Eagle Soaring on the Emergent Winds of Indigenous Legal Authority

*Larry Chartrand**

This paper discusses the nature of Indigenous peoples' social order systems and highlights some fundamental "legal" principles that perhaps exemplify many Indigenous nation's legal traditions to a greater or lesser degree depending on the particular nation. They are:

The Principle of Progress as Renewal,
The Principle of Balance,
The Principle of Life-Wide
Legal Agency Equality, and
The Principle of Decentralized
Normativity and Decision-making.

In discussing these principles, the author through his own personal experiences and connection to traditional teachings, reveals the interconnectedness of indigenous legal thought and spirituality and how there is really no essential distinction between the two concepts. The point is also made that the legal cultures of Indigenous and Western societies may be different in nature, process and structure than European-based social order systems, but they were and are no less effective. In addition, the paper discusses issues concerning the right to assert control over justice and legal order within Indigenous communities. It identifies concerns with a domestic Aboriginal rights approach and prefers to ground the claim in the paradigm of international human rights instruments which are significantly less colonial and discriminatory than Canada's Aboriginal rights jurisprudence. The paper ends with some thoughts on strategies for renewal of Indigenous legal thought, principles and processes so that the Eagle can fly freely once more.

L'auteur de cet article examine la nature des systèmes d'ordre social des peuples autochtones et attire l'attention sur certains principes « juridiques » fondamentaux qui illustrent peut-être les traditions juridiques de nombreuses nations indigènes à un degré moindre ou supérieur selon la nation, dont :

Le principe de progrès comme renouveau
Le principe de l'équilibre
Le principe de l'égalité des moyens juridiques
embrassant tous les aspects de la vie
Le principe de la normativité et la prise de
décision décentralisées

En examinant ces principes, l'auteur, par ses expériences personnelles et ses liens avec les enseignements traditionnels, révèle le lien entre la pensée juridique et la spiritualité indigènes et comment il n'y a vraiment aucune différence fondamentale entre les deux concepts. Il fait également remarquer que les cultures juridiques des sociétés indigènes et occidentales diffèrent peut-être de par leur nature, leur processus et leur structure des systèmes d'ordre social européens mais elles étaient et elles demeurent non moins efficaces. De plus, l'auteur examine des questions touchant le droit de revendiquer le contrôle de la justice et l'ordre juridique à l'intérieur des communautés indigènes. Il identifie des inquiétudes liées à une approche intérieure aux droits des peuples autochtones et préfère fonder l'affirmation sur le paradigme des instruments internationaux portant sur les droits de l'homme, qui sont considérablement moins coloniaux et discriminatoires que la jurisprudence canadienne sur les droits des peuples autochtones. L'auteur conclut par des pensées sur des stratégies visant le renouveau de la pensée juridique, les principes et les processus indigènes afin que l'aigle puisse de nouveau voler librement.

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The current climate

Wind is a powerful force of nature. It can be the cause of environmental change in both positive and negative ways. Winds can bring rain clouds when rain is needed to nourish the trees and plants so that they can, in turn, nourish other life. Yet winds can be destructive too and destroy much of what we regard as important in our lives. All we need do is witness the enormous power of the tornado or the hurricane and the helplessness of being unable to do anything to stop or hinder their paths of oncoming devastation.[1]

Like the winds of nature, the Europeans who arrived on Turtle Island brought both beneficial and destructive weather. The winds of European origin are complex in nature: some were beneficial, particularly in terms of early trade relations, but most would agree that the winds of colonization were overall far more destructive, bringing much pain and despair to the camps of Indigenous peoples.[2]

The winds of colonization brought great thunderstorms that blackened the skies. In the wake of the storms much harm has been caused to the dignity and humanity of Indigenous communities: loss of culture, loss of identity, loss

1 There is a Haudenosaunee legend about the Lynx out-smarting the Flying Head (Hurricane):

> This is one of the evil spirits, the Hurricane. Every time it came to the village there was always bad luck, damage, pestilence and death.
>
> The Indians in the village could not do anything about this evil until the Lynx came to dwell among them. She is the mother of nations and has great powers. It is said; she used to travel by night from tribe to tribe warning them of danger, and be back at her Lodge by morning (Source on file with author).

2 I prefer the use of the phrases "Indigenous nations" or "Indigenous peoples" in describing the many peoples and nations indigenous to Turtle Island (North America). I prefer this phrasing over terms like "Aboriginal peoples," "Native peoples," "Indians," or "First Nations." In discussing the peoples that occupied Turtle Island (North America), I wish to emphasis the similarity in their peoplehood status with all other recognized peoples and countries of the world and to use the term in the very simple sense of describing a people who are of a territory and have deep and powerfully committed connections to the land they occupy. I do not want my description of the peoples Indigenous to Turtle Island to attract the colonial presumptions associated with terms that have significance only within the context of a colonial relationship, such as "Indians." In this sense, I use the term "Indigenous peoples" to capture the totality of the tribes, nations, and confederacies themselves. Accordingly, I wish to emphasis the universal political dimension of Indigenous existence in the sense that such peoples have rights no different in kind, but also no less in degree, than any other peoples of the globe. In my opinion, the distinct peoples of Turtle Island possess the necessary indicia of peoplehood status to benefit from the right of self-determination recognized as inherent to all peoples regardless of their cultural, religious, or racial attributes. I recognize that because of the size, composition, and nature of social group units, determining which levels of social organization are capable of possessing collective rights in a normative sense is a contested inquiry, and increasingly so as absolute political boundaries of recent world history and the concretization of concepts like sovereignty give way to more porous and overlapping divisions.

of economic opportunity, loss of language, loss of family, and loss of authority, to name but a few negative impacts of the storms of colonization. Together, these losses have ultimately culminated in intergenerational collective trauma of enormous magnitude.[3]

The winds of colonial destruction continue to this day, although diminished perhaps by countervailing winds born of a growing Indigenous rights and cultural revitalization movement. This paper will focus on one set of colonial winds, those related to the imposition of a hegemonic form of colonial legal authority. More specifically, I would like to explore the destructive winds of the Euro-monopolizing legal cultures (common law and civil law) that have been transplanted onto Turtle Island soil like foreign weeds that now strangle the indigenous plants of the area, threatening their very existence. I will contrast these colonial storm winds with the Indigenous winds now beginning to emerge. Gentle breezes now, with the occasional gust,[4] these emerging winds bring with them a renewed sense of legal authority sourced in their own epistemology that originally existed apart from the legal cultures of the English- and French-Canadian tradition but that now exist largely as shadows of their precolonial vitality. The momentum is towards the solidification, once again, of Indigenous peoples' legal authorities and traditions. Consequently, the challenge for Canada, as professors John Borrows and David Milward have recognized, is how multiple legal traditions can effectively coexist with/within Canada.[5]

This paper will offer some general comparisons and contrasts between the different legal cultures of the peoples indigenous to Turtle Island and the Euro-Canadian legal traditions. I intend to focus on some common themes of political/legal thought that are, in my opinion, broadly characteristic of Indigenous normative values. I recognize that there are differences in substantive and procedural law between Indigenous nations in North America; yet, at a theoretical level, as is the case with nations that are based on Western legal traditions, some broad and common understandings that are generally

3 One of the most powerful descriptions of the overall impact of colonization is contained in the Report of the Royal Commission on Aboriginal Peoples, *Looking Forward, Looking Back. Vol. 1* (Ottawa: Minister of Supply and Services, 1996).

4 The Idle No More movement that began in December of 2012 is a good example of a strong wind of renewed Indigenous resistance. Will this gust continue and transform into the "prevailing winds" of the land? Time will tell. See <http://idlenomore.ca/>.

5 John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) and David Milward, *Aboriginal Justice and the Charter*: *Realizing a Culturally Sensitive Interpretation of Legal Rights* (Vancouver: UBC Press, 2012).

shared do exist among Indigenous legal traditions in North America.[6] Prior to discussing Indigenous legal conceptual understandings, I will offer some personal background and an instructive teaching that captures for me the essence of Indigenous legal thought as focused on respectful kinship in regards to all life. One of the reasons I am undertaking this discussion is to show that even though Euro-Canadian and Indigenous legal traditions involve culturally different conceptual understandings, such societies at their roots strive to achieve the same societal goals of order and security.

I then explore the justifications for Indigenous legal authority acceptance into or beside the overall mainstream Canadian legal system. Canada's duty to recognize and legitimize Indigenous legal authority is grounded in Canada's obligation to respect and recognize the expression of Indigenous self-determination. The peoples indigenous to Turtle Island are "peoples" and, as such, are entitled to exercise the right of self-determination as, indeed, all peoples are entitled to as a fundamental principle of international law reflected in Article 1 of the United Nations Charter.[7]

This approach to justifying Indigenous legal authority is sourced in the political status of Indigenous peoples. However, this approach is not necessarily exclusive. It can recognize the value of a cultural-protection approach to boosting the claim for recognition of Indigenous legal authorities and traditions. A cultural-protection approach can evoke the sympathies of Canadians by relying on their worries of the impact of losing Indigenous authenticity. Although valuable in its support of political claims to Indigenous self-determination, a cultural-protection model will never be sufficient as the sole justification for strong autonomously respected recognition of Indigenous legal traditions. Reliance solely on a cultural-protection approach within a liberal democracy like Canada will only lead to a limited and subservient form of acceptance of Indigenous legal authority; even then, this acceptance is only possible if the cultural differences being recognized do not threaten fundamental "Canadian" principles embedded in the values of the dominant Euro-White society or the colonial claim to a monopoly on ultimate governance authority.[8]

6 See generally the discussion in James (Sákéj) Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon: University of Saskatchewan, 2006) at 116-177.

7 *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7 online: United Nations <http://ww.un.org/en/documents/charter/index.shtml>.

8 The limitations of including Indigenous knowledge and practice can also be seen in the test for proving Aboriginal title by the Supreme Court of Canada in decisions like *R v Marshall; R. v. Bernard*, 2005 SCC 43 at para 48, 61, 77, 80 and 83 , 2 SCR 220. In this case, the court declared that the Mi'kmaq had no title interest in their historical territories because they were too nomadic

Moreover, liberal principles of multiculturalism or protection of cultural differences for their own sake as the dominant justification perspective is theoretically difficult to support because of the innate problems of cultural relativism. We cannot logically resolve the question of what is authentically Indigenous and distinct from Euro-Canadian culture, and therefore valuable and worthy of protection from assimilative pressures.[9]

Recognition of Indigenous legal traditions based on the political status of self-determining peoples is preferable because it is possible to avoid the unsolvable problems of cultural characterization, as such efforts are irrelevant to Indigenous institutions grounded in peoplehood. It does not matter whether the legal system at issue is culturally "genuine" or not to make valid assertions relying on political status as opposed to cultural or racial differences. The legal system asserted as a political expression of self-determination does not depend on how closely it resembles the pre-contact culture of the Indigenous nations (whether Mohawk, Cree, or Coast Salish). Culture is irrelevant on this score. Some Indigenous communities may wish to retrench legal authority based on a strong representation of historical traditions with little interest in colonial or contemporary Canadian approaches to justice. Others may choose to integrate colonial systems to varying degrees. However, when an Indigenous authority decides to embrace or revitalize traditional processes, including substantive laws, the fact that they may look very different from mainstream Canadian processes or laws should not be confused with the idea that the community lacks a justice system.

