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Reflective Frameworks:
Methods for Accessing, Understanding and Applying Indigenous Laws

HADLEY FRIEDLAND*

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There is increasing academic, professional and community interest in the greater recognition and revitalization of Indigenous legal traditions in Canada. While there are compelling arguments for why this is important, there has not been much academic attention to the practical question of how to go about doing so. This article takes up the practical question of

* Hadley Friedland, LLB, LLM, is a PhD Candidate and Vanier Scholar in the Faculty of Law at the University of Alberta. The author thanks Prof. Val Napoleon for her incredible encouragement, insights and advice, and Emily Synder and two anonymous reviewers for their helpful suggestions and feedback for improving this article.
method, examining the question: How might legal scholarship assist with the practical tasks of finding, understanding and applying Indigenous laws today? Through a close analysis of the work of three leading Indigenous legal scholars, it first addresses current issues related to the identification and availability of existing resources. It further goes on to discuss identified challenges to a greater engagement with Indigenous laws. It then examines how each of the three legal scholars have addressed these challenges, identifying four analytical frameworks from their respective works, including (1) the linguistic method; (2) the sources of law method; (3) the single-case analysis method; and (4) the multi-case analysis and legal theory method. Finally, it proposes a fifth possible methodological framework for finding, understanding and applying Indigenous laws: an adapted method of legal analysis and synthesis, as currently taught in common-law law schools. This method is illustrated through a case study of the author’s own research project employing this method to identify and articulate Cree legal principles regarding the wetiko (windo). The article concludes that serious and sustained legal scholarship, scholarship that takes Indigenous laws seriously as laws, is both possible and important. Such legal scholarship is best seen as contributing to Indigenous communities’ own ongoing internal political projects of learning, researching, debating and applying Indigenous laws today.

I Introduction: The First Stream

On October 16, 2010, at the close of the conference entitled “Indigenous Law in Coast Salish Traditions,” Professor John Borrows told a story about an experience he had in the summer on Cape Croker reserve, as he stood by a lake in the early morning. When he looked up, soaking in the beauty of the morning, he realized that he was seeing a reflection of the lake in the sky. As he gazed upon this reflection, he suddenly noticed in it a small stream connected to the lake that he had never noticed before. Sure enough, looking down, he saw the stream, which had always been part of the landscape. That morning, a confluence of events allowed him to view a familiar vista in a new way, making it possible for him to see clearly what had been there all along.

1 This conference was held October 14-16. It was hosted by Cowichan Tribes on Cowichan Territory, and sponsored by the Cowichan Tribes and the Research Group on Indigenous Peoples and Governance (IPG), with funding from the Social Sciences and Humanities Research Council of Canada, the Pierre Trudeau Foundation, the Faculty of Law at University of Victoria, and the Consortium of Democratic Constitutionalism.
Like the stream in the above story, Indigenous legal traditions continue to exist in Canada, despite a lack of recognition by the state or by the general public. Indigenous legal traditions may be deeply meaningful and have great impact on the lives of people within Indigenous communities. Yet I have come to accept that, outside those communities, these traditions are largely invisible or even incomprehensible. Borrows captures this familiar perception when he relates a personal conversation with an unnamed Chief Justice of a provincial appellate court who bluntly stated, “You say Indigenous law exists; I don’t believe it for a minute.” Yet even people who want to engage more deeply with Indigenous legal traditions struggle to understand how to do so. Professor Val Napoleon relates her experience of having a well-known lawyer for Aboriginal groups say to her: “We all know there is something there—but we don’t know how to access it.” Even if we agree that Indigenous legal traditions should be given more respect and recognition within Canada, and drawn upon in more explicit and public ways, we are still left with the very real question of how to do this.

There has been increasing scholarship in recent years, by both Indigenous and non-Indigenous scholars, arguing for the importance of a revitalization and recognition of Indigenous law in Canada at a philosophical or political level and discussing legal and theoretical frameworks for imagining that possibility. Interest about this goes beyond the academy as well, to the judiciary, legal professionals, governance organizations, the federal Department of Justice and Indigenous communities. Yet very little scholarship or discussion has

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3 Ibid at 46.
4 Val Napoleon, personal conversation, April, 2010.
6 Some examples of this professional and community interest include the Law Commission of Canada, *Justice Within: Indigenous Legal Traditions*, DVD (Ottawa: Minister of Supply and Services Canada, 2006). In February 2006, the Institute on Governance, a non-profit think tank dedicated to issues of Aboriginal governance, held a “Roundtable on Indigenous Legal Traditions.” For a summary, see online: <http://iog.ca/sites/iog/files/2005_tanaga6summary.pdf>. The Indigenous Bar Association’s annual conference held October 25-27, 2007, was called “Indigenous Laws: Practice, Conflict and Harmonization: Indigenous Laws and Territorial Dispute
focused on the critical and imminently practical question of how academics, lawyers, judges and members of Indigenous communities can “locate methods of finding, analyzing, and applying [Indigenous] law.”

The need to address this question of methods is highlighted by the fact that, in the U.S. context, several Indigenous scholars who are also tribal court judges, including Mathew Fletcher, Pat Sekaquaptewa and Christine Zuni Cruz, have recently raised and explored variations of the above question. This is significant because, unlike Canada, the United States has a tribal court system. The existence and ongoing operations of tribal courts mean that many of the vexing institutional and intellectual questions often posed as barriers to the greater recognition and integration of Indigenous legal traditions within Canada’s legal system, such as jurisdiction and harmonization, have been answered satisfactorily enough in the American context. In addition, many

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7 Mathew Fletcher, “Rethinking Customary Law in Tribal Court Jurisprudence” (Occasional Paper delivered at Michigan State University College of Law, Indigenous Law and Policy Centre Occasional Paper Series, 2006) at 17, online: <http://www.law.msu.edu/indigenous/papers/2006-04.pdf>. Fletcher uses the term “customary law” interchangeably with “traditional law” or “custom”. I prefer the term “Indigenous law”, of which custom is one of several sources, following Borrows on this point. See Borrows, supra note 2 at 24, where he explicitly makes the point that “not all Indigenous laws are customary at their root or in their expression, as people often assume.”


9 For a discussion of some of the institutional challenges, see Borrows, supra note 2 at 155-165 (discussion of applicability), 177-218 (ch. 7), 219-238 (ch. 8).

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of these courts have requirements—through “tribal constitutions, tribal court codes and ordinances, and tribal court rules”—to use “customary law” in tribal court decision-making.11

Yet American legal scholars and tribal court judges are clear that a disjuncture exists between the written laws adopted and applied in tribal courts, which remain largely Anglo-American in origin, and “traditional” or Indigenous laws within Indigenous communities.12 Justin Richland asserts:

Whatever the perspective on the place of customs and traditions in their tribal law, even a cursory review of the contemporary literature on tribal courts reveals that, for today’s tribal jurists, the question concerning the relationship between norms of Anglo-American legal procedure and their unique tribal legal heritage is their fundamental jurisprudential concern.13

Even with tribal court jurisdiction, incorporating Indigenous laws makes for a challenging endeavour that often requires further work.14 The methodological question of how to find, analyze and apply Indigenous laws still remains.15

It is this question of method I take up in this paper. To be clear from the outset, I will not be addressing the question of whether or not Indigenous laws

11 Fletcher, supra note 7 at 10 (for a complete discussion, see 10-17). See also Zuni Cruz, supra note 8 at 5-6.
12 See, for example, Zuni Cruz, supra note 8 at 1 (“even recently enacted law continues to look very much like the western law of states”), 5. See also Ames, supra note 10 at 135: “The Hopi Courts are in much the same situation that I am—halfway [about recognizing custom and tradition in rendering decisions].” Even in the Navajo courts, Austin is blunt that “there is an obvious imbalance in all Navajo Nation Law”; Austin, supra note 10 at 37. See also Richland, supra note 10 at 15-16.
13 Richland, supra note 10 at 16.
14 See, for example, Sekaquaptewa, supra note 8 at 320; Williams’s discussion in Austin, supra note 10 at xx; and Zuni Cruz, supra note 8 at 5-6, 10.
15 As mentioned above, this is not to suggest that there are not Indigenous people in Canada who already access, understand and apply Indigenous laws. In the U.S. context, the Navaho courts are renowned for the extent to which they have incorporated and applied Navaho legal principles to develop a truly Navaho common law. See generally, Austin, supra note 10. This may be due to the extensive publically available case law applying these principles, as well as to the cultural knowledge of tribal court judges themselves. However, Sekaquaptewa stresses that, although it may surprise outsiders, “tribal leaders and judges find themselves looking for the law as well,” for good reasons, including the existence of multiple legal levels within any group (Sekaquaptewa, supra note 8 at 330, n 31). This inquiry may also be useful for considering how to articulate or reinterpret these laws more explicitly in order to increase general understanding outside communities; see Borrows, supra note 2 at 139. Importantly, this inquiry may be used to increase the accessibility of Indigenous laws for the great number of Indigenous individuals who may be alienated from their own communities or legal traditions due to the colonial “socio-economic dislocation amongst Indigenous peoples in Canada” (at 143).
exist here. It seems to me illogical to assume otherwise, and I hope we will one day shudder at the collective colonial ignorance and arrogance that once submerged the resources of Indigenous legal thought from the broader Canadian political and legal imagination. However, we now must address one of the intellectual consequences of this: that the current state of invisibility and incoherence raises issues related to the accessibility and intelligibility of Indigenous laws. I will also not be addressing the question of whether legal scholars should work towards increasing the accessibility and intelligibility of Indigenous laws. Although I am conscious there are those who might caution against such a thing, I begin from the assumption that there is value in such an endeavour, and I leave debate about this value for others to take up and examine. I also step aside from the broader questions of the political and legal justifications and frameworks for greater formal recognition of Indigenous legal traditions in Canada that other scholars have already grappled with so ably.

The narrow question this paper contemplates is: How might legal scholarship assist with the practical tasks of finding, understanding and applying Indigenous laws today? In the American tribal court context, there is a recognized need and a use for increased serious and sustained scholarship engaging with Indigenous legal traditions. Sekaquaptewa argues that legal treatises, accounts, studies, compilations and reviews “provide a big picture backdrop for the making and application of written laws. They also generate debate about...”

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16 See the discussion of groups and law in Sekaquaptewa, supra note 8 at 346. The concept of Indigenous peoples as the ‘lawless other’ is an illogical myth that historically served to justify denials of Indigenous sovereignty over desired land by imperial cultures. See, for example, Tully, supra note 5 at 65; and Michael Asch and Patrick Macklem, “Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow” (1991) 29 Alta L Rev 498 at 507. Prior to European contact or ‘effective control’, Indigenous peoples lived here, in this place, in groups, for thousands of years. We know that when groups of human beings live together, they must have ways to manage themselves and all their affairs. Therefore, as a matter of logic alone, our starting point for any inquiry has to be that, at some point, and for a very long time, all Indigenous peoples had self-complete systems of social order. While not every form of social order is legal in nature, the self-completeness means that these systems had to include some normative mechanisms that legal theorists like to call law.

17 Austin, supra note 10 at xv, points out that a goal for establishing a solid foundation for the Navaho courts is so they may “eventually assume their rightful place among the world’s dispute resolution systems.”

18 For a discussion of these challenges, see Borrows, supra note 2 at 138-148.

19 Borrows himself points out some cautions around greater accessibility to Indigenous legal traditions that stem from a lack of trust due to a historical and present disregard for Indigenous peoples’ intellectual property. See ibid at 148-149.

20 See, for example, ibid ch. 4-5, 7-8, in which Borrows thoroughly examines and suggests solutions for numerous theoretical, legal and institutional barriers to the greater recognition of Indigenous legal traditions in Canada. See also Tully, supra note 5, for a compelling political argument.
the deeper meaning of legal principles important to historical and contemporary issues and spur innovation to solve current problems.” Specifically, this paper argues that a certain kind of legal scholarship could be particularly useful for the critical development and application of written laws in American tribal courts, as well as for revitalizing Indigenous legal traditions in Canada: scholarship from an internal viewpoint of a legal tradition. Even more specifically, I conclude that adapting and applying the core method of current legal scholarship from an internal viewpoint—legal analysis and synthesis—is a promising framework to build on the current work of Indigenous legal scholars in this regard.

In this article, I will first discuss the question of what legal resources are available for engaging with Indigenous legal traditions. Next, I outline some of the issues raised by three leading Indigenous legal scholars regarding the current identification and understanding of Indigenous legal traditions, and then I describe the frameworks they propose or use to address these issues in their work. I turn to a discussion of the fundamental similarities in their work, focusing on the questions they ask and on the way they answer these questions—from an internal viewpoint. I then discuss the general recognized benefits of scholarship from an internal viewpoint of a legal tradition, and highlight legal analysis and synthesis as the central method for this scholarship in law schools today. Finally, drawing on my own work applying these adapted tools to Cree laws as a case study, I will argue that this method is the next logical step building on the work of these scholars, as it effectively addresses many of the challenges they raise for finding, understanding and applying Indigenous laws. I conclude that this method is worth pursuing but must be approached responsibly. Legal scholars engaging with Indigenous legal traditions should do so reflexively, conscious of the limits and contributions possible in their role and of their work within the broader communities of practice they engage with.

21 Sekaquaptewa, supra note 8 at 379.
22 Zuni Cruz advocates for studies of traditional laws and “the critical development of written law that is based on the principals and precepts of traditional law, thus requiring an inquiry into how any proposed written law relates to principles of traditional law, and whether it is consistent or inconsistent” (Zuni Cruz, supra note 8 at 9).
23 “Scholarship from an internal viewpoint” refers to legal scholarship that addresses the way one negotiates successfully and argues within the parameters of legal practice itself. I will discuss the concept at greater length below. See Jeremy Webber, “The Past and Foreign Countries” (2006) 10 Legal Hist Rev 1 at 2. Webber contrasts this with legal scholarship from an external viewpoint, which focuses on “historical and sociological accounts of the very same body of law” (ibid at 2).
II Approaches to Engaging with Indigenous Legal Traditions: Resources, Challenges and Analytical Frameworks

Some recent scholarship by leading Indigenous legal scholars in North America effectively adapts existing theoretical and analytical tools developed within the legal academy to provide analytical frameworks through which other legal scholars and legal practitioners can begin to engage with Indigenous legal traditions in a realistic and useful manner. I focus specifically on the work of three leading Indigenous scholars mentioned already in this paper, John Borrows, Mathew Fletcher, and Val Napoleon. All of their work, in different ways, identifies possible legal resources, directly addresses challenges around the practical engagement with Indigenous legal traditions and provides analytical frameworks for accessing, analyzing and applying Indigenous laws to contemporary issues.

Identification of Legal Resources

A natural consequence of the dearth of publically accessible and written materials explaining, analyzing and using Indigenous laws are the questions: What and where are the resources for engaging with these laws? Where would legal scholars or practitioners start? The Law Commission of Canada’s report, Justice Within, 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. Some people described Indigenous laws as being “written on our hearts.”

These are not the kind of legal resources your average Canadian law student (or professor) would be familiar with! Borrows, Napoleon and Fletcher have all turned their minds to this issue, and all offer some useful starting points. Fletcher also raises some critical questions about the challenges and limitations posed by accessing many of these resources. A further question, addressed later in this paper, is how to begin understanding and interpreting Indigenous laws, even if one finds resources for identifying them.

Borrows explains that Indigenous laws can be recorded and shared in different forms, and in more broadly dispersed and decentralized ways than in the published statutes and court cases that legal scholars are accustomed to. He argues that part of the strength and resiliency of Indigenous laws derives from them having been practiced and passed down through “[e]lders,

24 For representative work, see Borrows, supra note 2; Fletcher, supra note 7; and Val Napoleon, Ayook: Gitksan Legal Order, Law, and Legal Theory (PhD Dissertation, University of Victoria, Faculty of Law, 2009) [unpublished]. I will focus on these three scholars for clarity but will continue to refer to others as they overlap with or expand on certain aspects of the discussion.


26 Borrows, supra note 6 at 139.
families, clans, and bodies within Indigenous societies.”  He agrees that Indigenous laws can be recorded and promulgated in various forms, including in stories, songs, practices and customs. Although Borrows does not discuss this, he also demonstrates that it is possible to identify and interpret law from a variety of different resources through his own identifying and interpreting of legal principles from published collections of ancient origin stories, from family and elders’ teachings regarding laws in nature, from pots, petroglyphs and scrolls found in an ancient ceremonial lodge, from terms within an Indigenous language, and even from descriptive historical accounts recorded by outsiders.

Napoleon appears to agree with Borrows when she explains that law “setting out the legal capacities, relationships, and obligations” can be embedded and recorded in “narrative, practices, rituals and conventions.” In her in-depth treatment of the Gitksan legal traditions, Napoleon draws on the cases she analyzes from witness testimony in the Delgamuukw trial transcripts regarding oral history (the adaawk), from collectively owned stories (antamahlaswx), from personal memories and direct experiences, and from information gained through interviews and other published research, both by community members and by outsiders.

In his broad study, Fletcher identifies several sources that tribal court judges in the United States use as a means for discovering Indigenous laws, and he also adds his critical evaluation of the advantages and limitations of each source. His criticisms are worth discussing in some detail, as they may equally apply to some of the sources Borrows and Napoleon explain and use, and thus may be considered when developing frameworks for interpretation. Fletcher states that, in a tribal court setting, the parties to the litigation should be the first source. However, he notes that this is “almost never the

27 Ibid at 179.
28 Ibid at 139.
29 See, for example, ibid at 93-95 (a Carrier story about a wife who changes into a beaver), and at 119-121 (a Cree story about a meeting between the animal people and the Creator before humans were created). See also John Borrows, “With or Without You: First Nations Law in Canada” (1996) 41 McGill LJ 629 (about a treaty between the deer people and humans).
30 See, for example, Borrows, supra note 2 at 29-30 (his mother’s legal reasoning related to the observation of butterflies and milkweeds), and at 31-32 (a community meeting discussing a negotiation for control over fishing, where two respected elders tell stories and recollections of fish management).
32 Borrows, supra note 2 at 84-86 (using examples from the Cree language).
33 Ibid at 81-82 (a case regarding an Anishinabek group’s collective response to an individual becoming increasingly dangerous, recorded by the Superintendent of Indian Affairs in 1838).
34 Napoleon, supra note 24 at 71.
36 Fletcher, supra note 7 at 36.
case,” with lawyers or advocates rarely contributing any arguments or materials based on Indigenous laws, even when the judge directly asks for these.\textsuperscript{37} Further, he points out that where litigants make representations regarding Indigenous law without citing authority, this guidance may not prove helpful at all—or may even become dangerous if a judge creates precedent based on faulty guesswork.\textsuperscript{38}

A second possible source, one that Fletcher describes as “having the potential of being the finest source available,” is the use of knowledge of the language. He explains that in many Indigenous communities, “the law is encoded right into the language—and the stories generated from the language.”\textsuperscript{39} Yet this source often remains unavailable, as “realities dictate” few judges sitting who are actually fluent in the Indigenous language of the tribal court community, and Fletcher believes that translations to English may miss “fundamental fine distinctions, subtle nuances, and even correct meaning.”\textsuperscript{40} Another source is “people of the community—often elders—who are cognizant of the community’s customs and traditions.” Fletcher describes these community members as the “next best ideal source” after a tribal judge who might fit into this category.\textsuperscript{41} Yet he goes on to describe several difficulties with this resource, including finding people “willing and qualified to participate in tribal court litigation,” and, more sensitively, “the legitimacy of the representations made by … community ‘experts.’” Not only might “reasonable minds differ” but there also might exist “fundamental differences on family or political lines” of what constitutes Indigenous laws and what they require of people.\textsuperscript{42} Realistically, tribal judges might “not have the institutional capacity” to choose between competing understandings of Indigenous laws.\textsuperscript{43}

\textsuperscript{37} Ibid.
\textsuperscript{38} Ibid at 36-37.
\textsuperscript{39} Ibid at 37.
\textsuperscript{40} Ibid. A notable exception to this concern is perhaps the Navaho courts. See Austin, supra note 10 at 40-44 for an example of Navaho fundamental doctrines rooted in Navaho language.
\textsuperscript{41} Fletcher, supra note 7 at 37. See Austin, supra note 10 at 45-46. See also Zuni Cruz, supra note 8 at 8, who draws on an approach taken in Saddle Lake to advocate for a “process of utilizing meetings and interviews with elders to determine traditional law” and the “use of the information to then articulate basic, foundational principles and precepts of traditional law and the use of those foundational precepts to build the law.”
\textsuperscript{42} See some of the questions around this in Zuni Cruz, supra note 8 at 9. One way of addressing some of these challenges is the Navaho case law developed around the qualifications of expert witnesses on Navaho culture (Austin, supra note 10 at 48-49).
\textsuperscript{43} Fletcher, supra note 7 at 39. See also Sekaquaptewa, supra note 8 at 320, where she describes her surprise “to find a common practice whereby elder community members are randomly consulted ‘on the spot’ to provide information regarding custom where the context, relevance, and application of such information is reserved to the sole discretion of (often non-Native) drafting attorneys or judges. In the case of judges, there is an expectation that a tribal judge will use his or her knowledge and experience of tribal custom.” She argues, “In all such cases, drafting attorneys and judges are de facto policymakers in great need of useful theories or at least guidelines for working with custom.”
Finally, Fletcher identifies published works as possible sources for locating and identifying Indigenous laws. Fletcher sees “secondary literature about tribal customs and traditions” as having “considerable possibility” as a resource. There is an ample supply of this academic literature, and a good researcher could locate and deliver it to judges.\textsuperscript{44} Fletcher points out that, for many communities, this work may be the only source of histories, legends and laws available.\textsuperscript{45} However, “there is a very significant bias” among Indigenous people against this academic work, which could present a “formidable obstacle” for any tribal court judge using it as a basis for finding and understanding Indigenous laws. Fletcher states frankly, “the legitimacy of a tribal court opinion declaring customary law based on the findings of an academic would be in serious doubt much of the time.”\textsuperscript{46} Another source that might arguably be considered more legitimate is the written work of community members, including “academic research, translation, by others of the oral stories and histories of Indian people and Indian tribes, and even fiction, poetry, stories, and legends told and written by … community members.”\textsuperscript{47} Although Fletcher does not discuss this, relying on these kinds of sources would likely raise some of the same challenges as would the work of community ‘experts’ or of academics, depending on the author’s proximity to and affiliations with the home community.

