, is not really or only about authenticity. It is about the decision to adapt or to move/change. When facing the treaty process, we need to work with this reality and not be trapped in language. In the case of treaties being entered into recently, the

processes have not been equal. The pressure of doing the best for the people at the time is a common issue.

The need for a discussion of legality, not authenticity was suggested; an ability to discern between internal disputes that matter and those that don't. There is a perceived vulnerability in disagreement. The state uses the fact that there is disagreement between Indigenous people to undermine Indigenous legal orders. We need to support legitimate processes where those issues can be sorted out. This raised further questions: When and where does the conversation of legitimate authority come into play? How do we think about legal theory?

Another concern was raised with the idea of "revitalizing" Indigenous traditions. These traditions have adapted over time and had other forms of law inform them. An example came from a workshop in the interior of BC, in which one Elder stood up and said, "we don't actually have our own laws, we adopted laws based on interactions and travel routes." How do we understand what the legal tradition was and how has it changed? How does that then inform contemporary governance and treaty making? Indigenous laws are often so silent, you can see them expressed but they're not necessarily talked about as law. We need to understand what are we talking about and how to put it into contemporary terms. For example, kinship – how does that relate to corporate forms and how does corporate forms relate to that?

Further discussion followed on issues of identifying Indigenous law and concerns about Indigenous law in modern and historical treaty contexts. Questions were raised whether negotiations and treaties in both Indigenous and English languages would allow the necessary space for Indigenous perspectives. In regards to prairie (historical) treaties, certain terms were not used in an effort to protect jurisdiction. A question was raised whether even if Indigenous law is well articulated and reflected in the treaty, whether that would result in a better outcome? The concept of treaty is not necessarily in a one-to-one relationship with Indigenous law.

It was commented that Canadian law is the focus by default when considering treaties because Indigenous law has not been emphasized. Research within Indigenous law is actually about rebuilding. We need a thicker conception of treaty so that the starting place is about rebuilding communities, citizenry, and relational law. The rebuilding effort is a double burden on First Nations – their legal traditions have to be understood and rebuilt. What is the state's role in reciprocating this effort? How does using Canadian law to protect the land interfere with our own jurisdiction? People act proactively

and strategically to best achieve protection. The traditional law supports that action and the decision to use Canadian legislation to protect the lands is an exercise of Indigenous jurisdiction.

iv. Afternoon Presentations

Indigenous law through collaborative community engaged research with Yukon First Nations (focus on Heritage Chapters): Catherine Bell, University of Alberta, Faculty of Law

See also the slides provided by Catherine with her presentation in Appendix 2 following the report.

This presentation was about a collaborative research project involving Professor Bell, Dr. Sheila Greer and four Yukon First Nations (YFNs) concerning interpretation and implementation of chapter 13 of the Yukon Umbrella Final Agreement (UFA).[1] Chapter 13 is the "Heritage" chapter and addresses matters such as ownership and management of moveable (e.g. artifacts and archival documents) and non-moveable (e.g. sites, heritage routes/trails) heritage resources.

What triggered this research? The melting of the ice patch and discovery of Kwäday Dän Ts'ìnchi: Long Ago Man in Champagne and Aishihik First Nations (CAFN) traditional territory and a B.C. provincial park (Tatshenshini-Alsek Park) brought to the forefront the need to clarify ownership and jurisdiction over archaeological and ethnographic heritage discovered on YFN traditional territory, including in the Yukon, and how that was to be managed. The definition of ethnographic and archaeological objects plays a key role in determining who has ownership and/or jurisdiction under Chapter 13. However, these and other key terms are not defined in the UFA because agreement could not be reached at the time. Rather it sets up a system of dispute resolution. Nevertheless, wherever located, heritage resources related to the "culture and history of Yukon Indian People" are to be managed consistent with or with respect for YFN "values and culture" as well as the standards of mainstream (western state sanctioned) heritage resource management, where appropriate.[2]

This research was one component of a larger, multifaceted and long-term initiative by YFNs directed at understanding and articulating YFN "values," laws, and practice; their interface with Canadian laws and heritage norms; and implications for a heritage management framework based on YFN "values and culture." The broad goals were to:

(1) articulate key values, YFN laws and relationships to cultural heritage;
(2) contribute to other research initiatives aimed at grounding heritage law, policy and practice in YFN laws and values; and

[1] With support from SSHRC and the the Intellectual Property in Cultural Heritage (IPinCH) project, YFN partners included the Champagne and Aishihik (CAFN), Carcross/Tagish (CTFN), Tr'ondëk Hwëch'in First Nations (THFN) and the Ta'an Kwach'an Council (TKC).
[2] These phrases represent terminology employed in the Yukon Land Claim Agreements.

(3) consider possible implications of Section 35 and the honour of the Crown for interpreting and implementing modern treaties.

The next step was for YFN partner governments to combine this ethnographic work with other resources to develop categories, principles and practices relevant to intergovernmental and internal heritage initiatives.

Research was informed by a variety of sources including documented and undocumented YFN knowledge and laws and ethnographic research. Questions for the ethnographic research were grounded in previous work done by heritage departments of YFNs and were intended to serve as a general guide to structure dialogue around YFN heritage values. This decision to ask about "values" was a function of the text of the Agreement, which referred to values, not Indigenous law. The research team also thought that referring to values, rather than laws, might help bypass colonial preconceptions of what constituted "law" particularly given a context in which YFNs have for many years enacted law through legislation under various sections of the UFA and accompanying self-government agreements. It allowed the researchers to include broad sources of Indigenous values including Indigenous laws that went beyond courts, codified legislation, or contracts. As values and laws are dynamic, ethnographic research was not limited to the knowledge of the Elders but also included discussions with YFN youth, heritage workers and other YFN citizens.

The research was used with other sources to inform: (1) YFN governments and other stakeholders about potential implications of honour of Crown on modern treaty interpretation and implementation; (2) reasoning and mechanisms to address different interpretations of jurisdiction and ownership (3) a symposium with representative from other YFNS about the research and implementation of YFN laws and values through; (4) heritage manual negotiations at heritage management tables; (5) a Heritage Management Framework for YFN Heritage Legislation that can be adapted and passed by any Yukon First Nation; and (6) a 2018 Guide to Heritage Stewardship for Yukon First Nation Governments developed by the Yukon First Nations Heritage Group which includes an articulation of YFN heritage values and laws. There were also podcasts, a newsletter, and videos made available through a public website and two publications issuing from the research – an article in the Supreme Court Law Review and a co-authored report on the project made publicly available on the Intellectual Property in Cultural Heritage Project Website (https://www.sfu.ca/ipinch).

Some of the questions raised by this presentation included:

- How does recent law on interpreting modern treaties affect analysis of contested terms in chapter 13?
- What are the benefits and detriments of using western legal frameworks to implement Indigenous law under modern treaties?
- What are the challenges of conducting collaborative research with Indigenous governments within academic institutional frameworks?

(Discussion following Catherine Bell's presentation was forgone for scheduling reasons.)

Methodology and Workshop: Indigenous Law Research Unit (ILRU)

Presented by the ILRU team, Jessica Asch (Research Director), Rebecca Johnson (Associate Director), Simon Owen (Senior Researcher), Lindsay Borrows (Lawyer and Staff Researcher), Liam McGuigan (Co-op student)

The Indigenous Law Research Unit introduced how it works with Indigenous communities to articulate and revitalize Indigenous legal orders. ILRU researchers explained how they analyze and synthesize intellectual resources from within specific Indigenous legal traditions to assist communities in the ongoing work of asserting, upholding, and applying their laws to contemporary challenges. The ILRU envisions Indigenous laws to be living and in use on the ground, and to be researched, taught, and theorized about treated just as other great legal traditions of the world are now.

In its major research projects, which are undertaken at the invitation of Indigenous communities, the ILRU and community partners collaboratively identify research questions, then work on drawing out legal principles and processes from narratives and other accessible and available resources within that community's own legal tradition(s). This is done, in part, through the 'case briefing' method used in law schools, which helps make visible the intellectual reasoning embedded within specific stories. When multiple narratives within a legal tradition are asked the same structured questions in this way, patterns emerge which allow researchers to draw preliminary conclusions about how specific societies engage with universal human issues. ILRU researchers bring these preliminary findings into focus groups with community members, in order to develop deeper understandings of a legal question's parameters, nuances, applications, and contentions within specific contexts. Legal knowledge is also embedded and expressed in language, so key concepts are explored through a community partner's Indigenous language(s).

Once validated through community-led processes, final research outputs provide both communities and others with transparent, thoroughly-cited analyses of specific legal questions within specific legal traditions, which are intended to support robust citizenries of Indigenous legal practice, within and between communities as well as in engagements with state governments and other actors.

The presenters described ILRU's methodology in five phases:

- Phase 1: Listening – identifying Community Goals and developing a Specific Research Question.
- Phase 2: Story Analysis – Bringing the Research Question to appropriate Stories and Developing
- Preliminary Framework and Analysis.
- Phase 3: Community Focus Groups – towards Creating Integrated Framework and Analysis.
- Phase 4: Community Validation.
- Phase 5: Implementation, Application and Critical Evaluation.

This research methodology does not replace laws, change laws, or codify laws. It does analyze information in a methodical, highly structured and transparent way, organizing and articulating a community's own knowledge and resources regarding specific questions of law in accessible forms that allow it to be more readily accessed, understood, challenged, changed, and applied. Then intention is to collaboratively build tools and frameworks that support practical uses, debates, and evolutions of law.

Key Take away Points from ILRU presenters:

- It is possible to practically engage with Indigenous legal traditions on specific, substantive levels. This engagement often requires an intellectual shift – asking (ourselves) better questions to push past generalities and generalizations.
- It won't be easy and it shouldn't be.
- Serious and sustained engagement requires hard intellectual work. It requires us to treat Indigenous laws as we do other laws on an intellectual level.
- ILRU's methodology won't provide all the answers, but it will provide the ability to ask better questions of and about law, and this is crucial to the work of healthy Indigenous communities AND a healthy, legally pluralistic Canada.

Following this presentation, the workshop participants practiced and discussed the case briefing method. They were divided into three groups and each group worked on drawing the legal principles from a Secwépemc story (Story of Porcupine) that, in part, addressed relationships with neighbours. Questions posed to guide the group discussions were:

- What might be required on the part of states to create/maintain treaties under Secwépemc
- law?
- What more information about Secwépemc law would be required to build on this understanding of Treaty?
- What are some limitations of the ILRU methodology?