Thus, it is important to show how, despite looking and functioning very differently from colonial processes, Indigenous legal orders still achieve functional social order within their communities. Recognition that different nor-

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to establish title under British common law criteria. Thus, the Mi'kmaq have become squatters in their own traditional lands. This conclusion was rendered despite the court's claim that they were taking the Indigenous perspective into account. For an excellent account of this judicial doubletalk see Minniwaanagogiizhigook (Dawnis Kennedy), "Reconciliation without Respect? Section 35 and Indigenous Legal Orders" in *Indigenous Legal Traditions* (Vancouver: UBC Press, 2007) at 77.

9 There has always been a school of thought that Indigenous peoples' cultures are worthy of protection and that there is a right to cultural protection separate from any other principle of law governing the protection of their existence. This approach leads down a slippery philosophical and theoretical slope. The fact that certain tribes have historically been defined as Indian and later as White, based on the degree of civilization they exhibit, is evident of the problem of cultural relativism embedded in recognizing Indigenous culture as a right divorced of political status. See Chapter Three "Cultural Relativism and the Doctrine of Aboriginal Rights" in my LLM thesis for a more elaborate analysis of this concern. Larry Chartrand, *The Political Dimension of Aboriginal Rights* (LLM thesis, Queen's University, 2001) [unpublished] See generally Gordon Christie, "Law, Theory and Aboriginal Peoples" (2003) 2 Indigenous LJ 67.

mative beliefs and mechanisms can achieve effective social order can also help counter stereotypes about the nature of Indigenous legal orders as pre-legal or primitive that continue to be perpetuated by the public and indeed at times by "our" esteemed judiciary.

For example, one need only recount the infamous remarks of Justice McEachern in *Delgamuukw* in which he described the pre-contact society of the Gitksan as "nasty, brutish and short".[10] Perhaps more disconcerting are the remarks made by the Chief Justice of Quebec at Convocation for the graduates of the University of Ottawa law students in the spring of 2011.[11] He spoke of the great contributions England and France made to Canada's legal traditions. He spoke eloquently of how Canada is privileged to have inherited such fine legal traditions and how Canada is an example to the world of how to embrace different legal traditions in harmony. He extolled the virtues of bi-juridicalism. Then, later in his remarks, not wanting to forget mentioning the First Peoples entirely,[12] he spoke of the contribution of Indigenous peoples to Canada. He celebrated that Indigenous peoples contributed a cure for scurvy, invented the canoe and snowshoe, and then finally acknowledged the need to address outstanding land claims. My reaction to his remarks was disbelief leading to grave disgust. How is it, I thought, that a man of such stature, who spoke so elegantly about the imported foreign colonial legal traditions, could be so ignorant about the contributions of the Indigenous peoples that all he could remark upon were canoes and snowshoes?[13]

10 [1991] 3 WWR 97 (BCSC), 79 DRL (4th) 185, McEachern CJ [*Delgamuukw*]. For an insightful review of this trial decision see James (Sákéj) Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon: University of Saskatchewan, 2006) at 118. This book also has much to offer in terms of understanding Indigenous Legal Traditions. See especially Chapter 4 entitled "Nature of First Nations Jurisprudence".

11 The Honourable JJ Michel Robert, Convocation Address (Speech delivered at the Faculty of Law, University of Ottawa, 12 June 2011), [unpublished], online: University of Ottawa <http://www.president.uottawa.ca/video-gallery_32-1.html?movie=20110711-honorary-doctorate-jj-michel-robert>.

12 It was rather ironic that the only graduate student to be awarded a PhD degree in law during that convocation was an Indigenous student who was under my supervision, an Indigenous law professor.

13 For an explanation of why the judiciary is so ignorant and disrespectful of Indigenous peoples' civilizations, see Robert A Williams Jr, *Like a Loaded Weapon: The Rehnquist Court, Indian Rights and the Legal History of Racism in America* (Minneapolis: University of Minnesota Press, 2005). For a Canadian perspective, see Grace Li Xiu Woo, *Ghost Dancing with Colonialism: Decolonization and Indigenous Rights at the Supreme Court of Canada* (Vancouver: UBC Press, 2011). Neither author attributes the disrespect and ignorance of Indigenous peoples by the highest judges in North America as deliberate and conscious racism but rather as manifestations of their socialization in a society that embodied highly stereotypical ideas of "Indians."

Thus, one of the reasons for providing descriptions of some key Indigenous legal concepts is to show these systems are not simple or barbaric with no sense of principled legal rationality or authority. Through attempts to describe complexity, effectiveness, and legitimacy of Indigenous legal traditions, we can dismantle the ignorant myths perpetuated by the public and legal community.

Yet it is not enough simply to include Indigenous perspectives in the common law or to take into account Indigenous customs when sentencing Aboriginal offenders.

Indigenous systems of legal order must be allowed to stand on their own terms.[14] Prior to colonial contact, Indigenous peoples possessed institutions that met the needs of their society. These institutions may not have looked like their Western-European counterparts, but they nonetheless allowed such societies to function and, indeed, flourish within an Indigenous perspective of values.[15] These governing institutions were highly developed, efficient, and interdependent, having evolved over thousands of years.[16]

14 Of course from a practical perspective, given the degree of integration, there will be a need to accommodate both common and civil law systems. Indeed, there may even be a desire within some communities to borrow and adopt various aspects of colonial legal traditions in the same way that Christianity has been adopted and included alongside Indigenous spiritual traditions and has made Indigenous societies even richer and more diverse. The point, however, as I argue later, is that this process must be free from coercion. For a model of how this can be achieved, even within the confines of the *Canadian Charter of Rights*, see Milward, *supra* note 5.

15 The Coast Salish legal tradition is a representative case as significant aspects of its legal processes and structures are an integral part of the pot latch institution. Decisions made within the long house occur within the context of political, spiritual, and legal affirmations. These decision-making processes do not look like the colonial process captured by a single authoritative space with a judge sitting above the rest of the participants separate from political matters. Sarah Morales, professor of law at the University of Ottawa, is completing her PhD thesis on Coast Salish law. For an excellent video summary of her work see Sara Morales, "Cooperation or Conquest: Coast Salish Legal Traditions & the Canadian State" (5 June 2012), online: Lawyers' Rights Watch Canada <http://www.lrwc.org/sarah-morales-cooperation-or-conquest-coast-salish-legal-traditions-the-canadian-state-video/>.

16 Over the years, a number of academics (both Indigenous and non-Indigenous) have increasingly provided descriptive accounts of Indigenous legal traditions. (Michael Coyle, James Dumont, and Rupert Ross are notable earlier contributions.) This trend is growing as academics and Indigenous communities become increasingly more concerned with identifying and revitalizing Indigenous legal orders and, in many cases, through Indigenous research methodologies that challenge the orthodox research paradigm of the academy. (Scholars include Ron George, Val Napoleon, Darlene Johnston, John Borrows, Sákéj Henderson, Kiera Ladner, David Milward, Janna Promislow, Sarah Morales, Hadley Friedland and many others.) Concurrent with this growth in the normative study of Indigenous legal traditions, law schools in Canada are increasingly teaching Indigenous law and processes and are pushing back on the myth of Canada as a bi-juridical state where the imposed colonial English and French systems are the only ones recognized and taught. (See for example, Faculty of Law course curricula from the University of Ottawa, University of Windsor, University of Victoria and the University of British Columbia.) Moreover, many communities have established justice projects to revitalize their legal traditions and, in some cases, to codify their traditional

After colonial contact, Indigenous peoples contributed more than what Canadians typically acknowledge, including structures of government, such as how to establish a federal multinational overarching common constitution.[17] Other forms of knowledge Indigenous peoples shared with the settlers include agricultural technology, health and pharmacological technology, and engineering — not just canoes and snowshoes.[18]

In terms of justice, an essential and related message is that if we remove the Canadian justice system — its laws and institutions and indeed its government — the result is not legal chaos or a legal vacuum. Yet this situation is what politicians and jurists assume would occur if Canadian laws were declared invalid for whatever reason.[19] On the contrary, the default is not chaos,

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laws. (Lac La Matre, Saddle Lake, Teslin Tingit and Carcross/Tagish First Nations are some examples.) On a more regional basis, the Anishinabek communities are undertaking a "Restoration of Jurisdiction" process which includes the incorporation of the traditional clan system and the Seven Grandfather Teachings into their Anishinabek Nation Constitution building exercise. See Union of Ontario Indians, "Serving the Anishinabek throughout Ontario" online: Anishinabek Nation <http://www.anishinabek.ca>.

17 Notable is the contribution of the Haudenasaunee Confederacy model of governance to the creation of the United States Constitution. See Chief Jake Swamp & Gregory Schaaf, *The U.S. Constitution and the Great Law of Peace*: *A Comparison of Two Founding Documents* (Sante Fe: CIAC Press, 2004). This book also contains the Concurrent Resolution of the House of Representatives and the Senate. Significantly the preamble states:

> Whereas the original framers of the Constitutions, including most notably, George Washington and Benjamin Franklin, are known to have greatly admired the concepts, principles and governmental practices of the Six Nations of the Iroquois Confederacy; and,
>
> Whereas the confederation of the original Thirteen Colonies into one republic was explicitly modeled upon the Iroquois Confederacy as were many of the democratic principles which were incorporated into the Constitution itself; and,
>
> Whereas since the formation of the United States, the Congress has recognized the sovereign status of Indian tribes, and has, through the exercise of powers reserved to the Federal Government in the Commerce Clause of the Constitution (art. I, s8, cl.3), dealt with Indian tribes on a government-to-government basis and has, through the treaty clause (art. II, s2, cl.2) entered into three hundred and seventy treaties with Indian tribal nations; …

18 See David Newhouse, Cora Voyageur & Dan Beavon, eds, *Hidden in Plain Sight: Contributions of Aboriginal Peoples to Canadian Identity and Culture* (Toronto: University of Toronto Press, 2005).

19 For example, the Supreme Court of Canada always seems to insist that some residual regulatory power remain with federal or provincial governments even when Aboriginal or Treaty rights are upheld and recognized as being possessed by an Aboriginal community as a collective. They worry that without some residual regulatory oversight there would be a legal vacuum and chaos, as if without some regulatory interference, the "Indians" would run wild in the bush exploiting resources. They forget that Indigenous peoples have laws to regulate the use of resources within the environment and are likely more conservation-minded (given the high degree of respect to "mother earth" within many Indigenous worldviews) than any federal or provincial equivalent laws. Emily Walter, Michael M'Gonigle and Celeste Mckay, "Fishing Around the Law: The Pacific Salmon

but rather Indigenous legal authority, which has always existed in the territory now called Canada and continues to exist (despite being weakened and smothered by colonization and racism).

Now, I will offer some ideas of the foundational nature of Indigenous legal cultures as I have come to understand them over the course of some 25 years of life experience and study. I begin with a story of how I came to value Indigenous spirituality and Indigenous legal thought. Later, I will discuss the institutionalization of Indigenous legal orders within Canada.