The resources identified above can be separated roughly into three categories based on their general availability: (1) resources that require deep knowledge and full cultural immersion; (2) resources that require some community connection; and (3) resources that are publically available.

1) **Resources that require deep knowledge and full cultural immersion:** The first category of resources would appear to require something close to full immersion in a specific culture to access. This category would include resources such as specific terms in a language, dreams, dances, art, beadwork, pots, petroglyphs, scrolls, songs, natural landscapes, ceremonies, feasts, formal customs and protocols.

2) **Resources that require some community connection:** The second category of resources would likely require some familiarity with or

\textsuperscript{44} Fletcher, supra note 7 at 37.
\textsuperscript{45} Ibid at 38. See Austin’s point that some Indigenous nations “will have to dig deep into the past to uncover fundamental philosophies, values, and customs to apply to their governments and communities and various aspects of nation-building” (Austin, supra note 10 at xx).
\textsuperscript{46} Fletcher, supra note 7 at 38. See also Sekaquaptewa, supra note 8 at 382, citing some challenges for judges using outside experts. But see Austin, supra note 10 at 48, stating that this may not always be the case anymore in the context of a Navaho court, as there are “now non-Navaho authors who have interpreted, analyzed and discussed Navaho culture and philosophy very well in their books.”
\textsuperscript{47} Fletcher, supra note 7 at 37-38.
connection to a particular cultural community to access. These resources include stories, communally owned oral traditions, information from knowledgeable community and family members, including elders, as well as personal knowledge and memories.

3) **Resources that are publically available**: The third category of resources requires the least amount of connection to a particular culture or community to access, as it involves publically available, published resources. This category would include written work, including academic work, and works of fiction by community members, descriptive academic work by outsiders to the community, published court cases, trial transcripts involving Indigenous issues and litigant arguments in tribal court settings.

In identifying these categories, I note that in actual practice, no bright lines differentiate these resources, and there is much overlap between them. However, these three categories do roughly map onto the advantages and challenges identified by Fletcher.

Generalizing from Fletcher’s insights, it seems fair to say that resources of the first category, such as language or deep knowledge of ceremony, may be perceived as ‘ideal’ sources for accessing, analyzing and applying Indigenous laws. Yet, realistically, many legally trained scholars, judges and professionals, or even community members, will not have the deep knowledge or cultural immersion they require. While it is worthwhile pursuing such knowledge, the time required to gain it is immense. The next best resources may be those that require some community connection, such as conversations with and teachings by community experts, elders and certain oral traditions. However, it may be challenging to find people willing and able to share their knowledge for particular purposes. Further, it may be difficult to navigate internal conflicts of interpretation within communities. Finally, publically available published resources may raise serious questions of bias and legitimacy. However, they may be the amallest or even the only source of historical legal knowledge available for some Indigenous communities and legal scholars. It thus appears that, generally, the most ideal resources are likely the least available at this time, while the least ideal resources are the most available.

In summary, then, there are many and varied potential resources for accessing Indigenous laws. While the ones identified here are not intended to represent an exhaustive summary of those opportunities, it is none the less possible to sort resources into three categories, each one of them requiring a different depth of cultural knowledge. Real challenges and limitations exist for all categories, and at this point in time, we are faced with a disconcerting inverse correlation between the idealness of resources and their availability. This means that legal scholars must consider the specific challenges of par-
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More Challenges for Increased Practical Engagement with Indigenous Legal Traditions

Borrows addresses institutional and intellectual challenges that interfere with the greater recognition and integration of Indigenous legal traditions within Canada’s legal system. For the purposes of this paper, I focus on the intellectual challenges. Borrows argues that one barrier to the enhanced recognition of Indigenous legal traditions are negative stereotypes derived from the overgeneralization and oversimplification of these traditions. He identifies as another intellectual barrier “pressing concerns” regarding the intelligibility, accessibility, equality, applicability and legitimacy of Indigenous legal traditions.

As this paper focuses on methods of engagement with Indigenous laws, I will not discuss issues of equality and applicability, which primarily relate to the interaction of Indigenous laws with the Canadian legal system.

Borrows begins by explaining that some people may see Indigenous laws as too vague or imprecise to constitute intelligible legal prescriptions for conduct. He points out that there is “nothing inherently unintelligible within Indigenous laws” but acknowledges that “there may be a need to articulate, translate or reinterpret some of them in particular instances.” Closely related to intelligibility is the issue of accessibility, the concern that Indigenous laws are “not readily available” and are difficult to understand. The current conundrum regarding resources for accessing Indigenous laws has already shown us that accessibility is indeed a pressing issue.

Borrows also discusses the problem of legitimacy, which he describes as a “catch-all category” that addresses “broader sociopolitical difficulties,” including “psychological and emotional objections” that both non-Indigenous and Indigenous people might have regarding a broader acceptance of Indigenous laws in Canada.

Another perspective on legitimacy comes from a common-law scholar, Peter Birk. A contemporary aspect of any law’s legitimacy today, he points out, is that the authority of law has been “deeply challenged by changes in

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48 For a discussion of some of the institutional challenges, see Borrows, supra note 2 at 177-218 (ch. 7), 219-238 (ch. 8).
49 Ibid at 23.
50 Ibid at 138.
51 But if the reader is interested, see ibid at 150-165.
52 Ibid at 138-139.
53 Ibid at 142.
54 See Zuni Cruz, supra note 8 at 4; and Sekaquaptewa, supra note 8 at 378, and suggesting structural solutions to accessibility concerns at 379.
the structure of society itself”: “A democracy the members of which are well educated, ambitious and articulate will not take the authority of law for granted. Authority has now to be earned as legitimacy, and legitimacy must be grounded in reason.” This contemporary demand for explicit reasoning behind laws is another important consideration alongside the psychological and emotional aspects of legitimacy.

Napoleon identifies at least three problems that arise from the typical descriptive accounts of Indigenous legal traditions. First, oversimplified descriptions can “serve to perpetuate the stereotypical myth [that] [I]ndigenous peoples had little or no intellectual life, but just followed rules and stoically upheld unchanging morals.” Second, it can be hard to imagine the relevance and current usefulness of “fundamentalist versions” of Indigenous legal traditions because they tend to erase the “messy stuff of life,” such as “conflicts and contradictions,” and appear to assume a “naturally harmonious people” rather than real people dealing with real life. A third issue is the distortion that occurs when state legal systems consider isolated elements of ‘customary law’ as “disconnected and bizarre practices” rather than as parts of “a comprehensive whole.” This makes Indigenous laws appear “completely and hopelessly stuck in the past” and leads to the assumption that they cannot change or adapt internally to deal with today’s issues “according to current social and legal norms, and politics.”

Napoleon voices particular concern about the issues of relevance and utility, arguing that if “legal traditions are determined to be incapable of change or are pinned in the past, their theoretical and intellectual resources will no longer be available.” She argues that if legal principles, processes and obligations are to be seen by both insiders and outsiders as part of living legal traditions, rather than as cultural remnants, they must be seen as relevant in today’s world, stating succinctly, “law is something people do… [so] if it is not practical and useful to life … why bother?”

Significantly, Fletcher points out a dearth of the actual use of Indigenous laws in recorded tribal court decisions in the United States. The reasons he gives resonate with the concerns cited by Borrows and Napoleon in the Canadian context. Fletcher identifies eight practical reasons why judges may not rely on Indigenous laws in tribal courts. First, he points out that Indigenous laws are “difficult to discover.” Second, experts may disagree or “be unreliable

56 Napoleon, supra note 24 at 29.
57 Ibid at 30.
58 Ibid at 47. Napoleon uses an example of a treatment of African customary law regarding a modern-day ‘witchcraft’ killing in a South African murder case.
59 Ibid at 91.
60 Ibid at 312. See also Zuni Cruz, supra note 8 at 4.
relaters” of the relevant law. Third, judges who are part of the community may not give written reasons to expound the law (and they may not use English when doing so), while the majority of judges are not part of the community, raising the concern that their written reasons may not necessarily be reliable or legitimate indicators of Indigenous laws.  

A fourth practical reason is a question of relevance. Fletcher states that Indigenous laws “may have limited utility in modern disputes,” as they may be too broad and vague to apply to specific fact disputes, or, conversely, may be too specific, and so apply “only to limited fact patterns that tend not to arise in the modern world.”  

Fifth, Indigenous law from the past “may not carry enough moral weight to legitimate its use.” Because cultures are not static, new rules adopted by an Indigenous community may be inconsistent with past laws.  

Another, sixth, reason Fletcher believes tribal courts do not often use Indigenous laws is that litigants often do not cite them, either in oral or written arguments, and tend instead to “rely on Anglo-American law or intertribal common law.”  

Seventh, in some cases, statutes might preclude the use of Indigenous laws, even for interpretation purposes. The final reason Fletcher lists is the one he sees as perhaps the most important one: that “many tribal court judges do not feel competent to announce or apply customary law” and may not even see it as appropriate to their institutional role, seeing this as better left to the political leadership of the community.  

Fletcher also brings up some related concerns about tribal courts applying Indigenous laws, including the “sensitive” subject of whether judges who are not members of a community can or should announce those community’s laws. Additionally, there is the risk of tribal courts carelessly invoking vague, superficial “pan-tribal values” as Indigenous law.  

These practical and theoretical issues can be roughly sorted into five categories of challenges to finding, understanding and applying Indigenous laws: (1) challenges of accessibility; (2) challenges of intelligibility; (3) challenges of legitimacy; (4) challenges of distorting stereotypes; and (5) challenges of relevance and utility.

61 Fletcher, supra note 7 at 28-29. But see Austin, supra note 10 at 45-51, discussing ways the Navajo courts deal with these challenges.  

62 Fletcher, supra note 7 at 29.  

63 Ibid.  

64 Ibid. One reason for this may be a structural one. Sekaquaptewa argues that “tribal governments, by default have put the financial burden on our elders [those most likely to need or want] to find and plead custom.” She argues that tribal leaders and legislatures “need to give serious attention to shifting the burden off our more traditional and elder parties and onto the government where it belongs” (Sekaquaptewa, supra note 8 at 383).  

65 Fletcher, supra note 7 at 30. See Sekaquaptewa, supra note 8 at 320, describing this as a “policymaking role” and calling for guidelines for judges interpreting custom.  

66 Fletcher, supra note 7 at 40.  

67 Ibid at 33. See Sekaquaptewa, supra note 8 at 328, calling this “essentialism.”
1) **Challenges of accessibility:** This category speaks to the reality that Indigenous laws are typically not readily available, as Borrows points out and as we have already seen when we looked at the legal resources available. It is captured in Fletcher’s practical concerns about the difficulty of discovering what Indigenous laws are, the lack of written reasons citing Indigenous laws, and the reality that the majority of people with legal training may not have deep enough knowledge of the language and culture to recognize and understand Indigenous laws embedded within these resources.

2) **Challenges of intelligibility:** Some Indigenous laws may appear too vague or too imprecise to serve as standards for conduct. Borrows acknowledges this as a barrier, and Fletcher refers to the issue of specific laws being too broad or vague to be usefully applied to modern issues. There must be a way to understand what laws require of people subject to them. Some laws that are embedded in resources which require deep knowledge or cultural immersion to be understood may necessitate a more conscious and explicit articulation, translation or reinterpretation to be comprehensible to a greater number of people today.

3) **Challenges of legitimacy:** Borrows’s insight that historical, emotional and sociopolitical issues can impact people’s perceptions of legitimacy is a crucial one for understanding some of the concerns raised by Fletcher about tribal judges from outside the community, whose decisions, and decision-making capacity regarding Indigenous laws, may not be viewed as legitimate simply because of who they are (or who they are not). Deeply engrained feelings about who should and should not speak about Indigenous laws reflect a reasonable distrust rooted in a long and painful history. Such emotions clearly impact legal scholarship as well. However, authority and legitimacy are also grounded in people’s ability to reason through law. This may be an increasing challenge within communities. Fletcher’s point that specific laws from the past simply may not have enough moral weight today speaks to this aspect of legitimacy. Laws that might have been legitimate in the past may not be so in the present, in large part due to reasoning processes within traditions that respond to sociopolitical changes. This process of change is legitimate, and ignoring the results may lead to the fundamentalism and atrophy both Borrows and Napoleon caution us against.

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69 See, for example, Zuni Cruz’s point that issues regarding the use of “traditional” laws are raised “by those within the tribe and without the tribe,” and pointing out that some tribal members “may feel that traditional law is subject to manipulation” (Zuni Cruz, supra note 8 at 4).
4) Challenges of distorting stereotypes: All three scholars point out that there are negative, static, utopian or superficial pan-Indigenous stereotypes that must be contended with if the continued dismissal or distortion of Indigenous laws is to be avoided. Borrows sees overcoming negative stereotypes as one of the most crucial tasks to achieve greater recognition and respect for Indigenous laws in Canada. Napoleon’s concerns regarding distortions and the perpetuation of ugly stereotypes of unthinking Indigenous people and Fletcher’s concerns about superficial pan-Indian values masquerading as Indigenous laws represent serious concerns about the potential negative impact of stereotypical portrayals of Indigenous laws.

5) Challenges of relevance and utility: Both Napoleon and Fletcher talk directly about the challenge of Indigenous laws’ current relevance and utility. Napoleon is particularly concerned that, on a general level, resources from within Indigenous legal traditions will no longer be available to Indigenous people if they are seen as mere remnants of the past, without any capacity to change. Fletcher’s observation that most litigants in tribal courts do not use Indigenous laws in their written or oral arguments raises questions in this regard. This is surely an inevitable issue that must be considered, as is his point that some Indigenous laws simply may not apply, for various reasons, to certain modern issues. Issues of relevance and utility will have to be faced at both broad and particular levels.

These challenges are formidable, and they exist both in Canada and in the United States. In Canada, they arise more at the theoretical or philosophical level, sometimes being cited as reasons against the more formal recognition and integration of Indigenous legal traditions. In the United States, where tribal courts exist and are often specifically mandated to consider and apply Indigenous laws, they arise at an intensely practical level. This suggests that challenges of accessibility, intelligibility, legitimacy, stereotyping and utility are likely to be long-term ones, even if changes occur at the political and institutional levels in Canada. We cannot wish these difficulties away. Once again, we face the question of how to proceed productively in the non-ideal present.

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70 Fletcher, supra note 7 at 10-16, discusses the varied sources of these mandates in a number of tribal courts. The widespread persistence of these challenges to finding, understanding and applying Indigenous laws does not mean that tribal courts in the United States are not doing so. The institutional space of tribal courts, particularly when staffed by culturally embedded judges and legal professionals, creates the interactional space for the ongoing development of unique jurisprudence that considers and incorporates Indigenous laws in various ways. Two excellent examples of this can be found in the extended discussion of the Hopi courts in Richland, supra note 10, and of Navaho case law in Austin, supra note 10.
Indigenous Scholars’ Analytical Frameworks for Accessing, Analyzing and Applying Indigenous Laws

It seems fair to say that any legal scholarship robust enough to provide some useful frameworks or guidelines for finding, understanding and applying Indigenous laws will likely require methodologies that consciously consider and adequately address these challenges. I turn now to examine how different methods of engaging with Indigenous legal traditions create a variety of analytical frameworks for addressing them. Fletcher, Borrows and Napoleon have all developed such analytical frameworks; I will call the different ones (1) the linguistic method, (2) the source of law method, (3) the single-case analysis method and (4) the multi-case analysis and legal theory method. Each of these methods addresses several of the above challenges.

The Linguistic Method

I will begin with Fletcher’s proposed method because I find it the least useful for legal scholarship if used in isolation, although it may have much merit in the context of U.S. tribal courts. Fletcher argues that if tribal courts are going to require or encourage the use of Indigenous laws, they should also provide “a roadmap for finding, understanding, and applying” these laws. He then advocates for a specific method of accessing, understanding and applying Indigenous laws in tribal courts, which he relates back to H.L.A. Hart’s legal theory involving primary and secondary rules. For those readers in need of a Hart refresher, Fletcher explains that primary rules are rules that “impose obligation to conform behavior of members of the community,” such as prohibitions or requirements, and that secondary rules are rules of recognition, including “rules of adjudication” and “rules of change,” which comprise procedures for determining “where the rules are” and “authoritative determinations of the fact the rule has been broken.” Based on this discussion, Fletcher proposes what he calls the “linguistic method,” which involves the following process: First, the tribal court judge must “identify an important and fundamental value identified by a word or phrase in the tribal language” (a primary rule). Next, that primary rule is applied by the judge to the Anglo-American or intertribal secondary rule “as necessary to harmonize these outside rules to the tribe’s customs and traditions.”

71 Fletcher, supra note 7 at 36.
72 Ibid at 8.
73 Ibid at 10.
74 Ibid at 41.
75 Ibid.
Fletcher gives an example of a tribal court having actually done this, one where a Navaho court applied the tribal principle of *hazho’ogo* (a fundamental tenet about treating other humans with patience and respect)\(^{76}\) to expand the procedural prohibitions around self-incrimination in criminal cases.\(^ {77}\) Fletcher sees this method as transferable and capable of providing “interpretative parameters” to tribal judges.\(^ {78}\) He believes it provides the “critical advantage” of allowing tribal courts “to bring customary law into the modern era without creating much additional confusion as to the application of the law,” adhering to a form of “judicial minimalism” in tribal court jurisprudence.\(^ {79}\)

When considering the challenges listed in the previous section, as well as the current quandary regarding legal resources, I have trouble picturing how far legal scholarship could move using Fletcher’s method. In the context of a tribal court, I agree that relying on the inherent knowledge of language as a legal resource, and applying broad concepts as interpretative aids to Anglo-American procedural law, is likely to do the least harm: it risks little in terms of distortions relating to superficial pan-Indigenous values, and it at least gives tribal court judges a concrete way to begin considering and using Indigenous principles in a relatively safe and transparent way. This is perhaps the method’s greatest strength. In addition, by relying on language, which fits into the most ideal category of legal resources, it will have the ring of legitimacy for many people. However, Fletcher himself establishes that the most ideal legal resources are actually the least available, and he does not provide a satisfactory way of addressing this issue.\(^ {80}\)

The other glaring problem that Fletcher does not consider is his own earlier point that reasonable minds can differ regarding the interpretation of any law. His method appears to ignore the reality that serious interpretative conflicts can emerge concerning a single word, particularly one that signifies a fundamental legal principle in a society. For example, Austin describes *hazho’ogo* itself as “a polysemous term.” Although he states that it “generally means respectful and considerate behavior in the presence of others,” the term’s specific meaning “usually depends on the context in which it is used.”\(^ {81}\) Consider also that troublesome gem of the English language so central to con-

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\(^{76}\) My own rough interpretation from the “statement of tribal common-law” by the Navaho Court, as reproduced in Fletcher, *ibid* at 19.

