Did I Break It?
Recording Indigenous (Customary) Law

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Abstract

In this paper, I explore several issues emerging in the discourse about the recording of indigenous law by drawing on several examples of my research and work with indigenous law in Canada. This is an important inquiry because there are limiting and disturbing fundamentalist premises underlying the debate regarding the recording of indigenous law. To take up these issues, I analyse and articulate the law and legal processes from two indigenous oral histories. The question under consideration is whether by this recording and analysis, I have somehow damaged Gitxsan law. In other words, did I break it?

Keywords

Indigenous; law; legal traditions; fundamentalism; human rights; feminism; gender.

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1 Introduction

> Law is not tidy. It is not contained by the boundaries of modern states nor generated solely by the work of public officials ... . Nor is law lonely. It is frequently found overlapping or interacting with other instances of law. Yet somehow, despite this messiness and multiplicity, law still can, or at least claims to be able to, create obligations ... . Despite its plurality, law still has or at least claims some kind of authority.[1]

What does "recording" indigenous law mean? This is a complicated question, especially given law's "messiness and multiplicity", and the continuing problems of imposed state boundaries for indigenous peoples and indigenous law. Possible responses depend on which indigenous society is being considered when posing the question and at what point in history. It also depends on who is asking the question and what legal lens enables the asker to see or not see (eg, civil or common law, Cree law or Gitxsan law, etc). As a Maori legal scholar, Roughan observes that law, including indigenous law, is complicated which means that indigenous legal research must be capable of investigating complicated conversations.

In this paper, the aim is to explore some of the messy issues concerning the recording of indigenous law by drawing on examples of my research and work with indigenous law in Canada for the past several decades. In what follows, I challenge some of the premises that underlie the debate about the recording of indigenous law that have been generated in the past few decades of indigenous legal discourse. To take up the issues concerning the recording of indigenous law, I begin with two Gitxsan[2] oral histories which I analyse to identify, articulate and restate the law and legal processes they contain.[3] Of course in reality, as with Canadian law, one would never look at just one or two legal cases when researching a legal question. Similarly, with indigenous law, one would analyse and draw on a range of relevant oral histories or narratives to determine a legitimate legal response to a question or conflict. The question I want to get at is whether by this recording and analysis, I have somehow damaged Gitxsan law. In

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1 Roughan *Authorities* 1.

2 Gitxsan is the current spelling. It was spelled Gitksan until the early 2000s.

3 For a comprehensive discussion of the indigenous legal methodology employed here, see the trilogy: Napoleon and Friedland 2016 *McGill LJ* 725; Friedland and Napoleon 2015 *Lakehead LJ* 33; and Napoleon and Friedland "From Roots to Renaissance".

other words, did I break it?

2 Gitxsan oral histories

It is my theoretical premise that one cannot have law without some sort of organised and accessible public memory. Some background is necessary to appreciate the extent and complexities of these oral histories. Along with the Nisga'a and the Tsimshian, the Gitxsan are one of three closely related, northwest coast peoples in British Columbia that form the larger "Tsimshian" linguistic group. These three groups share a common ancient heritage and there are many similarities among their societies and languages.[4] The Gitxsan have two main forms of oral histories. First, the *adaawk* (collective oral history) is a formal and primary Gitxsan intellectual institution which is owned by each matrilineal kinship group, the House (*wilp*). It is the *adaawk* that links each House to its territories and establishes ownership of the land and resources. The *adaawk* tell of the origins and migrations of the groups to their current territories, their explorations, the covenants established with the land, and the songs, crests and names that result from the spiritual connection between people and their land.[5] According to legal historian and lawyer, Richard Overstall, this is terrain that requires thoughtful management.

> [A]n adaawk is owned by a matrilineal group, which may be a single House. But it is also possible for an adaawk-owning lineage to be a group within a House, likely closely related to the House's other lineage(s). For example, a 19th century Coast Tsimshian House may be made up of between one and eight lineage groups. … A House's wing chiefs are often the heads of its constituent lineages. [It is likely] … that Houses would prefer to be made up of a single lineage, but a lineage may need to fuse with close relatives when its fortunes or population sinks below a viable level. Relationships among lineages in a single House are often scrappy.[6]

The second form of oral histories is the *antamahlaswx* which are considered collective properties or stories owned by all the Gitxsan (as opposed to ownership by one or several Houses). These are more like stories that are commonly told to children.

Both forms of oral histories contain law and they are also expressions of law, and as such, they form part of the memory commons and legal history record for Gitxsan law and legal practice. The oral histories are drawn upon as legal precedent to reason through present-day problems and they are the pedagogical basis for ongoing legal education for Gitxsan people of all ages. Neither the *adaawk* nor *antamahlaswx* are parables – that is, simple

4 See Marsden, Anderson and Nyce "Tsimshian" 264.
5 Marsden "Northwest Coast Adawx Study" 121.
6 Overstall, Personal Correspondence, 14 June 2019.

stories used to illustrate a moral or spiritual lesson. Rather, the *adaawk* are extremely complex in scope, depth and purpose. The *adaawk* are the formal and owned oral histories with an architecture and interpretive processes, and they require public recounting and witnessing.

The *adaawk* form an integral part of the structure and operation of Gitxsan governance and legal order, and their own purposes derive from the Gitxsan economy and legal history. The Gitxsan oral histories are also Gitxsan intellectual property, but this is quite different from the common law definition of intellectual property, whether cultural property or commodity which derives from a different economy and legal history.

In the seminal Aboriginal title court action, *Delgamuukw*,[7] one of the Gitxsan witnesses, Gyolugyet (Mary McKenzie), explained to the Court:

> *Adaawk* in Gitksan language is a powerful word describing what the House stands for, what the chief stands for, what the territory stands for is the *adaawk*. It is not a story … . And it's the most important thing in Gitksan is to have an *adaawk*. Without *adaawk* you can't very well say you are a chief or you own a territory. It has to come first, the *adaawk*. Names come after, songs come after, crests come after it and the territory that is held, fishing places, all those come into one: that is the *adaawk*. It's not a story, it's *adaawk* to the Gitksan people.[8]

Gyolugyet is clear here, the *adaawk* are not merely stories – they are the political, legal and economic historical institution that comprise a decentralised governing and legal order. Furthermore, the Gitxsan oral histories often contain important counter-narratives to be considered when interpreting and drawing on them for reasoning through problems. They are not simple a list of rules or dos and don'ts.

There are four phases to the legal methodology applied to these two narratives and for this paper, I only focus on Phase 2. The complete methodology includes:[9] Phase 1 – developing a research question in collaboration with each community research partner; Phase 2 – oral history analysis; Phase 3 – creating a framework: primer and synthesis; and Phase

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7 *Delgamuukw v The Queen* (1991) 79 DLR (4th) 185 (BCSC); *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470 (BCCA) (at the British Columbia Court of Appeal, this decision is erroneously cited as *Uukw v British Columbia*); and *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

8 Monet and Skanu'u *Colonialism on Trial* 28. Songs, crests, and names are also expressions of law necessary for Gitxsan governance.

9 These indigenous legal methodologies were largely developed by Dr Friedland, Faculty of Law, University of Alberta, and further revised and employed by the Indigenous Law Research Unit at the Faculty of Law, University of Victoria. For a broader discussion and application, see Friedland 2012 *Indigenous LJ* 1; and Snyder, Napoleon and Borrows 2015 *UBC Law Rev* 593.