Appreciating the indigenous world view

In the mid-80s, I began my studies of the laws and legal systems of Indigenous peoples. Later, as an academic, I decided to offer a course on such legal cultures and traditions. The first law course on the legal traditions of the Indigenous peoples at any law school in Canada was one that I developed at the University of Alberta in 1992. The research I completed for this course was extensive, comprising the contents of an entire file cabinet. The table of contents for the course book included descriptions of traditional law from a variety of sources.[20]

However, if I am to write from a place of credibility regarding the knowledge of Indigenous legal traditions, I feel I am obliged to share things about my experience that are not typical of academic curriculum vitae. It is one thing to acknowledge that I have read widely on the subject of Indigenous legal traditions and have researched the field in a way the mainstream expects of academic scholarship. Evidence of my scholarly credibility includes publications, presentations, and courses I have taught concerning Indigenous legal authorities. Less evident is the degree to which I have internalized and participated in Indigenous experiences, teachings, and traditions. These informal non-institutional (in the mainstream sense) experiences have also shaped my understanding of Indigenous authority and legal processes and require some elaboration here.

Management System as a "Structural Infringement" of Aboriginal Rights (2000) 45 McGill L. J. 263. The judicial tendency to ignore Indigenous legal authority is particularly evident in *R v Nikal,* [1996] 1 SCR 1013, [1996] SCJ No 47, *R v Marshall,* [1999]3 SCR 456, SCJ No 55, and *R v Marshall,* [1999] 3 SCR 533, SCJ No 66. I discuss at some length the problem of ignoring the political dimension of Aboriginal rights in my LLM thesis. See Larry Chartrand, *The Political Dimension of Aboriginal Rights* (Queen's University, 2001) [unpublished].

20 At the time there was no commercial textbook. Fortunately, Professors Borrows, Henderson and Milward have undertaken the task of providing texts which I now use for a similar course I currently teach. See Borrows and Milward, *supra* note 5, Henderson, *supra* note 6.

Spirituality and its relationship to law

In the same way that spirituality has and continues to inform the common law, so too does spirituality inform Indigenous legal traditions. In the common law, such connections today are resisted, even denied (lest they taint the rationality of law); in Indigenous legal traditions, however, spiritual elements are naturally accepted. Yet, interestingly, much of tort law, for example, is based on and sustained by Christian beliefs. For example, Lord Atkin relied on the Biblical neighbour principle in his development of the modern-day tort of negligence, one of the most significant of the torts. This precept was then adopted into Lord Atkin's famous determination of the scope of the duty-of-care in the tort of negligence, as articulated in *Donoghue v Stevenson*.[21]

Contemporary Western law tries to maintain a distance from its religious roots. Western culture prefers to characterize law as a rational system divorced from non-legal influences. The law is strongly contested to be based on principled rationality (notwithstanding that the supremacy of God is the first principle articulated in the *Constitution Act*, 1982 and that the formal Head of State, the Monarch, must be of Christian faith [Protestant not Catholic]). Indigenous cultures continue to be more accepting of spiritual beliefs influencing and informing legal thought. Indeed, the idea of separation (given a strong holistic and interdependent belief system) would seem unnatural and foreign.[22] It would be difficult, if not impossible, to separate the law, social norms, and spiritual beliefs into discrete compartments.

Nor is it the case that Indigenous cultures have yet to progress to a Western legal model of thought in which law is perceived and preferred to be in isolation of spiritual and religious beliefs. Indigenous cultures would regard such attempts as fictitious and unnatural. It is important to stress, then, that Indigenous legal traditions are not lower in the scale of evolution simply because of such a holistic epistemological understanding of law that embraces the spiritual realm. Indigenous legal traditions are different, not inferior.[23] Henderson describes Indigenous social orders in a similar way:

> The Indigenous teaching about learning and justice as animate forces in human consciousness continues to justify our efforts to create a fair legal system and legal reform. The answers to the question of the value of law witness the same legal sensi-

21 *Donoghue v Stevenson*, [1932] UKHL 100, AC 562.

22 James (Sákéj) Youngblood Henderson, *"Postcolonial Indigenous Legal Consciousness"* (2002) 1 Indigenous LJ 1 at 27.

23 Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide* (Canada: Minister of Supply and Services, 1996) at 14 and 236.

> bility that was operative at the time treaties were signed. We believe in the spiritual force of law and justice in Indigenous knowledge and languages, independent of Eurocentric legal concepts and how Europeans use them.[24]

At this point, I believe that an examination of my own spiritual background will help explain how I came to embrace Indigenous teachings.

I was never raised Christian. My parents had experienced Christianity early in their lives and those experiences were anything but positive, which resulted in their commitment that their children would never be raised Christian or undergo a Christian education. This was sometimes difficult for me as I was growing up in rural Alberta. At one point, I attended a small rural Catholic school in Rivière Qui Barre, Alberta. I remember sitting apart from my grade five classmates who took Religion class as I was excluded from this class. This exclusion resulted in teasing and bullying during recess. I remember spending most of my recesses hiding.

My second introduction to formal spirituality many years later was much more positive through the generosity of Indigenous Elders near Edmonton where I went to university. In particular, I was introduced to Dakota spirituality and began participating in the teachings and ceremony associated with the Dakota sweat lodge tradition. *Wakan Tanka* became my acknowledged spiritual focus and it is this Great Spirit that I ask to hear my prayers. I still pray in the language of the Dakota when I am in the sweat or when I smudge.

I remember my first Dakota sweat vividly. Elder Stan Shanks and his assistant Cliff Pompana were my guides/teachers at the time.[25] They said that I may experience a vision during the sweat but not to worry if one does not come, as it is often the case that participants may have many sweats without ever having a vision. Notwithstanding this reassurance, I did experience what I can only describe as a "vision" that first time. It occurred in a sweat lodge within a mature forest clearing near Sherwood Park close to Edmonton almost 30 years ago, yet I remember it as if it were yesterday:

> It was dark inside and the heat and steam very hot. During the fourth round, I could see an ember in the rock pit of the sweat lodge. The walls and roof that enclosed me seemed to begin to disappear as if I was now standing in an expanse of darkness but with only one light — the ember. That light formed into a newborn infant small, helpless, completely dependent. It cried, but there was no sound to be heard. As the

24 Henderson, *supra* note 22 at 27.

25 Out of respect for these Elders, I will not go into any details regarding these teachings as I am no longer in touch with them.

> ember began to change shape into a baby, it began to rise at the same time towards the sky, and I looked up to where it was heading and all I could see was a brilliant star-filled night sky. I watched it slowly rise as time itself seemed enormously condensed so that I was witnessing an eternity in only a few moments. In the end, the baby transformed into one of the many stars above.

I did not inform my Dakota teachers that I had a vision during that first sweat. I felt unworthy to have one, as I had only begun to learn of Dakota spiritual traditions. I kept the experience of that vision to myself for many years and I have never spoken of it in public. I have yet to be confident of its full meaning or significance. Since that time in the forest I have treasured and sought out as many opportunities to listen to Elders and Spiritual leaders from many of the Indigenous nations. I am grateful for all their teachings and humble wisdom.

For example, over the course of several years I learned foundational teachings relating to the Medicine Wheel and the Eagle, which are prominent symbols with valuable social messages. For the benefit of subsequent discussion, I offer a snapshot of their significance at this point.

The Wheel

The Medicine Wheel is cut into the four directions: North, South, East, and West. The Medicine wheel can offer many teachings to those who understand its gifts. It is as much medicine as it is a tool for teaching. Some of the teachings are legal, in that they convey values and principles of how one is to relate to the environment, to oneself, to others, and to the spirit world. Teachings based on the Medicine Wheel often speak of living a healthy way socially, mentally, spiritually, and physically. Such holistic and nonlinear teachings provide important guidance as to how to behave. A holistic understanding of our relations is embedded in such teachings and emphasizes the fact that as humans we are only one of many within the same circle. There is no apex in the circle; there is only kinship.

The Eagle

The Eagle is prominent within many Indigenous knowledge systems, as it embodies a powerful spirit and demands our greatest respect. Many seek the wisdom of the Eagle. Ceremonies rely upon its feathers as a symbol of respect and courage. The feather represents truth and must be treated with great respect when earned. I earned one when I was working for the University of Alberta as Director of the Indigenous Law Program at the Faculty of Law. I was in

Winnipeg for a lengthy period of time and I got to know the Fontaine family from Sagkeeng First Nation quite well. When I arrived in the community for a visit over Christmas holidays I was met by an Elder from the family, and, to my surprise, he had an Eagle feather for me. He gifted it to me because of my work in promoting and helping Indigenous students obtain a legal education. I was surprised and deeply honoured and thought that I did not deserve it as I had only just started my professional legal career in 1989. I received the feather around 1994 and in 2013 I still carry and protect the feather. I now use it as part of the talking circle protocol in my Indigenous Law Traditions class after I explain its teachings and provenance.

The Eagle feather has been used in court rooms in Canada as a means to bind one's conscience as an alternative to the Bible when swearing an oath. As a recent witness in an Ottawa courthouse involving a minor traffic violation, I have personally relied on it. Although the court clerk did not know what to do when I insisted on using the Eagle feather, the judge decided to let me speak with the Eagle feather in my hand, notwithstanding the lack of precedent. The University of Ottawa Legal Aid Clinic had initiated the "Eagle Feather" project to encourage courthouses to provide an Eagle feather as an alternative for Indigenous witnesses, but the project faded away a few years ago and no longer exists. Given my experience, I suggest the Eagle Feather project should be reinitiated under the careful guidance of local Elders.

A teaching

One teaching stands out more than any other and it came not from an Elder or even a human being but rather from the life of the land itself. It is a sacred place, perhaps unknown to others, although I have difficulty believing that others are not aware of the spot. Maybe it is supposed to remain undiscovered.

About four summers ago, I went fishing with my father and his friend Mervin Bellrose from the Paddle Prairie Métis Settlement. My parents first met Mervin when they lived in a remote part of the Paddle Prairie Settlement on the banks of the mighty Peace River near Carcajou on the way to Armstrong Flats. Mervin was one of our closest neighbours even though he lived about an hour's drive away. It was an untouched place where nature dominated and demanded respect.[26] The nearest grocery store was almost two hours away by

26 For a history of the area and a brief synopsis of my family's life in the Paddle Prairie Métis Settlement in Alberta, see Keg River Historical Book Committee, *Way Out Here: A History of Carcajou, Chinchaga, Keg River, Paddle Prairie, Twin Lakes* (Keg River: Keg River History Book Committee, 1994).

dirt then gravel and then highway to Manning or High Level. My parents lived there for many years before moving south to be closer to Edmonton, mostly for health reasons.

Mervin had recently purchased a fishing camp on an island in the eastern arm of Great Slave Lake between Fort Resolution and Snow Drift. The lake itself is massive (the ninth largest in the world) and the deepest on Turtle Island with many islands and inlets. The camp is accessible by a long boat ride from Fort Resolution. We settled at the fish camp that was to be our base for the next few days while we explored the fishing around the many islands. We paired into three boats and I went with a young man that Mervin knew. It was on the third day that we went northeast. We found a bay and had great luck with catching some big Northern Pike. We then noticed a small corridor at the back of the bay past a weed bed and decided to follow it. It faced straight south and was long and narrow with steep cliffs on both sides.

I had spent the previous day with Mervin. My father, Mervin's usual fishing partner, was not feeling well so he stayed in camp. The morning was bright and sunny and we went west from camp and found an enclosed bay. On a fairly large rocky outcropping there was a small grove of trees. One particular tree stood out; on top of this tree was the home of an Eagle. We could see it circling overhead from time to time and it watched us curiously. We knew we were in a good place to catch fish as an Eagle will only make a home where the fish are plenty. We made a few casts and, sure enough, we had three or four fish. Mervin thought that we should see if there were any Eagle feathers at the base of the Eagle's tree. We landed on the shore near its home and I climbed out of the boat and searched the area. I returned to the boat empty-handed, but Mervin asked that I still toss out one of the larger fish we caught onto the shore for the Eagle and I did.