\(^{77}\) *Ibid* at 41, referring to the case, *Navaho Nation v. Rodriguez*, discussed in detail at 17-21. See also Austin, *supra* note 10, for extended case law applying fundamental Navaho principles to various cases in a similar way.

\(^{78}\) Fletcher, *supra* note 7 at 42.

\(^{79}\) *Ibid*.

\(^{80}\) Fletcher does suggest that tribal court judges who do not speak the language could still apply the values in a specific term, but this seems to fly in the face of, or at least dodge, his own earlier comments about the problems of translation.

\(^{81}\) Austin, *supra* note 10 at 110.
stitutional jurisprudence both in the United States and in Canada, “equality.”\textsuperscript{82} Fletcher suggests no real way of grappling with conflicting interpretations of the principle in question. Also troubling, applying single linguistic terms as legal values, without anything more, seems to raise the risks of oversimplification that Napoleon cautions against, as the terms are presented as isolated values, rather than as one principle to consider, one that must be balanced against others in a comprehensive whole. While the competing interests before tribal courts may provide this balancing, in scholarship \textit{per se} there is no obvious way to deal with the attendant risks of rigidity, essentialism and fundamentalism using this method.

\textit{The Sources of Law Method}

Borrows suggests that the intellectual barrier posed by negative stereotypes about Indigenous legal traditions can be overcome if “Indigenous laws are understood in greater detail, free from misleading characterizations.”\textsuperscript{83} He argues that a better understanding of the details of Indigenous laws and of “communities’ legal foundations” could “lead to a better appreciation of their contemporary potential, including how they might be recognized, interpreted, enforced, and implemented.”\textsuperscript{84} Towards this end, he identifies varied sources of Indigenous laws, including (1) sacred, (2) natural, (3) deliberative, (4) positivistic and (5) customary law.\textsuperscript{85} This offers a particularly important discussion for two main reasons. First, by identifying multiple sources of law, Borrows demonstrates that Indigenous legal traditions reflect a much richer and more complex social organization than their typical characterization as “customary law” suggests.\textsuperscript{86} Second, Borrows argues convincingly that “the proximate source of most Indigenous law” is deliberation.\textsuperscript{87} This emphasizes the intellectual and inherently social character of all law, including the centrality of questions of interpretation and persuasion. He explains: “When Indigenous people have to persuade one another within their traditions, they must do so by reference to the entire body of knowledge to which they have access, which includes ancient and modern understandings of human rights, due process, gender equality, and economic considerations.”\textsuperscript{88} Borrows stresses that the deliberative character of Indigenous laws is “key to resisting fundamentalist

\begin{itemize}
\item \textsuperscript{82} Although examples of this abound, a clear illustration of competing interpretations of equality is found in Borrows’s discussion of equality arguments for and against the greater formal recognition of Indigenous legal traditions in Canada. See Borrows, \textit{supra} note 2 at 150-155.
\item \textsuperscript{83} \textit{Ibid} at 23.
\item \textsuperscript{84} \textit{Ibid}.
\item \textsuperscript{85} \textit{Ibid} at 23-58 (ch. 2).
\item \textsuperscript{86} \textit{Ibid} at 51.
\item \textsuperscript{87} \textit{Ibid} at 35.
\item \textsuperscript{88} \textit{Ibid}.
\end{itemize}
and dogmatic legal practices and ideas.”

Borrows’s discussion of different sources of Indigenous laws provides an analytical framework for thinking through them in a more complex and complete way than do typical descriptive accounts. This attention to complexity and a focus on deliberation appear to effectively challenge and avoid stereotypes, as well as increase intelligibility by making the origins of laws more explicit. Identifying and questioning the sources of any particular Indigenous law also provides a way to reinforce the legitimacy of a statement of law or to respectfully argue interpretative differences. Yet this method does not necessarily address the issue of accessibility to laws in the first place.

The Single-Case Analysis Method

Yet another striking and groundbreaking method Borrows often uses, but rarely, if ever, discusses in detail as a methodology, goes quite far in increasing accessibility to Indigenous laws by closely analyzing individual Anishinabek stories to draw out legal principles, much as law students do with court cases. I call this the “single-case analysis method” and believe it is the single biggest step towards accessibility and intelligibility that has ever been taken in legal scholarship engaging with Indigenous legal traditions.

In some places in Canada’s Indigenous Constitution, but more so in its companion book, Drawing Out Law, and in previous work, Borrows interprets legal principles from a particular story and uses these principles to explore or explain current issues. In doing so, he explains, he is acting on his mother’s teachings about the need to consider and share the current relevance and utility of these stories. While the single-case analysis method undeniably renders principles within stories much more accessible and intelligible, Fletcher criticizes and actually rejects this method, which he views as a variation of the case method, because he sees the interpretation of principles from specific stories as an essentially boundless endeavour, raising the issue of in-

89 Ibid at 36.
90 Ibid at 35.
91 For example, see Borrows’s discussion regarding the appeals to authority of positivist proclamations where they are practically entangled with a “powerful group’s claims to authority from laws flowing from the Creator [sacred], nature [natural law], or from the functioning of a deliberative council [deliberative]” (ibid at 50).
92 Borrows, supra note 29.
93 In Drawing Out Law, Borrows, supra note 31 at 87, explains, “his mother always encouraged him to see the wider world through older Anishinabek eyes. She encouraged him to share how their ancient ways still swirled around them. It was obvious to her that the events and stories surrounding them were still very much connected to their living, enduring culture. She always expected her son to make these connections more explicit, no matter where he lived.”
determinacy. He states bluntly: “Some limitation in meaning must be present or else there will be no meaning at all.”

To be fair, Borrows never claims his interpretations as authoritative; he merely states that ancient stories have useful lessons to give, and that these can be applied to current issues. However, if deliberation, interpretation and persuasion are at the heart of a legal tradition, and if these principles are to be applied with concrete consequences, there must be ways for others to legitimately confirm or challenge his interpretations and their relevance. The single-case analysis method may thus raise similar challenges as I discussed regarding the current availability of ideal legal resources.

Borrows may be operating within implicit interpretative limits when identifying principles from individual stories due to his particular deep cultural knowledge, or to his access to family and community connections, even though he often uses publically available sources in his work. Other people without deep knowledge or comparable family connections may not have similar implicit interpretative limits at their disposal. Borrows himself points out that “law is a cultural phenomenon,” and so “those who evaluate meaning, relevance, and weight of Aboriginal legal traditions must therefore appreciate the potential cultural differences in the implicit meanings behind the explicit messages if they are going to draw appropriate inferences and conclusions.”

This could pose a particular interpretative challenge for legal scholars who are attempting to engage with and articulate internal dimensions of Indigenous legal traditions but who were not, in fact, raised or trained within that particular Indigenous society. Both Borrows and Napoleon emphasize the importance for legal scholars to be reflexive about their position in power dynamics and structures, to recognize the cultural foundations of knowledge and to acknowledge their own biases when engaging with Indigenous legal traditions. Yet while recognition and reflexivity may allow scholars to question their assumptions, they do not, in and of themselves, support the development of interpretative limits. There must be some way to recognize legitimate boundaries for interpretative arguments to take place within.

94 Fletcher, supra note 7 at 43-44.
95 Borrows, supra note 2 at 140.
96 Napoleon acknowledges that this constitutes a limitation for her analysis, despite her having spent more than 20 years working with the Gitksan and being an adopted member of the Hours of Luuxhon of the Frog Clan. She none the less proceeds to “explore and interpret Gitksan legal traditions from an internal philosophical basis, rather than focus on external descriptions” (Napoleon, supra note 24 at 17). While legal scholars of non-Indigenous descent most obviously face this limitation, there are also Indigenous scholars who may be working in a different legal tradition (like Napoleon, who is Cree, but engages with the Gitksan legal order) or who were not raised within Indigenous communities for a variety of reasons.
97 Ibid.
98 Borrows, supra note 2 at 141.
boundaries would also provide an important safeguard against distortions deriving from stereotypes or simply from profound misunderstandings as people reason through the law.

**The Multi-Case Analysis and Legal Theory Method**

Napoleon’s work with the Gitksan legal tradition stands out as by far the most thorough analysis of a particular Indigenous legal tradition to date. She combines two major approaches to avoid replicating the problems in many descriptive accounts that she criticizes in her own treatment of Gitksan law, as well as to build interpretative limits. First, she deliberately adopts a “law case method” for exploring Gitksan law in a substantive way.\(^99\) She explains that she has chosen this method, despite extant criticisms, because “the law case method reveals the intellectual aspects of Gitksan law—forms of legal reasoning (i.e., analogy, metaphors, problem-solving, collectively owned outcomes, etc.), use of precedent, interpretation, applications, decision-making and agreements that are often missed or ignored completely in descriptions of [I]ndigenous law.”\(^100\) Second, she draws from Western legal scholars to theorize about the broader “structures, processes, and expressions of law” that enabled the Gitksan “to effectively manage themselves as a decentralized, non-state people.”\(^101\) She consciously adapts and applies work from classic Western legal theorists (specifically from H.L.A. Hart’s positivist theory of primary and secondary rules, Lon Fuller’s interactional law theory, and William Twining’s legal theory framework) as critical tools to explore and analyze the substantive Gitksan law she identifies through the case method.\(^102\) By combining these two approaches, Napoleon locates principles from specific cases in a comprehensive whole, while also ensuring that her articulation of that comprehensive whole avoids “romanticism and rhetoric”\(^103\) by remaining “grounded in a substantive on-the-ground treatment of Gitksan law.”\(^104\)

In her two-pronged approach, Napoleon first groups cases into rough categories to identify principles within each category. She then applies Twining’s theoretical framework to the principles and practices within these categories to identify a tentative Gitksan legal theory, which she proposes can be “tested

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\(^{100}\) Napoleon, *supra* note 24 at 29.

\(^{101}\) Ibid at 38.


\(^{103}\) Napoleon, *supra* note 24 at 39.

\(^{104}\) Ibid at 15.
and extrapolated for broader application to other areas of law within the Gitksan legal order” and, “with care,” may have potential as a “basic framework model for other non-state and decentralized indigenous peoples.”

To give a sense of the complexity and comprehensiveness of Napoleon’s work here, I set out an outline of her articulation of a tentative Gitksan legal theory. Her findings include

1) *A coherent total picture* of the Gitksan legal tradition, including

   a) a non-state, decentralized governance system
   b) relevant legal actors and relationships (including kinship)
   c) stabilizing tensions
   d) sources of law
   e) geographic space or jurisdiction

2) *General concepts*, including that

   a) Gitksan law comprises implicit and explicit rules *and* the intellectual processes of legal reasoning, interpretation and application
   b) there are different types of Gitksan laws, including primary, secondary and strict

3) *General normative principles*, including

   a) the “paramount importance of maintaining … the overall legitimacy of the legal order”
   b) the importance of kinship relations
   c) individual and collective accountability
   d) resistance to hierarchy and centralization
   e) the importance of relationships to the land and to non-human life forms
   f) agency and independence
   g) cooperation

4) *General working theories* for participants, including

   a) “a focus on compensation rather than a determination of guilt”

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105 Ibid at 294.
106 Ibid at 296.
107 Ibid at 297-299.
108 Ibid at 299-300.
109 Ibid at 300-301.
110 Ibid at 301-303.
111 Ibid at 303-305.
112 Ibid at 307.
113 Ibid at 307.
b) “public witnessing and accountability”

c) “collectivity versus individuality insofar as responsibility and compensation are concerned”

d) the importance of precedent

e) “the critical importance of knowledge of lineage, history, and kinship relationships”

It is hard to imagine someone walking away from legal scholarship so robust imagining that Gitksan legal principles are isolated anachronisms or viewing the Gitksan of the past (or the present) as simple, unthinking people. It is also an accessible and intelligible treatise, even for people who are not Gitksan, or for those who may not even know who the Gitksan are.

Napoleon’s work appears to answer Fletcher’s criticism of boundlessness, as well as his concern about the case method more generally, partially because she develops a larger theoretical framework, which arguably sets up interpretative limits, but also because she analyzes a number of Gitksan stories and cases (24 in all) as a “small slice” of a larger Gitksan legal tradition. By taking Borrows’s method of single-case analysis one step further and “unpacking” several cases at the same time, Napoleon is able to identify differing themes, or categories of legal decision-making, as well as common legal principles. Although she does not explicitly identify her methodology beyond that of the case method, she clearly reaches and supports her conclusions by analyzing and synthesizing several cases, from different times and with different fact scenarios. Arguably, such an identification of general principles can serve to set the outer limits of the normative and interpretative debates within the broader Gitksan legal tradition, or at least suggest certain factors that would likely influence the “relative success of various normative assertions” within it.

114 Ibid at 309.
115 Fletcher, supra note 7 at 43.
116 Napoleon, supra note 24 at 95. Napoleon stresses the importance of remembering “that the whole of the Gitksan legal traditions is infinitely more extensive than anything I am able to capture here.”
117 For example, Napoleon identifies as a general legal principle a focus on punishment, compensation and remedies, rather than on findings of guilt or responsibility. See the discussion and analysis ibid at 156-160. Other general principles she identifies in this manner include a heavy reliance on reciprocal relationships in kinship systems and an emphasis on public witnessing and accountability. See ibid at 148-156, 160-164.
118 Jeremy Webber, “Legal Pluralism and Human Agency” (2006) 44 Osgoode Hall LJ 167, as cited in Borrows, supra note 2 at 137-138. Webber’s essential insight is that law’s content is always more provisional and open-ended than “singular or predetermined,” and that it is more useful to look at the range of arguments and terms of the debate itself, rather than focusing on one particular outcome at any given point in time.
Relying on case analysis and synthesis using many legal resources, and building a tentative legal theory based on these findings, may also offer one way to effectively address some of the challenges of legitimacy. Napoleon relies mainly on publically available materials from court transcripts, but her synthesis considers and incorporates interviews with community connections and even published accounts from outside academics. By synthesizing legal principles from all of these resources, and by bringing this synthesis back to sketch a tentative legal theory, her final result becomes more than the sum of its parts. It is both grounded enough to withstand challenge and criticism and flexible and complex enough to acknowledge interpretative debates, as tensions between legal principles are a vital part of a living Gitksan legal tradition.

Each of the four methods described and discussed in this section has significant strengths. None provides a complete answer to every challenge or represents the definitive road map for how to find, understand and apply Indigenous laws. For instance, generally, it would appear that while the strength of Fletcher’s framework lies in the immediacy and efficiency with which it may allow tribal court judges to apply Indigenous laws in an institutional setting, the strengths of the frameworks provided by Borrows and Napoleon are the extent to which they may allow legal scholars to access and understand these laws. This arguably creates a more robust foundation for ongoing application, but in the end, the question of whether these methods can address the challenge of relevance and utility is still an open one.

III Next Steps for Legal Scholars

Thus far, I have examined some of the opportunities and challenges facing those interested in engaging more deeply with Indigenous legal traditions. By looking closely at the work of three leading Indigenous legal scholars, I have identified several legal resources which can be roughly grouped into resources that require deep knowledge or cultural immersion, resources that require some family or community connection and resources that are publically available. 

119 See Sekaquaptewa, supra note 8 at 320.
120 This is not necessarily a bad thing, if a sustained, serious engagement means that relevance and utility are able to be considered, debated and decided upon openly within Indigenous communities. See, for example, the finding by the Navaho Supreme Court in an individual case that “[t]he danger in using Navajo custom and tradition lies in attempting to apply customary principles without understanding their application to a given situation. Navajo custom varies from place to place; Old customs and practices may be followed by the individuals involved in the case or not; there may be a dispute as to what the custom is and how it is applied; or, a tradition of the Navajo may have so fallen out of use it cannot any longer be considered a ‘custom’” (Lente v. Notah, as cited in Austin, supra note 10 at 173). On a political community level, see also Zuni Cruz, supra note 8 at 9; and Sekaquaptewa, supra note 8 at 373).
available. I have also outlined the present resource quandary that the most ideal resources are the least available and the least ideal are the most available in many instances. Further, I have identified five additional challenges, ones of (1) accessibility, (2) intelligibility, (3) legitimacy, (4) stereotyping and (5) relevance and utility. Last, I have examined four methods for finding, understanding and applying Indigenous laws, including (1) the linguistic method, (2) the sources of law method, (3) the single-case analysis method, and (4) the multi-case analysis and legal theory method. I have also critically considered whether and how these methods address the identified challenges, establishing the strengths and gaps in each one. Stepping back to look at this work more generally, I now turn to ask what might be potential next steps in this work for interested legal scholars.

Learning from and Building on the Frameworks

The legal scholarship I have examined in this paper has effectively adapted and applied existing tools from the legal academy to develop analytical frameworks for engaging more productively with Indigenous legal traditions. Despite differences between the methods, all these frameworks constitute significant steps forward because so little legal scholarship has engaged substantively with Indigenous legal traditions thus far, and these traditions are not currently taught in university law schools. This absence implicitly perpetuates colonial legacies that ignore, dismiss or diminish the importance of Indigenous laws. It also means that legal scholarship—which is one way for us to recognize and consciously explore aspects of legal traditions and legal practice that practitioners might otherwise not consciously notice, or which they simply take for granted—is unavailable as a resource to Indigenous communities for Indigenous laws. Sekaquaptewa highlights this structural absence when she demands of Indigenous leaders and governments, “Where are our institutionally mandated self-studies? Where are our custom law treatises and archives? Where are our tribal bar study materials and exams requiring attorneys and advocates to have some basic knowledge of our custom law?”

121 There have, however, been exceptions to this, and currently efforts are under way for the creation of a degree program in Indigenous Law at the University of Victoria. See Borrows, supra note 2 at 228-237.

122 For a discussion of this complementary role of legal scholarship and legal practice in the U.S. legal system, see, for example, Fred C. Zacharias, “Why the Bar Needs Academics—and Vice Versa” (2003) 40 San Diego L Rev 701; and Andrew Halpin, “Ideology and Law” (2006) 11 Journal of Political Ideologies 153. Of course, as Halpin writes, “Just as theoretical reflection may bring illumination to practice, so too the wider observation of practice may cause us to refine our theory—where, in particular, a theoretical construct is seen to be artificially restricting our view of what we find is actually going on in that practice” (at 153).

123 Sekaquaptewa, supra note 8 at 383.
It is worth noting that the role of legal scholarship and law schools in the common law legal tradition is itself a relatively recent phenomenon. The common law did not always incorporate legal scholarship, and even now scholarship is not always accepted or used in practice. None the less, it is currently acknowledged as playing a useful role in that legal tradition.

The existing work by the Indigenous legal scholars mentioned above clearly demonstrates that legal scholarship engaging with Indigenous legal traditions can also be useful. It may provide a way into Indigenous legal traditions, offering a concrete step towards the greater accessibility and intelligibility of Indigenous laws. It can dispel negative or pan-Indigenous stereotypes and may help identify the current relevance and utility of these legal traditions. If done carefully and explicitly, it might also provide interpretative limits and transparency, so that the legitimacy of statements about Indigenous laws can be challenged, confirmed or questioned, reinvigorating deliberative traditions. This kind of legal scholarship does appear to increase the possibility of Indigenous laws being accessed, understood and applied to contemporary issues. Therefore, such work can contribute to the continued health and vitality of Indigenous legal traditions, as well as to increasing respect for and recognition of them within the broader Canadian legal and political framework.