4 – implementation, application and critical evaluation.[10] In Phase 1, the research question is what the indigenous community[11] partner wants to learn about their indigenous law; it can concern governance, dispute resolution, human rights, lands and resources, water, harms and injuries, or child protection, for example.[12] Phase 2 of this methodology is premised on an understanding that to answer a question posed to the Gitxsan legal order (or other indigenous legal order), one would have to systematically examine many oral histories/narratives. Phase 3 involves creating a comprehensive legal report that is accessible, may be added to and has full citations.[13] Phase 4 is the ongoing work undertaken by our indigenous partner communities to implement their laws. Again, for the purposes of this discussion, I only focus on Phase 2 – the oral history analysis.

2.1 Narrative One: The origin of Gitanmaax[14]

Gitxsan means people of the River of Mist. Salmon has always been the source of wealth for the Gitxsan. *Gitanmaaxs* means People Who Harvest Salmon by Torchlight. The first village of *Gitanmaaxs* was located by the banks of the *'Xsan* (Skeena River). This is the story of the beginning of *Gitanmaaxs.*[15]

A young woman, the daughter of a chief, became *ubin* (pregnant). No one knew who the father was. The young woman did not know who the father was either. Each night she climbed a ladder that the servants put up for her and after she climbed up, the ladder was taken away, so no one could get to her and she could not get out. Yet each night a handsome young stranger would come to her.

Her father, the chief, was very angry and the Gitxsan were afraid. The chief ordered the Gitxsan to pack their belongings and load up the canoes. They were going to abandon the young woman. The handsome young man had

10 Friedland and Napoleon 2015 *Lakehead LJ*.

11 A community partner can be a group of communities or a single community.

12 See the Indigenous Law Research Unit (ILRU) website for examples and materials: ILRU 2019 https://www.uvic.ca/law/about/indigenous/indigenouslawresearchunit/index.php.

13 This does not constitute codification. See the ILRU website for examples (ILRU 2019 https://www.uvic.ca/law/about/indigenous/indigenouslawresearchunit/index.php).

14 Smith *Placing Gitxsan Stories in Text* 85-87. There is a 1920 version of this narrative, entitled "How Gitanmaax Village Began" in MacDonald and Cove *Tsimshian Narratives 1* 89-92 (narrated by Isaac Tens to William Beynon).

15 Overstall contends that since Gitanmaax obviously already existed, the narrative is really about the start of a new lineage that originated with the chief's daughter and the "handsome young stranger". Overstall, Personal Correspondence, 14 June 2019.

disappeared.

The young woman wept as she watched the canoes disappear around the bend in the river. Her mother had left her food and given her hurried instructions on how to deliver her baby when the time came and wept. They did not know that she was going to have triplets.

Her food supply ran out. She sat on the banks of the *'Xsan* thinking she could easily slip into the water. Who would know and who would care? It was at this time the babies decided to be born. She knew she had to eat to keep up her strength and feed her babies. She held her three tiny babies.

In Gitxsan society, in times of great distress, *Uun ts'iits'* (supernatural being) comes from the earth, to help. *Uun ts'iits'* appeared before the weeping mother and instructed her to take strips of bark from the birch trees and make torches. *Uun ts'iits'* explained that the woman must then place the torches along the riverbank. The light would attract fish and she could spear them. The grateful young mother gave the *uun ts'iits'* her earrings in payment and the *uun ts'iits'* disappeared.

Each night the mother would bundle her babies together and leave them in the longhouse and she would go to the river to fish. She became strong and confident and soon she had many salmon hanging in the smokehouse. Her children grew very quickly and soon were a help to her. They hunted and trapped small animals, they fished, and they picked berries.

The mother explained to her children that their people had moved away because she did not know who their father was. She instructed her children and taught them about the land. Many years passed and her father, the chief, forgot his anger. He sent out his warriors to fetch the bones of his daughter so that he could mourn her. The warriors returned with astonishing news. The chief's daughter and his three grandchildren were alive and well.

The chief and his people returned to the first *Gitanmaaxs* to find a woman with much wealth in the smokehouses. A great feast was held to celebrate the reunion and Gitxsan names were given to the children.

2.1.2 Legal analysis: Origin of Gitanmaax

What is the main human problem the story focuses on?

- What is the proper response when abandoned by one's family and people for something that one had little or no control over?

- What is the proper response when one is entirely responsible for others that are vulnerable?

What facts matter?

- A young woman was visited each night by a stranger and she became pregnant. She did not know who the father was.
- Her father, a chief, became angry with her and he moved the village away abandoning her.
- The young woman's mother secretly left her daughter some food and instructions for the birthing.
- The young woman's food supply ran out and she despaired and thought of killing herself.
- She gave birth to three babies by herself, and in her despair, a supernatural being (*Uun ts'iits'*) came to her and taught her to fish by torchlight.
- The young mother was able to feed her children and as they grew, they learned to hunt. The little family became wealthy with much food and supplies.
- The young woman's father sent someone to bring his daughter's bones back for burial, but instead, they found an independent and wealthy woman with three healthy grown children.
- The father and village returned and a huge feast was held; the young woman's children were given names.[16] Her experience is remembered in the name, *Gitanmaax* to this day.

16 Again, the basic conceptual political, social, economic and legal unit in Gitxsan society is the House. Every Gitxsan person is born into her or his mother's House, a matrilineal kinship group sharing a common ancestry. Each House owns and has authority and responsibility for a number of chiefly names – a head chief (*simoogit*) name and wing chiefs (*hla ga kaaxhl simoogit*) names. The names form part of the governance system and are the intellectual property of each House, and each name indicates the status of the members in the House. When an individual dies, his or her name returns to the House and the House may assign it to another House member. An individual may pass through a number of names before attaining a higher-ranking name. When a chief dies, the chiefly name is usually immediately passed on to the person in line for the name.

What is decided about the problem or how is this problem resolved?

- The young woman decided to survive and to ensure her children survived.
- A supernatural being responded to her distress and taught her how to fish with torches.

What is the reason behind the decision? Is there an explanation in the story? Is the explanation explicit or implicit?

Implicit reasons:

- The father should not have left his daughter and unborn grandchildren to die.
- When the village moved back, the young woman was recognised as a survivor who triumphed.

Explicit reasons:

- The young woman asked for help in a time of great distress. She not only asked for help for herself but also for her children.
- The father still had obligations to his daughter, including burying her.
- The mother left food and information for her daughter.

Bracket: Some things will be beyond one's terms of reference and are not necessary to the story analysis. These questions create and hold space for critical future conversations.

- What was the role of the young woman's mother and her House group? It is a matrilineal society and mother's House has specific legal obligations to its House members. As with every other Gitxsan person, she was born into her or his mother's House.
- What is the role of the father's House group? The father's House has specific legal obligations when House members are harmed or injured.
- What is going on when *Uun ts'iits'* (supernatural being) does not respond to great distress?
- Did the young woman consent to having sex with the stranger? How might this matter?

Interestingly, Richard Overstall argues that another legal interpretation should be considered. For Gitxsan and other pre-contact indigenous peoples, marriage was primarily a means of sealing alliances among lineages. As with the former practice of arranged marriages, neither the young woman nor the young man would have had much of a say in the choice of their partner. The mother's side provides the children with their identity; the father's side provides their status. The maternal and the paternal sides must then work together to ensure that the children are brought up to achieve honour and wealth that enhances both lineages. According to Overstall, it is this contractual function of marriage that is the source of the unnamed chief's anger at his daughter's pregnancy. In other words, "there is no known lineage that can take up the duties of the father's side, and no known lineage with which a post facto alliance can be made".[17]

From Overstall's perspective, the daughter and her children were lawfully banished to not bring shame on the chief's and his wife's lineages.