The next day, back in the narrow channel heading south, my fishing companion and I came upon an opening after navigating that narrow passageway. At first we did not know the significance of the place, but it quickly dawned upon us that we had stumbled upon a most sacred place. We were in a part of the lake into which four channels from each direction converged. There was a slow curved wall of rock and land immediately to the right of us and facing west was a channel that split the rock and land. The same pattern repeated itself in each direction. We were surrounded by a rocky landscape apart from the four channels of water. More significant was the fact that in the middle of that body of water was a small island with an Eagle's nest in a tree. We both then saw the Eagle flying overhead, gliding. Watching. My companion and I

quickly understood the significance of the moment. We were awed. We felt we should not stay there very long and quickly exited through the eastern door. I could not believe that we had come across a naturally formed geographical replica of the Medicine Wheel with an Eagle watching, which we both surmised was there for a special protective reason. We left in silence and did not speak of the gift we received that day again.

Some general reflections on the nature of indigenous legal traditions

In my formal and informal studies of Indigenous legal orders and systems over the years, I have been able to appreciate some dimensions or characteristics that warrant highlighting.

I do not presume to offer a theory of Indigenous legal order because I still have much to learn. Nor am I sure that it is possible to identify a single theory of law characteristic of Indigenous societies on Turtle Island. No doubt there are common threads that exist to a greater or lesser extent among Indigenous nations in how law is conceived and appreciated. Indigenous nations are not isolated islands unto themselves nations within geographical proximity will influence and be influenced by other nations and share similar ideas, values, and worldviews. European cultures also experienced this mutual influencing. The common law, for example, uses language borrowed from the French and Latin traditions.[27] Indeed, there is recent evidence of sharing between common law and Indigenous law as judges of Indigenous heritage incorporate traditional perspectives into their legal opinions and processes.

I intend to discuss certain conceptual characteristics of Indigenous legal orders, some of which can be contrasted with Western legal concepts (a methodology that admittedly risks furthering an inappropriately simplified dualistic analysis fraught with unintentional stereotyping of Western and Indigenous societies). Yet, in undertaking this comparison, I raise some insights about different yet equally functional legal systems and traditions. Thus, my purpose here is rather narrow. I do not intend, nor is it possible within the scope of this paper, to provide a nuanced and comprehensive analysis of prominent Indigenous legal concepts and knowledge. In a modest sense, I capture some of the essence of Indigenous legal thought and tradition as I have come to understand them.

27 Sharron Gu, *The Boundaries of Meaning and the Formation of Law* (Montreal: McGill-Queen's University Press, 2006) at 5.

The principle of progress as renewal

Must knowledge always be "new" in order to be considered progress? Much has been said about the fact that traditional Indigenous knowledge regarding cosmology is inherently circular and that European knowledge is inherently linear.[28] However, little has been claimed about the implications on legal thought or order within Indigenous communities of such cosmological perspectives. Research that turns to this question suggests that such understandings will lead to different expectations of how to deal with social problems and judicial processes. For example, Professor Leroy Little Bear has spoken of how Western philosophy contributes to singular product-oriented thinking as opposed to the cyclical, holistic worldview evident in Indigenous thinking.[29] The Western criminal justice system focuses on the individual and generally filters out other factors and relationships as irrelevant.[30] Conversely, in Indigenous thinking, the offender is not an "abstract" individual isolated from the community but part of a network of relationships which is implicated by the offender's illegal behaviour.

A 1991 Alberta Government Inquiry into the impact of the justice system on Aboriginal peoples (Cawsey Report) explored some of the implications of linear as compared to cyclical thought on the nature and expectations of justice and governance:

> The values that arise out of a linear/singular worldview will differ markedly from wholistic/cyclical worldview.
>
> Linear thinking lends itself to a singularity of view. Implicit is the idea that a line leads to one thing. Ramifications of this idea are beliefs that there can be only on god, only one true answer, one and only one way. Horizontal and hierarchical chronologies are still other outgrowths of the linear and singular worldview.…
>
> In contrast to White society's linear/singular worldview, the Indian and Metis worldviews can be characterized as cyclical/wholistic, generalist and process oriented. The cyclical/wholistic view looks at time in terms of cosmological cycles and patterns and not in terms of an artificial creation of "time units". Cosmological cycles are generally unperceivable in terms of change. Consequently, time at the functional, opera-

28 See for example, Jim Dumont, *First Nations Regional Longitudinal Health Survey (RHS) Cultural Framework* (February 2005) online: <http://www.rhs-ers.ca/sites/default/files/ENpdf/RHS_General/developing-a-cultural-framework.pdf>. How distinct these cosmological differences remain today as a result of many years of mutual acculturation remains debatable.

29 Leroy Little Bear, "What's Einstein Got to Do With It?" in Richard Gosse, James (Sákéj) Youngblood Henderson & Roger Carter, eds, *Continuing Poundmaker and Riel's Quest* (Saskatoon: Purich Publishing, 1994) at 71.

30 *Ibid* at 72.

> tive day to day level is not considered dynamic, and therefore, is not an important referent. The wholistic view leads to an implicit assumption that everything is interrelated. Inter-relatedness leads to an implicit idea of equality among all creation. Equality is brought about by the implicit belief that everything — humans, animals, plants, and inorganic matter — has a spirit.[31]

There is value in returning to tradition. The use and preservation of traditional knowledge is understood as part of the whole and integral to the cycle and progress of life. In such a context, law is reserved for fundamental principles to guide social behaviour. Such laws are broad enough to be recycled to fit new situations. Laws do not necessarily need to be reinvented to fit new situations; they simply need to be applied in thoughtfully calculated ways to meet new circumstances. Law-making (legislative function) and the application of the law (judicial function) are virtually identical in traditional Indigenous legal thought, as social order problems are solved within the context of individual disputes relying on legal function broadly defined.

In contrast, the Western worldview is future-oriented and concerned with discovery and the production of new knowledge — Western society considers this progress. This belief is manifest in the need to create new laws for new problems. The internet is new; we need a new law. Cloning of humans is new; we need a new law. Technological advancements compromise privacy; we need a new law. More is better. We have so many laws and regulations in Canadian society that it is impossible to know them all. The rule of law becomes devalued as new legal solutions are created for every new problem. As a result, its spirit is becoming diluted. Now, law itself is becoming increasingly trivial as it becomes diluted in the mundane; its normative rigour made qualitatively weaker in the process. But that is another story for another day.

The interrelated and cyclical idea of human existence helps explain why social disorder within many Indigenous communities is not the exclusive domain of only a few "relevant" actors. There are no restrictions on who can participate in the resolution of social disorder. Everyone is potentially affected within an epistemological view of interrelatedness. This idea includes not only human but also animal and spiritual participation in the resolution of social problems.[32] In such places of wide deliberation with many affected

31 Alberta, Justice and Solicitor General, *Justice on Trial (Cawsey Report)* (Edmonton: Government of Alberta, 1991) at c 9-2 – c 9-3.

32 It is also true that authority may not necessarily rest in the hands of human agency, but in the spiritual realm or animal realm. For example in Dene legal traditions, medicine power exists as a means to bring about resolution of social harm. Moreover, legal relations can exist between human and spirit or between human and animal (other life). Thus, it is not only humans that possess legal

voices speaking, technical, concrete, and prescriptive regulations will often have little value. The focus is on the broader legal principles and how they are to be interpreted in line with the ultimate objective of maintaining healthy kinship. Certainty of interactional expectations is developed and fostered in kinship and thus contributes to a sense of social security. Brenda MacDougall brings this perspective to life in her analysis of Métis culture in northwestern Saskatchewan. She states:

> What makes the northwest truly compelling is that it is home to one of the oldest, most culturally homogenous Metis communities in western Canada, a community of people who grounded themselves in the lands of their Cree and Dene grandmothers by adhering to a way of being embodied in the protocols of *wahkootowin*. The Metis family structure that emerged in the northwest and as Sakitawak was rooted in the history and culture of Cree and Dene progenitors, and therefore in a worldview that privileged relatedness to land, people (living, ancestral, and those to come), the spirit world, and creatures inhabiting the space. In short, this worldview, wahkootowin, is predicated upon a specific Aboriginal notion and definition of family as a broadly conceived sense of relatedness with all beings, human and non-human, living and dead, physical and spiritual.[33]

The principle of balance

The concept of balance figures prominently in Indigenous normative thinking. It is inherently a relational concept and related to the principle of interconnected holism discussed above. Social harmony and order, is achieved through balance. Balance reflects the idea that no single life force should possess unlimited detached power over others. It also means that law is not merely an abstract set of ideas, obligations, and rights. Rather, law is more of an internalized set of understandings for valuing harmonious relationships. Law is but one of many interrelated tools for maintaining social and ecological balance.[34] The boundaries between law, politics, spiritual beliefs, and social mores are porous. In this sense, problems are resolved holistically. In Western society, by contrast, there is a strong desire to keep law separate from politics. Indeed, judges will be strongly criticized for entering into the political and executive branches of government and vice versa as political and executive government

agency but rather all life. For example, the story "Cheely Brings the Caribou to K'Ahbamitue" recalled by George Blondin demonstrates a kinship relationship between a Dene community and the caribou. From a Western perspective this agreement might be characterized as "contractual." See George Blondin, *Yamoria the Lawmaker*: *Stories of the Dene* (Edmonton: NeWest Press, 1997) at 116.

33 Brenda MacDougall, *One of the Family: Metis Culture in Nineteenth-Century Northwestern Saskatchewan* (Vancouver: UBC Press, 2010) at 3.

34 Henderson, *supra* note 6.

actions will be found unconstitutional if they intrude too far into the judicial branch.[35] This division of powers is seen as essential in a Western democracy like Canada to ensure proper checks and balances. The risk of corruption and dictatorial arbitrary power ever looms over those who act for the benefit of the public. Dividing power minimizes such risks. This division also ensures accountability as actions of one branch will always be reviewable by the other branches.

From a Western perspective, the idea that legal problems can be simultaneously approached from a holistic perspective may seem to risk abuse of authority. This perspective may be true if the decisions being made are from entrenched centralized authority (such as a judge or political leader). It is less risky when decisions are made in a highly decentralized manner with ultimate authority residing in the community as a whole. In this context, individual leadership is practical, functional, conditional, discretionary, and based on recognized knowledge and skill concerning the matters at hand rather than based on entrenched status through some abstract "office" of authority. In this structure, accountability is widespread and direct. I have witnessed the effectiveness of this kind of decentralized community-based decision-making process through the traditional consensus-circle process (for example, as used in law-school sponsored Kawaskimhon Moot programs) in which monopolization of discussion and manipulation is difficult if not impossible to achieve. Thus, the Western model is not the only model for ensuring accountability and minimizing risk of abuse of authority. Unfortunately, problems arise when the democratic Western model of the abstract "office" of Chief and Council is imposed without correspondingly effective culturally sensitive Western-model checks and balances.

The principle of life-wide legal agency equality

Western society views humanity as the focus of legal agency. In Western legal thought, we speak of "human" rights. However, this narrow focus is itself culturally determinative. From a Western liberal democratic perspective, law is about human agency and how to maximize human security, freedom, and wealth. Thus, when humans are the only legally relevant reference, it matters less how non-human life is affected. It thus becomes possible to own animals, plants, and the land itself. If we do not limit our focus to human rights, but instead expand the inclusion of legal agency to all life, then rather than speaking of human rights we can speak of *life* rights.