It is worth asking what Fletcher, Borrows and Napoleon have all done differently than other legal scholars who have written about Indigenous legal traditions. I would suggest two main differences. First, they are asking different questions of Indigenous legal traditions than are typically or were historically asked. Rather than focusing on broad generalities, or on using Indigenous laws as rhetorical tools to critique state legal systems, these scholars focus on the specifics of Indigenous laws themselves. This focus leads to the following intellectual shifts vis-à-vis typical research questions:

124 Birks notes that, at the beginning of the 20th century, “the common law had barely begun to acknowledge the existence, much less the importance, of jurists, and the notion that university law schools might be essential to the education of lawyers was still novel.” See Birks, supra note 55 at v.

125 Obviously, Indigenous legal traditions continue to be practiced without the benefits of legal scholarship. However, in regard to the common law tradition, Birks points out that the role of legal scholars in “shaping raw case law” went largely unrecognized for “the best part of a century after it might first have been observed” and that even now, “neither the image of the common law nor formal accounts of its operation has fully adjusted to the necessity of law schools and the law-making and law-shaping role of the juristic literature that flows from them” (ibid).

126 Napoleon, supra note 24 at 295. Napoleon argues that the health of law in a society means, at minimum, the legal order “(1) is considered legitimate by the people of that society, (2) is an effective tool by which citizens manage themselves as a society, and (3) provides a constructive way for people to manage internal and external conflict” (at 294-295).

127 Borrows, supra note 2 at 139, 143.
Reflective Frameworks: Accessing, Understanding and Applying Indigenous Laws

FROM

What is Aboriginal justice?

What are the cultural values?

What are the “culturally appropriate” or “traditional” dispute resolution forms?

TO

What are the legal concepts and categories within this Indigenous legal tradition?

What are the legal principles?

What are the legitimate procedures for collective decision-making?

OVERALL SHIFT:

What are the rules?

What are the answers?

What are the legal principles and legal processes for reasoning through issues?

These shifts in questions are demanding ones, particularly given the current challenges of available and ideal legal resources for engaging with Indigenous legal traditions. However, asking these questions is worth the effort, because they force legal scholars to think beyond stereotypes and pan-Indigenous generalities, and they treat Indigenous legal traditions as seriously as other legal traditions. This is particularly important because it encourages legal scholarship that grapples with Indigenous laws as laws, in all their complexity. Legal scholarship that asks the right questions may be able to play a vital role in reasoning through the “questions, contradictions and conflicts” that arise from the substantive practice of law on the ground.

The second, and closely related, unique aspect of these Indigenous legal scholars’ work is how they have answered these questions. Fletcher, Borrows and Napoleon are among a handful of North American scholars who are writing about Indigenous legal traditions from an internal viewpoint. To be clear, legal scholarship from an internal viewpoint does not refer to the legal scholar’s Indigenous descent or membership in a specific Indigenous community prior to engaging with an Indigenous legal tradition. Rather, it refers to a specific type of legal scholarship. Law schools across Canada train law students to learn and write about the common law or the civil law tradition.

Zuni Cruz stresses the value of an approach that “represents a serious respect for traditional law and its place not only in resolving specific disputes on a case-by-case basis, but in serving as a foundation for all law of the tribe, including the law of governance, ethics, and substantive and procedural law” (Zuni Cruz, supra note 8 at 9).

Ibid.

Of course, American tribal court judges such as Zuni Cruz, Sekaquaptewa and Austin are also doing this substantive scholarship.
from an internal viewpoint. In law school I had classmates from all over the world, from China to Ukraine, but we all learned the Canadian common law legal tradition from an internal viewpoint, because it was this internal viewpoint that would enable us to access, understand and apply laws—in class, in our exams, and eventually in legal practice. Fletcher, Borrows and Napoleon all demonstrate that legal scholars can productively adapt and apply the tools they have learned in law school, such as legal theory, to similarly engage with Indigenous legal traditions from an internal viewpoint.

The work of both Borrows and Napoleon demonstrates that it is both possible and productive to analyze Indigenous legal resources. This leads me to take a closer look at the analytical tools of legal analysis and legal synthesis, although neither scholar explicitly identifies these tools in his or her respective methods. Most people who have attended a North American law school in the past century are familiar with the tool of legal analysis, first developed by Christopher Langdell, the dean of Harvard Law School in 1870. While there is a rich, ongoing debate about the need for and use of other methods and interdisciplinary influences in the study of law, Langdell’s “original program of analyzing legal materials and cases (albeit now suitably leavened by a sprinkling of non-legal sources)” continues as a central methodology within legal scholarship and legal education.

Minimally, contemporary legal scholarship from an internal viewpoint continues to consist of legal analysis, whereby cases are summarized and interpreted (much like Borrows’s single-case analysis), and legal synthesis, whereby disparate elements of cases and statutes are fused to develop coherent and useful general legal standards that explain, justify or are consistent with a group of particular legal decisions (much like Napoleon’s multi-case analysis).

Legal analysis and synthesis are methods of legal scholarship that start from an “internal” view of a particular legal system, thus producing “embedded” legal scholarship: extended discussions based on “the authoritative artifacts of law.” The knowledge gained through legal analysis is no longer seriously considered “scientific,” nor is it necessarily about a broad under-

132 Ibid at 160.
134 Ibid at 232. For a particularly good article on teaching the skill of legal synthesis in law school, see Paul Figley, “Teaching Rule Synthesis with Real Cases” (2011) 61 J Legal Educ 245.
135 Balkin and Levinson, supra note 131 at 162.
137 Balkin and Levinson, supra note 131 at 162. Balkin and Levinson point out that while Langdell originally touted legal analysis as a “scientific method” of studying law, “only the most foolhardy academic today would describe doctrinal analysis as ‘scientific’. The preferred term today is ‘craft’.” (at 162).
standing or critique of the legal order. Rather, it is considered knowledge of the “language of law”: of the practical nuts and bolts of “how arguments are fashioned and deployed within legal practices.” In other words, legal analysis and legal synthesis are methods that assist scholars and practitioners in learning the law from an internal viewpoint—learning in a way that enables them to access, understand and apply that law.

In addition to offering this kind of assistance, Birks points out that traditional legal research and scholarship within the common law tradition “criticizes, explains, corrects, and directs legal doctrine.” It can also be used to resolve doctrinal issues, such as inconsistent or conflicting decisions of different courts, and to produce teaching materials for law students. My hypothesis is that employing the methods of legal analysis and synthesis to engage with Indigenous legal traditions could, with some adaptation, likewise allow legal scholars to summarize and interpret legal resources, articulate coherent legal principles and standards, reconcile seemingly disparate resolutions and develop teaching materials from an internal viewpoint of Indigenous legal traditions. This type of detailed and robust scholarship could contribute to increasing potential resources and to addressing the challenges facing those wishing to access, understand and apply Indigenous laws to contemporary issues. I believe that legal scholarship which explicitly adapts and applies legal analysis and synthesis to Indigenous legal materials constitutes the next logical step in building on the current legal scholarship from an internal viewpoint of Indigenous legal traditions. In the following section, I give an example of one way this might be done.

A Case Study: Applying Legal Analysis and Synthesis to a ‘Deep Slice’ of Cree Law for the Wetiko (Windigo) Legal Principles Project

To illustrate the possibilities in adapting and applying the tools of legal analysis and synthesis to Indigenous legal resources, I discuss my own research as a case study for how this method could potentially build on Borrows’s and Napoleon’s methods to move forward through challenges in future legal scholarship.

138 Kissam, supra note 133 at 236-239.
139 James Boyd White, “Legal Knowledge” (2001-2002) 115 Harv L Rev 1396 at 1397. White argues, “Knowledge of the law is like knowledge of a language: you never know all of it, you never know it perfectly, you cannot reduce your knowledge of it to a set of directions or descriptions or rules; rather, your competence consists of being able to use it more or less well, in one set of situations or another.”
140 Webber, supra note 23 at 2.
141 Birks, supra note 55 at ix.
142 Kissam, supra note 133 at 234.
143 Ibid at 236.
The Project: Wetiko (Windigo) Legal Principles

In *Canada's Indigenous Constitution*, Borrows applied his single-case analysis method to identify principles and processes in a historical account, recorded in 1838 by the Superintendent of Indian Affairs, William Jarvis, of an Anishinabek group who had to urgently respond to, and ultimately execute, a member of their group who had become increasingly dangerous to himself and to others. Borrows points out that “a vast literature shows this pattern of dealing, over long periods of time, and in different geographic regions where the Anishinabek lived.” He also suggests that these principles and processes, if not the specific outcome, would be familiar to Anishinabek people today.

In fact, although I am not Anishinabek, the principles did sound familiar to me, from similar stories I have heard from Cree elders in northern Alberta. These were stories about people who had become a wetiko (also known as a windigo). The word “wetiko” was sometimes translated to me as a “cannibal,” but on a closer examination, it appears to be a concept or categorization of people who are harmful to themselves or to others. While there are ‘supernatural’ aspects to stories about wetikos that might make them difficult to believe for many people, I was immediately struck by the fact that Cree elders living in northern Alberta today related principled responses to a person becoming a wetiko that were strikingly similar to the responses of a group of Anishinabek people in Ontario in 1838. In the excerpt analyzed by Borrows, the Anishinabek group leader explained how they responded to the man, after observing him becoming increasingly dangerous:

> We then formed a council to determine how to act as we feared he would eat our children. It was unanimously agreed that he must die. His most intimate friend undertook to shoot him not wishing any other hand to do it. After his death we burned the body, and all was consumed but the chest which we examined and found to contain an immense lump of ice which completely filled the cavity. The [young man], who carried into effect the determination of the council, has given himself to the father of him who is no more: to hunt for him, plant and fill all the duties of a son. We also have all made the old man presents and he is now perfectly satisfied. This deed was not done under the influence of whiskey. There was none there, it was the deliberate act of this tribe in council.

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144 Borrows, *supra* note 2 at 81-83.
145 Ibid at 83.
146 Ibid.
147 Borrows, *supra* note 31 at 227.
148 Borrows, *supra* note 2 at 82.
Reflective Frameworks: Accessing, Understanding and Applying Indigenous Laws

For many reasons grounded in Western legal theory, including the subject matter, the identifiable collective reasoning and problem-solving processes, and the demonstrated felt obligations in most accounts, I concluded that the wetiko was best understood as a legal concept or category in at least Cree and Anishinabek legal traditions. For this research project, I decided to pursue what I believe to be the next logical step from Borrows’s and Napoleon’s internal scholarship within Indigenous legal traditions. If Napoleon could identify general legal principles from a “slice” of Gitksan legal cases, and Borrows could identify legal principles from individual stories, or even from an outsider’s historical account regarding a wetiko, what legal principles might emerge from a legal analysis and synthesis of one deep slice of law within Cree and Anishinabek legal traditions? I decided to gather as many legal resources on the subject of the wetiko as I could, and then to apply legal analysis and synthesis to those materials in order to identify legal principles that might be evident, just as I had in law school and in legal practice.

Legal Resources: Sifting through the Stereotypes

Earlier in this paper I identified the current conundrum regarding legal resources. While many and diverse resources for accessing Indigenous laws exist, at the current time, those most ideal are least available, and those most available are the least ideal. I had to face this issue squarely when I began my research into the wetiko legal category. I do not have any deep knowledge of Cree language or culture to bring to the subject, so the most ideal resource was not available to me at all. I did have access to the next best resource—community connections. I was able to interview knowledgeable elders, as well as younger community members in the Cree community where I had first heard stories of the wetiko. Yet I quickly realized that I needed to go beyond

149 No one seriously argues against H.L.A. Hart’s assertion that our human vulnerability means that one of “the most characteristic provision[s]” of any system of law or morals must include the prohibition or restriction of “violence in killing or inflicting bodily harm.” See H.L.A. Hart, The Concept of Law, 2d ed (New York: Oxford University Press, 1994) at 194-196.

150 Gerald Postema argues that legal reasoning requires “a distinctive deliberative and discursive capacity … an ability to articulate and defend judgments publicly.” Because legal judgments are public and collectively owned, they must be made in a way that elicits “recognition and acceptance as appropriate in one’s community.” See Gerald Postema, “Classical Common Law Jurisprudence, Part II” (2003) 3 OUCLJ 1 at 10.

151 In their recent treatise on international law, Jutta Brunnée and Stephen Toope argue that “the distinctiveness of law lies not in form or in enforcement but in the creation and effects of legal obligation.” See Jutta Brunnée and Stephen J. Toope, Legitimacy and Legality in International Law (Cambridge: Cambridge University Press, 2010) at 7. A more in-depth discussion of the concept of legal obligation follows at 92-97.

personal community connections if I wanted a breadth of perspective on the issue, in terms both of time and of geographic space. To gain this perspective I had to look beyond what connections to one Cree community could provide. The only resource realistically available for these purposes was publically available literature, written mostly by outsiders. I gathered stories from a wide array of sources, including published folk-tale collections, academic publications in anthropology, history and psychology, and Canadian case law.

One thing that became immediately apparent was that if I was to be indiscriminate about resources, I needed a strategy for approaching them which allowed me to access the information they provided without adopting their culturally bounded interpretations, interpretations that often led to illogical, incomplete, distorting or demeaning conclusions. I returned to Borrows’s brief work on the wetiko to find a way to navigate this issue. Borrows’s approach has three interrelated aspects that I adopted as starting assumptions for analyzing the literature about the wetiko:

1) Borrows begins by assuming that Indigenous people in historical accounts are reasoning people within reasonable legal traditions. This allows him to access the historical rationality of their actions, regardless of any bias the recorder of events may have had.

2) His focus lies on the contemporary application of legal principles as present-tense intellectual resources within living legal traditions. This means that his analysis is more concerned with applicability than with some elusive ‘authenticity’. This keeps him from being distracted by distorted details.

3) He also focuses on the social responses to the universal human problem the concept of the wetiko represents and brackets off the big questions about supernatural aspects. This bracketing increases the accessibility of these intellectual resources.\footnote{For a more in-depth discussion of these three assumptions, see ibid at 45-53.}

Adopting these assumptions allowed me to analyze the literature for legal principles, rather than getting distracted by certain aspects of the stories themselves or by the author’s biased conclusions. The sheer number of ‘cases’ I was able to gather also helped with this. Fortuitously for my purposes, the wetiko had been a salacious topic for anthropologists and psychologists for many years. I found that by gathering a larger amount of resources on a single topic, patterns did begin to emerge, and this made it easier to sort out what was likely a biased distortion by an outsider and what elements appeared to have greater consistency through time and space. Borrows’s assumptions and the
public availability of many and diverse resources together helped me manage the bias contained in these materials and to access their potential as a resource.

*Method: Applying Legal Analysis and Synthesis to Learn about the Wetiko Legal Category*

As indicated earlier, my method was simple: to adapt and apply legal analysis and legal synthesis to the available resources about the *wetiko*. In the spirit of first-year law school, I began my legal analysis by briefing all resources that gave enough information to identify a problem and a decision or resolution to that problem (23 in all). Assuming descriptive accounts were of reasoning people in reasonable legal orders, I identified either an explicit or implicit ratio for the resolution. Many resources, including written stories and oral accounts, just gave the background or descriptions of certain aspects of the *wetiko* legal category. Where information was insufficient to complete a case brief, I began to record that information under various headings referring to the different aspects identified. Once I had completed a review of all the literature and conducted my interviews within the community, I undertook a legal synthesis, bringing together all of my legal analysis. How did I do this? I actually worked to prepare an outline of everything I had learned, just as I had done in law school to prepare for exams.

Quite simply, this worked. The results of this research were beyond anything I could have imagined. By applying the analytical tools of legal analysis and synthesis to a ‘deep slice’, or a single legal area in Cree and Anishinabek legal traditions, I was able to identify many rich legal principles that, together, helped me understand this area of law in a much more detailed and comprehensive way.

*Research Results*

The focus of this paper is method, rather than a discussion of my substantive research results. Yet in order to illustrate the depth and complexity that emerged for me in this single area of law, which, of course, is only one area of law within larger legal traditions, I provide here a very brief summary of my findings. In the *wetiko* legal category I found:

1) There were principles about *legal processes*, including the principles that
   a) legitimate decisions are collective and open
   b) authoritative decision-makers are leaders, medicine people and close family members
c) legitimate responses require three procedural steps:
   i) recognizing warning signs
   ii) observation, questioning and evidence gathering to determine whether someone fits in the *wetiko* category
   iii) determining the response.

2) There were principles about *legal responses*. The overall principle is ensuring group safety and protection of the vulnerable. Responses usually go from least intrusive to most intrusive, as needed, and available resources and larger political realities affect decisions. There are four response principles that are blended and balanced depending on the facts in a particular case. These are
   a) healing
   b) supervision
   c) separation
   d) incapacitation
   e) retribution (considered to a lesser extent).

3) There were legal principles about *obligations*, including
   a) a responsibility to help and protect
   b) a responsibility to warn
   c) a responsibility to seek help
   d) a responsibility to support.

4) There were legal principles about both *procedural and substantive rights*.
   Procedural rights include
   a) the right to be heard
   b) the right to decide.
   Substantive rights include
   a) the right to life and safety
   b) the right to be helped
   c) the right to ongoing support.

5) There were two *underlying, general principles*:
   a) the principle of reciprocity: helping the helpers
   b) the principle of efficacy: being aware and open to all effective tools and allies.\textsuperscript{154}

\textsuperscript{154} For a more in-depth discussion of these principles, see *ibid* at 82-122 (ch. 4).
How This Method Addresses Challenges

As is obvious from the detail and complexity of the principles listed above, the greatest strength of this method is how it addresses the challenges of accessibility and intelligibility. Working through the resources with the process of legal analysis and synthesis was hard work, and it took time. It was intense, but it was possible, even for me, a legal scholar without deep cultural knowledge. I was able to access and understand the principled reasoning behind a wide range of decisions responding to a person causing harm to others in Cree and Anishinabek societies, even from largely descriptive or incomplete accounts. It was possible to articulate these principles, so that others could access them in an understandable and convenient form. This method also proved an effective way to navigate bias and to effectively challenge distorting stereotypes. Crucially, my claim is not that such research gives me, as a legal scholar, the authority to pronounce or apply Cree or Anishinabek laws. Absolutely not. Rather, this kind of legal research could provide a starting point for the ongoing learning, research and debate Sekaquaptewa advocates for regarding Indigenous legal traditions, just as scholarly articles and legal texts do within the common law tradition.

This method does little to address the challenge of legitimacy linked to sociopolitical and emotional reactions to who articulates legal principles. At least, however, it may go some small way in addressing Fletcher’s insights that the legitimacy of a decision based solely on information found in published resources would be seriously questioned, and that there can be interpretative differences within communities. Importantly, any increased understanding of wetiko legal principles in this case study was not dependent on my identity, the authority of biased resources or even solely on the authority of the community members interviewed. Rather, the legitimacy of my research results is rooted in the process of reasoning through both community interviews and non-ideal resources using the adapted method of legal analysis and synthesis.155

This process proves particularly useful in that it contains its own interpretative limits. The legal synthesis provides the bounds within which reasonable interpretations can occur, and statements of law within it can be tracked back to a specific legal analysis of one or several legal resources. This provides a reasoned avenue for challenging a particular interpretation as well. For example, if someone finds fault with my interpretations of the wetiko legal principles, he or she can track any one of them to its source and challenge me accordingly. This method thus also appears to have real potential for addressing the challenge of legitimacy as it relates to the extent people can reason

155 I thank Val Napoleon for this insight. Val Napoleon, personal conversation, October, 2011.
through law, providing a possible transparent process for revitalizing respectful deliberation within and between communities.

In addition, by developing additional legal resources for those interested in understanding and applying Indigenous laws, increased scholarship using this method may develop resources that could potentially reduce the time and uncertainty currently correlated with many peoples’ challenges to accessing Indigenous legal principles. A good legal synthesis organizes information on a specific legal subject in an accessible and understandable way, so that it can be readily analyzed and applied. To the extent that efficacy matters to people facing immediate issues they want to resolve, this may assist in addressing the challenge of utility. Ultimately, however, it is people on the ground, not legal scholars, who will really determine whether they see utility in specific Indigenous legal principles, and what principles, under which circumstances, they consider relevant to reasoning through and resolving their particular issues.