> This is a proper legal decision by the chief based on the facts before him. Rather than being forced to leave the village, the village leaves them. The girl's mother performs her duty to a House member by leaving her food and birthing instructions. While most banishments would result in the death of the banished, in rare cases supernatural intervention not only provides sustenance for survival but also sufficient surplus to give the banished great wealth. That is what occurs in this case.[18]

Another interpretation could be the supernatural helper is the same being as the supernatural father who is fulfilling his father's-side obligations. Overstall continues, "In my reading, this is the main legal decision recorded in this adaawk". From this perspective, the event was recorded precisely "because the supernatural father greatly enhances the daughter's lineage's status, which is celebrated by renaming the village".

What becomes apparent from these interpretations is that one could take up several perspectives (eg, family law, a governance or a gender) and each would provide valuable legal insight for contemporary problem solving. The lens I have applied is gendered so I consider the young woman as a single mother who is dealt with harshly, with life and death consequences. From my perspective, those gendered laws, their penalties and constituting power dynamics must be critically reviewed, discussed and changed where necessary to reflect the other legal principles of Gitxsan society – fairness, dignity and agency.

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17 Overstall, Personal Correspondence, 14 June 2019.
18 Overstall, Personal Correspondence, 14 June 2019.

This exchange with Overstall demonstrates the critical importance and richness of multiple perspectives and interpretations, disagreement and debate, and collaboration to maintaining law's life, health, relevance, and legitimacy.

2.2 Narrative Two: The blood sucking peoples[19]

In the old days, animals could take human form at will, especially when they wished to injure or prey on humans. There was a village in the hills the Gitxsan people always shunned because the people there were known as blood suckers. They had sharp crystal beaks they would insert into the victim's neck to drain all their blood. These blood sucking people were human-like and often lured people to their village, and while entertaining them, would attack them and drain their blood until they died.

This is what happened to a young couple, a young wing chief and his wife.[20] They were on their way to the young man's territory and they wandered into the dreaded valley of the blood sucking people. They arrived at this valley hungry and tired, and they saw smoke in the distance. The young man said, "We will go there and ask for shelter and food". At this village, the young couple were welcomed by an old chief who said, "Come in my friends, you must be tired and hungry as it seems you have travelled a long way."

After the couple had taken food, the wife[21] of the chief said, "Come, I will show you where you may rest." She led them to the side of the house where there was a platform with sleeping places. As soon as the young couple were asleep, the old chief and his wife inserted their long bills into the necks of the young couple and drained them dry. The next day, the old couple took the young people's bodies and hung them over their sleeping places to dry along with the numerous earlier victims.

Now the young couple were not the only people who had gone missing. A party of Gitxsan people went out to search for the many missing people. They came to the village of the old chief and his wife as well as some younger blood sucking people, who were all very hospitable and kind and gave them food. When the Gitxsan search party asked, "Did you see a

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19 Harris, Gitsequekla, recorded by Beynan in 1954, "The Origin of the Mosquito" in MacDonald and Cove *Tsimshian Narratives 1* 67.

20 Likely she would have been a wing chief too given the ranking structures and arranged marriages that were a part of maintaining the political, legal, and economic ordering for Gitxsan and Tsimshian peoples. According to Richard Overstall, it was unlikely that women would have been chiefs or wing chiefs, rather they would have been of a lineage with wing chief status to match her husband's. Overstall, Personal Correspondence, 19 July 2019.

21 Since she is married to a chief, she would likely have been highly ranked as a chief or wing chief.

couple, two young wing chiefs pass this way?"[22] They were told, "We have seen no one pass this way. People never come our way. You are the first people we have seen."

The people in the search party rested and while they slept, their hosts began to suck their blood. The chief went from one victim to another. It so happened that among the search party was a young man who had made his sleeping place at the entrance of the house and he was a very light sleeper. This young man woke up and saw what the chief and his wife and the others belonging to the house were doing. He cautiously crawled out from where he slept and managed to escape into the hills.

He kept on travelling, but whenever he looked behind him, he saw the old chief chasing him. He ran along until he came to a lake and he dived in. When he surfaced, he saw the branches of a great spruce hanging over the water, so he pulled himself out and climbed to the top of the tree. The chief saw him plunge into the waters and when he looked down into the water, he saw the reflection of the young man. He thought the young man was sitting in the water, so he dived in the water to stab him with his long crystal nose. After a struggle to get his long crystal nose out of the mud at the bottom of the lake, the old chief came out of the water. When the water cleared up, the chief again saw the reflection of the young man who seemed to be sitting comfortably in the lake. This further enraged the old chief and he dived in to stab the young man. This time he was submerged longer in the water because he had even greater difficulty extracting his long crystal nose from the mud. As he reached the bank he looked back into the lake and again he saw the image of the young man laughing. This angered the old chief to further madness, and he dived into the lake, staying down even longer as he drove his crystal nose even deeper into the mud. This time he barely had strength enough to pull it out.

When he got to the bank of the lake again, he was exhausted and he rested. It was now getting dark and there was just enough light to see the reflection of the young man laughing and making faces. This so angered the now weakened chief that he very nearly drowned before he was again able to pull his crystal nose from the mud. He was barely able to crawl up the bank of the lake. As he sat down, the weather turned and it began to freeze very hard and, being too weak to move, the old chief gradually froze where he sat.

The old chief was still for a very long time before the young man came down from the tree and he clubbed the frozen old chief. To make sure he was

22 Again, I am inferring that the young woman was a wing chief too or they would not have been married.

really dead, the young man took his knife and cut out the old chief's heart. The heart was still alive and had eyes and a face. The young man took this heart and returned to where his friends had been killed by the old chief with the crystal nose.

There was no one else around because when the old chief died, the other blood sucking villagers ran for the hills. When the young man came in, he saw that all his companions were dead. He looked up and saw many bodies on the drying racks and he saw the missing young couple, the wing chiefs for whom they had all been searching. The young man did not know what to do. Suddenly, the heart of the old chief, which was still alive, spoke to the young man, "Lay all the people on the floor and wave me over each body."

The young man did this as he knew this must be a supernatural aide. He laid all the bodies on the floor and then waved the living heart of the old chief over each one. As he did so, each of the bodies, including those of the young couple, woke as if from a deep sleep. They all came back to life and told of their experiences. The young wing chief then said, "We will go back to the lake and see if the old chief with the crystal nose is still there. Perhaps his fellow blood sucking people will take his body to restore him to life so he might again endanger the lives of our people."

The wing chief and the Gitxsan group went to where the young man had left the corpse of the old chief and it was still there. The young wing chief said, "We shall burn it and break up the crystal nose so this monster will not be able to harm anybody again." They took the old chief's corpse and burned it. A great wind sprang up and blew on the fire until there was nothing left but the ashes. Then the wind blew the ashes up into the air and this ash turned into small flies which immediately flew in all directions. All these small flies had long beaks. This was the origin of the mosquito, which still flies around biting Gitxsan and other people, and drawing their blood.

2.2.1 Legal analysis: The blood sucking people[23]

What is the main human problem the story focuses on?