35 See *Macmillan Bloedel Ltd v Simpson,* [1995] 4 SCR 725 at para 8, SCJ No 101.

Some Indigenous legal traditions have an extended awareness of interests worthy of independent legal recognition. There is an understanding of respect for all life that equates all life with equal worth and a communally authoritative voice. Humans are no better or worse than other life. Consequently, other life, including Mother Earth, has a voice and a right to negotiate its relationship with others, including humans. The relationship does not allow one to disregard the perspective of the land or the animal. Rather, humans must consult with the animals and the earth if we wish to engage with them or rely on them for life sustaining resources. This principle of balance and equality demands respect for these other non-human perspectives.[36]

The principle of decentralized normativity and decision-making

Indigenous legal decision making is highly decentralized. This decentralization may be a by-product of the oral tradition in the historical context of highly panoptic homogeneous communities.[37] Related to this characteristic is the closeness of normative responsibilities to the individual, family, and community. The responsibilities of normative order are not delegated to a specialized body or group but rather are more internal and immediate, thus allowing for a wide network of verification. This characteristic accounts for its horizontal and egalitarian features[38] but does not mean that certain individuals or groups (families, Houses, clans, Totems) do not have distinct roles and responsibilities in resolving conflict or determining rights and obligations.[39]

Through this process, the law is more internalized and intimate. There is close control over legal matters and more widespread agency in regard to the nature of the law. Because of this internalization, a legal system with these characteristics prevents people from being a slave to "the law." Such social ordering processes also tend to prevent law as a social concept from being too powerful. The value of law as a concept is kept in check and not overstated in its importance as a societal institution. These features may make Indigenous legal orders seem almost invisible to the outsider. Yet visible mechanisms exist when the issue demands greater witness and prudence, such as when

36 Borrows, *supra* note 5 at 244-245.

37 Val Napoleon, "Living Together: Gitksan Reasoning as a Foundation for Consent" in Jeremy Webber & Colin Macleod, eds, *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010) at 64.

38 Napoleon, *ibid* at 60.

39 Napoleon, *ibid* at 65.

community members become a serious threat to the wellbeing of the entire community.[40]

Both Indigenous legal traditions based on customary law (articulated in oral legends and stories passed down from generation to generation) and the common law have similar roots in local laws as understood by the local community. The primary difference, however, is that in the common law, a specialist enforcer or decision-maker such as a judge interprets and applies the law. In Indigenous systems, the community as a whole fulfills this role, in the sense that each member has the responsibility and authority (usually in consultation with Elders) to apply the law as understood communally. Hence, Euro-Canadian law tends to be more rigid and inherently more concrete and passive, characterized by externalized abstract binding rules and detached authority.

Indigenous societies can be described as inherently complex, dynamic, and liberal systems of governance. Related to this conception is the highly free nature of Indigenous societies, as law is generally "contained" for socially important purposes of maintaining harmony and social order within society. The ethic of "non-interference," identified by the Manitoba Justice Inquiry, reflects the importance given to individual freedom in traditional Indigenous societies:

> It promotes positive interpersonal relationships by discouraging coercion of any kind, be it physical, verbal or psychological. It stems from a high degree of respect for every individual's independence and regards interference or restriction of a person's personal freedom as "undesirable behaviour."[41]

The above accounts of fundamental legal principles within Indigenous society are not meant to be a comprehensive overview and may not apply to all the diverse legal traditions of Turtle Island. Nor may they necessarily reflect the dominant views of the contemporary community as colonization has eroded their relevance over time. Band Councils often function within the Western framework of governance, producing written by-laws that become specialized discrete positivist prescriptions of authority not easily compatible

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

41 Public Inquiry into the Administration of Justice an Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People, Vol. 1* (Manitoba: Queen's Printer, 1991) at 31.

with traditional legal orders. My purpose is to describe principles that have some general resonance and ongoing endurance, notwithstanding the imposition of the Western model, in order to demonstrate that legal traditions may look very different from the Western Euro-Canadian system but still achieve their ultimate purpose of maintaining human security. Indigenous communities have had a coherent set of principles which have inherent value as a means of achieving social order. It is understandable that such communities may wish to reinvigorate these principles within the broader Aboriginal rights movement. Yet, when a community wishes to reinforce such traditional values and approaches, the implementation will be met by the intransient and often unyielding monopolizing force of the Western common and civil legal traditions. The following discussion explores ways of overcoming such barriers to judicial self-determination within Canada.

Changing the climate: institutionalizing indigenous social order traditions

At this point, I would like to discuss the principal sources for legal and political recognition of Indigenous legal systems as authoritative in Canada. Some argue that Indigenous legal traditions should be recognized and protected because of their cultural value. Unfortunately, this approach can diminish or detract from the objectives of political recognition of Aboriginal peoples and nations as sovereign authorities. I agree with Avigail Eisenberg that cultural rights arguments can benefit Aboriginal peoples,[42] but ultimately you can have all the cultural rights you want recognized (even Aboriginal self-government as a form of protected cultural right)[43] but the Aboriginal community will remain subordinate to Canadian legal authority. I prefer to argue for the recognition of Aboriginal legal traditions based on the principle of self-determination of peoples (i.e. peoplehood).[44] As a people, Indigenous

42 Avigail Eisenberg, "Domestic and International Norms for Assessing Indigenous Identity Claims" (Presentation delivered at the Indigenous Peoples and Governance International Conference of Montréal, 17 April 2012) [unpublished] online: Michigan Law <http://www.law.umich.edu/workshopsandsymposia/Documents/Eisenberg%20Workshop%20Paper%20(2).pdf>.

43 In *Alberta v Cunningham,* 2011 SCC 37 at para 88, 2 SCR 670, the Supreme Court of Canada characterized the Métis Settlements legislation, which sets aside separate lands held in common by the Métis communities and governance authority, as an ameliorative program designed to protect the unique and distinct Métis culture under s 15(2) of the *Charter* in response to a challenge by someone who regained Indian status and thus could no longer live on Métis settlement land.

44 The Royal Commission on Aboriginal Peoples concluded in 1996 that "Aboriginal peoples are not racial groups; rather they are organic political and cultural entities." As such, they are "nations vested with the right of self-determination" and are "sovereign within their several spheres" of

communities and authorities possess the right to self-determination, including the right to maintain and develop their own legal traditions and not to have another imposed.[45]

The value of cultural differences is in the sharing between societies. Comparative legal studies is a valuable exercise in itself that can lead to various insights.[46]

I do not propose to offer any assessments of which legal tradition is better than the other; one legal culture deserves no greater or lesser protection as against the other legal tradition. Differences in how social order is maintained do not justify diminishing the status of the other or rendering traditional values essentially invisible by the overwhelming force of colonization. If there is to be a measure of how well a legal tradition functions, then we must turn to the regime of international human rights.[47] As long as a social order system does not condone the abuse of accepted human rights (e.g. slavery, arbitrary discrimination, etc.), we must deem this system acceptable regardless of its institutional characteristics or how they differ from Euro-Canadian institutions. Even so, it is up to Indigenous nations to be mindful of these human rights in their governance. Self-governing entities, even within a broader union, are not exempt from complying with international human rights standards. However, it is not up to Canada or any other government entity to "enforce" these human right standards in violation of other human rights, such as the collective human rights of Indigenous self-determination.[48] The *Charter*

authority. Royal Commission on Aboriginal Peoples, *Restructuring the Relationship Volume 2, Part One,* (Canada: Minister of Supply and Services, 1996) at 177, 180 and 244, respectively.

45 Royal Commission on Aboriginal Peoples, *ibid* at 254-256.

46 Borrows, *supra* note 5 at 21-22.

47 I am not naïve to the fact that international law has not been fair or just in the development of fundamental principles of human rights; how can a system or process be credible if it has historically excluded certain national voices in the discussion of international law? For a historical review of the early international period regarding the peoples of the "new world," see L Leslie C Green & Olive Patricia Dickason, *The Law of the Nations and the New World* (Edmonton: University of Alberta Press, 1989). The legitimacy of the international human rights standard-setting process is vitally dependent on the inclusion of Indigenous peoples. Confidence in its credibility demands no less. A step in the right direction, the United Nations Indigenous Forum offers a permanent voice at the international level and is a critical element in furthering the credibility of international law. Nevertheless, there are problems with the degree to which the Indigenous voice is heard due to the subordinate level in which the Forum is situated within the United Nations hierarchy, as an expert advisory body to the Economic and Social Council.. See the official United Nations website of the Permanent Forum: http://social.un.org/index/IndigenousPeoples.aspx.

48 The right of self-determination is found in Article One of the United Nations Charter itself. Its application to Indigenous peoples has been recently confirmed in the *United Nations Declaration on the Rights of Indigenous Peoples*, UN GAOR, 61st Sess, Annex, Agenda Item 68, UN Doc A/Res/61/295 (2007) at 1 [*UN Declaration*] passed overwhelmingly by the United Nations General

of the United Nations and the edicts of human rights agencies must only apply to the independent governments of Indigenous peoples by agreement and not by unilateral imposition.[49]

In making this statement, I purposely place myself within a certain uncompromising perspective from which Indigenous independence and authority must be free from unilateral external imposition by Canadian authorities. This position cannot be easily reconciled with the view that individuals whose rights are abused by Aboriginal governments should be allowed to find redress by resorting to Canadian legal processes. I acknowledge that in some Aboriginal communities, governance is incapable or unwilling to protect members from abuses, sometimes because traditional internal normative processes have been damaged by colonization or because individual leaders do not identify with certain human rights standards for usually selfish reasons. I am also aware that it is mostly the vulnerable (women and children) who are disproportionately unable to have their human rights respected when such communities are dysfunctional.[50] Despite acknowledging these harms, and despite knowing that Canadian human rights law may rectify such abuses if applied, I will not alter my position against Canadian legal imposition without the consent of the Aboriginal community or leadership to which such members belong.

Assembly. As a declaration, it may not in itself be effective to raise legal arguments because it is not a binding document per se. However, in a number of instances this comprehensive human rights instrument is declaratory of customary international law, which is binding. One of the principles of customary law is the principle of the right to self-determination. Canada is likewise bound to give recognition to this principle. Moreover, "courts have the legal capacity to take the *Declaration* into account in interpreting Indigenous peoples' rights." See Paul Joffe, "Canada's Opposition to the UN Declaration: Legitimate Concerns or Ideological Bias?" in Jackie Hartley, Paul Joffe & Jennifer Preston, eds, *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (Saskatoon: Purich Publishing, 2010) at 91.

49 This discussion reflects the tension between rigorously upholding self-government and the protection of individual human rights guaranteed under Canadian law. This tension seems to be a constant in politics, law, and policy initiatives in Canada these days. Attempts to diffuse this tension range from ignoring it altogether to making Aboriginal governance and laws subject to the individual rights protections contained within Canadian human rights law. See the history and analysis around section 25 of the *Charter* and compare it to the new provisions of the *Canadian Human Rights Act*, RSC 1985, c H-6 that now allows for it to apply to *Indian Act*, RSC 1985, c I-5 government authorities. See Pamela D Palmater, *Beyond Blood: Rethinking Indigenous Identity* (Saskatoon: Purich Publishing, 2007) for an insightful discussion and perspective on this issue. For an interesting discussion of this tension in the United States context see Dan Russell, *A People's Dream* (Vancouver: UBC Press, 2000).