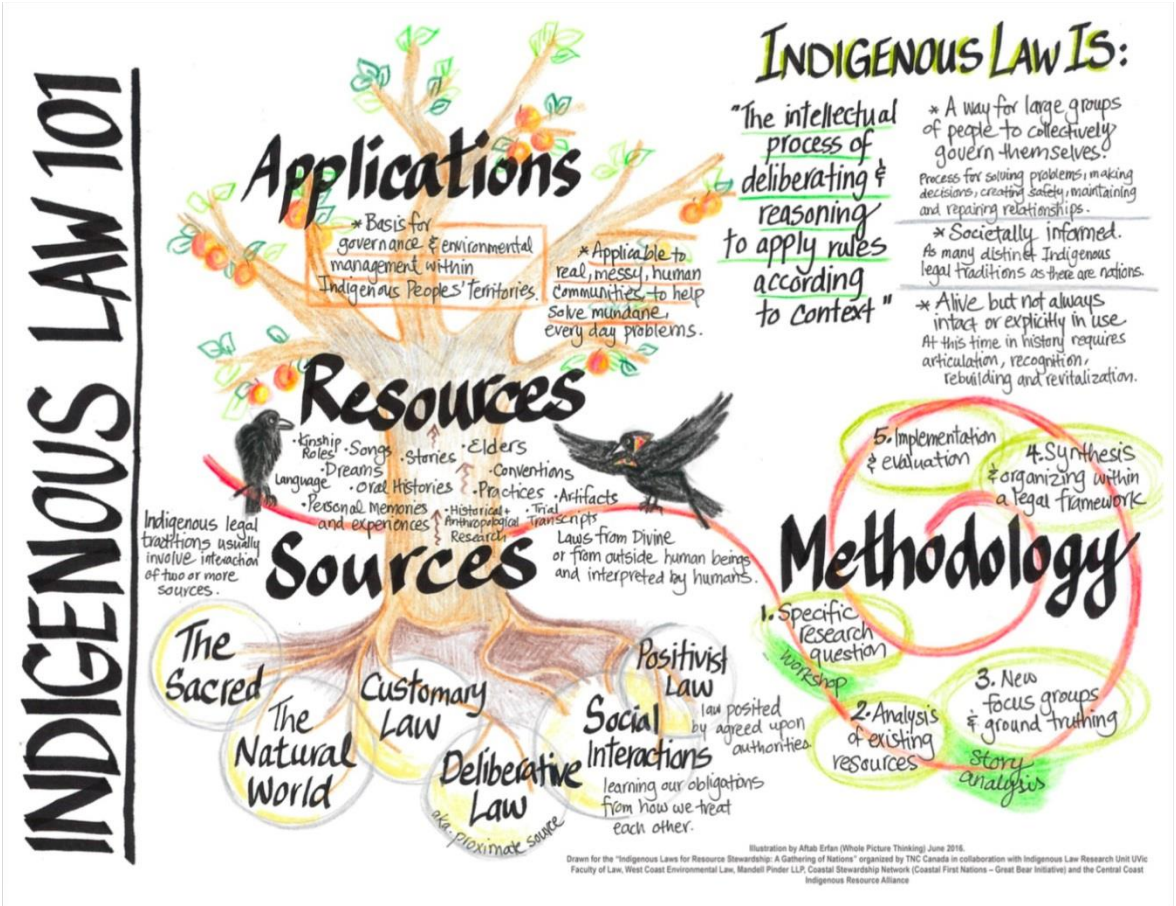


Figure 2: Indigenous Law 101, produced by ILRU

Day 2 (half day), September 22, 2018

i. Recap of Discussions & Identification of Issues

The day started with a brief recap of discussions from Day 1 by Janna who attempted to summarize common observations and points of discussion before the morning presentation:

- Context matters, differences in specificity of both historical and modern treaties:
    - Some see historical treaties as very different and see more space for indigenous law (not just text but in oral tradition and ceremony);
    - Others see modern treaties as having a lot of continuity with the historical treaties.
- Modern agreements and their detailed text both limit expression of Indigenous law and facilitate it:
    - There is potential limitation because of power relations in the interaction and because of the text, but there is also a lot of space for Indigenous governance, and Indigenous law in the agreements;
    - Catherine Bell's presentation is an example of the agreements opening up opportunities for Indigenous law research;
    - Indigenous law sits apart from (and is different from) the treaty but also within the treaty and informs the Indigenous actors engaging with state governments.
- Methodologies and limits of methodology for the research:
    - There are, perhaps, issues of language – what to call "Indigenous law" in the different ways Indigenous law informs and manifests in treaty environments or in any interface with the state;
    - Many shared concerns for sharing and protecting Indigenous law, and for seeing the dynamic of transformation affect state law and not just Indigenous law, that state law and governance must be changed/be open to be changed by engaging with Indigenous legal orders.
- Indigenous law in the internal dynamics of the Indigenous nation entering into an interface with the state is important:
    - It is necessary to ensure the legitimacy of the process;
    - When do internal disputes matter and when do they not? How do we know the difference?

ii. Morning Presentation

Reconciling the History with the Present in Indigenous Law: Val Napoleon, University of Victoria, Faculty of Law

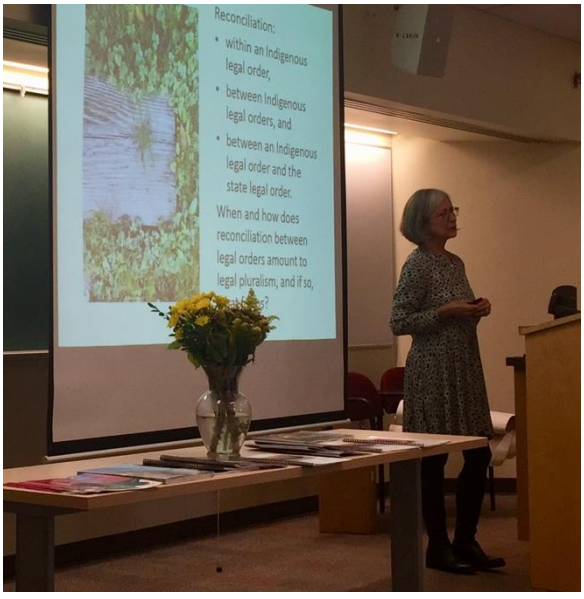
See also the slides prepared by Val with her presentation in Appendix 4 following the report.

This presentation began with an image of Kokum Raven as the trickster. Trickster figures are the first law teachers for many Indigenous peoples. Indigenous law has not gone away. It persists in every space, but has also been distorted over time. State law and non-state law continue to exist in geographical space.

Legal pluralism is inescapable. The Truth and Reconciliation Commission recommendation #50 suggests that establishing respectful relationships requires the revitalization of law and legal traditions. The initial premise of this presentation is that reconciliation might provide an opportunity and ongoing process through which Indigenous peoples and allies can build and maintain decolonized legal pluralism. Reconciliation can occur within Indigenous legal orders, within state legal orders, between Indigenous legal orders, and between Indigenous and state legal orders. In some instances, reconciliation could lead to the development of legal pluralism.

An example to explore these questions through is the story of Xhiimlaxha. Xhiimlaxha is the hereditary chief of her Gitksan house group. Under Gitksan law, house members have authority over a particular area of land around a fishing site. A group of young people come and start to use the site without permission. Xhiimlaxha replies: “why not ask if you can use it?” They reply that their grandmother used it. Xhiimlaxha responds, “Yes. 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.” Through this interaction, Xhiimlaxha is expressing Gitksan law by making it clear that there are ownership laws, and that she owns the fishing site. She informs them that as the owner she has the authority to determine access and resource use, and that there is a process for approving use, varying terms of access and ending arrangements. The Gitksan youth either do not know the law or they ignore it.

Gitksan law is horizontal and relational. Canadian law is vertical and hierarchical and has disrupted the deliberations and relationships of Gitksan law. Colonization has also changed the landscape, divided people within the landscape, and undermined the institutions through which Gitksan law operated. There are now fewer feasts, which are one of the primary means by which the law is transmitted and advanced. The result is an incomplete understanding of Gitksan law. What is necessary here is an internal reconciliation. Without a deliberate and thoughtful reconciliation, conflict will occur and continue within Gitksan communities around the application of disrupted legal orders.



The process of creating legal instruments matters. Process is central to creating legitimate law. The question of process needs to be included in the conversation about treaty and legal pluralism. We need to look at these problems as legal issues, and legal issues are solved by legitimate processes, not by foregone conclusions or declarations. The question to ask when evaluating the legitimacy of law is: Was the process used to arrive at the legal answer or legal instrument legitimate in accordance with the integrity of the legal order or legal orders involved?

iii. Group Reflections on Morning Presentation

Discussion of the presentation addressed issues and questions about the reconciliation of historical legal orders with the present. Comments and questions included:

- That the only place that we can rest things while making an argument against the common law is to use the words "spirit and intent" without describing it. "Spirit and Intent" is an undescribed thing that is not recognized, but is present in the common law. The example of trapping was given, and how it has changed from being about food and clothing to a commercial activity.
- Process and rituals are linked to the land. We have a history of coming together to survive under one leadership. Everyone became a big family. Unity informs our spirit and intent.
- There seems to be a disconnect between the thinking of Elders and young people. How do we determine the legal orders with these divisions?
- If there is no reconciliation [within Elders and young people], is there a possibility that the alternative to reconciliation will be civil disobedience and violence, especially amongst young people?
- When Indigenous people bring legal problems to Canadian courts, should those courts engage with Indigenous law?
- What about the problem of bad outcomes for Indigenous communities who take their disputes to Canadian courts? Is there a duty for non-Indigenous lawyers to encourage non-state process and avoid the courts?
- In the fishing story, is there an obligation for these people to have been taught the law? This is indicative of a breakdown. Can we facilitate different avenues for the rebuilding of the legal tradition from within? Do reports stand in the way of transmitting indigenous law through oral histories?
- Young people use things like petitions and social media to engage with the community. How do we rebuild our legal order, and how do we get our young people involved in a way that supports that project? Petitions and social media are huge right now, and this is contrary to traditional ways of doing things, like feasting.
- The same conversation around process and dogma exists in Canadian Law. There is a tension in settler law between law as declarations and law as deliberation around story and process. How do we think through the reasoning of legal processes? The tension comes out when law becomes a bureaucracy that makes no sense in its process or outcome. We do better when we look to the past and the stories in our legal orders, and ask: how do they achieve results? What are the practices that these stories speak to? There is a big distinction between outcome and process in law.

Val responded to all of the questions and comments. She emphasized the importance of bringing law into the future in order to deal with new legal issues. In the trapping example, there was an intellectual process of recognizing that the two kinds of trapping are two different things, and deliberating over how the historical order can apply today. If we don't bring the legal reasoning from the past into the present, conflict ensues. For lots of folks there is a disconnect, and that's where the rebuilding has to happen.

Regarding encouraging fulsome discussion of law and legal traditions in divided communities, she stated that group processes that included all the dissenting voices were important—for example, considering disagreements about what stories say as sources of law. She stressed that the process must be collaborative, with everyone figuring it out together and the need to build communities of practice, as opposed to just handing out a legal textbook. How do you build these resources so that communities can reason through legal problems? We can't rely on law by declaration. If we do, Canadian law will start to look more appealing. People have to see themselves in the legal process if they are going to respect it. And non-Indigenous researchers must look at Indigenous law and treat it respectfully by asking hard critical questions. Disconnection between generations are always there, but the loss of the land makes the divisions more striking, especially in law. However, people proceed with the work of rebuilding. It should include everyone, even those that disagree. We need to rebuild the processes to guide strategies and responses. Those outcomes are not foregone conclusions.

Regarding the bringing of Indigenous law to Canadian courts and institutions and the obligations of non-Indigenous lawyers, Val responded that Indigenous people will sometimes decide that Canadian legal instruments are the best way of addressing problems. Courts and colonial structures may be a valid part of the expression of Indigenous law. What is important is that the process used to decide on the use of Canadian law is a deliberative, reasoned process informed by Indigenous law. If lawyers had the capacity to look at Indigenous law processes, they could bring the outcomes of those processes to Canadian courts, and Canadian courts would be more likely to be deferential to those legitimate processes. Non-Indigenous lawyers need to help make Indigenous law articulated and visible, or Canadian law will remain the default, and we are all in this multi-juridical system together.

Regarding the process of bringing Indigenous law forward, Val gave the example of the South African constitution, which requires that 'customary' law be considered, but it's been badly handled in the courts. Indigenous law is already distorted. It's already changed. We need to take it up and rebuild it in a way that makes it usable. Reports are not important enough to overtake legal orders. They are just supplementing larger political projects. Traditionally, a lot of Indigenous law was horizontal. There was no central state and no lawyers. There were practices of civility that maintained these horizontal relationships. When they broke down there was war, but now there are no consequences. Rebuilding civility is a part of rebuilding citizenry. Individuals are legal agents. But it's never going to be a utopia—it never was.

iv. Group Discussion

Following Val Napoleon's presentation, and based on the conversations to date, several questions were posed to the group to spur more discussion.