- How does one respond to those that are dangerous?
- Does the party that caused injuries have a responsibility to the injured parties?

What facts matter?

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23 As with any other cases or legal narrative, one will learn different things depending on the questions asked.

- There was a group of blood sucking people that were killing the Gitxsan. They had long beaks they would stab into the victims' necks to suck their blood.

- Gitxsan people kept disappearing, so a search party was sent to look for them. The search party went to the village of the blood sucking people and while they slept, all but one was attacked and drained of blood.

- One young Gitxsan man was a light sleeper and because he was by the door, he was able to escape. He was chased by the old chief of the blood sucking people. The young man jumped into a lake and managed to climb up into an overhanging tree.

- The old chief saw the young man's reflection in the water and kept diving into the water and mud to try to kill him. When he exhausted himself and then froze, the young man was able to kill him.

- The young man cut the old man's heart out which was alive with a face and a voice. The heart told the young man how to revive his companions and the others killed by the blood sucking people by waving the heart over their bodies.

- The young man revived the others as instructed. The Gitxsan decided to burn the old man's body so he could not be brought back to life. From the ashes of the old man's body, mosquitoes were born and they continue to suck people's blood.

What is decided about the problem or how is this problem resolved?

- The young man killed the old man and cut out his heart.

- The heart spoke to the young man and instructed him on how bring the other Gitxsan back to life.

- Gitxsan decided to burn the old man's body to prevent him from returning to life.

- The ashes from the old man's body turned into mosquitoes that still suck Gitxsan people's blood.

What are the reasons behind the decision? Is there an explanation in the story? Is this said or unsaid?

Implicit reasons:

- The heart of the old man had the power and responsibility to help the people he had harmed.

- One can never be completely free from dangerous or evil people, even if they are killed.

Explicit reasons:

- The old man posed a continuing danger to the Gitxsan, but there are still consequences today for killing him.

Bracket: Some things will be beyond one's terms of reference and are not necessary to the story analysis. These questions create and hold space for critical future conversations.

- What happened to the other blood sucking people who fled?

3 Questions about recording indigenous law

On the question of recording indigenous law, my starting place is that all law is recorded whether it is past or present, indigenous or non-indigenous, state law or non-state law, formal or informal. After all, law is public, it is collaborative, and people have to know what it is to apply it or challenge it. For some scholars, the concerns of recording law or oral histories are often related to its capture in legislation and how indigenous law actually engages with and is recorded in state legal processes (eg, constitutional recognition, court applications versus conversations, art, media, music, narratives or conversations).[24] What I take up in this paper is a set of concerns regarding the recording of indigenous law as generated in Canada in this era of rebuilding indigenous law.

There are a range of critiques in the Canadian legal and political discourse about recording indigenous law. First, is the critique that recording indigenous law in written form will damage it thereby causing it to lose its depth and meaning. Second, that recording law is to disembody it from the land that gives rise to the law, causing its distortion and abstraction. Third, that recording law will de-contextualise it from its spiritual moorings and cause it to become an entirely intellectual rather than holistic, spiritual process. And finally, that indigenous law must be expressed only in its

24 Rautenbach "Case Law as Authoritative Source of Customary Law" (this edition).

original language to be properly expressed and understood.[25]

While these assumptions are problematic, they contain grains of truth that must to be considered to effectively work with indigenous law. However, what is most troubling with these critiques is that they reflect a narrow conception of law and there is a suspicious undercurrent of anti-intellectualism. For one thing, there are assumptions about indigenous law's former purity either prior to colonisation or prior to the writing down of law, and hence law can be corrupted by this textual form of expression. Another assumption is that indigenous peoples did not historically employ rigorous analytical reasoning as part of their legal intellectual traditions.[26]

There is also a limiting assumption about the unchanging nature of law through time as well as in the present day. It is the case that these critiques can stop critical conversations and in doing so obscure power dynamics, including those relating to gender, that are so much a part of the indigenous political and legal reality in Canada and elsewhere. Every generation must figure out, interpret and apply the law to new legal problems. This is true for indigenous peoples as with every other legal tradition of the world.

Interestingly, Gyolugyet spoke to this very issue in her evidence during the *Delgamuukw* trial:

> I have tried to illustrate what all goes into *adaawk* and what it means to the Gitksan people. The *adaawk* is most important. Today these *adaawk* are told: The Gitxsan people didn't write anything, it was all oral. But today these *adaawk* will go on because our young people have educated themselves to write these and we have our language, our own alphabets that they can be put on paper, black and white, it will never diminish at all. It will still be there, like it has been before. It goes around like a windmill, it goes around and that's how our *adaawk* are. It goes from one generation to the another ... .[27]

To properly consider these critiques about recording, it is helpful to consider indigenous law in its broadest sense as forming legal traditions that are deeply rooted and comprise:

> … historically conditioned attitudes about the nature of law, role of law in the society and the polity, about the proper organisation and operation of the legal system, and about the ways law is or should be made, applied, studied, perfected, and taught.[28]

From this perspective, however law is recorded, it is still part of a much

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25 For a great discussion on language today, see Borrows 2016 *McGill LJ* 809.

26 I am interested in exploring this more by drawing on the controversial work of Kenyan philosopher Oruka. See Masolo 2016 https://plato.stanford.edu/entries/african-sage/.

27 Monet and Skanu'u *Colonialism on Trial* 28.

28 Merryman *Civil Law Tradition* 1.

bigger conception that is integral to all aspects of governance for each society. On this point, Kirsten Rundle argues that law is a distinct mode of governance.[29] As such, law is an essential societal intellectual and practical resource for the management of messy and unruly collective human lives in every society.

Most Indigenous societies in Canada were non-state, meaning that political and legal authorities were distributed horizontally and operated through decentralised institutions. As with state societies, indigenous law is a public process that operates through legal institutions and to apply law, one draws from patterns and dissimilarities of past applications recorded as precedent. Interpretations of precedent are made on a case-by-case basis, and for this to be possible, legal memory must be publicly available. This means that law must continually exist in accessible public memory, organised and recorded in different forms of legal precedent (eg, oral histories, stories, etc), so that it can be applied in the everyday, thereby creating new precedents for future legal problem solving. It is only through sustained engagement with law that people create the necessary, ongoing intellectual space to critically examine norms, power, assumptions and contradictions.

In Canada as elsewhere in the world, colonialism has undermined indigenous societies and their legal traditions. Basically, the Canadian government and the courts denied indigenous law throughout colonial history and perpetuated the trope of indigenous peoples being essentially lawless.[30] Indigenous law and legal processes were outlawed and people were incarcerated and executed for their continued lawful practices.[31] Given this, indigenous legal institutions and law have been eroded and there are gaps and distortions so that the essential work of today is one of rebuilding law.[32] Recording law is a necessary method for that rebuilding to create local, accessible legal resources. Questions of the "what", the "whys" and "hows" must be carefully considered as part of this essential rebuilding. I explain this further below.

4 Indigenous legal traditions in Canada – larger context

Indigenous societies were not homogenous in the past nor are they today. The oral histories of indigenous societies have examples of the taking in of

29 Rundel *Forms Liberate* 99.

30 See Slattery 2007 *Sup Ct L Rev*. The initial encounter between indigenous peoples and the newcomers included that recognition of indigenous law through the negotiation of the historic treaties, and cases such as *Connelly v Woolrich* (1867) QSC 17 RJRQ 75.