50 See Larry Chartrand & Celeste McKay, *A Review of Research on Criminal Victimization and First Nations, Métis and Inuit Peoples 1990 -2001* (Ottawa: Department of Justice, 2006).

Of course, I acknowledge that states have a duty to protect and it is at this point when states are not only justified to intervene, but that they have a duty to do so in order to protect vulnerable populations.[51] However, through persuasion and human rights awareness and knowledge, I advocate for positive institutional change in the protection of individual human rights, short of the violation of the community's right to responsible self-determination. This position does not mean pushing for a Western cultural understanding of human rights or the values that inform them. I know that healthy Indigenous traditions would not countenance such abuses either.[52] It matters not, however, which model — Western, Indigenous or hybrid — is ultimately adopted by Indigenous peoples to deal with human rights or social order as long as the decision is based on their own informed choice and not imposed externally.

It is in the face of these Indigenous government decisions and processes that Canadian governments are now obliged to give way. This obligation to provide jurisdictional space for Indigenous legal traditions to apply to their territories and citizens stems from Canada's responsibility to uphold the minimum human rights standards as they apply to Indigenous peoples including respecting the right of Indigenous peoples to exercise the right of self-determination.

It is no longer acceptable to impose Canadian law or processes without consent or consultation. This kind of unilateral act is colonialism, and I would add that it is the kind of action that exemplifies systemic racism as well.[53] In order to appreciate why such a unilateral action is wrong, one must appreciate that Indigenous communities, as distinct peoples, possess distinct

51 It may be argued that if the leadership in a community is so completely dysfunctional, then such a state of affairs is akin to a community possessing no effective government at all. Under such circumstances, other governments may be justified in intervening as such a dysfunctional government is not in a credible position to protest the interference within their internal affairs for the purpose of protecting fundamental human rights. The universal protection of human beings from unjustified harm in the context of complicit leadership and authority overrides formal jurisdictional barriers of sovereignty. Sovereignty must be exercised responsibly. This is the hard lesson the international community has learned from the Rwanda genocide, for example. The development of the "Responsibility to Protect" principle in international humanitarian law is an example of when it is justified to intervene in the internal affairs of self-governing states for humanitarian reasons. Gareth Evans, "From Humanitarian Intervention to the Responsibility to Protect" (2006) 2 Wis Int'l LJ 703. For an account of the failure of the international community to intervene when they had a duty to do so, see Roméo Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (Canada: Random House of Canada, 2003).

52 For example, see Taiaiake Alfred, *Wasáse*: *Indigenous Pathways of Action and Freedom* (Toronto: University of Toronto Press, 2005).

53 Williams, s*upra* note 13.

and independent political governments.[54] They entered into treaties with the British and subsequent Canadian governments on a nation-to-nation basis and in some cases as wartime allies.[55] From the beginning, the imposition of the *Indian Act* was wrong and marked a serious violation of the independent governance rights of the First Nations and a violation of their right to self-determination. It might be excusable to have imposed the *Indian Act* unilaterally on the Indigenous nations in 1879, before an understanding of human rights evolved to what it is today, but that excuse is no longer acceptable and the Federal Government knows that. More difficult to justify is how British/Canadian authority was dishonest and deceitful with regard to promises made in Treaties by enacting legislation that is directly contradictory to such contractual obligations or by simply ignoring them.[56] Regardless of what view of human rights may have prevailed at the time, deceit and fraud were clearly as wrong then as they are today.[57]

Although it is now arguably legally wrong to pursue policies unilaterally that affect Indigenous peoples, according to current views of the state's minimum human rights obligations, without proper consultation and consent unilateral imposition is also now unacceptable within Canada's own domestic internal legal system. The Supreme Court of Canada has recently stated in several important landmark cases (*Haida, Mikisew, Rio Tinto*, and *Beckman*)[58] that if the government proposes legislation or policy that has an impact on valid interests possessed or claimed by Indigenous peoples, it must meaningfully consult with Indigenous communities and "accommodate" their concerns in the case of unproven rights and, in cases where there is serious and

54 Royal Commission on Aboriginal Peoples, *supra* note 44.

55 For an excellent understanding of the nature of the treaty relationship, see Office of the Treaty Commissioner, *Treaty Implementation: Fulfilling the Covenant* (Saskatoon: Office of the Treaty Commissioner, 2007). For an excellent historical case study of the Haudenosaunee resistance to British/Canadian authority based on their position as a national ally of Britain see Constance Backhouse, "'They are a People Unacquainted with Subordination' — First Nations Sovereignty Claims: *Sero v Gault*, Ontario, 1921" in *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: University of Toronto Press, 1999).

56 The violation of Treaty terms has occurred in every part of Canada from the Maritimes to Nunavut. In terms of the numbered treaties, on the prairies violations occurred in terms of governance, resource use, reserve creation, and legal authority. See Office of the Treaty Commissioner, *ibid*.

57 Andrea Carmen, "The Right to Free, Prior, and Informed Consent: A Framework for Harmonious Relations and New Processes for Redress" in Jackie Hartley, Paul Joffe and Jennifer Preston, *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope and Action* (Saskatoon: Purich Publishing, 2010) at 126.

58 *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73, 3 SCR 511 [*Haida*]; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, 3 SCR 388 [*Mikisew*]; *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council,* 2010 SCC 43, 2 SCR 650 [*Rio Tinto*]; *Beckman v Little Salmon/Carmacks First Nation,* 2010 SCC 53, 3 SCR 103 [*Beckman*].

significant interference, obtain full consent (akin to a veto) even in the case of proven rights.[59] Surely the "governance" interests, including Indigenous traditions of social order, would trigger the duty to consult and accommodate when such interests are asserted and may be negatively affected by proposed government action. Thus, to undertake legislative or policy actions that have a potentially negative effect on these governance interests, Canadian governments are, at minimum, constitutionally bound to consult. In *Beckman*, Justices LeBel and Deschamps, in exploring the nature of the duty to consult, held that it flows from the Honour of the Crown, which transcends classification as an Aboriginal or Treaty right. The duty to consult is a standalone constitutional obligation.[60] Arguably, then, this duty applies to any collectively asserted Indigenous interest and would naturally lead to the collective right to manage and apply an autonomous judicial system.[61]

International legal recognition of human rights — as belonging to Indigenous peoples and outlined in Canada's Constitution — demands a meaningful consultation process before the federal or provincial governments can enact any legislation that may affect Indigenous peoples' interests.[62]

As I will explain below, I do not pursue the case that an Aboriginal right to revive and/or apply an Indigenous legal tradition flows from Canadian common law recognition of Aboriginal rights in section 35 of the Constitution. The case has been made that an Indigenous judicial system is an Aboriginal

59 In terms of asserted, but unproven claims see *Haida, ibid,*, and *Rio Tinto, ibid,* and in terms of proven claims, see *Delgamuukw*, *supra* note 10. In terms of the duty applied in a treaty context see *Mikisew, ibid,* and *Beckman, ibid.*.

60 *Beckman, ibid at* para 141.

61 It is yet to be determined whether the dicta in *R v Pamajewon,* [1996] 2 SCR 821 at 27, 4 CNLR 164 regarding the inability of the court to entertain broadly framed claimed rights will be applied to asserted but unproven claims or rights. If this limitation of what is considered "cognizable" enough is applied to asserted but unproven rights under a duty to consult analysis, then it may be difficult or impossible for an Indigenous community to assert a broad right to control justice or social order even if only for the purposes of a duty to consult analysis based on the honour of the Crown principle as per *Haida*, *supra* note 58.

62 Contra, *R v Lefthand,* [2007] 4 CNLR 281 (ABCA) at para 38 held that the duty to consult cannot bind Parliament's authority to legislate and therefore the duty does not apply to proposed as opposed to enacted legislation. One must wait until the legislation is passed before it can be challenged. In my respectful opinion, the court's reasoning is weak on this point because it fails to fully appreciate that the process nature of the duty to consult is a constitutional principle which in the case of legislation that impacts Aboriginal interests should bind Parliament's authority. There is no logical distinction between Parliament making decisions and an administrative board as far as the duty to consult obligation is invoked. After all, administrative boards are given delegated powers from Parliament. Theoretically, Parliament could repeal all delegated powers to administrative boards. Where then is the duty to consult?

right (and in some cases as a treaty right).[63] Despite the value in consultation, consultation is not consent. Moreover, achieving formal recognition through reliance on section 35 in the courts is largely illusory, as the claims must be characterized to fit within an excessively narrow colonial construct and is difficult and expensive to prove.[64] I intend, rather, to rely on international law. Recognition of the right to self-determination flows from an international human-rights perspective of equality rather than the inherently colonial one currently embedded in the doctrine of Aboriginal rights, as defined by the Supreme Court of Canada in its Eurocentric interpretation of section 35 of the Constitution that unsuccessfully attempts to lessen the racist impact of the doctrine of *terra nullius*.[65]

The international human right of indigenous legal authority

I see the source of the emergent winds of Indigenous legal authority coming principally from within our communities as part of the larger Indigenous rights and cultural regeneration movements.[66] It is first through our own actions and within our own communities that we must begin to rebuild our political strength and thereby be in a position to reassert our own legal traditions, regardless of the degree to which we hold to pre-contact practices and values. It is the assertion itself that matters, not the content of those assertions. We can sort out the characteristics of what is being asserted internally, between ourselves, within our communities, on our own terms. Most importantly, in the assertion of this right to decide, we must stand united. It is our right and our responsibility.

Indigenous scholar Patricia Monture-Angus knew this was the path we must follow. She knew that the wellbeing of Indigenous peoples is primarily

63 Royal Commission on Aboriginal Peoples, *supra* note 44 at 254-256. For a very detailed and thorough analysis, see Matthias Leonardy, *First Nations Criminal Jurisdiction in Canada*: *The Aboriginal Right to Peacemaking Under Public International and Canadian Constitutional Law* (Saskatoon: University of Saskatchewan, 1998).

64 Milward, *supra* note 5 at 40.

65 Larry Chartrand, "The Story in Aboriginal Law and Aboriginal Law in the Story: A Métis Professor's Journey" in Sanda Rodgers & Sheila McIntyre, *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Toronto: LexisNexis Canada, 2010).

66 Gordon Christie, "Culture, Self-Determination and Colonialism: Issues Around the Revitalization of Indigenous Legal Traditions" (2007) 6 Indigenous LJ 13. The view that transformative fundamental reform will be obtained from change driven from within our communities is consistent with Indigenous critical theory. See Tracey Lindberg, *Critical Indigenous Legal Theory* (Diss. Faculty of Law, University of Ottawa, 2007).

up to us as citizens to manage and that we must actively shed the colonial baggage we carry and free ourselves from the control of the colonizer: that is, we must become *free*.[67] Our independence begins within each of us as Indigenous peoples. We can view the emergence of the Idle No More movement as a manifestation of this obligation.

Indeed, the way to freedom is the Eagle's path.