This brief evaluation of how my case study of adapting and applying legal analysis and synthesis to Indigenous legal resources addressed the identified challenges to accessing and understanding Indigenous laws shows clearly that this method does not address every challenge facing the revitalization of Indigenous legal traditions today. Yet it does have significant strengths. It is a simple, bounded and transparent way for legal scholars to access non-ideal resources productively, and to contribute to the greater accessibility and understanding of Indigenous laws. *How* legal scholars approach Indigenous laws matters. At the very least, I contend that legal scholars need to approach Indigenous laws seriously as *laws*, and should expect to work at least as hard to access and understand them as we do the state laws we learned in law school. This method reminds us of that. It builds on the work of the Indigenous legal scholars engaging with Indigenous legal traditions from an internal viewpoint, and it builds on skills that are already being taught and used in law school. This case study of my own research experience suggests that the method of adapting and applying legal analysis and synthesis to ‘deep slices’ of Indigenous legal traditions is worth pursuing further. For these reasons, I conclude that it constitutes a useful fifth analytical framework for legal scholars to consider using when engaging with Indigenous laws from an internal viewpoint.

IV Conclusion: Another Stream

Shortly before the Cowichan conference mentioned in the introduction to this paper, my Cree partner pointed out a rather tiny stream beside the road as we drove by.156 I remarked that I had never noticed it before, and he told me that

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156 He has given me permission to tell this story in this paper. All interpretations, and the analogy I am using it for, are mine alone.
that was because this stream had not been there. He had noticed it a short time before and observed that it was growing wider. He interpreted the fact that the stream had appeared and was growing as a sign of a beaver dam or of another obstruction closer to the water source. If the stream continued to grow, the creek running through the community, a few kilometres away, might dry up.

Until very recently the local community relied completely on this creek for all its water, and some community members and elders still use it as their primary water source. The elders work on hides and drink tea down by the creek, and it is a peaceful and familiar gathering spot. My partner noted, matter-of-factly, that he was continuing to watch the stream and would, if needed, eventually go look for the obstruction and break it up. Sure enough, a few weeks later, on his days off from work, he and his mother followed the stream upwards until they discovered the obstruction—a pile of rocks that had fallen into the water. His brother came to join them on his lunch break to assist with the laborious project of moving all the stones.

I tell this second story, about this observation of another stream, to illustrate that while legal scholarship does have contributions to make, the ‘heavy lifting’ of law will still remain in the hands of practitioners on the ground, acting on their responsibilities. In addition, if legal scholars’ understanding of Indigenous legal traditions increases through our research, this increased access and understanding may come with increased responsibilities. A vital aspect of these responsibilities is, as Napoleon has stressed in her work, the need to go beyond aspiration and rhetoric to consider law “on the ground.”

The hard, and often messy and mundane work of law in practice is precisely how each generation makes and remakes law, and there is never a guarantee that any legal tradition will continue without our conscious effort. Indeed, “the hard work of … law is never done.”

Gordon Christie argues that Indigenous legal theorists must “maintain their groundings in their communities.” I would suggest that a broader grounding is necessary, one that requires all legal scholars to reflexively consider and act on their ongoing responsibilities, including the limits of their scholarly role, within the communities of interpretation and practice they are engaging with. In an Indigenous context, the work of consciously revitalizing and developing laws rooted in Indigenous legal principles can be seen as an act of self-determination.

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157 Napoleon, supra note 24 at 15.
159 Brunnée and Toope, supra note 151 at 8.
160 Christie, supra note 5 at 231. Christie discusses the importance of both experiential and cultural grounding (at 204-206).
161 Zuni Cruz, supra note 8 at 11.
be “debated internally on an ongoing basis,” allowing that “at different points in time consensus or compromise will happen.” As Austin puts it regarding the U.S. tribal context: “Whatever the process of revitalization, simply drafting customs and traditions into tribal codes and tribal court decisions will not suffice. The people and their leaders must supplement text with meaningful discourse and action to ensure full comprehension and employment of the traditional principles in the native context.” The work, then, is about strengthening today’s governance structures and functions. Ultimately, Napoleon argues, it is “fundamentally about rebuilding citizenship.”

Legal scholarship from an internal viewpoint may contribute to this work through serious and sustained engagement with Indigenous legal traditions. This scholarship may prove useful in broadening, clarifying, legitimating or critically examining the work of practitioners if legal scholars remain connected to the practices, problems, conversations and questions of the day-to-day practice of law. Ultimately, just as occurs with legal scholarship within the common law tradition, (Indigenous) people themselves will determine if legal academics’ insights contribute to the ongoing work of law within Indigenous legal traditions. Legal scholars would do well to keep this at the forefront of our minds as we move forward.

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162 Sekaquaptewa, supra note 8 at 386.
163 Austin, supra note 10 at xx.
165 Birks argues that if legal scholarship “is ever useless to [practitioners] we have come adrift from our foundations,” and that if a law school “bore no relation” to the activities of law in practice, it “would have defined itself out of existence as a law school” (Birks, supra note 55 at vi).
Only One Law: Indigenous Land Disputes and the Contested Nature of the Rule of Law

RYAN NEWELL

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On several occasions in recent years, Indigenous people in Ontario have erected blockades to defend disputed land from development by private third parties. Protests by the Haudenosaunee, the Ardoch and Shabot Algonquin and the Kitchenuhamaykoosib Inninuwug First Nations received significant media attention and brought the conflicting interests of Indigenous people and development corporations into stark relief. After Indigenous demonstrators defied injunctions ordering them to allow the

* Ryan Newell is a recent graduate of Osgoode Hall Law School. He is currently completing his articles at Sack Goldblatt Mitchell LLP. The inspiration for this article came in part from his experience of being welcomed as a visitor and supporter of the Haudenosaunee land reclamation in 2006 and 2007.
corporations onto the disputed territory, citations of contempt were made by Ontario courts in each of the above-listed disputes.

This paper analyzes how the law of injunctions and the contempt of court power have interacted with the constitutionally protected rights of Aboriginal people in the context of direct action protests. More specifically, this paper examines the parameters of the rule of law as it has developed within the context of Indigenous land disputes. The decisions of the Ontario Court of Appeal in Henco Industries Ltd v. Haudenosaunee Six Nations Confederacy Council and Frontenac Ventures Corp v. Ardoch Algonquin First Nation are indicative of a positive turn towards a more nuanced and inclusive conception of the rule of law which allows for a more flexible application of the contempt power, at least at the stage of sentencing. However, the Court of Appeal’s holding in Frontenac Ventures ultimately reinforces a singular conception of the rule of law during the contempt of court stage of the proceedings. Unfortunately, the conception of the rule of law as fleshed out by the Court of Appeal in Frontenac Ventures is not expansive enough to include a consideration of the Indigenous legal rationales for defiance of the respective courts’ orders. This article reviews recent contempt and injunction jurisprudence in relation to Indigenous land disputes in order to trace some positive developments in the case law. While examining these developments, the article also uses these applications of the contempt power as case studies in some of the fundamental tensions in play in the relationship between Canadian law and Indigenous legal perspectives.

I Introduction

Mr. Lovelace says that while he respects the rule of law, he cannot comply because his Algonquin law is supreme. He says he finds himself in a dilemma. Sadly it is a dilemma of his own making. His apparent frustration with the Ontario government is no excuse for breaking the law. There can only be one law, and that is the law of Canada, expressed through this court.

—Cunningham A.C.J.S.C.,

Frontenac Ventures Corp v. Ardoch Algonquin First Nation

Contempt of court proceedings have occurred in Ontario courts on several occasions in recent years after conflicts erupted over land and resources between Indigenous peoples and non-Indigenous private interests. Members of

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1 Quoted in 2008 ONCA 534 at para 40 (Superior Court decision unreported) [Frontenac Ventures].
the Ardoch Algonquin First Nation, the Haudenosaunee (Six Nations) and of the Kitchenuhmaykoosib Inninuwug First Nation (KI) have been cited in contempt following occupations of and blockades on disputed territory. In each of these cases, private corporations sought injunctive relief after Indigenous people stood in the way of their development plans. While the sentences of the people cited in contempt and the details underlying their respective nations’ claims varied, each case raises common questions about the application of the contempt of court power and the unique status of Indigenous people in Canadian law. These struggles offer poignant examples of the tension at play inside Canadian courts between the maintenance of a singular rule of law and the development of the scope and content of constitutionally protected Aboriginal rights. The disputes shine light on the nature of the troubled relationship between Canadian law and Indigenous peoples’ legal perspectives.

Aboriginal blockades, occupations and the contempt of court proceedings that have followed in their wake cannot be properly understood outside the history of Canadian colonialism and, more specifically, without considering the role that the legal system has played in the oppression and dispossession of Indigenous people. According to Mohawk scholar Patricia Monture, “all the oppression of Aboriginal Peoples in Canada has operated with the assistance and formal sanction of the law.” In other words, the Crown has consistently grounded its attempts to strip sovereign nations of their traditional territories and to assimilate Indigenous people into the broader Canadian society in law. Be it the imposition of the band council system onto sovereign Indigenous nations, the institution of the residential school system, or the prohibition against the retention of counsel to seek redress in Canadian courts, the hallmarks of Canadian colonial policy can be located in law itself.

3 An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42, SC 1869 (32 & 33 Vict), c. 6, s. 10. For an overview of the imposition of the band council system, see Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back, vol 1 (Ottawa: Supply and Services Canada, 1996) [RCAP], chapter 9, section 7, online: <http://www.collectionscanada.gc.ca/webarchives/20071211051222/http://www.aicc-icac.gc.ca/ch/rcap/sg/sq23_e.html#78>.
5 Indian Act, 1927, RSC 1927, c. 98, s. 141. For a short overview of the impact of this provision of the Indian Act, see RCAP, supra note 3, chapter 9, section 9.9, online: <http://www.collectionscanada.gc.ca/ch/rcap/sg/sq25_e.html#89>. 
While the above are all legislative examples of colonial policy, the history of Canadian common law demonstrates that courts have also been implicated in the dispossession of Indigenous people. In other words, Indigenous people have often found little redress in the Canadian courts. John Borrows has argued that much of the history of the Canadian common law has favoured non-Aboriginal legal sources over those of Aboriginal people: “This over-reliance on non-Aboriginal legal sources has resulted in very little protection for Indigenous peoples. Aboriginal land rights were obstructed, treaty rights repressed, and governmental rights constricted. This judicial discourse narrowed First Nations social, economic, and political power.”

This history of Canadian law continues to shape interactions between Indigenous people and the Canadian legal system today. A deep sense of distrust in Canadian legal and governmental institutions persists among many Indigenous people.

Instances of Indigenous direct action and the subsequent contempt proceedings must be viewed with this context in mind. Justice Sidney B. Linden noted in the Report of the Ipperwash Inquiry that Indigenous people had often used occupations as a last resort when other means had failed to bring about change. Indigenous people have repeatedly felt compelled to employ direct action to protect lands after the avenues of Canadian law have been exhausted or negotiations have stagnated, in many cases leaving Indigenous claimants with little more than burdensome legal bills. While land claims and rights litigation and negotiation processes move along at a snail’s pace, private corporations continue to stake claims to develop valuable resources and infrastructure in ways that jeopardize Indigenous peoples’ relationship to the land for generations to come.

7 RCAP, supra note 3, chapter 14, online: <http://www.collectionscanada.gc.ca/webarchives/20071211052915/http://www.a-inc-inac.gc.ca/ch/rcap/sg/sq51_e.html>: “With considerable historical justification, [Aboriginal people] argue that Aboriginal voices have been excluded from the Canadian narrative, that non-Aboriginal people have simply refused to recognize Aboriginal nationhood, and that at the core of Canada’s fundamental contradiction is a racism and ethnocentrism that rejects the viability and value of Aboriginal cultures. Laws and structures founded on assumptions of cultural superiority continue to form the basis of the relationship between our peoples.”
8 Throughout the article I use the term “direct action” to refer to blockades, occupations and other protest tactics employed by Indigenous people to assert their land rights and sovereignty in defiance of Canadian law. However, it should be noted at the outset that while such actions may constitute illegal activity according to Canadian law, Indigenous people always possess their own legal rationales for taking such actions. In this sense, it is somewhat of a misnomer to dichotomize “direct action” and “legal action.” The legal perspectives underlying instances of Indigenous protest will be further explored below.
Blockades and occupations are part of a history of Indigenous resistance to Canadian colonial policy. In fact, Indigenous peoples’ contemporary efforts to protect their land and assert their sovereignty form part of the “longest running resistance movement in Canadian history; indeed, one that predates the formation of Canada itself.” Desperate to have their voices heard and to disrupt business as usual at least temporarily, Indigenous people have initiated blockades on several occasions in the past 35 years. Rarely does a year go by without an instance of Aboriginal direct action making its way into Canadian news headlines. From the 1974 Ojibwa occupation of Anishinabe Park in Kenora, to the 1990 Mohawk occupation of the proposed site for an expansion of a golf course at Oka, to the 2001 Secwepemc blockade of a road leading to Sun Peaks ski resort, Indigenous people across the country have employed these tactics repeatedly and, in doing so, captured considerable media attention. As long as there remain outstanding treaty disputes, unresolved Aboriginal rights and title claims, and strained relationships between Indigenous peoples and the federal and provincial governments in general, blockades and occupations are likely to recur. When these direct actions do occur, a familiar sequence of legal proceedings in Canadian courts transpires. It is this sequence of legal proceedings that this paper takes as its focus.

The objective underlying this paper is twofold. First, I examine recent injunction and contempt jurisprudence as it relates to instances of Indigenous direct action in order to identify some encouraging trends in the development of the common law. Second, I analyze the contempt of court power as a case study of the fundamental tensions between the Canadian legal system and Indigenous nations and their systems of law. The decisions of the Ontario Court of Appeal in *Henco Industries Ltd v. Haudenosaunee Six Nations Confederacy Council* and *Frontenac Ventures Corp v. Ardoch Algonquin First Nation* are indicative of a positive turn towards a more nuanced and inclu-

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10 *RCAP, supra* note 3, chapter 6, section 8, online: <http://www.collectionscanada.gc.ca/webarchives/20071211050911/http://www.ainc-inac.gc.ca/ch/rcap/s17_e.html#57>. The RCAP summarized the history of Indigenous resistance to colonialism as follows: “Resistance at times took the form of passive non-cooperation (for example, with respect to the enfranchise- ment initiative), at times defiant continuation of proscribed activities (with respect to the potlatch and the sundance, for instance), and in more recent decades it has taken the form of vocal and organized opposition.”


14 *Ibid* at 47-51.

15 Linden, *supra* note 9 at 30-32.

16 82 OR (3d) 721 [*Henco (appeal)*].

17 *Frontenac Ventures, supra* note 1.
sive conception of the rule of law which allows for a more flexible application, at least at the injunction and sentencing stages of Indigenous land disputes. Yet despite the important movement evident in these decisions, by the time an Indigenous person has defied an order of a Canadian court to dismantle a blockade or to vacate a parcel of disputed territory, no room remains for a consideration of the Indigenous legal rationales underlying the alleged contemnor’s conduct. At the stage of contempt proceedings, Canadian law maintains its monopoly on legitimacy, and Indigenous law is viewed as collateral at best. The failure of the courts to pay Indigenous law more than lip service while applying the contempt power evidences a more fundamental issue at the heart of Canadian law: the incapacity or unwillingness of Canadian courts to employ an authentically pluralistic conception of the rule of law.\textsuperscript{18}

This paper begins with an overview of contempt law in Canada before turning to an analysis of the application of the power in the context of Indigenous land and sovereignty disputes with reference to two recent Ontario cases. I will highlight some of the encouraging trends in two recent decisions of the Court of Appeal. Here, I will place emphasis on the expansion of the common law’s conception of the rule of law at the injunction stage of the legal process. I will then explore the ways in which the definition of the contempt power in the common law jurisprudence ultimately relies on a singular or one-dimensional conception of the rule of law. I will conclude by drawing connections between the rigidity of the contempt power and more fundamental problems in Canadian law as it relates to Indigenous people.

II The Contempt of Court Power

The common law contempt of court power as it is currently exercised by Canadian courts “began as a natural vehicle for assuring the efficiency and dignity of, and respect for the governing sovereign.”\textsuperscript{19} According to one oft-cited common law scholar, rules dictating respect for the court and its procedure are “essential to the administration of justice,” and as a result, the contempt of court power—if not in name then at least in substance—is as old as law itself.\textsuperscript{20} While it is difficult to trace its origins with any degree of precision, it is clear that the contempt of court power derives from the divine status

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\textsuperscript{18} I use the terms “pluralistic” and “multidimensional” rule of law interchangeably throughout the article. Legal pluralism has been defined as the “simultaneous existence within a single legal order of different rules applying to different situations.” Andre-Jean Arnaud, “Legal Pluralism and the Building of Europe,” cited in John Borrows, \textit{Canada’s Indigenous Constitution} (Toronto: University of Toronto Press, 2010) at 8.
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of the monarch.\textsuperscript{21} When the orders of the King’s courts were disobeyed, the contempt power was used to vindicate the monarch as the source of all political authority. Consequently, it “is closely linked, in its origins, with autocratic power.”\textsuperscript{22}

Many surveys of the contempt power start with a 1631 case in which Richardson C.J. of the Common Bench was nearly struck in the head with a stone thrown by an unnamed criminal defendant. Richardson C.J. responded promptly. The prisoner, who had just been convicted of a felony, had his right hand amputated, before being hanged in front of the court.\textsuperscript{23} The contempt power is well encapsulated by Richardson C.J.’s impulse to vindicate the authority of the court after it had been denigrated. While the nuances of the contempt power have evolved since the 17th century—fortunately including a softening of the sentences imposed—the crux of the power remains fundamentally untouched: it is used to address conduct “calculated to bring a Court or a judge of the Court into contempt, or to lower his authority.”\textsuperscript{24}

Contempt of court is classified as either civil or criminal in nature. Civil contempt arises when a party’s failure to respect the rules or an order of the court results in a private injury to another party. Criminal contempt arises when there has been public defiance of a court’s authority. McLachlin J. (as she then was) articulated the distinction between criminal and civil contempt in this way:

Criminal contempt contains all the elements of civil contempt. In addition, the act of disobedience must have been undertaken in a public way; and the deliberate or reckless act of disobedience must have been undertaken with an intention that such a public act of disobedience would tend to depreciate the authority of the courts, or alternatively, with foresight that it might do so and indifference to whether it did so or not.\textsuperscript{25}

The objective underlying sentencing for civil contempt is “coercive or persuasive” in nature, whereas sentencing for criminal contempt is aimed at punishing the contemnor.\textsuperscript{26} The Canadian Judicial Council notes that civil contempt is “in some respects, criminal or quasi-criminal.”\textsuperscript{27} A person cited in civil contempt can face imprisonment or a fine, and the elements of the civil offence must be established beyond a reasonable doubt. To blur the bright line of the

\begin{itemize}
  \item Goldfarb, \textit{supra} note 19 at 11-12.
  \item Barry J. Cavanaugh, “Civil Liberties and the Criminal Contempt Power” (1977) 19 Crim LQ 349 at 350.
  \item Jeffrey Miller, \textit{The Law of Contempt in Canada} (Scarborough: Carswell, 1997) at 1.
  \item \textit{Frontenac Ventures, supra} note 1 at para 37.
\end{itemize}
distinction even further, a person may be cited in criminal contempt in the
course of a civil proceeding. Nonetheless, the Supreme Court of Canada and
the Canadian Judicial Council maintain that the distinction between civil and
criminal contempt is an important one.\textsuperscript{28}

The contempt power is a part of the inherent jurisdiction of the superior
court, protected from legislative and executive interference by s. 96 of the
\textit{Constitution Act}.\textsuperscript{29} The space for the common law contempt jurisdiction with
respect to criminal proceedings is carved out by s. 9 of the \textit{Criminal Code},\textsuperscript{30}
which disallows convictions under all other common law offences. References
to the civil contempt power and the principles guiding its use are articulated
in the \textit{Rules of Civil Procedure}.\textsuperscript{31}

Indigenous people who engage in direct action in defiance of a court’s
orders have very few defences available at law. According to the British Co-
lumbia Court of Appeal in \textit{MacMillan Bloedel Ltd. v. Simpson}, there is no
space in contempt law for the defence of necessity.\textsuperscript{32} In that case, environ-
mentalists had obstructed loggers’ access to Clayoquot Sound in defiance
of successive injunctions, resulting in the eventual arrest of more than 600
people. The protestors argued that they had no alternative but to violate the
injunctions because the imminent logging threatened to cause grave damage
to the forests they wished to protect. The court held that the defence of neces-
sity was unavailable to the protestors for two principal reasons. First, the road
blockaders had failed to apply to set aside or vary the court order which they
defied. In the Court’s view, the blockaders had a viable alternative to breaking
the law which they had neglected to pursue. Second, “the defence of necessity
can never operate to avoid a peril that is lawfully authorized by the law.”\textsuperscript{33} The
legality of the corporation’s logging interest prevented the operation of the
defence of necessity in the circumstances. Similarly, there is no defence avail-
able on grounds of ‘conscientious objection’ to those facing a contempt cita-
tion for having disobeyed an order of a Canadian court. According to Jeffrey
Miller, Canadian and American courts alike have consistently held that people
who commit civil disobedience implicitly accept the legal consequences of
their actions.\textsuperscript{34}

The nuances of the contempt power are difficult to capture concisely. In
order to give exhaustive meaning to the power, one must delve into “a moun-

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\item \textsuperscript{28} \textit{Ibid} at 10-13; \textit{Poje v. British Columbia (Attorney General)}, [1953] 1 SCR 516 at 517.
\item \textsuperscript{29} Miller, supra note 23 at 23; \textit{Constitution Act, 1982}, being Schedule B to the \textit{Canada Act 1982}
(UK), c. 11.
\item \textsuperscript{30} \textit{RSC 1985, c. C-46}.
\item \textsuperscript{31} See, for example, \textit{Rules of Civil Procedure}, RRO 1990, Reg. 194, rule 60.11.
\item \textsuperscript{32} \textit{MacMillan Bloedel Ltd. v. Simpson} (1994), 90 BCLR (2d) 24, 89 CCC (3d) 217 (CA), aff’d
[1995] 4 SCR 725 [\textit{MacMillan Bloedel}].
\item \textsuperscript{33} \textit{Ibid} at para 46.
\item \textsuperscript{34} Miller, supra note 23 at 128.
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tain of case law.” However, for the purposes of this article it is sufficient to understand the rationale underlying the power, the basic distinction between criminal and civil contempt, the inherent jurisdiction of superior courts to apply it and the dearth of relevant defences available to Indigenous protestors. With this general overview of the contempt power as a backdrop, I turn to examine how the power has been applied in the context of two recent Ontario land disputes.