Questions presented to the group included:

- Indigenous legal orders sit outside of treaties (and other expressions of the interface with the state). How might law grounded in these orders inform rules (legislation, bylaw, guidelines) and institutions (judicial councils, DR, judicial review and appeals)?

- Should it inform these "interface" forms of law? Are these forms of law a continuation of Indigenous legal orders or under what conditions might they be?
- Are there ways to maintain Indigenous law once it enters and informs the interface? How do communities maintain connection and maintain desired degrees of separateness and connection to Indigenous legal orders?

The discussion of these questions started with the example of co-management regimes in the modern treaties in the north. These regimes provide for representation from Indigenous communities, but these processes are seen as separate—a part of the state, despite the fact that these co-management agreements are informed by Indigenous traditions. They are separate, not 'Indigenous Law'. What do we call the middle stuff? This question is not intended to take away from the robustness of Indigenous law by calling these things not Indigenous. But is it purely ethnographic, a self-understanding of what constitutes "Indigenous Law" that matters? Is the Indigenous/ non-Indigenous law divide an important distinction?

Comments on this point included that it [Indigenous law] isn't accessible to researchers. For example, the Great Bear Forest Agreement references 'ecosystem-based management systems.' And these management systems are based on Indigenous law, but there isn't anything that is accessible to researchers that tells us how Indigenous law forms these systems. There have been land-use plans developed according to expressions of Indigenous law, but these are inaccessible from the outside. Sometimes they are identified as Indigenous law, sometimes not.

It is also hard to articulate what is and what isn't Indigenous law or legal process as it too is dynamic and changing. For example, the original proposal for the Metis Settlement Appeal Tribunal (MSAT) anticipated Elder decision making but as it became increasingly apparent, jurisdiction of MSAT would need to extend over existing and new oil and gas development to protect Metis interests and settlement lands. Other technical expertise was also important in the decision-making process. This eventually resulted in changes in the composition of decision-making panels to include non-settlement members depending on the issue before MSAT. Another example is the decision-making process of the Metis Settlements General Council. The original process for passing policies that affect all settlements incorporated Cree law requiring all representatives of the eight Metis settlements to reach consensus. However, this made it difficult over time to enact policies which displace provincial laws in a timely way for the benefit of the settlements so 'consensus' requirements were changed at the request of Metis settlement governments and citizens.

A further suggestion was that the forms through which people take on responsibility are different, but there are still historical [Indigenous] legal obligations that people are fulfilling. The key question here is: who are the authoritative decision makers? For example: in Canadian law, Impact Benefit Agreements are a matter of private contract law. However, in Gitksan law, they are public law. How we understand the substance of processes and the legitimacy of institutions is informed by the Indigenous law context.

Another comment was that it is also important to look at the larger framework in which Indigenous law is operating. For example, in the co-management of diamond mines, we have to be strategic about how we manage the files, because if we ever have to go to court, we need to have everything right. We need to ensure that the board is held to the highest standards of state administrative law. The decision-making is managed to the potential for judicial review. This context makes it difficult to uphold Indigenous law. So, Elders do sit on co-management boards, especially on the renewable resources board. The boards incorporate traditional knowledge into their decision making. However, much of regulatory assessment is driven by the colonial process.

These comments raised more questions. Indigenous law is implicit in the actors involved. What are the pros and cons of making Indigenous law more accessible to these boards? There are treaty parameters and the judicial review structure constraining these things. Should Indigenous law move into these forums? What are the expected benefits or issues? Boards have guidelines and policy about how they operate with regard to traditional knowledge and social assessment—is this where Indigenous law can come in? We have to make sure they are asking the right questions.

If we want to delineate Indigenous law from state law, we should be asking: who/what body is accountable for a legal decision? As researchers, we need to ask this accountability question.

Discussion turned to the suggestion that it is also interesting to also think about accountability and self-determination of individuals and Indigenous governments' authority to oversee and regulate (with laws that look very similar to the state). Tension within communities also. Law has been such a violent process within communities for so long so even identifying legal traditions within communities using the language of law is a challenge.

Further comments suggested the need to do an overhaul and bring back Indigenous traditions. Further development of our governance authority should be based on our legal orders and stories. People are getting kicked out of houses in our communities all the time. Something is broken, and we need to overhaul the system under Indigenous legal jurisdiction.

Similar problems were related regarding fishing authority; that people didn't recognize the authority or jurisdiction of the Indigenous laws around fishing. They were taking pick-up loads of fish to the big city to sell and justifying it under Canadian law. It's a problem.

We need to return to dialogue with Elders. Laptops and phones have replaced memory, the 'computer in the brain'. We need to retrain ourselves to think like Elders again.

Further comments were that the next step is to give greater recognition to our land and laws and develop laws that keep us alive, and not boxed in. Government lenses are too limited with respect to many problems, such as the management of endangered wildlife. We have and need to implement our own processes, putting boots on the ground to observe the animals and have the evidence to provide to decision makers. The only way to get a remedy from these governments is to go to the courts. How do we develop the engagement on the front end, to develop regulations and policies at big and small levels? How do we fill this space with laws that make sense? Doing our own thing is a demonstration of our capacity that leads to larger dialogue.

To quote Jim Tully, "we become self-governing by being self-governing". This has to happen concurrently with restoring legal pedagogy, real engagement with families and communities to make the governance more real. Being self-governing means taking action in our everyday lives. Becoming lawful is being lawful.

Connections between language and law were also made. We can be very playful with language, and that should inform a pedagogy of playfulness in law as well. An example was given about learning Anishinaabemowin and a conversation about how to say "pizza". The word that we settled on was the equivalent of "cheesy-bread-thing." We need to play with adapting Indigenous laws and culture to new contexts without worrying about the "culture police."

An analogy was made to the Secwépemc story of the suckerfish. A suckerfish falls to the ground and breaks apart, but the creator fixes him. In a different version, the fish is reconstituted by the community. The problem of suckerfish is that he doesn't think that he's beautiful. Suckerfish isn't a broken thing. He is made up of the best of whatever people had to offer at the time. Each version speaks to reconstitution and renewal. What different sources of the story mean is relevant. The work of rebuilding law and culture needs to be done by the community with the best of what people have. As we reconstitute structures with the detritus of other people's parts, the question of authenticity takes on a new meaning.

v. Closing Circle

The workshop closed with a circle discussion, in which participants shared their thoughts on what they will take from the discussions and questions that had arisen for them.

Appendix 1: *A Brief Reflection on the ILRU Exploratory Workshop Dialogue: On the "what" and the "ways"*

By Jim Tully

September 21-22, 2018, Uvic Fraser Building 152

A Judge said to me: "We are in favour of Indigenous law, but you have to present it to the court in ways that are understandable to Common law lawyers and judges."

The Indigenous Law Research Unit members (ILRU) respond to this request. They study Indigenous stories to discover Indigenous laws, and then one thing they do is present them in ways that are understandable to common law lawyers and judges.

For example, in the workshop handout we were shown that a number of Indigenous stories in Indigenous communities recommend the remedy of "consulting community members" in response to a number of different situations and in order to help to bring about "reconciliation."

Judges and lawyers can cognize this. The common law courts have been recommending a linguistically similar remedy ever since Delgamuukw. Their understanding of "consulting" is given in the literature developed under the duty to consult.

Of equal importance, ILRU present this feature of Indigenous law in a way that is also easily understandable to the citizens of Indigenous communities. They see it as an articulation of what is already present in their stories - stories they know well, like old friends.

So this dual-aspect feature of Indigenous law (cognizable by both parties) is literally the beginning of the regeneration of a decolonial "middle ground" on which the "epistemologies" of both peoples are on equal footing (in Boaventura de Sousa Santos' broad concept of epistemologies).

However, this is only the first step. Let's call the feature of Indigenous law that ILRU bring forward ("consult the community members") a "manifestation" of Indigenous law. It is not Indigenous law, but, rather, an articulation or manifestation of it in these circumstances and for these purposes of auto-generating a middle or intermediate ground on which the parties can begin to understand each other. In this case, it just tells us "what to do": namely, consult widely.

Once this is established the important question then comes to light. As many workshop participants mentioned, the big question is not only "what to do", but "the way to do it." The whole period from Delgamuukw to the present is a period of disagreement over the way to consult, as Janna helpfully explained in her discussion paper. It is not the "what" (consult) that is in question, but the "ways" of consultation.

ILRU have a response to this fundamental "ways" question. They keep the manifestation of Indigenous law (consult community members) tethered to the stories from which it is drawn. The stories are listed immediately after the statement of the "consult" clauses in the handout.

When we follow this path and learn the stories, we see that there are many ways in Indigenous law of "consulting"; depending of the problem at issue, its context, the members involved, and the reconciliation they are seeking. These ways of consulting in specific yet generalizable cases are illustrated (or, again, manifested) in the ways different people and animals get caught up in the type of problem at issue and in the ways they work to resolve it through consultation.

This is crucial. Without taking the path to the stories, the common law judges and lawyers will just interpret the manifestation of Indigenous law ("consult") in light of their background assumptions, presuppositions and stories about ways of consultation. That is, they will just continue the colonial middle ground.

And, if the Indigenous community fails to turn to their own stories to see the "way" of consultation, then they will get drawn into this colonial middle ground and way of thinking and acting with respect to consultation. When Val took a reading course with me after Delgamuukw, she told that she was worried this was happening among Gitxsan children. They were learning about their own house laws and ways of resolving disputes by reading the factum the Gitxsan lawyers wrote in terms the court could understand, rather than by learning through their stories. And Bertha also emphasised that it is important not to take the manifestation of indigenous law in the multiple agreements she has to deal with in her amazing work as the primary sense of indigenous law.

So, the stories literally ground the remedy or manifestation of Indigenous law ("consult") in Indigenous law, because, as Val said, Indigenous law is "manifest" in Indigenous stories. It is manifest in a more primary sense in stories than it secondary sense of "manifestation" in the "consult with the community" formulation. The stories tell us the "ways" of manifestation in the ongoing ways of life of Indigenous peoples.

As Justice Finch wrote in 'The Duty to Listen', it is the duty of the common law lawyers and judges to listen deeply and to learn these stories from Indigenous peoples in order to understand the meaning of the way of consultation being presented to them. This is a huge task, but it is the only way to regenerate a decolonial middle ground. It often involves going out on the land and seeing how the story and its remedy are enacted in the biotic community to which it refers and from which it draws its sources. On this duty or responsibility, Alan's comments and concerns were really helpful.

As Deborah pointed out, the various Indigenous communities in their Rain Forest Agreements articulated their remedies for sustaining ways of living with and within the ecosocial systems of the mid-coast in terms of their Indigenous stories and laws. Again, the written agreements are "manifestations" of Indigenous laws. They are not indigenous laws in any primary sense.

The important thing about these agreements is that the environmental lawyers presented them in the language of western ecological sciences that are similar to the Indigenous ways of understanding intergenerational ecosocial sustainability conditions, much like the earlier Clayoquot Sound forest practices code. So, perhaps the mutual learning process is not as difficult in these cases as in others. A kind of complementarity between Indigenous ecological law and western ecological law is emerging.

However, it is also important to see that the Indigenous stories themselves are not the primary manifestation of Indigenous laws. As John explained to us, Indigenous law is, literally, a "living law": that is, embodied in and carried by the lifeways of Indigenous communities. It is not a "formal" law that is more or less autonomous or independent of the people who are subject to it, as in modern western law and the modernized form of common law. Since Hobbes and Kant, it is presented as independent of and constitutive of society.