International human rights law as it is contextualized to the experience of colonization will provide support in following the Eagle's path. The right to Indigenous legal authority is recognized in the United Nations Declaration of the Rights of Indigenous Peoples. Indeed, there are a number of articles that directly relate to this collective human right of Indigenous judicial recognition:

> Article 9 of the Declaration asserts that "Indigenous peoples have the right to belong to Indigenous communities or nations according to their own traditions and customs."
>
> Article 19 provides that "Indigenous peoples have the right […] to maintain and develop their own decision making institutions."
>
> Article 33 recognizes that Indigenous peoples have the "right to maintain a justice system in accordance with their legal traditions".[68]

In addition, the Organization of American States has produced a draft Declaration on the Rights of Indigenous Peoples.[69] Article 15 and 16 expressly deal with the right to self-government and Indigenous law, respectively. With respect to the right to maintain Indigenous structures of legal authority, Article 16 states:

> 1. Indigenous law shall be recognized as a part of the states' legal system and of the framework in which the social and economic development of the states takes place.
>
> 2. Indigenous Peoples have the right to maintain and reinforce their Indigenous legal systems and also to apply them to matters within their communities, including

67 Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations' Independence* (Halifax: Fernwood Publishing, 1999).

68 *UN Declaration*, *supra* note 48. For a copy of the Declaration along with useful commentary, see Indigenous Bar Association, *Understanding and Implementing the UN Declaration on the Rights of Indigenous Peoples: An Introductory Handbook* (Winnipeg: Indigenous Bar Association, 2011).

69 Approved by the Inter-American Commission on Human Rights, *Proposed American Declaration on the Rights of Indigenous Peoples* (Washington, DC: Organization of American States, 26 February 1997) online: Organization of American States <http://www.cidh.oas.org/indigenas/chap.2g.htm>.

> systems related to such matters as conflict resolution, crime prevention and maintenance of peace and harmony.
>
> 3. In the jurisdiction of any state, procedures concerning Indigenous Peoples or their interests shall be conducted in such a way as to ensure the right of Indigenous Peoples to full representation with dignity and equality before the law. This shall include observance of Indigenous Law and custom and, where necessary, use of their language.

It should be clear that I do not rely on domestic Canadian law as it has been defined in the common law or in reference to section 35 of the Constitution. I do not attempt to make an argument that Indigenous legal orders are practices, customs, or traditions integral to the distinctive culture of Aboriginal peoples prior to European contact and have continuity to the present day.[70] The doctrine of Aboriginal law as it has matured over time remains immoral and indefensible despite the occasional progressive decision. After all, "decolonization cannot be accomplished by applying colonial law more rigorously".[71]

Yet, despite how deeply entrenched colonial thinking informs Aboriginal rights jurisprudence, Felix Hoehn has convincingly demonstrated that the doctrine of Aboriginal rights may indeed be subject to an *emerging* paradigm shift that places the principle of equality of peoples squarely within the legal analysis of the reconciliation process as embedded in the interpretation of section 35 of the Constitution.[72] For example, Hoehn highlights recent cases such as *Haida* and *Taku River*[73] that now acknowledge the pre-contact sovereignty status of the Indigenous nations as early indications of an emerging paradigm shift. More importantly, these remarks lead to the conclusion that

70 Although one could make a strong argument for this position, I will not give legitimacy to the doctrine of Aboriginal rights by doing so because the doctrine is fundamentally flawed and racist at its core.

71 Grace Woo, *supra*, note 13 at 201. Woo's book is primarily a sociological study of the Supreme Court of Canada's jurisprudence on Aboriginal rights cases beginning with the 1983 decision of *Nowegijick v The Queen* [1983] 1 SCR 29 and ending with the 2005 decision of *Mikisew*. The author systematically assesses these cases according to factors that exhibit the colonial and postcolonial impact. The author first identifies indicia that lead to a colonial understanding of Aboriginal rights analysis. In addition, the author also identifies indicia that support a postcolonial understanding of Aboriginal rights analysis. Together these sets of indicia produce a binary model for analysis. Thus, a decision can be assessed on both scales in this binary model. A judicial opinion could theoretically exhibit simultaneously, within the same judicial opinion, both colonial and postcolonial factors. On a scale of 1 to 10, Woo concludes that the judicial opinions in her study on average score 8 out of 10 for exhibiting indicia of colonial reasoning, whereas the average score for postcolonial indicia is 4.9 out of 10.

72 Felix Hoehn, *Reconciling Sovereignties: Aboriginal Nations and Canada* (Saskatoon: University of Saskatchewan, 2012).

73 *Haida*, *supra* note 58; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director),* 2004 SCC 74, 3 SCR 550 [*Taku River*].

without consent by way of treaty, Canada's sovereignty will remain invalid and incomplete until there has been consensual agreement between the respective sovereignties.

The principles contained within the UN and OAS Declarations will hopefully guide this jurisprudential paradigm shift and replace existing colonial doctrine with more respectful principles that recognize the collective human rights and legal traditions of Indigenous peoples. Notwithstanding Hoehn's optimism, however, the courts are unlikely to transpose recognition of past Indigenous sovereignty into the present day. The courts will likely maintain the fiction that the assertion of sovereignty (whether coupled with the concept of "effective occupation" or not) is sufficient to establish English sovereignty in a given territory, regardless of the prior Indigenous sovereignty.

The problem the court faces, however, is that this conclusion defies logic. How can one sovereignty dominate another without consent? What logical criterion justifies one having authority over the other? Past justifications based on racial discrimination and prejudice do not satisfy the need for a logical and principled explanation. The Supreme Court will be unable to reconcile this dilemma and is not required to, given the nature of the common law. The Court can simply ignore this problem and conveniently rely on past precedent to justify its conclusions. Yet perhaps a simple appeal to logic and respectful kinship may shift the colonial perspective.

Global warming of indigenous legal climate

Until there are clear skies, the Eagle will have difficulty flying. Canadian legal culture is often praised for being tolerant and even accepting of diversity, including the recognition of both French and English linguistic and juridical cultures. Despite the positives, it is a destructive myth only to think of Canada as bi-juridical or bilingual. This idea of Canada as founded on dual cultures excludes the legal traditions of Indigenous peoples. Yet the impoverished understanding of Canada as only a bi-juridical nation is strongly entrenched.

Despite small pockets of respect and understanding that existed occasionally during early colonial contact, the predominant view of the colonists towards the Indigenous societies became increasingly one of intolerance and disrespect.[74] Well-entrenched within the psyches of the newcomers were de-

74 For an account of mutually respectful relations where there was an adherence to Indigenous legal authority by early European traders see Janna Promislow, "Thou Wilt Not Die of Hunger ... for I Bring Thee Merchandise": Consent, Intersocietal Normativity, and the Exchange of Food at York

finitive conceptions of justice and what law and legal processes should look like. These Western ideas of justice were highly regarded with elaborate protocols connected to their spiritual belief systems. They include a single independent judge, written laws, court rooms with elaborate protocol and costumes, and a written creation story and legends (the Bible) to bind the participant's conscience. Particularly foreign to Indigenous societies, laws and processes were not designed to be applied or carried by the public at large as their own internalized responsibility, but instead wielded by specialized guardians of the law called "lawyers."[75]

These ideas of justice and law acted as a kind of filter. When Europeans arrived, they did not see similar institutions of governance and law among the Indigenous people and thus often assumed the Tribes did not have an organized or civilized system for maintaining law and order. Such societies were accordingly devalued and misunderstood because of this mismatch of culturally determined systems of social order between the peoples of Europe and the peoples of Turtle Island.

In conjunction with the social, political, and economic intolerance that characterized English colonial domination over the peoples Indigenous, there existed heightened legal intolerance, which I term "legal colonization."[76] Others have described the impact of legal colonization from a variety of perspectives; I shall not go into detail in this paper about its destructive impact. Indeed, the literature describing the impact of colonization and its current manifestations in the social and economic statistical profile of Indigenous peoples reflects an overwhelming avalanche of collective social pain.

Yet in the aftermath of destruction caused by colonialization, there is another wind emerging from within the Indigenous spaces, even if only a fragile, preliminary breath. There is now a conditional recognition that the Indigenous roots, although almost destroyed by hurricane winds, can now be "allowed" to grow once again.

However, today's political and legal context is not capable of allowing this growth to occur unrestrained, given the perceived threat to mainstream colo-

Factory, 1682-1763" in Jeremy Webber & Colin Macleod, eds, *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2011).

75 Leroy Little Bear. "Dispute Settlement Among the Naidanac" in Richard Devlin, ed, *Introduction to Jurisprudence* (Toronto: Emond Montgomery, 1990).

76 I am purposely being obtuse with this phrase knowing that it has a double meaning. It means that the displacement of Indigenous legal traditions was considered lawful from the perspective of the colonizer's law.

nial inherited interests that may arise from a vigorously pursued Indigenous revitalization movement. The doctrine of Aboriginal rights as defined by the Canadian courts continues to be a valuable tool in circumscribing and limiting what is possible under this movement. The natural freedom that this Indigenous wind should enjoy is thereby conditioned and contained. There is not yet enough wind for the Eagle to soar freely.

When it comes to revitalizing Indigenous legal traditions, there are barriers to doing so on their own terms. This prevention is not necessarily solely the result of fearful self-interest by the mainstream. The impact of decades of being unable to pursue Indigenous forms of governance and the corresponding damage caused by the incessant messages of inferiority and shame fuelled by prejudice and discrimination are further barriers to advancing the movement. Arguably, much has been irrevocably changed by the passage of time under an intolerant regime. The landscape is permanently scarred by colonial interests that have been internalized by the colonized. Sadly, it is this scarred landscape that is now in many cases the familiar and the Indigenous unfamiliar.

Moreover, it is difficult to determine what this new Indigenous wind of governance in general and legal authority in particular will look like. Valid questions arise as to whether the new wind is indeed even Indigenous in nature.[77] Professor LaRocque has critiqued common assumptions about traditional justice as only about healing and reconciliation and how blind acceptance of this dogma may lead to further victimization of the vulnerable.[78] She asks whether justice is healing or whether healing is justice. Nor is the characterization of traditional justice processes as healing-oriented based on circle consensus-building restorative processes necessarily completely accurate of traditional justice.[79] My research has shown that traditional justice was at times anything but "healing" or restorative in nature but rather immediate, retributive, punitive, and uncompromising.[80] That is not to say that a healing model that focuses on the underlying causes of crime, along with

77 Emma LaRocque, "Re-examining Culturally Appropriate Models in Criminal Justice Applications" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1997).

78 *Ibid*. See also David Milward, *supra* note 5, Chapter 6 in particular, in which he provides a very thoughtful discussion of how victims interests are at risk within reconciliation models of justice; he proposes minimizing these risks by applying certain safeguards and adequate resources.

79 See for example Michael Coyle, "Traditional Indian Justice in Ontario: A Role for the Present?" (1986) 24 Osgoode Hall LJ 605. I also note that Blackfoot Elders recounted a time when a man was caught tepee crawling. He was tied to a stake with honey poured on him and left there for punishment. (Transcript on file with author.)

80 See also the summary of this aspect of Indigenous traditional justice at Milward, *supra* note 5 at 21.

reconciliation and balance, is not now more appropriate given the impact of colonization; the socio-economic inequalities have exacerbated and disrupted Indigenous society to such a degree that neither traditional pre-contact, nor Western adversarial models are sufficient or appropriate. The "healing model" of justice may very well be a colonial reaction. However, justice cannot, as Professor LaRocque reminds us, focus solely on the interests of the offender and leave the victim(s) behind.