31 Napoleon *et al Mikomosis and the Wetiko*.

32 My colleague, Dr Friedland and I have written about this rebuilding work elsewhere. See for instance the trilogy cited above.

other peoples through time as well as through intentional inter-societal marriage arrangements and trade. Given this, indigenous law is already to a large extent plural, but legal fictions today perpetuate notions of hermetically culturally homogenous groups. For example, in my own community, Saulteau First Nation, there are three historic languages – Dane-zaa, Cree, and Saulteaux (and arguably, now English). Another example are the Gitxsan who adopted other peoples from the north (and from a different linguistic group) into their communities.[33] Still another example are the Dene in the very far north who took in other peoples to form a larger political and legal collectivity.[34] Law is a societal phenomenon that is capable of internal diversity of cultures and languages within societies. Currently, there are between 60 and 80 historically-based nations in Canada, compared with a thousand or so local Aboriginal communities.[35]

Historically, each indigenous society's territory was the area they could defend both physically and legally according to their indigenous legal orders. Colonially imposed reserve boundaries created by the *Indian Act*,[36] divided and grouped indigenous peoples into small bands cutting across each larger indigenous legal order. This division of indigenous peoples and fragmentation of lands have undermined the efficacy of the larger legal orders and the operation of indigenous laws. For example, the larger Gitxsan society is now divided into six bands with a number of small reserves and a tiny combined land base of 113 square kilometres.

Consequently, and as with other indigenous bands, the primary political orientation largely shifted from the horizontal relationships among communities of matrilineal kinship groups to a vertical relationship between the state and the bands reconfigured with state-determined, patrilineal memberships.[37] In contrast, the historic and present-day Gitxsan legal order

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33 Marsden S (Xamlaxyetxw) 9 May 1988, BCSC Trial Transcript, 5932 at 5959, Evidence for *Delgamuukw v The Queen* [1991] BCJ No 525, 79 DLR (4th) 185.

34 Factoring in time depth is a critical aspect to appreciating the historical dynamics, formations and changing of peoples. Helm *People of the Denendeh*. Helm described two groups of Hare Dene who lived on the northern shores of Great Bear Lake in the 1860s. By the early 1900s, these two groups were no longer identifiable as Hare, and instead had become part of a people who identified as Sahtu Dene or Bearlake Dene. In fact, the Bearlake Dene were a historical amalgamation of Hare, Tli Cho, Slavey and Mountain Dene – these were formerly disparate linguistic groups. Helm's work also refers to other major territorial shifts and what she calls "intertribal" amalgamations that occurred through time such as joint land occupancy by the Gwichin and Hare, the merging of the Yellowknives into the Chipewyan and the submersion of the eastern Dogribs into the Chipewyan.

35 Canada *Report of the Royal Commission on Aboriginal Peoples* 235.

36 *Indian Act*, RSC 1985, c 1–5.

37 It is the state, through the *Constitution Act*, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App 11, No 5, and the *Indian Act*, RSC 1985, c 1–5, which recognises

operates along kinship lines that necessarily span the entire combined Gitxsan 55,000 square kilometre territory.

In Gitxsan society, every person is born into her or his mother's lineage and the mother's extended family has specific legal obligations to her or him and vice-versa. If a Gitxsan person is injured, the legal obligations for dealing with injuries are with the father's House. The problem today is that many Gitxsan people, as with other indigenous peoples, live off-reserve in urban settings,[38] so members of the father's House can live anywhere, on or off reserve. If only state or *Indian Act* band membership rather than kinship is considered in the case of an injury to a Gitxsan person, then all the other Gitxsan people who have legal obligations through the kinship system, whether living on other reserves or off reserve, are excluded from fulfilling their legal responsibilities. The Gitxsan legal order extends throughout Gitxsan territory and cannot function properly if its legal relationships are fractured and centralised to each local band level. It is through the larger legal order that the systems of accountability and neutrality are operative to establish the necessary legitimacy for dealing with inevitable power imbalances and vulnerabilities.[39]

I will begin exploring questions about the recording of indigenous law with a focus on the Gitxsan peoples in northwest British Columbia. Gitxsan law is also recorded in crests (*ayuk*), songs, specific kinship relationships, chiefs' names and place names, and legal practices such as pole raising. For example, the *ayuk* is a specific named power or privilege drawn from the *adaawk* that may be represented on poles, robes, regalia, head-dresses, or other objects.[40] Chiefs Gisday Wa and Delgamuukw explain how intertwined the crests, poles and *adaawk* are with the Gitksan and their land:

> The pole which encodes the history of the House through its display of crests, also recreates, by reaching upwards, the link with the spirit forces that give the people their power. At the same time, it is planted in the ground, where its roots spread out into the land, thereby linking man, spirit power, and the land so they form a living whole. Integral to this link and the maintenance of the partnership, is adherence to the fundamental principles of respect for the land and for its life forms.[41]

The *adaawk* are publicly recounted at specific feasts, a complex political,

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bands as legal and political entities, and provides funding for housing, etc to the bands.

38 There are many reasons for this including employment, lack of housing, and educational opportunities.

39 For a detailed demonstration of Gitxsan legal processes and accountability, see Napoleon "Living Together".

40 The crest is actually a complex category of intellectual property as well as governance.

41 Gisday Wa and Delgam Uukw *Spirit in the Land* 26.

legal, economic and social institution in which the main business of the hosting House is transacted and formally witnessed by the guest Houses.[42] Jurisdiction among the Gitxsan is exercised through the Feast. In former times, Feasts were held for all major legal, social and political transactions including marriage, shaming (to control harmful and injurious behaviour), cleansing (to restore spirits after serious injury), restitution, birth, graduation (to celebrate achievements), naming, reinstatement (for Gitksan people who disobeyed the laws), coming of age, "smoke" (for obligations related to organising settlement feasts), grave-stone placing, settlement (repayment of obligations arising from a death), divorce and pole raising.[43] It is in the Feast that each House recreates and performs its legal relationships and connections with other lineages.

So, what can we learn about the recording of indigenous law from this tiny backdrop? The first is obvious – there are many ways to record law. The second might not be so obvious – one must learn to see the law, reason with it, apply it and record it. In other words, this lens requires a Gitxsan legal education which starts with Gitxsan infants. Hereditary Chief Tenimgyet (Art Mathews) explained that when he was a small child, at the end of the day, his grandparents required him to stand up and fully recount his day.[44] This meant that, among other things, he had to pay attention throughout his day, increase his memory capacity and develop and hone his skills as an orator. These are the capacities necessary for Tenimgyet to be able to recount the full and extensive adaawk of his House, serve as a witness for the business transacted at Feasts, and recall precedent to inform legal problem solving. This is all part of the Gitxsan legal education necessary for Tenimgyet and others to be effective individual and collective legal actors in Gitxsan society.

While Tenimgyet is an important hereditary chief, he is also able to write in English and *Gitsanimx* (Gitxsan language), and he operates fully in Canadian society. Tenimgyet, along with over a hundred Gitxsan and Wet'suwet'en hereditary chiefs, was an expert witness in the previously mentioned seminal title court action, *Delgamuukw*.[45] Tenimgyet was also

42 See generally Daly *Our Box Was Full* 57-106. Daly was an expert witness on behalf of the Gitxsan in the *Delgamuukw* trial, and he has maintained close working relations with Gitxsan and Wet'suwet'en organisations and people.