Indigenous law is manifest in the ways of life of the Indigenous community in which it is alive. Note again, this is not only 'what' they do, since they run up against the same sorts of problems and remedies and successes and failures as any human community. Rather, it is their ways of living, learning, agreeing and disagreeing and sustaining themselves in the interdependent webs of relationships that comprise their human communities and the communities of all their interdependent relatives, - human and more-than-human.

However, even these grounded, on the land, ways of living Indigenous law are not the primary manifestation of Indigenous law. As Indigenous people remind us, they learn their laws from mother earth: that is, from the symbiotic ways of life and relationships that constitute the ecosystems or biotic communities of which they are just one species among many fellow citizens or relatives.

We cannot make sense of and understand Indigenous law without understanding the way Indigenous communities try to understand the "Indigenous laws" of their more than human fellow citizens. This is a long evolutionary process of trial and error, and what they learn from these trials and errors is saved for future generations in their lifeways and stories.

One of the central roles of the stories is to orient and embed us all back to this ground of living law: namely, that it is a just a part of this larger ecological legal pluralism in which they live and breathe and have their ways of being. This is literally what the word "indigenous" means: living in accord with the ecosocial communities in which one lives. So, it is the laws of the biotic communities that are Indigenous law in the primary or primordial sense. All the others are manifestations of this ground – the living earth or Mother Earth.

One important feature of this grundnorm (to put it in western legal parlance) is that the animals that manifest it in their symbiotic relationships make almost as many mistakes as humans. They too learn by trial and error. We are all apprentices of indigenous law in this sense. The stories ILRU studies are full of mistakes and how different animals learn from them and pass this knowledge forward in their stories. And, as Lindsay mentioned, there is a playfulness in this realization that we all make mistakes and try to learn from them – as the Raven cycle of stories illustrates here on the Northwest coast.

However, a large number of mistakes we learn about in Indigenous stories are caused by humans and animals forgetting that they live within these legal-normative relationships and labyrinths that sustain them and all life on earth for over three billion years.

When this forgetting happens, we see ourselves as independent - rather than as interdependent in gift-reciprocity relationships of mutual aid – we misunderstand, damage and destroy these relationships that

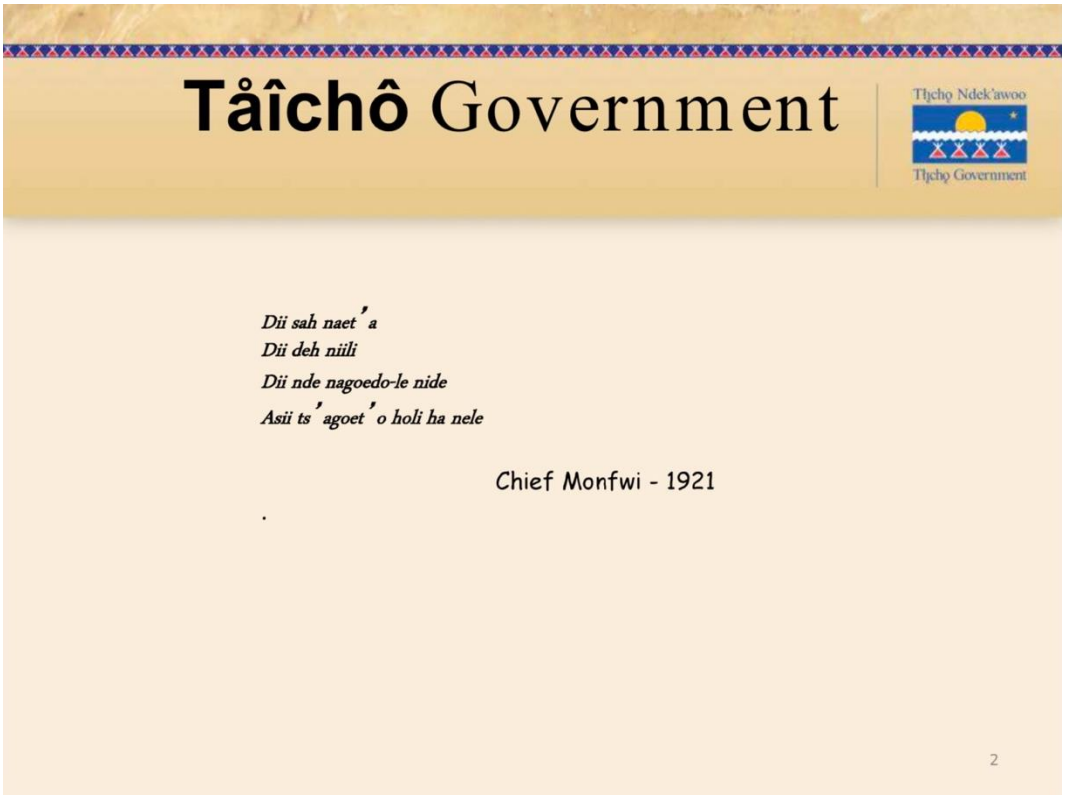
sustain all life. Unfortunately, modern western law is part of an elaborate social-economic-military historical concatenation of systems that are based on this fundamental error. Rather than becoming aware of this mistake by attending to the stories that point this out, modern western law misunderstands and colonizes the Indigenous communities and lifeways that can show Homo sapiens the ways out of this crisis before it is too late. This is why the work of ILRU is so important here and now.

So, what I learned from the workshop is that ILRU take us through the various "manifestations" of Indigenous law – from the "what remedies" to stories, to ways of life of Indigenous peoples, to their ground in the ways in which the living earth sustains its complex lifeways – Gaia laws. All these manifestations are important in the process of decolonization, but what is most important is seeing that the various manifestations are all connected to and grounded in the laws of mother earth as these are understood imperfectly in ongoing trial and error ways by Indigenous communities and their ways of living. This is why the middle ground "manifestations" (such as "consult") need to remain tethered to the stories from which they are derived, so we are led back along the path to the underlying living indigenous laws, and so become decolonized and placed back in the living world with all our relations. It is difficult journey of decolonization, de-alienation, and remembering our interbeing.

At least this is my no doubt imperfect, apprentice understanding of what I heard and also what I saw in John's astonishing drawing of the circles of manifestations of Indigenous law and the arrows that lead the way back to their ground. He shows us how to explore this world of living law. I couldn't interpret his words and drawing in this way without the dialogue we had and I am most grateful to all participants for that experience.

Appendix 2: Bertha Rabesca Zoe's Presentation Slides

Note: Anywhere that "Tåîchô" appears in the below slides should read as "Tłı̨chǫ."



Tåîchô Government

Self-Government is based on the traditional governance system of the Tåîchô – Since time immemorial

Tåîchô Unity is integral to the Tåîchô and its survival as a people is based on this unity

The Agreement is an extension of what Mowhi achieved for the Tåîchô people

3

Tåîchô Government

Tåîchô Agreement:

•Effective date on August 4, 2005

•Agreement provides certainty in respect of rights of the Tåîchô relating to land, resources and governance

•Three Party agreement – Tåîchô , Canada and GNWT

•The Agreement ensures that the Tåîchô language, culture and way of life is preserved, protected and promoted

•Indian Act not applicable therefore Band Councils cease to exist and is replaced by Tåîchô Government

4

Tåîchô Government

Powers (chapter 7.4)

•Powers to enact laws in relation to the structure of the Tåîchô Government and its internal management

•Powers to manage and exercise of rights and benefits provided under the Agreement to the Tåîchô Citizens, Tåîchô Nation or to the Tåîchô Government including those related to wildlife, plants and trees

•Powers to enact laws in relation to the use, management, administration and protection of Tåîchô lands and renewable and non-renewable found thereon

•Powers to enact laws in areas such as training, social assistance, child and family services, adoption, education, pre-schooling and early childhood, to name a few

5

Tåîchô Government

There are three (3) geographical areas:

1.Mowhi Gogha De Niitl'ee

2.Wek'èezhii

3.Tåîchô Lands

Note: The map for Mowhi Gogha De Niitl'ee is for illustrative purposes.

6

Tåîchô Government

Tłı̨chǫ Ndek'awoo
Tłı̨chǫ Government

Mowhi Gogha De Niitl'ee:

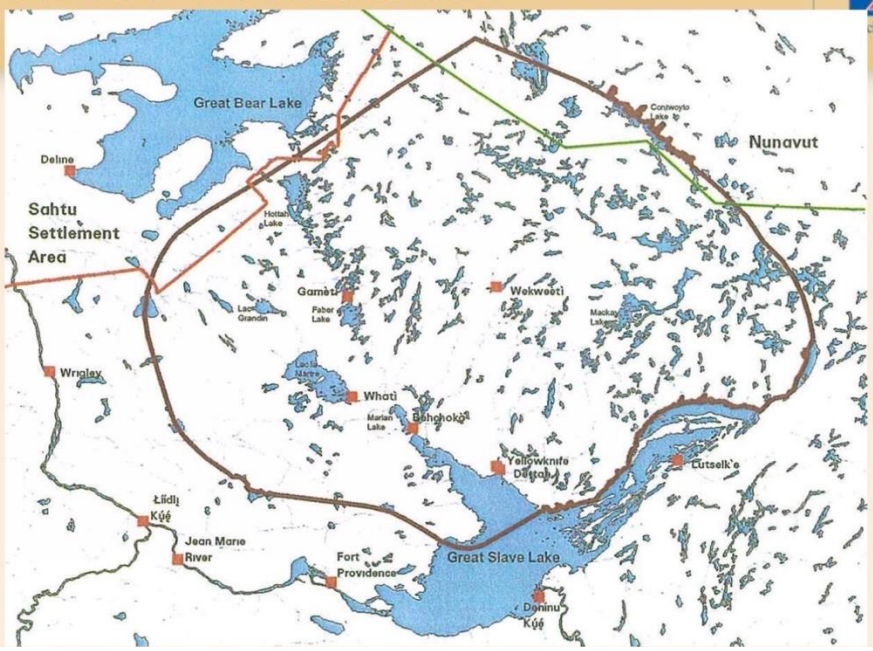
Mowhi Gogha De Niitl'ee is the traditional territory of the Tåîchô and includes all four of the Tåîchô communities.

The Tåîchô are able to exercise most of the rights set out in the Agreement in this area.

7

Tåîchô Government

Tłı̨chǫ Ndek'awoo
Tłı̨chǫ Government



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Tåîchô Government

Tłı̨chǫ Ndek'awoo
Tłı̨chǫ Government

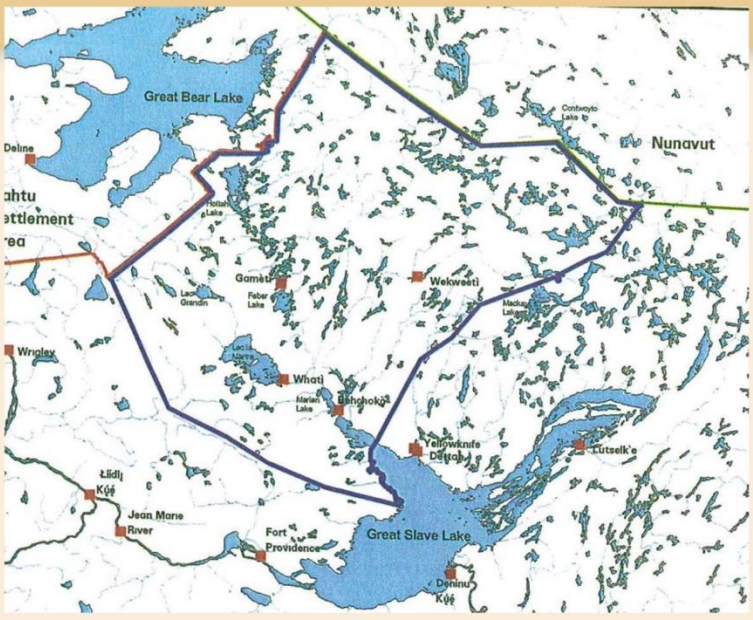
Wekʾeezhii:

- Is a resource management area.
- The WLWB and WRRB management authority apply to this area.
- This area is bordered by land claims settlement areas and traditional areas of neighboring Aboriginal groups.