III  *Henco Industries Ltd v. Haudenosaunee Six Nations Confederacy Council*

The Haudenosaunee Confederacy has long held that it exists in a nation-to-nation relationship with the Crown. This intergovernmental treaty relationship was first symbolized with the *Gus Wen Tah* or Two-Row Wampum, an agreement initially made between the Dutch and the Haudenosaunee in the early 17th century. The purple and white wampum belt symbolizes two sovereign societies existing side by side in peace, friendship and respect. Subsequent to the Dutch, the British also sought an alliance with the Haudenosaunee on the same nation-to-nation basis and adopted the Two-Row Wampum to represent and solemnize their agreement.

Before the American Revolution, the Six Nations lived in villages in the territory that would become New York State. Worn weary by the end of the war, the British, in the negotiations that ensued, “conceded everything south of the Great Lakes to the Americans—although most of that vast region actually belonged to Indians, including the Six Nations.” From the perspective of the Six Nations, the Crown had failed to uphold the principles at the heart of the Two-Row Wampum. They felt betrayed and pressured the Crown to repay them for territory lost as a result of the drawing of the American border. Sir Fredrick Haldimand, then Governor of Quebec, purchased a piece of land from the Mississauga First Nation and made the following proclamation on October 25, 1784: “I do hereby in His Majesty’s name authorize and permit

36  I use the terms “Haudenosaunee” and “Six Nations” to refer to the group of Indigenous nations which forms the Iroquois Confederacy. The Haudenosaunee Confederacy is made up of the Onondaga, Mohawk, Oneida, Seneca, Cayuga and Tuscarora Nations.
38  *Ibid.* For more information on the nature of the Two-Row Wampum, see Borrows, *supra* note 18 at 75-76.
the said Mohawk Nation, and such other Six Nations as wish to settle in that Quarter to take possession of, & Settle upon the Banks of the River commonly called Our's (Ouse) or Grand River … which them & their posterity are to enjoy for ever."}

Mohawk leader Joseph Brant led a group of 1,500 Haudenosaunee people to relocate to the new territory. This swath of land, which encompassed 950,000 acres at the time that Haldimand made his promise, follows the meandering path of the Grand River from its source to Lake Erie. In the subsequent decades, the Haldimand Tract was gradually eaten away by settler encroachment, questionable sales and leases, and unlawful Crown grants, such that the Six Nations of the Grand River reservation is currently one 16th of the original Haldimand territory. Between 1976 and 1994, the Haudenosaunee made dozens of land claims for fragments of the Haldimand Tract under the Specific Claims Policy. As of 2006, more than 10 per cent of the land claims made against the government of Canada and Ontario related to the Six Nations of the Grand River. In 1995, the Six Nations Elected Council launched a lawsuit, seeking a “general accounting” for the manner in which the Crown had managed and disposed of the property and assets promised in the Haldimand Proclamation. The suit was placed in abeyance in 2004 when negotiations with the federal government began, and reactivated in 2009 after the Six Nations grew dissatisfied with the progress of the negotiation process.

In 1992, Henco Industries acquired a piece of the Haldimand Tract bordering on the town of Caledonia and, in 2005, the developer registered its subdivision plan with the province. Henco’s acquisition represented a small portion of one of the several land claims that the Six Nations had filed in the preceding decades. The site of the proposed subdivision was included in a claim concerning the manner in which the Crown had dealt with the Hamil-

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43 Henco (appeal), supra note 16 at para 14.
46 Ibid.
47 Ibid.
48 Ibid.
ton-Port Dover Plank lands. Having warned the developer about the disputed title of the land and concerned that waiting to achieve resolution through legal channels would allow yet another fragment of the territory to be developed against their wishes, a small group of Six Nations people began occupying the 52 hectare property on February 28, 2006. The protestors erected blockades on the entrance roads of the subdivision and began camping out. On March 3, 2006, Henco obtained interim injunctive relief against the Confederacy Council, the individual protestors, as well as against Jane and John Doe. Those named in the injunction were ordered to cease interference with Henco’s operations and to dismantle barricades. When the Sheriff attempted to deliver Matheson J.’s order to the demonstrators, he was met with resistance. After being handed the order, Dawn Smith, one of the persons named in the court order, lit it on fire while television cameras captured the spectacle on film. On March 9, Matheson J. made his March 3 order permanent.

Henco’s contempt motion was heard by a different judge of the superior court, Marshall J., on March 16 and 17, 2006. While the respondent Haudenosaunee protestors did not file any evidence, Smith appeared before the court and submitted that “her people had never relinquished title to North America,” informing the motions judge that “she did not recognize the court’s jurisdiction.” Marshall J. held that all the elements for contempt of court had been established: (1) the terms of the injunction ordering that the protestors leave the disputed land were clear and unambiguous; (2) the protestors had been given proper notice of the order; (3) the protestors, by their continued presence on the land, had blatantly and unapologetically breached the terms of the order; and (4) the protestors possessed the requisite intention to do the acts prohibited by the injunction. Marshall J. held that the public manner in which the protestors had defied the court’s order required that they be cited in

50 Linden, supra note 9 at 28.
53 I have referred to two different Six Nations governing bodies: the Elected Council and the Confederacy Council. The Elected Council is the governing body created by the government of Canada through the imposition of the Indian Act structure in 1924. The Confederacy Council is the ‘traditional’ governing body of the Haudenosaunee. The historical details and political nuances underlying this distinction are too complex to adequately address here. See Wright, supra note 39 at 320-327.
54 Henco (appeal), supra note 16 at para 20.
55 Ibid at para 22.
56 Ibid at para 25.
57 Ibid at para 26.
58 Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council, 2006 CarswellOnt 8116 at para 15-31 (Sup Ct J) (WL) [Henco (contempt)].
civil as well as criminal contempt: “They could not have but known that such defiance would harm the court’s enforcement of its orders generally.”

Marshall J. acknowledged that the case, at its most fundamental, related to the Six Nations’ grievance with respect to the Haldimand Tract. However, in a manner that falls in line with the principles of contempt law to be explored below, Marshall J. only superficially engaged with the validity of the defendants’ claim: “The Mohawk people feel that they have been unfairly treated in regards to the Haldimand Land Grant. I can say nothing today of the validity of that claim.” Marshall J. told the Six Nations defendants that they had no right to stand in the way of Henco Industries, imploring them to “turn and walk away.” The contemnors, both those named in the injunction and those unknown, were sentenced to thirty days in jail, but their sentences were suspended such that if they obeyed the terms of injunction for a period of six months they would not have to serve any jail time. The Attorney General of Ontario brought a motion to amend the March 17 order, and on March 28, Marshall J. issued a new order of contempt and warrant of arrest for all of those blockading Douglas Creek Estates in contravention of the injunction.

The Haudensaunee protestors did not turn and walk away. Before dawn on April 20, 2006, the Ontario Provincial Police (OPP) raided the encampments and arrested 21 people. Within hours of the raid, hundreds of Haudensaunee people and their allies flooded back onto the disputed land, making the police retreat. Additional barricades were erected on surrounding railways and highways, and a bridge was burned down. Negotiations between the Haudensaunee and the federal and provincial governments began weeks later. In June 2006, Ontario announced its plan to purchase the disputed land from Henco. While tensions would certainly flare up again, and the Haudensaunee continue to adamantly assert their entitlement to the Haldimand Tract and the need to engage on a nation-to-nation basis with the Canadian state, the events immediately following April 20, 2006, were among the most explosive of the protracted struggle.

60 Ibid at para 32.
61 Ibid at para 38.
62 Henco (appeal), supra note 16 at para 33.
63 Ibid at para 35.
66 Disputes over the ongoing development of land within the Haldimand Tract continue to arise. The Haudensaunee and their allies continue to call on the governments of Canada and Ontario to engage in good faith negotiations to resolve the countless outstanding claims. See, for example, Daniel R. Pierce, “Hundreds take part in Caledonia peace march,” Simcoe Reformer (29 April 2012) online: <http://www.niagarafallsreview.ca/2012/04/28/400-take-part-in-caledonia-peace-march>.
After the sale of the property was finalized in early July 2006, Henco brought a motion to dissolve the outstanding injunctions. The Province of Ontario, as the new property owner, had made a political choice—no doubt motivated by the resistance that erupted in response to the raid of April 20, 2006—to allow the protestors to remain on the disputed land. Nonetheless, Marshall J. refused to unconditionally dissolve the injunction. His reasons began as follows:

I am reading this judgment in open court because it is a matter of such importance to the communities and to this court. Ladies and gentleman we speak of the Rule of Law. This case deals with an issue that is arguably the preeminent condition of freedom and peace in a democratic society. It is upheld wherever in the world there is liberty. The Rule of Law is a principle not well known to people, but this case shows its importance, not just to the communities involved here but also the Rule of Law should be appreciated by all Canadians. The Rule of Law for our purposes can be simply stated. It is the rule that every citizen from the prime minister to the poorest of our people is equally subject to and must obey the law. It is a rule of general application. Whenever it is broken—even in a small way, we say there is injustice. We see the unfairness. It is a rule that is woven into every part of our social contract to live peacefully together. Even a small tear in the cloth of our justice system spoils the whole fabric of society.

Marshall J.’s preoccupation with a singular conception of the rule of law is palpable throughout his reasons, which at some points drift into the realm of hyperbole. Marshall J. claimed that he had the jurisdiction to suspend the land claims process “until the barricades are removed from Douglas Creek Estates and the rule of law restored to that property.” Departing considerably from the Supreme Court’s Aboriginal treaty and rights jurisprudence, which has repeatedly emphasized the importance of negotiation over litigation in the context of such disputes, Marshall J. suggested that the government negotiators should walk away from the table until the injunction had been enforced. He ordered that the injunction obtained by Henco would bind Ontario as the new property owner and that it would not be dissolved until after the contempt citations had been disposed of. The Attorney General appealed the order to the Court of Appeal.

67 In fact, it was a term of the agreement of sale that Henco seek an order dissolving the injunctions. Henco (appeal), supra note 16 at para 49.
68 Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council (2006), 82 OR (3d) 347 (Sup Ct) at paras 1-5 [Henco (dissolution)].
69 Ibid at para 83 [emphasis added].
70 See, for example, Delgamuukw v. British Columbia, [1997] 3 SCR 1010 at para 207 [Delgamuukw].
71 Henco (dissolution), supra note 68 at para 88.
72 Ibid at para 101.
By way of unanimous judgment, the Court of Appeal allowed the appeal in part. Writing for the Court, Laskin J.A. held that to compel Ontario to enforce the injunction obtained by Henco constituted an unjustifiable interference with the government’s property rights. Consequently, the injunction was to be dissolved effective July 5, 2006. Although the Court of Appeal lacked the jurisdiction to overturn the contempt convictions because none of the defendants had appealed, Laskin J.A. concluded in obiter dicta that the contempt convictions were fundamentally flawed because they were made in violation of basic procedural fairness guarantees. Nonetheless, the Court held that the motion judge’s decision to order the Attorney General to take carriage of the contempt proceedings was a proper exercise of his discretion and could be upheld subject to the stipulation of three conditions. The necessary conditions and the reasons for their imposition will not be explored in this article.

For the purposes of this paper, the two most significant aspects of the Court of Appeal’s judgment are found in its general concluding remarks. First, the Court emphasized that negotiation is the most effective means of addressing the claims of Indigenous people. Laskin J.A. pointed out that specific aspects of Marshall J.’s reasons were “unfortunate and at odds with the Supreme Court of Canada’s jurisprudence.” Second, the Court took the view that the rule of law is more complex than the conception of the constitutional principle reflected in the lower court’s reasons. Laskin J.A. started out by acknowledging the importance of “vindicat[ing] the court’s authority and ultimately … uphold[ing] the rule of law. The rule of law requires a justice system that can ensure orders of the court are enforced and the process of the court is respected.” However, according to Laskin J.A., the rule of law encompasses much more than obedience to court orders. The rule of law has multiple dimensions, including “respect for minority rights” and “reconciliation of Aboriginal and non-Aboriginal interests through negotiations.” Marshall J. had failed to “adequately consider these other important dimensions of the rule of law.” The implications of this broadened understanding of the rule of law will be explored further below.

73 Henco (appeal), supra note 16 at para 74.
74 Ibid at para 148.
75 Ibid at paras 123-128.
76 Ibid at para 147.
77 Ibid at paras 135-139.
78 Ibid at para 135.
79 Ibid at para 141.
80 Ibid at para 142.
81 Ibid at para 143.
Frontenac Ventures Corp. v. Ardoch Algonquin First Nation

The Ardoch Algonquin First Nation (AAFN) is an Anishnabek community located in eastern Ontario, about 100 kilometers north of Kingston. The history of dispossession of the Omamwiwinini or Algonquin people—like that of the Haudenosaunee—is long, complicated and, ultimately, beyond the scope of this article. A brief overview is necessary to understand the basic parameters of the dispute and the contempt proceedings that followed. Treaties have never been signed with the Algonquin people living in the southern Ottawa Valley. Beginning in the late 18th century, as greater numbers of settlers moved into their territory, the Algonquins insisted that treaties be negotiated to resolve disputes over land, but treaties were never signed and negotiations for a modern-day treaty agreement continue today. The Algonquin relationship with the Crown is further complicated by the fact that their claim to possession overlaps with that of other First Nations. The Algonquins assert that their lands were improperly ceded to the Crown through the Williams Treaties in 1923, agreements made with the federal and provincial Crown by Mississauga and Chippewa First Nations.

Reserves were created in Quebec and Ontario starting in the late 19th century to which some Algonquin people relocated from their traditional territories. One such federally recognized reserve is Golden Lake, located to the west of Ottawa. Yet many Algonquin family groups continue to live scattered throughout the southern Ottawa River watershed. Unlike the Golden Lake Algonquins, the Ardoch and Shabot Obaadjiwan communities are not organized under the Indian Act, so that many AAFN members are not recognized as status “Indians.” In 1992, the AAFN was established to give formal organizational structure to a group of Algonquin families that had lived in community for many years. In the years that followed, the AAFN developed

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85 Mayeda, supra note 84 at 148.
86 Huitema, supra note 83 at 100-101.
89 Ibid.
“Guiding Principles” which articulate the nature of the Algonquins’ relationship with their land base. It was on the basis of these principles that a series of legal and direct actions occurred throughout the 1980s and 1990s, including the AAFN’s stand against the destruction of wild rice beds and its assertion of hunting and harvesting rights in traditional territories.

In 1983, the Algonquins of Golden Lake launched a claim alleging that Aboriginal title to 3.4 million hectares of land in the Ottawa Valley had never been surrendered. Negotiations between the Golden Lake First Nation and the provincial and federal governments began in 1991 and in 1992, respectively. After tension developed between the Algonquins of Golden Lake and the AAFN, the AAFN formally withdrew support for the Golden Lake claim in 1994. Negotiations continue between the province and 10 Algonquin communities, including the Golden Lake First Nation. As of 2009, a negotiation framework agreement had been reached to guide ongoing discussions. The AAFN was not a party to this agreement.

After non-Aboriginal Sharbot Lake resident Frank Morrison discovered that a series of trees on his property had been flagged in 2006, he contacted Ontario’s Ministry of Northern Development and Mines. He was informed that a uranium exploration company had staked the claims. Knowing that they lived on disputed territory, Gloria Morrison, Frank’s wife, informed the AAFN and Shabot Obaadjiwan First Nation of the exploratory activities in November of 2006. In total, 30,000 acres had been staked by a small mining exploration company called Frontenac Ventures. The majority of the land staked was traditional Algonquin territory, and yet the Algonquins had not been notified, let alone consulted, about the development plans. The AAFN made multiple attempts to inform the province and Frontenac Ventures of their

90 See, for example, Lovelace v. Ontario, 2000 SCC 37. In that case, Robert Lovelace, on his own behalf and on the behalf of the Ardoch Algonquins and of several other non-band and Métis communities, challenged the decision of the province to distribute profits derived from Casino Rama exclusively to First Nations communities registered under the Indian Act. His appeal was dismissed by the Supreme Court of Canada.

91 Sherman, supra note 87 at 18-19.

92 Coyle, supra note 45 at 115.

93 For additional information about the history and current state of the ongoing negotiations, see Ministry of Aboriginal Affairs, “Algonquin Land Claim,” online: <http://www.aboriginalaffairs.gov.on.ca/english/negotiate/algonequin/algonquin.asp>.

94 Lovelace, supra note 88. Additional details about the history and current state of the relationship between the AAFN and the Algonquins of Golden Lake proved to be difficult to locate.