43 Anderson and Halpin *Potlatch at Gitsegukla* ix.

44 Napoleon "Living Together".

45 *Delgamuukw v The Queen* (1991) 79 DLR (4th) 185 (BCSC); *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470 (BCCA) (this decision is actually erroneously cited as *Uukw v British Columbia*); and *Delgamuukw v British Columbia* [1997] 3 SCR 1010. Prior to *Delgamuukw*, many Gitxsan, Wet'suwet'en, Tsimshian and Nisga'a recorded parts of their oral histories. See for example MacDonald and Cove *Tsimshian Narratives 1*; and MacDonald and Cove *Tsimshian Narratives 2.* These

one of the founders of and driving force behind the Gitxsan immersion schools (preschool and kindergarten to grade 4), where he helped to develop extensive written texts of all subjects of Gitxsan curricula (in English and in *Gitsanimx*). His tremendous pragmatic efforts in the major court case and as an educator were directed at forms of recording of Gitxsan law for his larger political project – the gaining of Canadian legal recognition Aboriginal title and protecting Gitxsan land, and teaching Gitxsan knowledge and language.

Tenimgyet has a Gitxsan legal education, but many young Gitxsan people do not and further, many do not speak Gitsanimx. Texts and other forms of media are now commonplace for education and entertainment. My point is that insisting on orality and historic methods of recording only work when all those historic elements form the context. When people do not have the extensive legal Gitxsan education that Tenimgyet has, texts (including audio visual media) are important additions to supplement Gitxsan law and its teaching, application and expression. This is the scope and context of Gitxsan society and law, that Tenimgyet and the other Gitxsan hereditary chiefs, such as Gyolugyet, identified and worked to maintain when they filed *Delgamuukw*.

5 One approach to recording indigenous law

The work with indigenous law must begin in the experience of indigenous reality – where people are at today as opposed to some idealised version of the past. Given colonial history and the crushing denial of indigenous law, what are the conditions that will make indigenous law and its attendant legalities possible today? What will enable indigenous peoples to restore indigenous lawfulness? As Friedland and I wrote in *Gathering the Threads*:[46]

> [T]he ground of Indigenous law is uneven — Indigenous law exists, it has not gone anywhere — and we saw this, but there are also serious gaps where some Indigenous law have been undermined, distorted, or lost. Given this, simply arguing for the recognition of Indigenous law is inadequate because we cannot just assume that there are complete and intact legal orders that can spring to life through recognition. This means that engagement with Indigenous law must move to thoughtful rebuilding, and this generates two questions: (1) What are the terms for this thoughtful rebuilding process with communities? and (2) What are the intellectual processes in each Indigenous society that historically enabled people to deal with and account for change?

Each indigenous legal order includes the full scope of law and legal processes that every society needs to manage itself – governance, family, injuries and harms, business, and lands and resources, and so on. While

were some of the resources for *Delgamuukw* and are informing the current research partnerships with Tsimshian and Gitxsan communities.

46 Friedland and Napoleon 2015 *Lakehead LJ* 29.

the forms and expressions of law were unique to each society, the issues and problems law was applied to are universal and include violence and conflict, power imbalances and economic and land disputes. While it is the case that violence is a problem in many indigenous communities today, historically, indigenous peoples were no more violent than any other peoples. Indigenous law is concerned with the same human problems as Canadian law which is evidenced by indigenous legal aspirations of dignity and agency, community safety, fairness and accountability. These aspirations are common themes shared across multiple indigenous legal orders in Canada.[47]

The indigenous legal methodology set out earlier includes essential dual requirements for transparency of reasoning and interpretive processes, and the consistent citing of sources, be they interviews, discussion groups or oral and published texts of stories. Everyone must be able to go to the same sources to determine their own interpretations to foster respectful and productive debate and inclusive engagement. This methodology results in a five-part synthesised report that sets out:

(1) legal processes of determining the appropriate authoritative decision-makers and how to respond to the legal problem;

(2) the range of appropriate legal responses or resolution;

(3) legal obligations;

(4) substantive and procedural rights; and

(5) legal principles.[48]

This articulation and restatement of indigenous law facilitates an internal view of indigenous law that enables its argumentation, application and practice in the real world – and is a way to keep law alive and in practice so that it does not become a romanticised historic artifact. Rebuilding indigenous law and its resulting resurgence will make a symmetrical relationship possible with Canada so that reconciliation can include indigenous law and Canadian law. This is the only way to leave behind the colonial asymmetry that denied and denigrated indigenous legal traditions.

47 Friedland and Napoleon 2015 *Lakehead LJ* 29.

48 This is one of the Indigenous legal methodologies employed by the Indigenous Law Research Unit. See the copies of some of ILRU's reports and materials at ILRU 2019 https://www.uvic.ca/law/about/indigenous/indigenouslawresearchunit/index.php.

There are and must be many methods for engaging with indigenous legal traditions.[49] In practice, the method outlined herein is complementary for indigenous and non-indigenous students learning through other legal pedagogies, including a Canadian legal education.[50] The ongoing challenges for students and scholars are to fully engage with indigenous laws, to be transparent about their methods and rigorous and critical in their own work.[51]

6 Issues arising

The approach here raises many critical questions that need to be embraced and taken on as an integral part of creating a robust and respectful engagement with indigenous legal traditions. This includes acknowledging the fact that indigenous laws have always been influenced by the power dynamics and politics around them, including sexism. Canadian laws are also surrounded by and are a part of societal power dynamics. A critical approach requires resisting the all-too-common tendency to romanticise indigenous peoples and indigenous law. It also means knowing that simply declaring the law is inadequate. Rather, people must have legitimate principled reasoning processes for determining whether a law has been broken and what to do when it is.

The important thing is not to let these critical questions paralyse or narrow the work of indigenous law. Dr Friedland and I have written elsewhere that fearful narratives of fragility or incommensurability related to indigenous

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49 See, for example, the Law Commission of Canada *Justice Within*, which found that some indigenous people suggest law can be found in dreams, dances, art, the land and nature, and in how people live their lives. Indigenous laws may be interpreted from words or phrases in indigenous languages. See Fletcher 2006 http://www.law.msu.edu/indigenous/papers/2006-04.pdf 41. Some people learn indigenous laws deeply from nature and land. See Borrows *Canada's Indigenous Constitution* 29-32; Lindberg *Critical Indigenous Legal Theory* 41-51; and Black *Land is the Source of the Law*, generally. Laws can also be identified in the ways people regulate and manage activities and resources. See Parlee, Berkes and Gwich'in 2005 *EcoHealth* 127.

50 See Friedland and Napoleon 2015 *Lakehead LJ* 26 where we note: "[T]hrough the interview transcripts and verbal reports from students about their time spent in the communities…, we were pleased, but not surprised, to hear of how much learning occurred through language, through guided observations and explanations of nature and the land, and through teasing, drumming, and other activities." See also, the *Aseniwuche Winewak* Youth Council's TRC Education Day presentation about its engagement with Cree laws related to reconciliation through stories, songs, language, art, and actions in Keegitah 2014 http://keegitah.wordpress.com/author/keegitah/.