Moreover, Indigenous self-government agreements tend to reflect Western notions of governance. For example, the Nisga'a governance institutions under the land and self-government agreement are very much structured on Western models of democracy, although Indigenous traditions are not altogether ignored. For example, in the Nisga'a Final Agreement, there is a power for the Nisga'a government to create its own Nisga'a court.[81] However, it must function within the existing provincial adversarial model. Traditional customs and knowledge are acknowledged but, with few exceptions, are subordinate to the Euro-Canadian governance structures and institutions adopted in the agreement. It is true that the *Ayuuk*, the ancient legal code of the Nisga'a, is recognized in the land-claim agreement and provides guidance in Nisga'a law-making.[82] Yet the overall structure of the land-claim agreement remains strongly entrenched in a Western model of governance and justice, keeping the *Ayuuk* restrained and subject to overall Canadian legal authority.

Likewise, the Manitoba Justice Inquiry report, progressive as it was, made recommendations that would have resulted in the creation of a mirror image of the Canadian model of how law and legal process is structured and decided.[83] Indigenous bodies would fill the roles of judge and prosecutor and would be more sensitive to culture and language, but it would still be a Western adversarial court system. This tendency to accept Western structures of governance is not unusual to Canada. This has long been the major experience in the United States.[84]

How much of the scarring is permanent and how much can be reclaimed are the questions we need to ask.

81 Nisga'a Final Agreement (Victoria: Queen's Printer, 1999) at Chapter 12, Article 30-52.

82 Law Commission of Canada, *supra* note 6 at 7.

83 Manitoba Justice Inquiry, *supra* note 41.

84 Bradford W Morse, *Indian Tribal Courts in the United States: A Model for Canada* (Saskatoon: University of Saskatchewan, 1980).

Resistance to the reclamation of traditional justice can be conceptualized as being sourced in two kinds of agency, outside and inside. Resistance to reclamation by internal agency is acceptable to the extent that it is made freely and with full dialogue and awareness. If an Indigenous community decides to accept the Canadian system in whole or in part, it would be an acceptable expression of self-determination if it occurred after a fully informed assessment of the circumstances and the acknowledgement of the right to reclaim justice without interference (including what a system based on their traditions would look like in a modern context). The appropriate decision-making levels of the Indigenous peoples must internally decide whether to adhere to traditional institutions, customs, and processes or to meld such traditions with mainstream contemporary influences. This view is not necessarily inconsistent with a traditionalist's agenda. For example, I believe that the right to maintain traditional values and structures of governance is best protected by relying on the inherent political rights of the nations as exercising self-determination. These rights are a stronger source for protecting Indigenous culture because they are beyond the confines of what is possible within a liberal mainstream democracy such as Canada. Within a liberal rights regime like Canada, there are too many limitations and conditions placed on the protection of Indigenous interests because they become translated into cultural interests no different in kind from other cultural interests that are protected for the benefit of minority groups. Such cultural minority interests are not allowed to prevail over the dominant cultural interests of an entrenched Euro-Canadian society.

The well-known case of *Thomas v Norris* illustrates this conflict.[85] In this case, the civil rights of the plaintiff were held to prevail over the Coast Salish Spirit Dance initiation ceremony. Framed as an Aboriginal cultural right, the individual freedoms protected by the common law of battery and false imprisonment prevailed over the rights of the Coast Salish to engage in the cultural/religious practice of the Spirit Dance. Had the issue been framed as a contest between the Coast Salish relationship healing law and the Canadian common law of tort, the issue of Aboriginal jurisdiction over social order and the Canadian jurisdiction over social order would have become much more apparent. The court could not then so easily rely on the argument that cultural and religious rights are not absolute and that they must give way to the interests of the public at large. Framed in the alternative, it no longer becomes individual rights versus collective rights within the same legal system. It becomes a contest between legal systems. From such a perspective, once the boundaries of

85 *Thomas v Norris,* [1992] 2 CNLR 139 (BCSC).

each jurisdiction has been identified, the issue is properly transformed into a conflict of laws or a jurisdictional competency issue.

No doubt, some cultural differences will be recognized within a tolerant liberal democracy so long as they do not threaten Canadian interests and values. We can eat bannock and dance the jig, have powwows and sing our songs, but Indigenous "cultural" interests will not be allowed to intrude too far or conflict too deeply with accepted Canadian values and institutions. For these reasons, I prefer to source the protection of Indigenous traditions and culture including Indigenous legal culture within the broader protection afforded to Indigenous self-determination under the United Nations Charter.[86] I ascribe to this perspective and rely on the exercise of my (prairie Métis) nation's political rights to protect our cultural heritage and values. Having said that, I would likely be considered more of a traditionalist during internal debates within the Métis Nation as to how we should govern ourselves. Indeed, I have expressed such views during community self-government consultation meetings hosted by the Manitoba Métis Federation.

I believe that traditional Métis customs of governance are more appropriate for us than the processes and structures that currently exist within the Métis Nation. Rather than relying on federal or provincial corporations as the vehicle for political decision-making and Robert's Rules of Order, should we not first consider our own traditions?[87] How our leaders were chosen and how the community was governed according to our customs differ from what is required under Canadian-imposed corporate law. Traditionally, we were beholden to no other government and had to report to no one else but ourselves. We had a process for resolving disputes and our substantive laws were tailored for our environment and lifestyle. Our traditional substantive and procedural laws can and should evolve to meet our contemporary needs. I have no issue with borrowing from other cultures but let us begin first with our own. Yet even if I find my views ultimately to be within the minority of our Métis nation, I can accept the majority as the collective will of my people. However, I believe it is unacceptable when prevention or hesitation to reclaim traditional governance comes from outside influences because of racial and colonial reasons or because of the community's own advisors or negotiator's adherence to the unjust doctrine of Aboriginal rights.

86 James (Sákéj) Youngblood Henderson, *Indigenous Diplomacy and the Rights of Peoples: Achieving UN Recognition* (Saskatoon: Purich Publishing, 2008) at 91.

87 Lawrence Barkwell, "Early Law and Social Control Among the Metis" in Samuel Walter Corrigan & Lawrence J Barkwell, eds, *The Struggle for Recognition: Canadian Justice and the Métis Nation* (Winnipeg: Pemmican Publications, 1991).

Presently, there is much of this unacceptable influence occurring. Growth or change within an Indigenous community, to be acceptable from a Canadian legal perspective, must look more like the colonially scarred environment, that is, like Western forms. Whether it is Coast Salish, Algonquin, or Métis, such institutions must be adhere to Euro-Canadian concepts of justice. This insistence on courts, criminal codes, and authoritarian police, evident in the cultural heritage of the colonizer, is a particularly insidious form of assimilation. This legal assimilation is rarely questioned because it possesses legal authority. How can we as lawyers and academics prevent this moulding from taking place?

First, we need to understand what Métis, Algonquin, or Coast Salish governance and legal order is on its own terms and resist using comparison to Euro-Canadian systems for validation. Lawyers are a Western concept and exclusively trained in the Western system. Thus, to bridge the cultural divide and to appreciate Indigenous legal orders on their own terms, lawyers need to transcend their institutional indoctrination. To do so means redefining law and legal process. It requires being open to understanding the function of law as a means to order society in meaningful ways that are comprehensible to the community.

Can law and social order be achieved without Western values, processes, and institutions? The answer is obviously yes, since pre-contact Indigenous societies had lawful and ordered societies without written laws, court rooms, or lawyers. Once cultural influence and imposition are removed, Western-trained lawyers will be better able to see that justice can be achieved through different institutions with their own legal concepts and processes and understand how this justice is communicated and its importance or value as a means of achieving effective social order.

In addition to being open-minded and not prejudging Indigenous systems based on Euro-Canadian terms, the second task is to take Indigenous legal systems seriously by paying them due respect. Law schools can do much to respect Indigenous legal traditions by teaching Indigenous law as part of the curriculum, especially the legal tradition of the nation that occupies the territory in which the university is situated. In Ottawa, this land is the unsurrendered territory of the Algonquin nation. At the Faculty of Law at the University of Ottawa, I have been teaching a course called Indigenous Legal Mechanisms for four years; my pedagogy differs from other law courses. For example, I apply the talking circle methodology employing the Eagle feather to engender respect for the circle and its participants. As academics of law, we

can be more active in teaching Indigenous peoples' laws and legal traditions. We can demonstrate and apply Algonquin law or Dene or Coast Salish laws and processes to resolve legal problems within Canadian legal education.

Canadian courts, however, have not been so willing to accept Indigenous law as an authority for resolving disputes. It is one thing to teach traditional justice in a university classroom and another to implement these practices in a conflict resolution body — particularly an Anglo-Canadian structured court room. A representative case involved a conflict between Algonquin and Ontario law. In the *Frontenac* case, a mining company wished to develop a mine on certain lands in southeastern Ontario.[88] A nearby non-Indigenous community became concerned as the area was already extensively developed. The Algonquin community felt that the land could not sustain additional development and would be harmed. Community deliberations and consultations with Algonquin Elders clarified the obligations of the community to the land: the land is a living entity and under Algonquin law when the land needs help, as in this case, the Algonquin have a legal obligation to provide that assistance. According to John Borrows, this obligation to the land is consistent with Anishinabek principles generally.[89]

In this case, the community felt compelled to set up a road block to prevent the mining operation. Members of the community were charged with contempt of court and some went to jail for resisting.[90] The trial court did not regard the situation as a conflict between two normative orders, but rather assumed that the Canadian legal order was the only valid authority. This kind of judicial response is no longer acceptable. What is needed is respect for Algonquin law and a means to determine mechanisms for resolving issues of authority between Canadian law and Algonquin law (preferably through mechanisms adopted within treaties negotiated equitably and in good faith) where they are perceived as incompatible.

88 *Frontenac Ventures Corporation v Ardoch Algonquin First Nation*, 2008 ONCA 534, 3 CNLR 119 [*Frontenac*].

89 John Borrows, *supra* note 5.

90 The decision to resist Western law is not taken lightly as it may negatively affect a person's life in many ways. The cost to do so to an individual is great: potential loss of job, reputation, criminal record, inability to relocate, etc. For many, however, the cost is greater to remain idle and accept the status quo. Resistance then becomes the least costly option.

The forecast

How can we reframe the issue of self-determination to make it less threatening to the Euro-Canadian system? One way is to avoid the implication that it is an either-or outcome. We must challenge the idea that there can only be one system of law. The conversation needs to change from one of conflict between Indigenous legal orders and Canadian legal orders to one of how to implement a viable system of legal pluralism. Focusing on the concept of legal pluralism helps shift the focus from contestation to compatibility.

Legal educators have a role in reframing this debate and in furthering processes to facilitate the coexistence of Indigenous and colonial legal orders, beginning with the incorporation of Indigenous legal traditions within our substantive law courses. Although I have started to teach Indigenous legal mechanisms as a standalone course, I think it equally important to include Indigenous law within core courses such as contracts or torts.[91] For example, in tort law I now reference Algonquin legal principles regarding land ownership in the context of the Tort of trespass. Moreover, I expect my students to reference such principles in their assignments and exams where appropriate. I have only begun to do this, but we all have a duty to learn and embrace all of Canada's laws — beyond the colonial ones. Fortunately since law is interpreted though our own human agency we can effectively control the legal climate and manipulate the prevailing winds. The legal forecast is up to all of us to decide. Will it be a bright sunny day where the Eagle can fly free or will the forecast be continuing storms on the horizon?

91 John Borrows offers considerable advice as to how to accomplish this including a model law school curriculum integrative of Indigenous legal traditions. Borrows, *supra* note 5.