98 Sherman, supra note 87 at 19.
concerns.\textsuperscript{99} After receiving no response to their correspondence, members of the AAFN, the Shabot Obaadjiwan and non-Aboriginal supporters blocked access to an intended site of exploratory drilling on June 28, 2007, a national day of Aboriginal protest.\textsuperscript{100} The Indigenous people were outraged that land subject to their unresolved claim would be mined by a private corporation with full authorization under Ontario’s \textit{Mining Act}.\textsuperscript{101} The non-Aboriginal settlers\textsuperscript{102} shared the Indigenous peoples’ concerns about the environmental degradation and impact on human health associated with mining uranium.\textsuperscript{103} In particular, the blockaders were concerned that the tailings produced by uranium mines would contaminate local water supplies.\textsuperscript{104}

In response to the blockade, Frontenac Ventures swiftly initiated legal action, claiming $77 million in damages and seeking an injunction to remove the protestors from the access road. The AAFN did not participate in the injunction proceedings. According to Paula Sherman, the Indigenous blockaders chose not to participate in the injunction proceedings because the necessary “political solution” was not available through the litigation process: “Our goal was not to negotiate for a part of the proceeds from exploration, but to challenge the right of the Province to issue mineral claims and permits on lands that were covered under a comprehensive claim and which had never been surrendered or sold to the Crown.”\textsuperscript{105}

On August 27, 2007, Thomson J. granted an interim injunction which restrained the AAFN and the Shabot from interfering with the mining exploration program.\textsuperscript{106} When the protestors refused to comply, the corporation initiated civil contempt proceedings in September 2007; these were adjourned until November 2007. Frontenac Ventures sought further injunctive relief, asking for an order prohibiting the AAFN, Shabot and any other associated parties from interfering with any of the corporation’s “legitimate activities on the subject property.”\textsuperscript{107} Again, the AAFN did not participate in the hearing. Cunningham A.C.J.S.C. issued a second interlocutory injunction on September 27, 2007.\textsuperscript{108}

\begin{itemize}
\item \textsuperscript{99} \textit{Ibid} at 22.
\item \textsuperscript{100} Gorrie, \textit{supra} note 97.
\item \textsuperscript{101} RSO 1990, c. M14.
\item \textsuperscript{102} According to Graham Mayeda, \textit{supra} note 84 at 150, the non-Aboriginal participants referred to themselves as “settlers” in order “to acknowledge the colonial context in which they have come to own property on the Algonquin’s traditional territory.”
\item \textsuperscript{103} Roy Macgregor, “Settlers and natives, united against the government,” \textit{The Globe and Mail} (3 December 2007) A2.
\item \textsuperscript{104} For further details about the myriad environmental concerns of the blockaders, see generally Sherman, \textit{supra} note 87.
\item \textsuperscript{105} \textit{Ibid} at 23.
\item \textsuperscript{106} \textit{Frontenac Ventures, supra} note 1 at para 17.
\item \textsuperscript{107} \textit{Ibid} at para 19.
\item \textsuperscript{108} \textit{Ibid} at para 20.
\end{itemize}
The blockade of the disputed territory continued in defiance of the court’s orders.

On the suggestion of Cunningham A.C.J., Frontenac Ventures and the AAFN commenced a 12-week period of mediation, requiring an adjournment to the contempt proceedings. According to AAFN Family Head Sherman, the talks were “flawed from the beginning.” After Frontenac Ventures and Ontario pressured the AAFN to allow continued exploration work as a precondition to ongoing consultation, the AAFN gave up on the prospect of achieving resolution through negotiation and walked away from the discussions. Frontenac Ventures revived its contempt motion in February 2008. On this occasion, the AAFN participated in the proceedings, conceding that they had defied the injunctions. The evidence and submissions of the AAFN defendants were limited to the issue of sentence. Robert Lovelace, an AAFN member and spokesperson, testified that “uranium exploration on the subject lands would violate Algonquin law, which imposed a ‘moratorium’ on such activity.”

On February 13, 2008, Cunningham A.C.J.S.C. cited the AFFN defendants in civil contempt of court. Harold Perry, a 78-year-old AAFN contemnor, purged his contempt immediately following the citation by undertaking to abide by the September 27, 2007, court order. Lovelace and Sherman were sentenced to six months in jail and fines of $25,000 and $15,000, respectively, on February 15, 2007. Sherman subsequently purged her contempt by providing her own undertaking to comply with the order, and the custodial portion of her sentence was discharged.

Lovelace, who declined to purge his contempt, appealed his sentence to the Court of Appeal. The other AAFN defendants appealed the fines that had been imposed. MacPherson J.A., writing for another unanimous panel of the Court of Appeal, held that Lovelace’s sentence had been “too harsh.” Importing the Supreme Court’s analysis in *R. v. Gladue*, MacPherson J.A. held that background factors particular to Aboriginal contemnors should be considered at the stage of sentencing. MacPherson J.A.’s recognition of the relevance of *Gladue* to Lovelace’s sentencing was based on three considerations: “The estrangement of aboriginal peoples from the Canadian justice system, the impact of years of dislocation, and whether imprisonment would be meaningful to the community of which the offender is a member.” Among the relevant background factors that the motions judge had failed to consider were the

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110 *Ibid*.
111 Frontenac Ventures, *supra* note 1 at para 27.
113 *Ibid* at para 66.
115 Frontenac Ventures, *supra* note 1 at para 54.
ongoing Algonquin land claim and negotiations and the fact that the *Mining Act* failed to institute a process for consultation with First Nations people.\footnote{In 2009 Ontario’s *Mining Act* was amended to require those that acquire interests under the statute to undergo a process of consultation with affected First Nations people. See *Mining Act*, RSO 1990, c. M14, s. 78.2. For further analysis of the 2009 amendments, see Mayeda, *supra* note 84 at 150-152.} MacPherson J.A. concluded that jail time was unnecessary and that a $1,000 fine would have been sufficient.\footnote{Jonathan Rudin, “Addressing Aboriginal Overrepresentation Post-Gladue: A Realistic Assessment of How Social Change Occurs” (2009) 54 Crim LQ 447 at 460. See also Kent Roach, “One Step Forward, Two Steps Back: *Gladue* at Ten and in the Courts of Appeal” (2009) 54 Crim LQ 470; Brent Knazan, “Time for Justice: One Approach to R. v. *Gladue*” (2009) 54 Crim LQ 431.} As has been noted by several criminal law scholars, MacPherson J.A.’s expansion of the *Gladue* analysis to the sentencing of Aboriginal contemnors is a significant development,\footnote{As was pointed out by the Court of Appeal in *Frontenac Ventures*, the AAFN did not appeal either of the injunctions granted by the two motions judges. As a result, the Court held that it was “thus not for this court to address the merits of either order.” *Supra* note 1 at para 47.} but it is not the focus of this article. Instead, I am interested in exploring the implications of the Court of Appeal’s development of a multidimensional conception of the rule of law which was initially identified in *Henco*. Before doing so, I will take a step back to provide some more legal context for these applications of the contempt power.

## V Contempt of Court and the Marginalization of Indigenous Law

Under the common law of contempt, it is no defence that the court order was incorrect, unreasonable or even unconstitutional.\footnote{Miller, *supra* note 23 at 95.} As long as a court order has not been overturned on appeal, it is to be complied with under all circumstances.\footnote{As was pointed out by the Court of Appeal in *Frontenac Ventures*, the AAFN did not appeal either of the injunctions granted by the two motions judges. As a result, the Court held that it was “thus not for this court to address the merits of either order.” *Supra* note 1 at para 47.} After a protestor has disobeyed a court’s order to vacate a disputed piece of land or to remove barricades from an access road and appears for a contempt hearing, courts do not consider the surrounding circumstances or the constitutional validity of the initial injunction when deciding whether a contempt citation should be made. To do so would permit a collateral attack on the initial injunction. As demonstrated in *British Columbia (Attorney General) v. Mount Currie*,\footnote{*British Columbia (Attorney General) v. Mount Currie* (1990), 54 BCLR (2d) 129 (Sup Ct) [Mount Currie].} courts refuse to interrogate a motions judge’s jurisdiction to issue the initial injunction in the course of the contempt proceeding. *Mount Currie* offers a poignant illustration of how the “collateral attack” doctrine marginalizes Indigenous peoples’ legal perspectives during contempt proceedings.

More than 50 members of the Lil’wat Peoples’ Movement were arrested for blocking a road in order to prevent logging on “unceded Indian territory” in
contravention of an injunction.\textsuperscript{123} MacDonald J. cited the Indigenous blockaders in contempt of court, holding that the “issue of Indian sovereignty may not be raised or argued in these contempt proceedings. That issue is not an exception to the collateral attack doctrine in the case of a superior court of general jurisdiction such as this.”\textsuperscript{124} While it was open to the Lil’Wat contemnors to raise the issue of their sovereignty at the injunction stage, they were precluded from doing so at the contempt proceedings. According to MacDonald J., to allow such a challenge of the Supreme Court of British Columbia’s jurisdiction at the contempt stage would be to destabilize a principle “fundamental to the maintenance of this court’s authority.”\textsuperscript{125}

During the proceedings that occurred in the \textit{Henco} and \textit{Frontenac Ventures} cases, the Indigenous protestors presented challenges to the capacity of Canadian courts to arrive at just resolutions of the underlying disputes. The AAFN declined to participate during the injunction stage of the proceedings because of its members’ belief that “the Ontario court system was incapable of providing a solution that protected [their] homeland from irresponsible development.”\textsuperscript{126} One of the Haudenosaunee people named in the injunction, Dawn Smith, appeared before the court during the contempt proceedings not to lead evidence but to inform the court that the Haudenosaunee did not recognize the court’s jurisdiction and that “her people had never relinquished title to North America.”\textsuperscript{127}

The Indigenous people who engaged in direct action in each of these cases possessed their own legal rationales which conflicted with the Canadian legal order and challenged the singularity of the rule of law relied upon in the contempt proceedings. The Haudenosaunee began the reclamation of Douglas Creek Estates to ensure that future generations would have a sufficient land base. The legal claims launched by the Six Nations and the subsequent negotiations had been ineffective at suspending development on the disputed territory. The Haudenosaunee Great Law of Peace, or \textit{Kaianerekowa},\textsuperscript{128} required them to stand in the way of continuing encroachment, and it was in this context that the occupation of Douglas Creek Estates began. While an in-depth exploration of the “complex and sophisticated” Haudenosaunee legal tradition is beyond the scope of this article,\textsuperscript{129} it is important to recognize that the Six Nations people repeatedly asserted that their efforts to stop the development of Douglas Creek Estates were grounded in an allegiance to their

\begin{itemize}
  \item \textsuperscript{123} \textit{Ibid} at para 4.
  \item \textsuperscript{124} \textit{Ibid} at para 53.
  \item \textsuperscript{125} \textit{Ibid} at para 34.
  \item \textsuperscript{126} Sherman, \textit{supra} note 87 at 25.
  \item \textsuperscript{127} \textit{Henco (appeal)}, \textit{supra} note 16 at para 26.
  \item \textsuperscript{128} Excerpted in John J. Borrows and Leonard I. Rotman, eds, \textit{Aboriginal Legal Issues} (Markham: Lexis Nexis, 2007) at 36-37.
  \item \textsuperscript{129} Borrows, \textit{supra} note 18 at 73.
\end{itemize}
own law. Haudenosaunee protestor Janie Jamieson stated only days after the reclamation of Douglas Creek Estates, known in Mohawk as Kanonhstaton ("the protected place"), began: "Ontario Provincial Police officers mean nothing to us. We are governed by the Great Law." Months after the beginning of the land reclamation, the Haudenosaunee Confederacy Council described the legal foundations for its land rights and responsibilities as follows:

The Haudenosaunee, and its governing authority, have inherited the rights to land from time immemorial. Land is a birthright, essential to the expression of our culture. With these land rights come specific responsibilities that have been defined by our law, from our Creation Story, the Original Instructions, the Kaianeren:kowa (Great Law of Peace) and Kariwiio (Good Message) …. [A] ccording to our law, the land is not private property that can be owned by any individual. In our worldview, land is a collective right. It is held in common, for the benefit of all. The land is actually a sacred trust, placed in our care, for the sake of the coming generations. We must protect the land. We must draw strength and healing from the land. If an individual, family or clan has the exclusive right to use and occupy land, they also have a stewardship responsibility to respect and join in the community’s right to protect the land from abuse. We have a duty to utilize the land in certain ways that advance our Original Instructions. All must take responsibility for the health of our Mother.

Thus it was a sense of legal duty and responsibility that gave rise to Haudenosaunee efforts to thwart the development of Douglas Creek Estates, a small fraction of the Haldimand Tract which the Six Nations sought to protect for the use of future generations.

Similar priorities underlay the Ardoch Algonquins’ actions. The AAFN were induced into action by the community’s Guiding Principles. Among the primary objectives listed in the AAFN’s foundational document is “the protection of the environment both locally and globally in keeping with the sacred responsibility to the earth.” The “Principles of Development” also emphasize the ecological priorities that lie at the core of AAFN law: “Algonquin people should regard the land as a living creature and should interfere as little as possible with its expressions.” At his contempt proceeding, Lovelace testified that Algonquin law prevented him from following the order of the court to allow Frontenac Ventures to begin drilling. Furthermore, Lovelace informed the Court that Ontario law conflicted with Algonquin law in two

fundamental ways: (1) by issuing mining permits allowing development prohibited under Algonquin law; and (2) by criminalizing Algonquin protestors for attempting to conserve the land and water of their traditional territories.\textsuperscript{134} As mentioned above, Sherman has written that the AAFN protestors had lost faith in the Ontario court system to deliver a conception of justice that would reflect the priorities articulated in Algonquin law.\textsuperscript{135} It was this lack of faith in the Canadian legal system that led the AAFN to begin its blockade. By applying the contempt power in ways that further marginalized Indigenous legal perspectives, the courts in each of these situations only further alienated the contemnors and their respective communities.

VI Injunctive Relief: Situating the Multidimensional Rule of Law

In \textit{Henco}, the Crown in right of Ontario had purchased the land in question and did not intend to enforce the injunction obtained by Henco Industries. Marshall J. was the target of the Court of Appeal’s criticism because he over-stretched the principles of contempt law and sought the enforcement of his injunction, even after the party to whom it had been granted wished to dissolve it.\textsuperscript{136} However, if a private party’s property interests were still impacted by the occupation of Douglas Creek Estates, what utility would the Court of Appeal’s nuanced rule of law have been to the Haudenosaunee protestors who continued to occupy the disputed land in violation of the injunction? How would the additional dimensions of the rule of law—for example, “respect for minority rights” and “reconciliation of Aboriginal and non-Aboriginal interests through negotiations”—have aided the Six Nations blockaders?\textsuperscript{137}

To a certain extent, this question was answered in \textit{Frontenac Ventures}. According to the Court of Appeal in that case, the motions judge did not err in his single-mindedness about one dimension of the rule of law at the stage of sentencing an Indigenous contemnor.\textsuperscript{138} Rather, the Court of Appeal held that the relevant dimension of the rule of law at the sentencing stage of a contempt proceeding—even in the context of a case involving Indigenous peoples’ land rights and sovereignty assertions—was “ensuring that orders of the court are enforced.”\textsuperscript{139} While the \textit{Gladue} analysis should have formed part of the motion judge’s assessment of the proper sentence, Cunningham A.C.J.S.C. was

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\textsuperscript{134} Sherman, \textit{supra} note 87 at 26.
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\textsuperscript{135} \textit{Ibid} at 25.
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\textsuperscript{136} Hazel Hill, one of the participants in the Six Nations land reclamation at Douglas Creek Estates, stated that Marshall J. was “trying to hang onto some fictional power over this whole land reclamation when common sense should tell him that his part was over the day Henco was bought out.” Quoted in DeVries, \textit{supra} note 37 at 21.
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\textsuperscript{137} \textit{Henco (appeal)}, \textit{supra} note 16 at para 142.
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\textsuperscript{138} \textit{Frontenac Ventures}, \textit{supra} note 1 at para 42.
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\textsuperscript{139} \textit{Ibid}.
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correct to focus on ensuring that the court’s power was respected. Instead, the Court in *Frontenac Ventures* clarified that the multidimensional rule of law as articulated in *Henco* is relevant exclusively to a court’s assessment of whether to grant a party injunctive relief in situations where Aboriginal or treaty rights may be adversely impacted. That MacPherson J.A. came to this conclusion appears curious when the *obiter* in *Henco* is closely scrutinized. In *Henco*, Laskin J.A. seemed to make it clear that other dimensions of the rule of law were relevant not merely at the injunctions stage of the analysis but also during the application of the contempt power. After listing other dimensions of the rule of law, Laskin J.A. stated: “It seems to me that in focusing on vindicating the court’s authority through the use of the contempt power, the motions judge did not adequately consider these other important dimensions of the rule of the law.” Thus the Court’s holding in *Frontenac Ventures* that the rule of law remains one-dimensional at the stage of a contempt proceedings—with the exception of the *Gladue*-informed sentencing analysis—represents a retreat from the *dicta* in *Henco*. Implicit in *Frontenac Ventures* is a reliance on the “collateral attack” doctrine. At the stage of a contempt proceeding, courts remain focused on one dimension of the rule of law, while all other considerations are still viewed as collateral.

Acknowledging that the Supreme Court has repeatedly stressed the importance of reconciliation in the context of Aboriginal rights analysis, the Court of Appeal stated:

Injunctions sought by private parties to protect their interests should only be granted where *every effort* has been made by the court to encourage consultation, negotiation, accommodation and reconciliation among the competing rights and interest. Such is the case *even if the affected [A]boriginal communities choose not to fully participate in the injunction proceedings*.

When granting an interlocutory injunction, a court orders a party to do something or to refrain from doing something before all evidence has been adduced and assessed at a trial. The impetus underlying interlocutory injunctive relief is “the need to fashion an order that ensures effective relief can be rendered at the final trial.” The object is to stop the greater harm before it occurs, since waiting until the case is heard on its merits could prove too late. To successfully obtain an injunction, the applicant must convince a court that three conditions have been satisfied: (1) there is a serious issue to be tried; (2) there

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140 Ibid at para 43; *Henco* (appeal), supra note 16 at para 143.
141 *Mount Currie*, supra note 122.
142 *Frontenac Ventures*, supra note 1 at para 46 [emphasis added].
144 *Platinex Inc. v. Kitchenuaykoosib Inninuwug First Nation*, [2007] 3 CNLR 181 at para 156 (Ont Sup Ct) [*Platinex 2*].
would be irreparable damage caused if an injunction was not issued; and (3) the balance of convenience favours the granting of an injunction.\textsuperscript{145}

The Court of Appeal’s direction in \textit{Frontenac Ventures} that injunctions should only be granted after all avenues of negotiation have been exhausted is a welcome one. Indigenous people have consistently had difficulty convincing courts to grant injunctions to prevent the development of disputed lands.\textsuperscript{146}

While this article is primarily focused on private parties’ use of injunctions and contempt proceedings to remove Indigenous protestors who are obstructing development on disputed land, the multidimensional conception of the rule of law elucidated in \textit{Frontenac Ventures} has the potential to improve the prospects of Indigenous parties seeking injunctions to prevent development. The stage of the three-step injunction test at which Indigenous people have frequently faced the most difficulty is the “balance of convenience.” The Supreme Court of Canada acknowledged in \textit{Haida Nation} that “the balance of convenience test tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to ‘lose’ outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns.”\textsuperscript{147} The Court of Appeal’s holding in \textit{Frontenac Ventures} that courts are required to employ a multidimensional rule of law that privileges reconciliation through negotiation when considering whether to grant injunctive relief can function as a counterbalance to the relative strength of private parties’ interests at the “balance of convenience” stage.

In \textit{Canadian Forest Products Inc. v. Sam}, Dillon J. relied on \textit{Frontenac Ventures} for the proposition that when private parties seek injunctions which may adversely affect Aboriginal rights, “a careful and sensitive balancing of many important interests should occur and terms carefully considered.”\textsuperscript{148} In that case, members of the Wet’suwet’en nation set up a blockade to prevent logging on land to which it asserted Aboriginal title. The plaintiff corporation, Canfor, sought injunctive relief against the blockaders. Members of the Wet’suwet’en counterclaimed for an injunction to prevent the extension of logging roads and logging activity on their traditional territories. They succeeded in persuading the Court that irreparable harm would be done if an injunction was not granted to prevent logging on the disputed territory. Dillon J. held further that the balance of convenience favoured the Wet’suwet’en although Canfor held a forest licence which allowed the company to harvest

\textsuperscript{145} RJR MacDonald, [1994] 1 SCR 311, 111 DLR (4th) 385.


\textsuperscript{147} \textit{Haida Nation v. British Columbia (Minister of Forests)}, [2004] 3 SCR 511 at para 14 [\textit{Haida Nation}].

\textsuperscript{148} 2011 BCSC 676 at para 75 [\textit{Canfor}].
a massive amount of timber annually for a term of 15 years. This recent case of the Supreme Court of British Columbia illustrates the transformative potential that a multidimensional rule of law can have in injunction proceedings between Indigenous protestors and corporate interests.