9

Tåîchô Government

Tłı̨chǫ Ndek'awoo
Tłı̨chǫ Government



10

Tåîchô Government

Tłı̨chǫ Ndek'awoo
Tłı̨chǫ Government

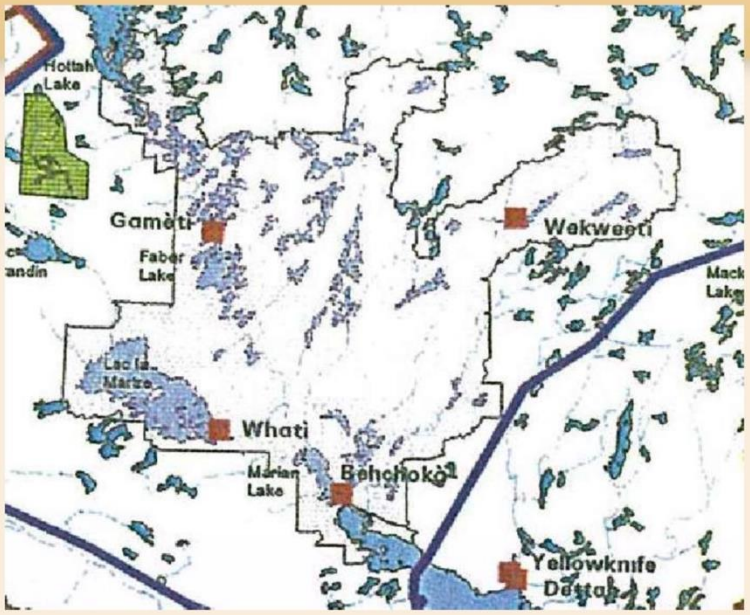
Tåîchô Lands:

- 39,000 sq/km in fee simple title
- surface and subsurface ownership
- Tåîchô lands was in moratorium.
- The Tåîchô Land Use Plan was approved by the Tåîchô Assembly.

11

Tåîchô Government

Tłı̨chǫ Ndek'awoo
Tłı̨chǫ Government



12

Tåîchô Government

Tłı̨chǫ Government

Tåîchô lands in relation to the Atlantic Provinces

	Square Kilometers	Tlicho Lands as % of Provincial Lands
Tlicho Lands	39,000	N/A
New Brunswick	55,284	70.5%
Nova Scotia	72,908	53.5%
Prince Edward Island	5,660	600.9%

13

Tåîchô Government

Tłı̨chǫ Government

The Tåîchô Constitution:

- Is the Tåîchô Nation's highest law
- Provides for the establishment of Tåîchô governing bodies and the exercise of the rights and duties and composition, membership and procedures
- Provides for political and financial accountability
- Provides for challenges to the validity of Tåîchô laws and decisions
- Is a protection for Tåîchô Citizens
- Opportunity for non-Tåîchô to participate
- Processes for amendments to Tåîchô Constitution and the Tåîchô Agreement

14

Tåîchô Government

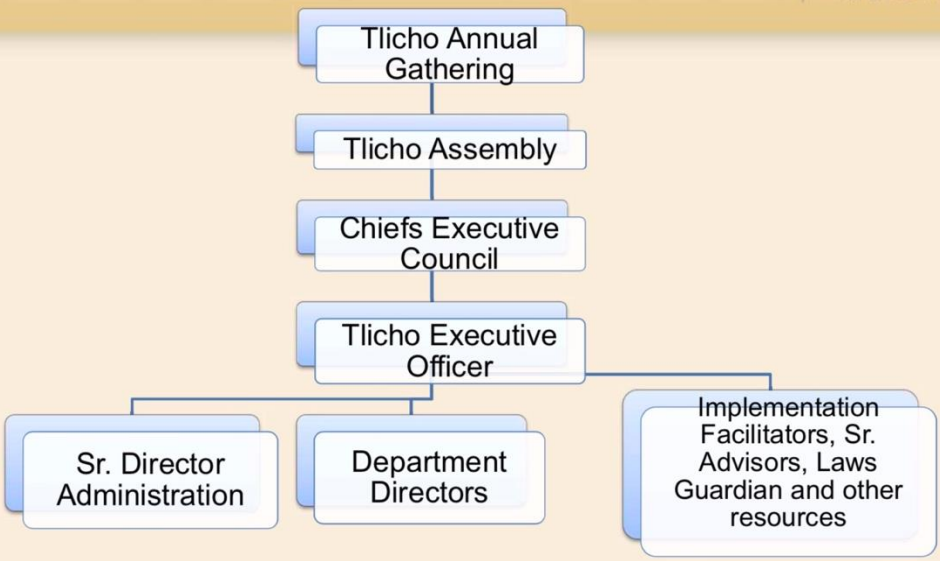
Purposes of Tåîchô Government:

To act in the best interests of the Tåîchô and to respect all laws, including Tåîchô laws

Acting to preserve, protect and promote the Aboriginal and Treaty Rights and way of life, including Tåîchô culture, language, heritage, lands, economy and resources for all Tåîchô today and for future generations to come for as long as the land shall last.

15

Tåîchô Government



16

Tåîchô Government

Annual Gathering:

Purpose is to bring Tåîchô together to share in the social, political and cultural activities as well as to deal with other matters:

- Open forum for Citizens to ask questions, make recommendations and provide broad policy direction
- Nominations for Grand Chief in the year of an election
- Annual reports including financial reports on activities of the Tåîchô Governments and its institutions are to be presented
- Debate, consideration and approval of proposed amendments to the Tåîchô Agreement and Constitution

17

Tåîchô Government

Tåîchô Assembly:

The Assembly is based on equal representation and includes the Grand Chief, 4 Chiefs and 8 Councillors. The Assembly meets 5 times per year.

- Responsibility and authority to implement the Tåîchô Agreement
- To protect and ensure good government
- Protect Tåîchô rights, titles and interests
- May enact Tåîchô laws in relation to all its authority pursuant to its self-government powers

18

Tåîchô Government

Chiefs Executive Council:

- Members are Grand Chief and the 4 Chiefs
- Take direction from and report regularly to the Tåîchô Assembly
- Ensure implementation of Tåîchô Laws
- Oversee the management and administration of the Tåîchô Assembly
- Take such action is are necessary to ensure implementation of good government of the Tåîchô
- Shall strive to make decisions by consensus

19

Tåîchô Government

Grand Chief:

- Is successor to Mowhi
- Provide overall political leadership for the Tåîchô Nation
- Shall take appropriate actions to achieve the purposes of Tåîchô Government including:
  - Act as principal spokesperson and representative of the Tåîchô Nation.
  - Encourage the resolution of internal disputes and conflicts within the Tåîchô and;
  - Promote the fundamental principles in this Constitution

20

Tåîchô Government

***Lafferty v. Tlicho Government*, 2009 NWTSC 35 (CanLII)**

- In 2008, the Tåîchô Assembly passed a Tåîchô Law suspending CEC meetings and exercised full powers. Three former Chiefs challenge the validity of that laws passed by the Assembly stating that the action by the Assembly was *ultra vires*.

- Court recognized the Tåîchô Government as an order of government in Canada and that the court cannot disregard the Constitution approved by the Tåîchô people that set out process for challenging the validity of a Tåîchô law.

- ***"... that the court's procedures ought not be misused in a manner which displays a blind ignorance of, or disrespect for, internal constitutional processes expressly adopted by, and accessed by, members of a self-governing people such as the Tlicho"***

21

Tåîchô Government

***John Mantla v. Tlicho Government*, 2016 NWTSC 54**

- J. Mantla filed statement of Claim seeking following relief: 1. impose requirement that the Rules of Order be approved by three annual gatherings before they are considered in force, 2. to require transparency and accountability from the departments, employers and contractors within TG. Mantla claims TG violated his rights under the Tlicho Constitution, the Canadian *Charter of Rights and Freedoms* and *Human Rights Act*.

Court stated:

1.there is no requirement in the Tlicho Constitution for Rules of Order to be approved in the manner that Mr. Mantla suggests. The court cannot impose itself arbitrary way to essentially legislate non-existent requirements. This issue, as framed in the Notice of Motion, does not disclose a proper cause of action.

2.As well, while transparency and accountability are laudable goals, they are not something that the court can effectively monitor or order. They simply too vague to be justiciable.

3.Courts are always ***deferential*** in dealing with the decision making processes of other bodies and specifically when dealing with self-government agreements. There is no evidence that Mr. Mantla ever attempted to have his grievance heard through the process available to him under the Tlicho Constitution. It would therefore, be an abuse of this Court's process to allow this matter to go forward without those processes having been exhausted. If this had occurred, the proper framing of this challenge would have been a judicial review, not a statement of claim.

22

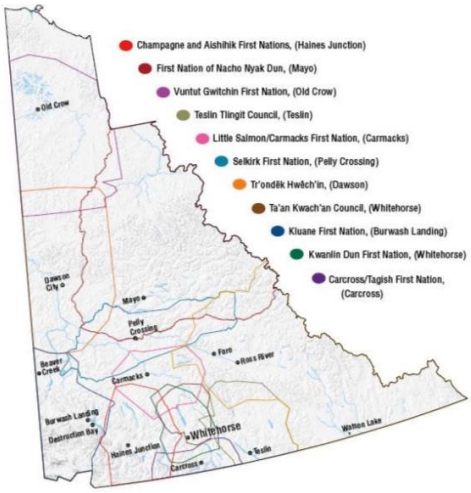
Tåîchô Government

Masi

23

Appendix 3: Catherine Bell's Presentation Slides

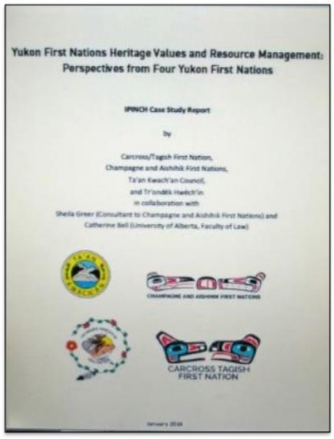
Chapter 13: Heritage



- [Yukon First Nations Heritage] is who we are and our identification…[First Nations Heritage Resources] I define as storytelling, teaching, a way you live. You can go hunting or you can go fishing or berry picking. Anything and everything you do, the way you live is your heritage. I walk it. that's who I am!

Angie Joseph-Rear, THFN session, August 4, 2012(citizen and former chief of the Tr'ondëk Hwëch'in FN).

www.sfu.ca/ipinch

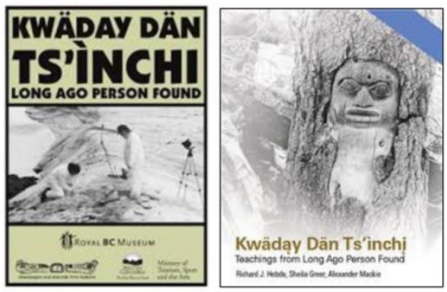


- Grounding heritage law, policy and practice on FN values
- Honour of the Crown, interpretation and implementation

Chapter 13
Research, Law and Policy Initiatives 1991 - 2018

- **YFN heritage staff** - learning & living heritage on the land
- Past YFN **conferences and workshops** (1991; 1995; 2005)
- YFN **community specific work** recording stories, elders understandings, laws . E.g. **CTFN Book of Statutes** – Traditional Beliefs and Practices (2005).
- **TK Policy Framework** (YFN Heritage Group 2007/2008)
- **IPinCH YFN Project 2009 – 2015**
- Research for **Practice and Policy Guide** to FN Heritage Stewardship (2014 to 2018 YFN Heritage Group)
- Research for **negotiations on heritage manual** 2000 onward
- Research for YFN **heritage legislative framework** 2014 – 2016 (Monina Whitfoth legislation and policy manager THFN; adopted by Tr'ondëk Hwëch'in (2016); Vuntut Gwitchin (2017); and Na Cho Nyäk Dun (2017).