51 Some of the weaknesses that have undermined human rights in non-state justice initiatives throughout the world include the lack of a sound research base and poor scholarship, resulting in "inconsistent, incoherent or unrealistic policies". International Council on Human Rights Policy *When Legal Worlds Overlap* ix.

laws are narratives of colonialism, basically narratives of despair.[52] These are powerful and seductive narratives that can easily capture researchers and communities. However, indigenous laws must do the hard work of law today as they have done in the past if law is going to remain in any way relevant. Part of the hard work of law is managing and negotiating inter-societal relations across legal orders today, as in the past.[53]

As briefly explained above, the methodology employed by the ILRU is to analyse and synthesise already published stories and oral histories. Over a period of 18 to 24 months, these are reworked in collaboration with community partners along with the final synthesis, and sometimes communities add unpublished materials. However, partner communities are cautioned against including any materials that are sensitive, and most partners have their own ethics agreements to protect their interests (in addition to the university ethics agreements). Where there are multiple versions of an oral history or narrative, and this is usually the case, all versions are included in the analysis. We take the position that there are legal teachings and important perspectives in each version, and that it is not our place to arbitrate which is the authoritative version.

The goal is not to simply produce a law report that sits on a shelf, but rather to produce a legal resource that can be legitimately applied to current legal problems such as family breakdowns, violence, land or water disputes, and governance and democratic concerns. The synthesised report contains comprehensive precedents that may be examined as part of the reasoning process, and as new cases are resolved, new law is developed and recorded.

Does the recording that is a part of this methodology change indigenous law? Probably, because nothing can be done without affecting or participating in change. The starting place in thinking about this question is to comprehend that indigenous law has already been changed – each generation must interpret and apply law to contemporary conflicts and problems – that is the essential work of law. Colonisation has also made changes to indigenous law, often creating unquestioned distortions or gaps in law.[54] It is also important to acknowledge how the context of today changes societal demands as well as the kinds of problems law must deal with. Having said this, the methodology introduces new ways of recording law for future recall and application, but arguably, supports the integrity of

52 See Napoleon and Friedland "From Roots to Renaissance" 239.
53 Webber 2006 *Osgoode Hall LJ* 170.
54 Osman "Method for Ascertainment".

the law and its practice.

Turning to another of the critiques concerning the focus on the intellectual, I take the position that indigenous peoples have always been intellectual because law is an intellectual process and indigenous societies always had law. Instead, there has been a shift, largely as a means to react to and recover from colonialism, away from the intellectual to the emotional and the spiritual. The way that this plays out is with the heavy emphasis placed on healing and on the role of the sacred. Sometimes this appears to be a reaction against the dehumanisation of colonisation, where the aim is to prove how indigenous peoples are different from or better than non-indigenous people.

Given colonialism and attendant racism, some indigenous peoples have created protection measures by characterising indigenous law as being primarily spiritual and sacred so they seem unassailable. Unfortunately, these measures can also stop conversations and critical thinking and perpetuate power imbalances. Of course, this does not mean the spiritual and emotional are not important to being whole human beings, just that the whole human being is also intellectual and there needs to be a balance.

My position is that the recording of indigenous law described here is another way to rebuild indigenous public memory, that precedent archive which is so central to all law. Engaging with law is fundamentally collaborative which in turn creates public trust, and according to Charles Taylor, this is an essential ingredient to meaningful democracy.[55] People must be able to imagine a public life complete with a repertoire of narratives in which problems and conflicts are resolved without violence. This methodology is a way of restoring indigenous legal reasoning processes and building a repertoire of conflict management narratives. It is also a way of rebuilding indigenous public intellectualism and public legal resources.

This indigenous legal methodology is also useful to upset sexism and stereotyped gender roles where there has been a reification of gender and entrenched human rights oppressions – often caused by restrictions on who can talk about or ask questions of law. This happens when only a few people, often men, are able to say what law is. Indigenous societies have not been and are not immune from sexism and other internal oppressions, so it is important not to idealise historic gender roles or the treatment of

55 Taylor "Crises of Democracy".

other vulnerabilities.[56] It is one of the reasons that transparency of assumptions is so important to articulating and interpreting law. I have argued elsewhere that indigenous law contained individual and collective human rights which were accountable and actionable on a horizontal basis.[57] This is in direct contrast to the standard centralised line of accountability being vertical between the individual and the state for human rights abuses and injuries.

Scholar Sally Engle Merry asks how one comes to understand one's problems in terms of rights – including human rights.[58] She argues that whether one has a rights consciousness derives from experience with the legal system where they learn whether their experiences matter to law. In other words, the adoption of one's self as rights-defined depends on encounters with police, courts, prosecutors, judges and probation officers. I argue that whether a person understands him or herself as human rights-bearing in indigenous societies also depends on a person's experience with indigenous law. So we have to ask, (1) Are women and girls encouraged and supported by Indigenous law? (2) What are the historic and present-day legal processes and institutions that deal with gender or sexuality issues? What are people's experiences in those indigenous legal orders? Specifically, what are women's and girl's experiences? What do we not know and why not? For instance, what are the words for rape and sexual violence in our respective indigenous languages? All of this requires pushing far beyond the prevailing idealised rhetoric about indigenous women and about law. Arguably, dignity and agency are what make law legal,[59] and as such, they are a necessary legality in indigenous legal traditions. This is visible in the Torchlight People for example.[60]

What one sees as law is determined by one's grid of intelligibility. If one understands and expects law to emanate from the state through hierarchical institutions, practised only by special designated experts and recorded in legislation or case law, then that is exactly what one will see. From this perspective, it is unlikely that one would see indigenous law recorded in oral histories and stories, on poles or crests, in kinship relationships or place names or in social interactions[61] and practices. I have heard lawyers saying that they just cannot see indigenous law. I have also seen hundreds of

56 For a discussion on gendered violence, see Snyder, Napoleon and Borrows 2015 *UBC Law Rev*.
57 Napoleon 2002 *Can J L & Soc'y* 149-171.
58 Engle Merry "Transnational Human Rights and Local Activism" 207-228.
59 Rundel *Forms Liberate* 99.
60 Smith *Placing Gitxsan Stories in Text* 15.
61 See Fuller 1969 *Am J Juris* 11.

people learn to see indigenous law through learning the methodologies outlined here – and these are always magical moments.

Cree legal scholar, Darcy Lindberg, when analogising the universe to law, wrote that one must learn to see all the stars in the universe because all the stars matter.[62] These representations and recordings of law would simply be invisible beyond the standard state law grid of intelligibility. Given this, the project of adding to the national and international legal imagination and expanding the Canadian law grid of intelligibility means substantively and procedurally articulating indigenous law and legal institutions. Recording is a practical part of this work and its attendant questions have to be worked out while doing the research and then through actual practice of indigenous law.

Contrary to what some fear, researching and practising indigenous law is not about going back in time. While there is much work to understand and articulate in historic legal institutions and law to create substantive and procedural resources for application today, this is not about trying to recreate conditions of the past or only to recreate past legal practices. For example, as with other indigenous peoples, Secwepemc people had historic legal institutions and law, and today, they also have contemporary legal institutions and law. While many aspects of the historic and contemporary legal institutions and law operate simultaneously in the same geographic space with no conflict, this is not the case with all aspects of law. For instance, historic Secwepemc laws regarding marriage and divorce have largely been subsumed by provincial and federal laws governing those areas. Still other historic and contemporary aspects are in direct conflict such as representation, governance, leadership and lands (ie, bands, councils and reserves). Whether one is informed by the historic or the contemporary, what one thinks is legitimate will differ according to one's experiences. These differences in perspectives can generate often seemingly intractable conflicts: the authentic or traditional versus colonised "sell outs", the traditional versus the modern. These are some of the discussions now being taken up by the Shuswap Nation Tribal Council and other groups as they rebuild their governance, citizenship principles and processes, and necessary institutional structures. This is hard work and it is complicated, and indigenous peoples are doing it.

The work of indigenous law, as with other law, is ongoing. It operates against the necessary and ongoing backdrop of disagreement in human society.[63] There has never been a time that indigenous people did not need

62 Lindberg "Brain Tanning and Shut Eye Dancing".
63 Webber 2006 *Osgoode Hall LJ* 169.

law.[64] It is law that enables large groups of people to collectively manage themselves "against a backdrop of deep-seated normative disagreement" and to fashion "collective positions out of the welter of disagreement".[65]

Finally, the importance of law that is understandable, accessible and applicable[66] cannot be overstated if law is going to have any place or utility in the world. If it is not understandable, not accessible and not applicable, then perhaps it should not exist. The problem is that such law is susceptible to the pressures of fundamentalism and essentialism. One can see elements of this today where declarations of indigenous law are made that actually foreclose legal reasoning and questions. For example, sometimes one hears from the environmental movement that indigenous laws mean this or that outcome. This is a form of simple instrumentalism applied to indigenous law. Meaningful engagement would involve posing legal questions about a legal issue and allowing or facilitating the legitimate collaborative, deliberative and principled legal processes necessary to arrive at a legal conclusion (and recording that decision with reasons). Similar dynamics occur when restorative justice is conflated with indigenous law thereby foreclosing indigenous norms and a range of remedies and reasoned decisions.

7 An example of a current research project

I am a co-investigator with my colleague, Debra Curran, on a major water project covering three regions in British Columbia that are experiencing water shortages: Cowichan Valley (Vancouver Island), Lower Similkameen (lower BC), and the Tsilhqot'in (interior BC). There are three distinct indigenous peoples with different languages and numerous communities in each region. There are also a number of non-indigenous urban communities and an agricultural industry (eg, vineyards, cattle ranching, crops and orchards). The first purpose of this initiative is to substantively articulate and restate indigenous law in each region in partnership with the Cowichan Tribes, Lower Similkameen Band and Tsilhqot'in National Government. The second purpose is to interview the non-indigenous water users in the non-indigenous communities and agricultural areas, and to analyse applicable state law. The third purpose is to bring to bring together the dual streams of

64 Borrows *Indigenous Law on Demand* (video), to be found on ILRU 2019 https://www.uvic.ca/law/about/indigenous/indigenouslawresearchunit/index.php.

65 Webber "Naturalism and Agency in the Living Law" 202. Webber defines a normative order as "a natural dimension of any human interaction, generated through the day-to-day business of human life, perhaps even definitional of the existence of society" (201).

66 Fletcher 2007 *Mich J Race & L* 57.

research in each region to build a collaborative and sustainable indigenous and non-indigenous water management and protection regime.

For each of the three regions, the community workshops (to introduce the methodology set out here) have been conducted, the respective oral history and story analyses have been completed and the preliminary syntheses have been drafted. Currently, interviews and focus groups are being conducted to review and correct the work completed to date and the finalisation of these indigenous water law reports will be concluded by the end of this year. Currently, the non-indigenous interviews are being conducted, a database is almost complete of provincial water licences, and the case law and legislative reviews are being completed. This work will be completed over 2019-2020.

In the end, the question of whether indigenous water law should be recorded might well be moot as indigenous law, as rebuilt by indigenous communities, just goes ahead and does the work of law alongside state laws. However, it is likely that a longer view assessment informed by the actual practice of law with real issues is required to determine the consequences of these forms of recording.

8 Did I break the story?

With both indigenous and non-indigenous students, I begin my indigenous law courses, and sometimes workshops, with the proviso that the students or participants[67] are not going to break indigenous law by critically analysing narratives and articulating legal principles. I employ a legal pedagogy that requires the serious and critical engagement with indigenous law as law. If I do not begin with this proviso, sometimes the students or participants are too paralysed to actually do any critical thinking about indigenous law and indigenous oral histories or stories. Taking this approach frees up both students and participants to fully and critically grapple with indigenous legal theory and the necessary work to articulate substantive law and legal processes for application to present-day legal problems.

Where will we end up? It is an exhilarating time with an exciting future for indigenous law. In September 2018, the Faculty of Law at the University of Victoria launched the JID/JD (Indigenous-Juris Indigenarum Doctor and Common law-Juris Doctor) with 26 students. This is a professional dual degree programme where students will earn an indigenous law degree and a Canadian law degree over a 4-year period (the first cohort will graduate in 2022). The core courses are taught with an adapted transsystemic legal

67 These include workshops for members of the judiciary, faculty of other universities, community members, government, and various other groups.

pedagogy developed originally by the University of McGill for its civil law and common law degree programme. This is the first law degree programme of its kind in the world and since its launch, we have been approached by law schools in other countries who wish to learn more. We truly live in an amazing world.

To return to the two Gitxsan narratives, I am working with Gitxsan women to research and articulate gender issues and Gitxsan human rights from within the Gitxsan legal order.[68] The methodology will involve analysing Gitxsan oral histories and other narratives to identify law and legal processes for legitimately responding to gender and human rights abuses. These will include oral histories that are about creating vulnerabilities, dealing with power imbalances and conflict, and gender and sexism. We will learn about and restate legitimate responses, Gitxsan legalities, dignity, legal agency, accountability and obligations, procedural and substantive human rights, and guiding legal principles. From this multiple-year interactive research partnership, we will create a series of Gitxsan legal resources such as plain language law reports and resources, short videos, and perhaps a graphic narrative.

The two narratives included herein and many others will be a part of creating these Gitxsan legal resources. Specifically, they offer ways to think about vulnerabilities, individual and collective obligations, power imbalances and abuses, difference, gender, harms, and kinship and inter-societal relationships.

So, did I break the law? Did I break the narratives by analysing them? Both the narratives continue their life and work within Gitxsan governance and have done before and since they were first recorded in text. Full versions of both oral histories[69] are publicly recounted in the feast hall at pole raising feasts to affirm House territories, authorities, lineages and histories. Gitxsan law has withstood colonisation and to date, Gitxsan law has continued to do the work of law, albeit with gaps. Now is the time of rebuilding. The human rights project listed here is one step toward the rebuilding of indigenous law so that it can again be accessible, understandable and applicable.

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68 The Indigenous Law Research Unit is also launching an indigenous human rights project in the Yukon with the Trondëk Hwich'in.

69 Overstall argues that more specific location of individuals and ownership of the oral histories in the Gitxsan system is necessary to properly and legitimately interpret their legal meanings. This is an important factor that will have to be taken up in Gitxsan legal practice along with a lot of other critical questions. Overstall, Personal Correspondence, 14 June 2019.

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List of Abbreviations

Am J Juris	American Journal of Jurisprudence
Can J L & Soc'y	Canadian Journal of Law and Society
ILRU	Indigenous Law Research Unit
Indigenous LJ	Indigenous Law Journal
Lakehead LJ	Lakehead Law Journal
McGill LJ	McGill Law Journal
Mich J Race & L	Michigan Journal of Race and Law
Osgoode Hall LJ	Osgoode Hall Law Journal
Sup Ct L Rev	Supreme Court Law Review
UBC Law Rev	University of British Columbia Law Review