What Triggered Our Research?



- 300 – 500 years old
- Melting ice patch
- Ice patch in traditional territory (B.C.)
- Matrilineal connection to CAFN citizens
- MOA between CAFN and BC

- **Issue** - Ownership and control over archaeological and ethnographic heritage discovered on or in YFN traditional territory (but not on settlement land) in the Yukon under Chapter 13 of UFA
- Heritage Manual Negotiations with Yukon Government

Chapter 13.3
Archaeological and Ethnographic Heritage

- Heritage sites and moveable ethnographic heritage resources found on settlement land and ethnographic moveable or documentary heritage directly related to the culture and history of Yukon Indian People are to be owned and managed by the FN in whose traditional territory they are found.
- Heritage sites not on settlement land, ethnographic moveable resources not directly related to the culture and history of YFNs… found on Non-Settlement Land, palaeontological, and archaeological objects are owned and managed by the Yukon government
- Definitions, disputes and the YHRB (heritage manual)
- **Example** – ancient tools and artifacts

Chapter 13
Context and Parameters of Research

13.1.1 -10

Wherever located, heritage resources related to the "culture and history of Yukon Indian People" are to be managed "consistent with or with respect for YFN values and culture" as well as the standards of mainstream (western state sanctioned) heritage resource management, where appropriate.

13.1.11

"oral history is a valid and relevant form of research for establishing the historical significance of Heritage Sites and Moveable Heritage Resources directly related to the history of Yukon Indian People."

Research Project Objectives

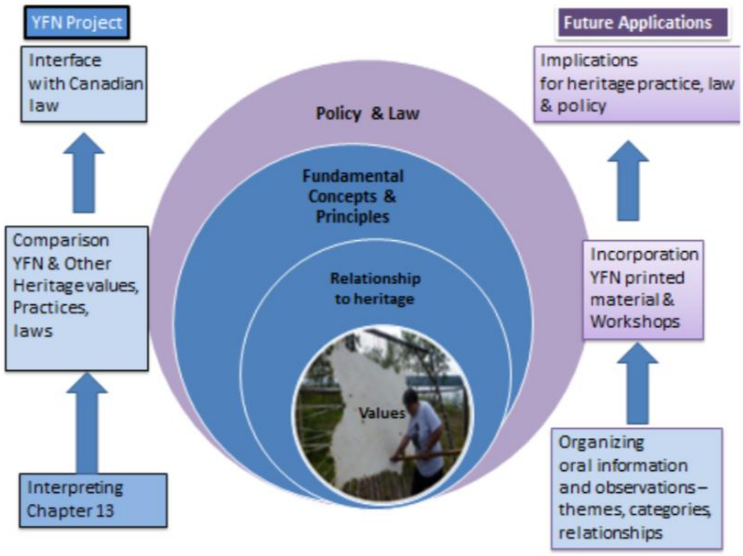
- Document how "heritage value" is defined by YFN Elders, heritage workers, *youth and other YFN citizens* (YFN law dynamic);
- Learn what constitutes stewardship and who has responsibility for different aspects of YFN heritage according to laws of participating YFNs;
- Learn about other values, norms, laws or practices that may affect heritage resource management by self-governing YFNs
- Consider implications of Canadian law concerning honour of the Crown and modern treaties on issues of ownership and jurisdiction of items found on traditional lands.
- Help provide direction for YFNs on management and regulation of heritage resources within their traditional territory

Within context of Chapter 13 and jurisdiction of self-governing YFNs

Sources

- Documented YFN knowledge and laws
- **Ethnographic research**
- **Canadian constitutional law**

Ethnographic research progressed in ten stages over five years



Language of Chapter 13 - YFN "values and culture"
Colonial filters about what is and isn't law
Ground documentation and creation of YFN law, policy and practice in YFN values

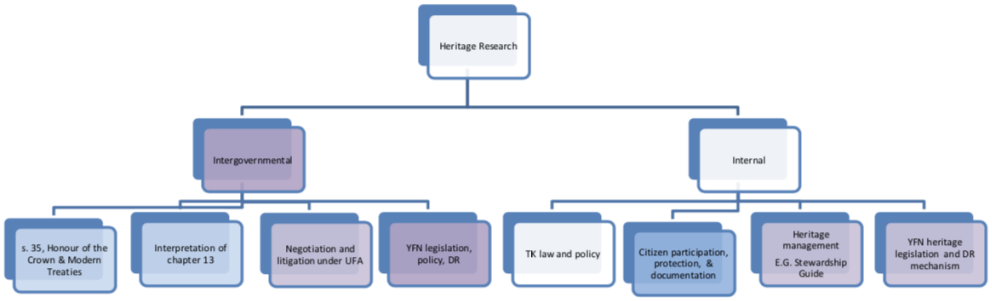
Fundamental Principles

- Heritage is a living and "moving" word
- Individual and group responsibilities
- Reciprocity and respect are key values that pervade laws, customs and practices.
- Integrity, accountability and responsibility – the "how" is as important as the "what"
- "Protection" through respectful engagement and transmission of knowledge
- May be imbued with power
- Value not just in age but in context
- Relatedness not only based on genetics or geography
- Do as much on the land as possible. This will help the researcher understand what is being said.

S. 35 Constitutional Questions

- How does recent law on interpreting modern treaties affect the analysis of contested terms in chapter 13?
- How does recent jurisprudence on honour of the Crown and reconciliation affect the rules of interpretation and processes for implementation under the UFA applicable to define contested terms (e.g. negotiate in good faith, consultation, duty of purposive fulfilment)?
- Possible courses of action for YFNs?

Bell (2015) 68 *Supreme Court Law Review* (2d) 1-39.



YFN Guide to Heritage Stewardship
We consider "heritage" to include everything about our past that we bring into our lives today: language, land, stories, songs, customs and family. For us, these things cannot be separated – this is what is meant by "holistic." Non-First Nation governments often divide heritage into different "boxes" to make management easier: archaeology, palaeontology, heritage sites. We sometimes need to interact with other governments through these boxes, but we always do so with the holistic idea of heritage in our minds

Heritage Framework Legislation 2014-2016

Purpose section 2

(a) affirms the Yukon First Nations inherent right to define heritage, culture, history and values;

(b) ensures the preservation and promotion of the Tr'ondëk Hwëch'in's heritage in and on their Traditional Territory, in a manner that is consistent with Chapter 13 (and the inherent right);

(c) ensures that Heritage Resources in Tr'ondëk Hwëch'in Traditional Territory are managed in a manner that is consistent with Yukon First Nations values and the Tr'ondëk Hwëch'in Final Agreement;

(d) articulates Yukon First Nations values and principles related to heritage and provides definitions required for this implementation of this Act;

(e) provides a mechanism for resolving conflicts between the Tr'ondëk Hwëch'in and other Yukon First Nations, and between the Tr'ondëk Hwëch'in and other governments, regarding the stewardship and management of Heritage Resources; and

(f) matters ancillary to the foregoing.

THFN Heritage Law Framework

- **Section 6** "The "What our Elders say" and "Yukon First Nations Worldview, Traditional Laws and Core Values Pertaining to heritage" sections shall guide the interpretation and understanding of Yukon First Nations heritage, and this Act.
- **Defines disputed terms**:
  - **Archaeological** means study through material remains (no reference to age)
  - "**Ethnographic** means a branch of anthropology …used to describe an object or other tangible or intangible aspects of a particular ethnic/cultural group and may include old items ,"archaeological" and "paleontological" resources;
- The determination of **direct relatedness** of heritage found in THFN traditional territory is in the exclusive jurisdiction of the THFN
- THFN to establish authorized body to advise YHRB (a) direct relatedness (b) stewardship responsibilities
- Creation of a mechanism to resolve disputes among YFNS
- Discovery of heritage resources in traditional territory

Challenges of Our Research

- **Complex legal environment**
  - impacts content, approvals and process of research
  - Documented and undocumented
- **Complex institutional environments**
  - time, momentum, distance, expense
- **Differing practices and laws**
  - e.g. concerning control over information, trust and consent
- **Academic institutional norms**
  - financial management, research ethics, concept of research and merit

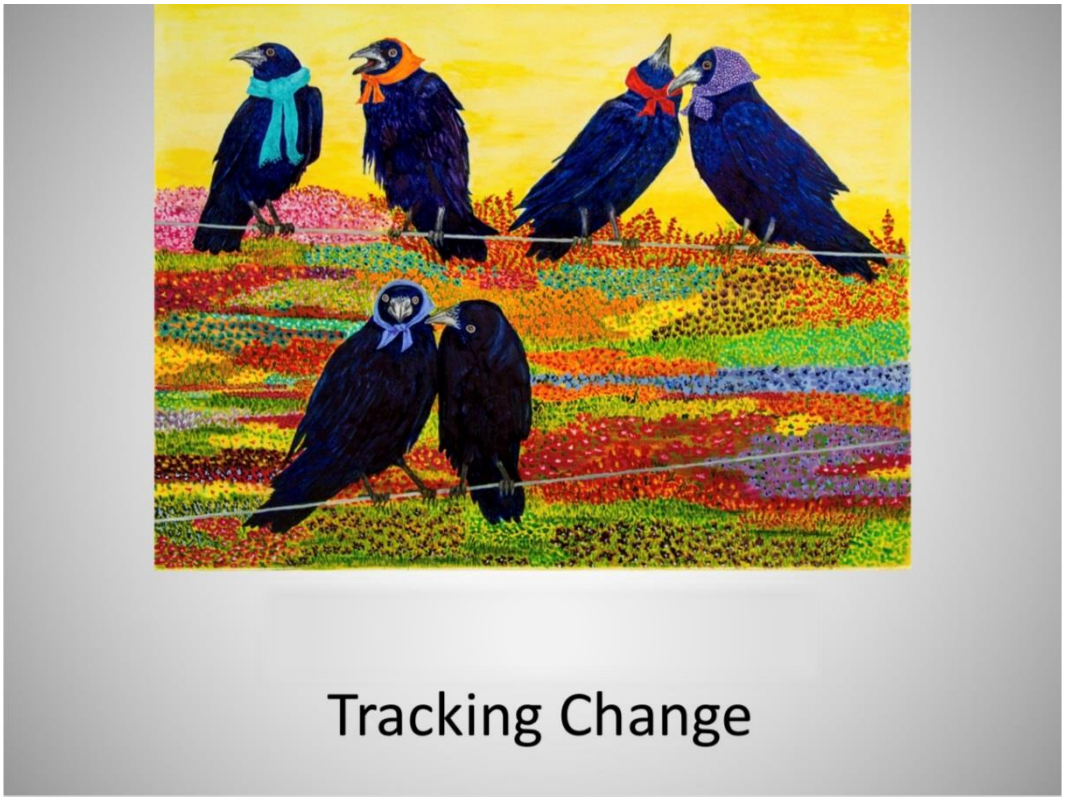
Indigenous Law, Research Ethics & Challenges for Academics

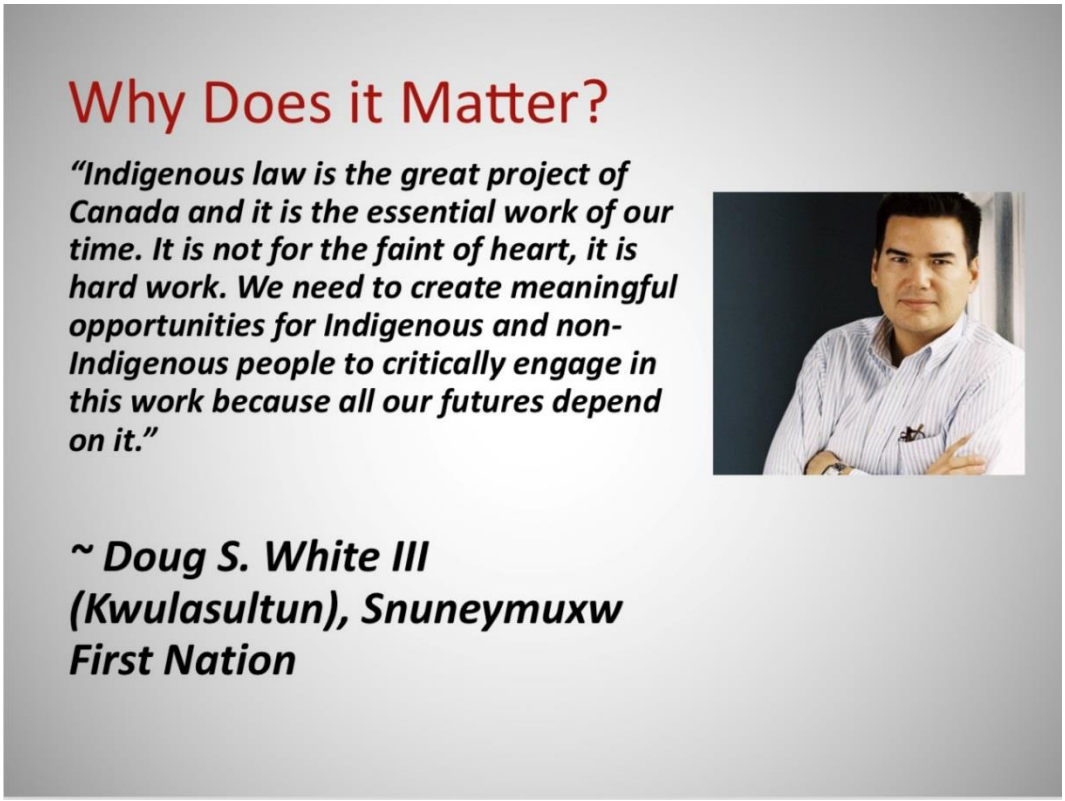
- Pace required by capacity, direction and goals
- Time to build and maintain relationships and obligations
- Multiple validation processes
- Dissemination of research
- Attribution of authorship
- Prior informed and ongoing consent
- Post publication and dissemination obligations
- IP management
- Publish at a slower pace or cannot publish

Challenging Questions

- How do we ensure we pay sufficient attention to the relationship and not just the research?
- How do we "decolonize" institutional policy and norms (e.g. administration of research funds and authority over academic matters, merit and curricula involving Indigenous knowledge and people)?
- What principles and cautions should be applied to such research?
- What differentiates northern treaty and land claim environments, if anything*?*

Appendix 4: Val Napoleon's Presentation Slides





"Establishing Respectful Relations…requires the Revitalization of Indigenous Laws."

"Aboriginal peoples must be able to recover, learn, and practice their own, distinct, legal traditions."

Truth and Reconciliation Committee of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg, 2015), online: http://www.trc.ca/websites/trcinstitution/File/2015/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf at 213 and at 206.

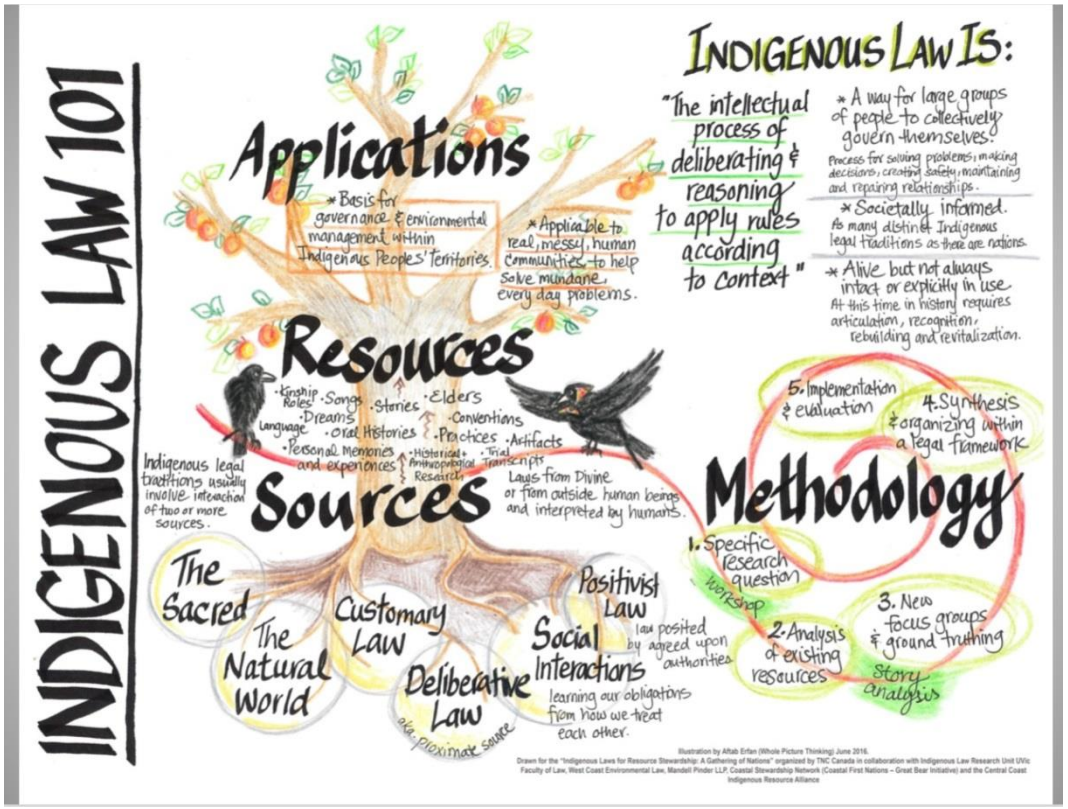
ILRU's Starting Position

Indigenous legal traditions must:

- be an integral part of conceiving and building Indigenous governance,
- be part of rebuilding our citizenries from the ground up, and
- form the basis for relating to other peoples, and to state governments

ILRU's Goals

- Work **with and support work by** Indigenous communities to rebuild and revitalize their laws.
- Develop tools to better **access, understand, and apply** Indigenous laws today.
- Create more **respectful and symmetrical** conversations across communities and legal traditions.



INDIGENOUS LAW IS:

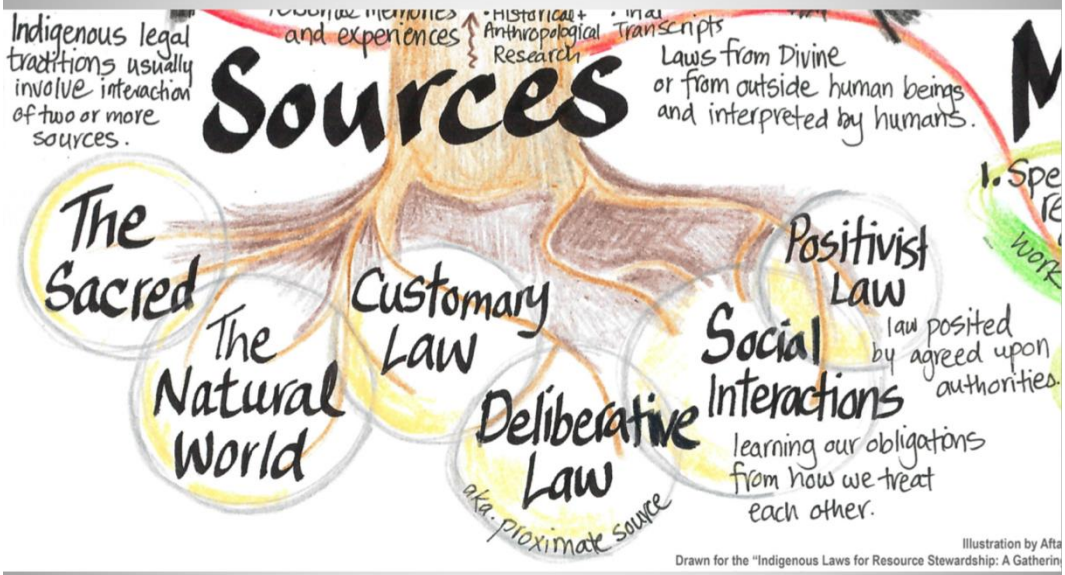
"The intellectual process of deliberating & reasoning to apply rules according to context"

* A way for large groups of people to collectively govern themselves.
Process for solving problems, making decisions, creating safety, maintaining and repairing relationships.

* Societally informed.
As many distinct Indigenous legal traditions as there are nations.

* Alive but not always intact or explicitly in use
At this time in history requires articulation, recognition, rebuilding and revitalization.

Sources of Indigenous Law



How we work: Principles and Methodology

Xhliimlaxha – Fishing Site

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.

- She makes clear that there are ownership laws and as a House Chief, she along with her House members, own the lands and fishing site she is referring to.
- As the territory owner, she knows the land, water ways, and where the fishing sites are, and she has the authority to determine access and resource use.
- She makes it clear that there are processes for approving varying terms of access and use, and for ending those arrangements.
- She also makes it clear that the particular right of access to the fishing site on her territory was legal for a set period of time according to certain terms, but that use was ended publicly at a feast where most Gitxsan legal business is declared and witnessed.

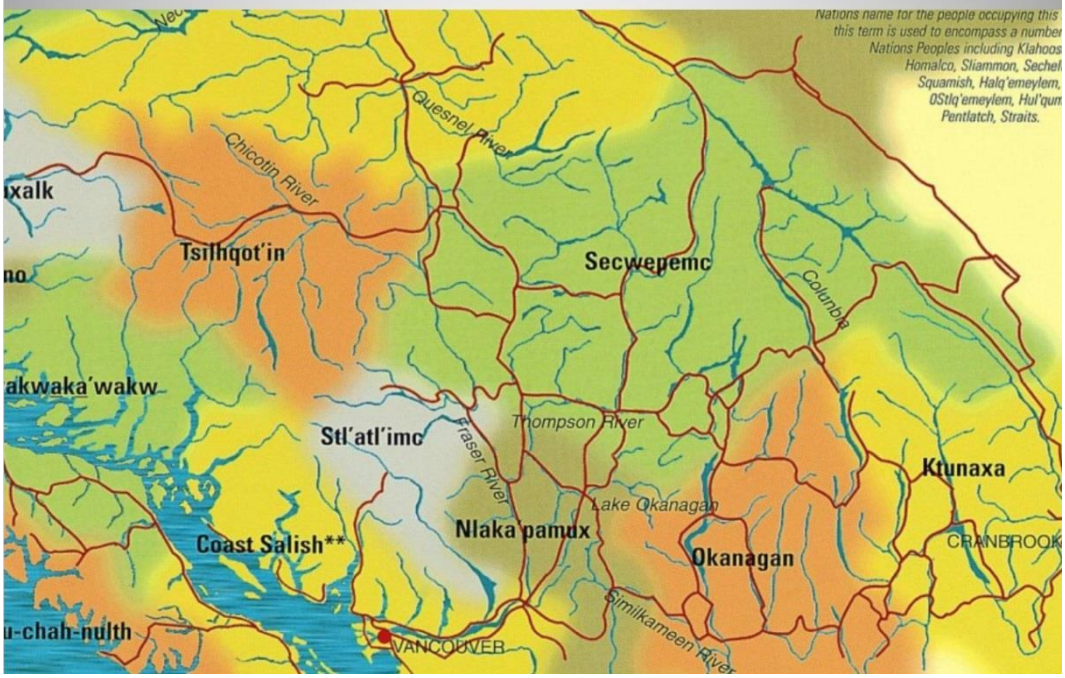
- The Gitxsan people she was speaking to did not know Gitxsan land laws and were in violation of those laws when they went to her fishing site.
- They either had not attended the public forum of the feast where the matter had been attended to or they had not received the necessary information.
- Possibly, they ignored the legal decisions and simply carried on fishing. Xhliimlaxha also stated that she could have given approval had she been asked permission so she was prepared to be generous and reasonable.
- The individuals that Xhliimlaxha is addressing have obviously made a claim based on former use, perhaps informed by a notion deriving from western property law.

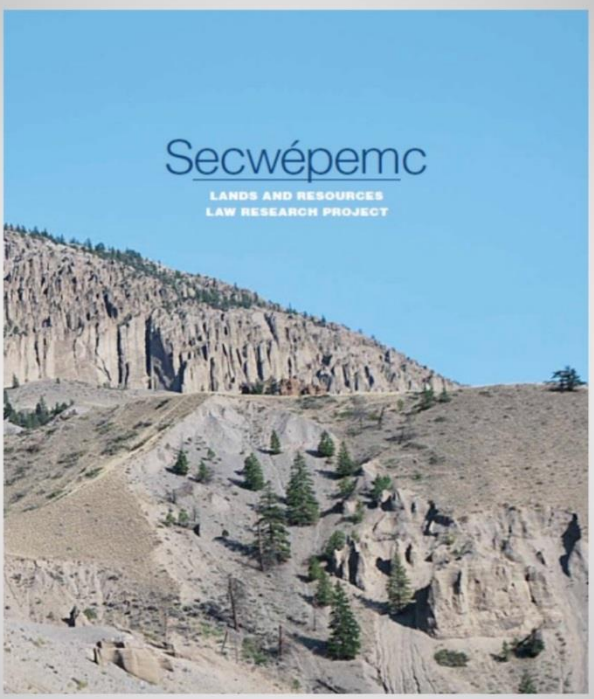
Historic Gitxsan Legal Institutions and Law	← Colonial History →	Present Day Gitxsan Legal Institutions and Law
Non-state, horizontal political, economic, and legal orders	**State law and legal benchmarks**	**Political reorientation from horizontal to vertical**
Decentralized authorities allocated through Gitxsan institutional forms – kinship lineages, chiefs' names	**Federal authority, Indian Act**	**Elected band councils, centralized decision-making**
Temporal – over time, Indigenous societies incorporated other societies – they were not homogenous	**Classification of peoples – for the purposes of federal control and benefits**	**Was - Indians, Métis, Inuit** **Now – Cree, Gitxsan, Dené, etc.**

Historic Gitxsan Legal Institutions and Law	← Colonial History →	Present Day Gitxsan Legal Institutions and Law
Political, economic, and legal relationships that matter – internally within Gitxsan society and externally with other peoples – were horizontal	Political, legal, and economic activities went underground to avoid prosecution	Small geographically pinned communities – relationships that matter are vertical with the state
Legal order extended over all Gitxsan territories (25,000 square miles)	Fracturing of larger legal order and cross cutting system of accountability	Band authority extends to reserve boundaries (44 square miles)
Public legal institutions, public legal archive, legal pedagogy, authority to enforce, public presentation and witnessing of decisions	Undermining of entirety of Gitxsan law and legal pedagogy	Fewer feasts – relating to succession Some Gitxsan peoples with incomplete understanding of Gitxsan law

Historic Gitxsan Legal Institutions and Law	← Colonial History →	Present Day Gitxsan Legal Institutions and Law
Pragmatic political and legal efforts to deal with settlers and state	No reconciliation between historic and present day • Contradictions • Incomplete Gitxsan legal education • Powerful capitalist and neoliberal ideologies	• FNLMA • MRP Act • Self-government agreements (Nisga'a) • Third party agreements • "govt" to govt agreements • Private property – many Indigenous peoples own private property
Xhliimlaxha is informed by this frame: authority and legal decisions	Incomplete Gitxsan law, need internal reconciliation	Young people are informed by this frame

Secwepemcul'ecw





Legal Synthesis of Secwepemc Law

ANALYSIS

Synthesis

- 30 Stories
- 10 Interviews
- 23 Voices

- Three authors
- Seven contributors
- 110 pages
- 47,000 words

18

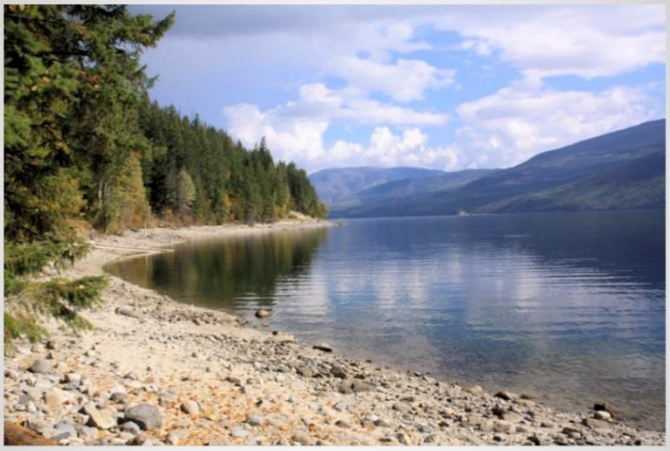
Casebook with Thematic Index

- Stories
- Case Briefs
- Thematic Index

Glossary of Terms

Secwépemc-kt ell k̓wséltktnéws-kt

("we are all Secwépemc and we are all interrelated")



Secwépemc Citizenship

Summary: What we do (and don't)

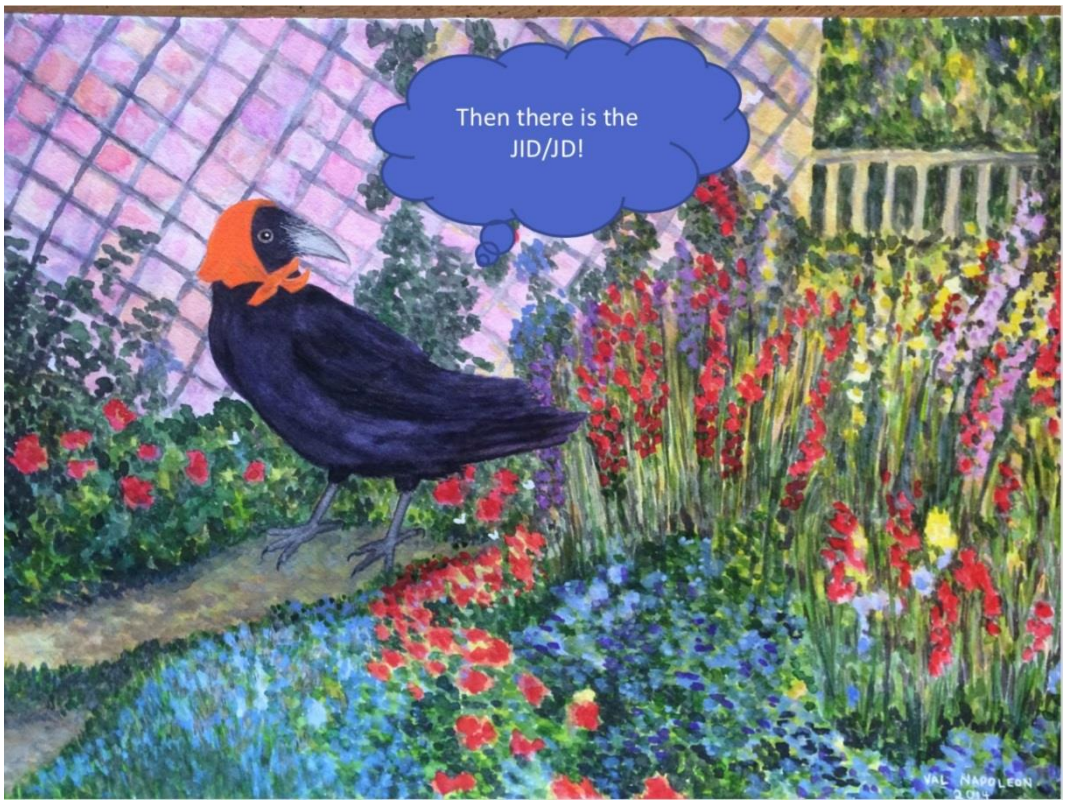
This research methodology does NOT:

- Replace laws.
- Change laws.
- Codify laws.

- **This research methodology DOES:**
- Analyze information in a methodical, highly structured and transparent way.
- Organize information in an *accessible, convenient* form so it can be more readily *accessed, understood, challenged, changed, and applied*.
- Create frameworks people can adapt and build on.

Opportunities for Engagement

- What happens if we don't engage?
- Practical reasons for engagement



Questions?

Contact

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INDIGENOUS LAW RESEARCH UNIT
AT THE
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Appendix 5: Participants

Alan Hanna	PhD candidate, University of Victoria, Faculty of Law and lawyer
Anna Sherman-Weiss	Visiting graduate student, University of Victoria, Faculty of Law
Bertha Rabesca Zoe	Tlicho Government, Counsel and Laws Guardian
Brittany Rousseau	JD student, Thompson Rivers University, Faculty of Law (student recorder)
Catherine Bell	University of Alberta, Faculty of Law (collaborator on PG)
Christina Gray	LLM candidate, University of Victoria, Faculty of Law (student recorder)
Darcy Lindberg	PhD candidate, University of Victoria, Faculty of Law
David Gill	PhD Candidate, University of Victoria, Faculty of Law (student rapporteur)
Deborah Curran	University of Victoria, Faculty of Law, Environmental Law Clinic Executive Director
Gordon Christie	University of British Columbia, Faculty of Law
Heidi Kiiwetinepinesiik Stark	University of Victoria, Political Science
James Tully	University of Victoria, Political Science, Philosophy, and Indigenous Governance
Janna Promislow	Thompson Rivers University, Faculty of Law, PG Co-lead (Indigenous and Settler Law theme)
Jessica Asch	University of Victoria, Indigenous Law Research Unit, Lawyer and Research Director
John B. Zoe	Tlicho Government, Senior Advisor and PG Co-lead (Lands theme)
Kim Stanton	Lawyer, PG Co-lead (Indigenous and Settler Law theme)
Lana Lowe	PhD student, University of Victoria, Faculty of Law
Liam McGuigan	Co-op and JD student, University of Victoria, Faculty of Law (student recorder)
Liliana Garay	Visiting graduate student, University of Victoria, Faculty of Law
Lindsay Borrows	University of Victoria, Indigenous Law Research Unit
Martin Papillion	University of Montreal, Political Science, PG Co-lead (Intergovernmental Relations theme)
Michael Asch	University of Victoria, Anthropology
Neil Vallance	Lawyer and independent researcher, Victoria
Ragnhild Nilsson	Visiting graduate student, University of Victoria, Faculty of law
Rebecca Johnson	University of Victoria, Faculty of Law, Associate Director, Indigenous Law Research Unit
Ryan Beaton	PhD candidate, University of Victoria, Faculty of Law
Sarah Morales	University of Victoria, Faculty of Law
Simon Owen	University of Victoria, Indigenous Law Research Unit, Lawyer and Senior Researcher
Val Napoleon	University of Victoria, Faculty of Law, Director of the JID degree program and Director of the Indigenous Law Research Unit.