Another excellent example of a motions judge wrestling with the competing interests of a private party and an Indigenous group at the injunction stage can be found in the meandering procedural history of *Platinex v. Kitchenuhmaykoosib Inninuwug First Nation*. This case illustrates both the potential and the limitations of the expanded conception of the rule of law in *Henco* and *Frontenac Ventures*. The basic structure of the conflict bears a strong resemblance to the disputes explored above. Kitchenuhmaykoosib Inninuwug (KI) is an Ojibwa-Cree First Nation located several hundred kilometers north of Thunder Bay. In 1929, KI’s predecessor, Trout Lake Band, signed on to Treaty 9. In 2000, KI filed a Treaty Entitlement Claim, alleging that “it was entitled to a reserve based upon its current population, rather than on the population of its predecessor band in 1929.”

The KI did not claim a particular parcel of land but a tract to be determined through negotiations with the provincial and federal governments. Platinex, a mining exploration company, possessed mining rights to a portion of KI traditional territories. Platinex suspended its exploratory drilling plans in February 2006 after being confronted by KI members on the disputed territory. Like the Wet’suwet’en and unlike the AAFN and the Haudenosaunee, the KI sought and successfully obtained injunctive relief to temporarily prevent Platinex from proceeding with its plans. In July 2006, Smith J. decided that the KI might suffer irreparable harm if its traditional territories were mined. Citing *Haida Nation*, Smith J. held that the Crown had failed to fulfill its duty to consult with KI and that if Platinex was granted an injunction, the duty would be “meaningless and send a message to other resource development companies that they can simply ignore Aboriginal concerns.” Significantly, Smith J. also held that the “public interest” in “maintaining the integrity of the consultation process” tipped the balance of convenience in favour of KI. About six months before the Court of Appeal’s decision in *Henco* and two years before *Frontenac Ventures*, Smith J. demonstrated the potential for a conception of the rule of law that accounts for constitutionally protected Aboriginal rights to counteract the tendency of courts to privilege private, non-Indigenous interests at the “balance of convenience” phase in injunction proceedings. Smith J. granted a five-month injunction on two conditions: first, that KI return any property

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149 *Platinex*, supra note 144 at para 49.
150 Ibid at para 56.
151 *Haida Nation*, supra note 147.
152 *Platinex v. Kitchenuhmaykoosib Inninuwug First Nation*, [2006] 4 CNLR 152 (Ont Sup Ct) at para 110 [Platinex I].
removed from Platinex’s drilling camp; and second, that KI organize a “consultation committee” tasked with “developing an agreement to allow Platinex to conduct its two-phase drilling project at Big Trout Lake but not necessarily on land that may form part of KI’s Treaty Entitlement Claim.”

In February 2007, Smith J. ordered that the injunction be extended. Negotiations between the parties continued during the following few months but failed to produce an agreement. The parties were just too far apart. After hearing new evidence in May 2007, Smith J. held that the balance of convenience favoured Platinex, since further obstruction of its drilling operation would likely put it out of business. Furthermore, KI had failed to proffer adequate evidence to demonstrate that the drilling operation would cause irreparable harm to its treaty rights. The KI motion for an interlocutory injunction was dismissed. Smith J. issued an interim declaratory order, imposing a two-week deadline before which the parties had to negotiate a consultation protocol and timetable. The Court further ordered that Platinex could begin the first phase of its exploration program on June 1, 2007. After the parties were unable to reach an agreement within the timeline imposed, Smith J. issued another order imposing a consultation protocol, timetable and Memorandum of Understanding on May 22, 2007. Again, negotiations failed to produce a resolution that was mutually acceptable to the disparately situated parties. On October 25, 2007, Smith J. issued yet another order demanding that KI members allow Platinex access to the drilling site. On November 6, 2007, a crowd of KI members prevented Platinex from starting its exploration program. On December 14, 2007, Smith J. cited eight KI members in contempt of court.

In his reasons for sentencing the KI contemnors to jail time, Smith J. stated:

The most significant aggravating factor to be considered in the cases before the court is the public and open declaration by the contemnors that the order of this court or of any court will not be respected or obeyed if it allows exploration or drilling on its traditional land. All have adopted the position of Chief Morris and all have stated that they will continue to defy the orders of this court. It is this public and open defiance of the rule of law and order of this court that is the most disturbing aspect of this case and which comes perilously close to criminal contempt. I find that incarceration is the only appropriate sanction. All contemnors lack the ability to pay a fine.

153 Ibid at para 139.
154 Ibid at para 68.
155 Ibid at paras 169-170.
156 Platinex 2, supra note 144 at para 188.
157 Platinex v. Kitchenuhmaykoosib Inninuwug First Nation, [2007] 3 CNLR 221 (Ont Sup Ct) [Platinex 3].
159 Ibid at paras 48-50.
The contemnors were sentenced to six months in jail. Five elected KI leaders and one community member spent approximately two months in jail and were released on consent. At the contemnors’ sentencing appeal, Platinex informed the court that it did not oppose the appeal since “no good purpose would be served by keeping the appellants in jail any longer.”

In the complicated procedural history of the dispute between KI and Platinex, we can observe a judge making earnest attempts at fostering the reconciliation of Indigenous and non-Indigenous interests. Smith J. evidenced a strong understanding of the multidimensional rule of law that the Ontario Court of Appeal first described in *Henco* and fleshed out two years later in *Frontenac Ventures*. Smith J.’s attempts to creatively employ his inherent jurisdiction to keep the parties at the negotiating table and to construct a process that would give effect to the Crown’s duty to consult are laudable. Indeed, when the sentences of the KI contemnors were appealed to the Court of Appeal, MacPherson J.A. remarked that both parties “were very appreciative of the efforts made by Smith J. to resolve this case.” That said, Platinex also demonstrates the limitations of the multidimensional rule of law. While Canadian courts can use their power to facilitate negotiation, they cannot force the parties to agree on a mutually beneficial course of action. In many of these cases, a mutually acceptable course of action is exceedingly difficult or even impossible to identify. The Haudenosaunee and the AAFN were fundamentally opposed to the proposed development activity of the other party. While KI did entertain the possibility of the commercial development of parts of their traditional territory, months of court-ordered negotiation and consultation were unable to lay the groundwork for a mutually satisfactory agreement. Often an Indigenous group and the corporation sitting across the table will have diametrically opposed interests. Canadian courts can only go so far to address the inherent disparities of bargaining power that exist between Indigenous people, corporations and the Crown. The Supreme Court has made it clear that the duty to consult does not amount to an Aboriginal veto power, and Platinex demonstrates that when talks break down, the private party which holds a concrete legal interest to the disputed territory—whether it be a fee simple or a mining lease—will often prevail against the assertion of a treaty entitlement or Aboriginal title.

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161 As mentioned above, to Smith J.’s further credit, the procedural history of the KI case took place before the release of the Ontario Court of Appeal’s decision in *Frontenac Ventures*.

162 *Platinex (appeal)*, *supra* note 160 at 7.

163 See *Platinex 4*, *supra* note 158 at 14.

164 *Haida Nation*, *supra* note 147 at para 48.

165 As was the case in *Henco*, after the contempt proceedings failed to effectively resolve the KI dispute, the Crown was forced to resort to other means. The Ontario government bought out...
VII Conclusion: Reconciliation and the Rule of Law

The Ontario Court of Appeal’s articulation of a more nuanced conception of the rule of law in *Henco* and *Frontenac Ventures* is a welcome development in the realm of injunction proceedings as they relate to Indigenous peoples. If applied thoughtfully, the formulation of a broadened rule of law will surely encourage courts to engage more thoroughly with the Indigenous interests underlying similar conflicts before granting injunctive relief to private parties intending to develop on disputed land as demonstrated in the *Platinex* and *Canfor* cases. Following *Henco* and *Frontenac Ventures*, Indigenous applicants who choose to pursue injunctive relief through the Canadian legal process are also likely to have better luck convincing courts to order in their favour in the context of similarly structured disputes. Likewise, the Court’s application of the *Gladue* principles at the stage of sentencing contemnors stands as a welcome attempt on the part of the Court to account for the unique relationship of Indigenous peoples to the Canadian legal system. The *Gladue* analysis can certainly serve to soften the blow of a contempt citation for many Indigenous protestors.

However, despite these positive developments in the common law as it relates to Indigenous land disputes, these judgments also indicate that the rule of law continues to be narrowly conceived at the stage of contempt proceedings. While courts have begun to explore the unique relationship of Indigenous people to the Canadian legal system at the injunction stage, the common law has not yet embraced a genuinely pluralistic conception of the rule of law in relation to the contempt of court power. In short, Indigenous legal rationales and perspectives continue to be marginalized. The Supreme Court’s jurisprudence defining the rights protected by s. 35 has repeatedly emphasized reconciliation as their purpose. For example, in *R. v. Van der Peet*, the Court held that “the only fair and just reconciliation is … one which takes into account the Aboriginal perspective while at the same time taking into account the perspective of the common law.” As noted above, one of the dimensions of the rule of law according to the Court of Appeal in *Henco* is the “reconciliation of Aboriginal and non-Aboriginal interests through negotiations.”

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168 *Henco* (appeal), supra note 16 at para 142.
Thus the process of reconciliation has been granted privileged status by Canadian courts tasked with resolving claims based upon Indigenous peoples’ land rights and sovereignty. But what exactly does reconciliation mean? Just how far is the Canadian legal system willing to bend?

If Canadian courts are serious about fostering genuine reconciliation, the rule of law must be further expanded to account for Indigenous peoples’ legal perspectives. Allowing for such an expansion would require courts to widen what is “cognizable to the Canadian legal and constitutional structure.”

Some scholars have argued that such an undertaking would not threaten but actually strengthen the constitutional structure. The Aboriginal rights jurisprudence of Canadian courts is replete with references to the need for the principles of the common law to be adapted when considering the claims and interests of Indigenous people. Constitutionally protected Aboriginal rights have been defined as sui generis, or “structurally outside all legally defined categories, a species that heads its own genus.” According to James (Sa’ke’j) Youngblood Henderson, the Supreme Court’s adoption of the concept of sui generis to describe Aboriginal and treaty rights arises from a “realization that the extraordinary sources of Aboriginal legal traditions and jurisprudence were beyond their legal training and experience.” According to John Borrows, the sui generis doctrine “suggests the possibility that Aboriginal rights stem from alternative sources of law that reflect the unique historical presence of Aboriginal peoples in North America.” In a number of the cases explored above, Canadian courts have shown an increasing willingness to recognize the unique legal and constitutional status of Indigenous people when considering whether to grant an injunction to temporarily prevent development on disputed territory or to order the removal of Indigenous protestors. However, the decision of the Court of Appeal in Frontenac Ventures also represented an unfortunate retreat from the dicta in Henco. By declaring that the multidimensional conception of the rule of law was only relevant at the injunction stage of the proceedings, the Court of Appeal ultimately reinforced the rule of law’s singularity. Once an order of a Canadian court has been defied, all other considerations—including the Indigenous legal rationales underlying the defiance—remain collateral.

Rigid applications of the contempt power will often only serve to undermine the policy objective underpinning the power’s existence. If the rationale

169 Van der Peet, supra note 167 at para 49.
173 Ibid.
174 Borrows, supra note 6 at 9.
for applying the contempt power is the restoration of respect for the Canadian legal system’s legitimacy, the contempt citations analyzed above proved patently ineffective. The case of the Haudenosaunee offers a rich example of the misapplication of the contempt power, leading to a diminution of respect for a singular rule of law. The Six Nations protestors were evidently not compelled to obey the injunction after the April 20, 2006, OPP raid. In fact, support for the land reclamation swelled to new levels in unabashed defiance of the Court’s orders. The lack of genuine consideration for the Haudenosaunee Great Law and for the fundamental issues at the heart of the dispute only further alienated the Indigenous protestors whose faith in the legal process had already worn thin. In this context, Marshall J.’s application of the contempt power failed to garner increased respect for the Canadian legal system.

The irony that certain applications of the contempt power will often only frustrate the court’s goals by further alienating Indigenous people from the Canadian legal system is a manifestation of a larger problem in Canadian law. Borrows writes:

When Indigenous laws are not recognized and harmonized, Indigenous peoples experience conditions that resemble a legal vacuum. When their own laws are not recognized and harmonized, it creates chaos and makes the legal systems ineffectual for them. As a result there is a mounting crisis in the rule of law within Indigenous communities because it pays so little attention to their values and participation.\(^\text{175}\)

The contempt proceedings that arise in response to Indigenous land disputes offer rich sites for an analysis of the broader dynamics in Canadian law that Borrows has identified. The dilemma faced by Robert Lovelace as described in this paper’s epigraph—a respect for the Canadian rule of law but ultimate allegiance to Algonquin law as paramount in the event of conflict—is a palpable one. In contrast to the patronizing contention made by Cunningham A.C.J., the dilemma is surely not one of Lovelace’s own making.\(^\text{176}\) At its most basic, the dilemma confronted by Lovelace and all Indigenous people compelled to assert title, rights or treaty claims through direct action is created by the imposition of a colonial legal order onto sovereign Indigenous nations. Lovelace’s dilemma stems from the “legal vacuum” created when Indigenous law is marginalized and Canadian law’s monopoly on legitimacy goes unquestioned.

If the contempt of court power is to serve its purpose in the context of Indigenous peoples’ land protests and to bolster a conception of the rule of law that speaks to Indigenous people, then it must be developed to account for the legal rationales that Indigenous people rely on when employing di-

\(^{175}\) Borrows, supra note 18 at 208.
\(^{176}\) Frontenac Ventures, supra note 1 at para 40.
rect action to halt development on disputed lands. Given that the power is constitutionally protected as part of superior courts’ inherent jurisdiction, the burden falls on judges to develop the common law of contempt to encompass a truly pluralistic view of the rule of law. For Canadian judges to acknowledge Indigenous legal perspectives as relevant considerations even after an Indigenous protestor has defied a court’s order to vacate or remove barricades from disputed land, a significant reformulation of the principles of contempt jurisprudence is clearly required. Before citing Indigenous protesters in contempt, courts must endeavour to understand and to demonstrate respect for the legal principles that compel Indigenous people to defy their orders. Courts must more thoroughly appreciate the “colonial legal legacy” that continues to shape Aboriginal rights jurisprudence. Courts must not only acknowledge the strained relationship between Indigenous communities and the Canadian legal system but also recognize the ways that applications of the contempt power can either serve to exacerbate or to mitigate this dynamic. Courts must contend with the reasons underlying lack of faith among many Indigenous people in the dispute resolution processes of the Canadian justice system. Perhaps most fundamentally, the judiciary must confront and move past Eurocentric notions about the inferiority of Indigenous law that continue to permeate Canadian society.

Fundamental changes in the relationship between Indigenous nations and non-Indigenous Canadian society are necessary. The burden of building just relationships between Indigenous nations and non-Indigenous societies surely cannot fall exclusively on the shoulders of the courts. That the case law has repeatedly encouraged negotiation as an alternative to litigation stems from the recognition that judges are often poorly situated to engage in the sort of balancing they are asked to perform. By no means is this dynamic unique to contempt of court proceedings. Judges find themselves in similar positions whenever Aboriginal rights and sovereignty claims come before them, as noted in recent commentary about the Aboriginal title case Tsilhqot’in Nation v. British Columbia: “[W]hen claims such as this come to court, judges are faced with the task of trying to achieve reconciliation of competing interests … but are unable to do so, given the constraints of the law and the inappropriate adversarial context in which judges are obliged to make their decisions.” In the contempt proceedings analyzed above, we can observe judges “trapped between an aspiration for reconciliation … and a requirement to follow the

177 Constitution Act, 1982, supra note 29, s. 96.
legally established rules.” Thus significant barriers exist to achieving the kind of transformative social change that is necessary to build just relationships between Indigenous and non-Indigenous societies through litigation in the Canadian court system.

Nonetheless, courts continue to have a crucial role to play. There is little doubt that Indigenous land disputes like the ones explored above will continue to arise. As they do, courts will be given opportunities to give broadened meaning and significance to a principle that, while foundational to the Canadian constitutional order, cannot afford to be static. As land disputes arise and the familiar sequence of legal proceedings outlined ensues, “Canadian courts could also act to facilitate healthier interactions.” Just as Linden J. recognized that Indigenous blockades require unique policing strategies if tragedies like the 1995 murder of Dudley George at Ipperwash are to be avoided, Canadian courts must similarly recognize that the contempt of court power must be modified to address the unique status of Indigenous people in Canadian law. As Indigenous land disputes throw the tenuous nature of a singular rule of law into sharp relief, the Ontario Court of Appeal’s movements towards an expanded definition of the rule of law should be built upon with an eye for legal pluralism. As long as courts continue to maintain that there is “only one law,” just relationships between Indigenous and non-Indigenous societies on Turtle Island will be impossible to foster.

182 Borrows, supra note 18 at 206.
183 Linden, supra note 9 at 182-193.
CASE COMMENT

Whose Claim Is It, Anyway?

KERRY WILKINS

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* Kerry Wilkins is a member of the Bar of Ontario. Thanks, as usual, to Kent McNeil for helpful comments on an earlier draft. Special thanks this time to Alyssa Holland and Lauren Edwards, whose comments on the argument in that same draft helped improve the text materially. Truth in packaging: I had some role in shaping Ontario’s position as intervener before the Supreme Court of Canada in this appeal. For a prose presentation that closely resembles Ontario’s position in the appeal, see Michael E. Burke and Malliha Wilson, “Considering Reconciliation in Characterizing and Proving Commercial Harvesting Rights Claims” (Paper presented to inSight Information’s 10th Annual Aboriginal Law Conference, Toronto, Ontario, 24-25 October 2011) [unpublished].

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I  Introduction

In Lax Kw’alaams—the first case since Donald Marshall in which it had given leave to appeal to an Aboriginal party seeking the protection of s. 35 of the Constitution Act, 1982—the Supreme Court of Canada held unanimously that a practice of trading in the grease from a fish called the eulachon, even if itself integral to the pre-contact way of life of an Aboriginal community, is insufficient foundation, qualitatively and quantitatively, for a contemporary Aboriginal right to harvest and trade all available species of fish. It held as well that the Crown had not promised, expressly or by implication, to give the appellants preferential access to the fishery when it established their reserves.

These are important conclusions—though hardly surprising ones, given the findings of fact in the courts below—but they are not the principal source of my interest in the decision. I propose to focus instead on the other issue the Lax Kw’alaams appeal has raised: the one relating to the characterization of claims of Aboriginal right. Briefly, who gets to decide, and on what basis, what claim of Aboriginal right is before the courts for adjudication, and why?

II  The Backstory

It all started with the Supreme Court’s Van der Peet trilogy. In each of those proceedings, the defendants claimed an Aboriginal right to sell fish in response to charges, under federal fisheries regulations, of selling fish—or, in Gladstone, of attempting or offering to sell herring spawn on kelp—in prohibited circumstances. These assertions met with mixed success in the lower courts before being rejected, in all three cases, by the British Columbia Court of Appeal. The defendants in each case appealed.

4 Lax Kw’alaams, supra note 1 at paras 48-59.
5 See ibid at paras 69-72.
7 See Van der Peet, supra note 6 at para 6; N.T.C., supra note 6 at para 7; Gladstone, supra note 6 at para 7.
8 Mrs. Van der Peet’s claim failed at trial ([1991] 3 CNLR 155 (BCPC)) but succeeded at the British Columbia Supreme Court ((1991), 58 BCLR (2d) 392); the Messrs. Gladstone succeeded below (1990 CarswellBC 1498) in establishing the Aboriginal right they had asserted but were convicted nonetheless: at trial, because the relevant regulations infringed the right, but justifi-
Case Comment: Whose Claim Is It, Anyway?

Here is what the Supreme Court said in *Van der Peet*, the principal case, about the subject matter of the appeal: “[I]n assessing a claim to an [A]boriginal right a court must first identify the nature of the right being claimed; ... The correct characterization of the appellant’s claim is of importance because whether or not the evidence supports the appellant’s claim will depend, in significant part, on what, exactly, that evidence is being called to support.”

This seems fair enough so far, but also sufficiently obvious that one might wonder why the Court felt moved to say it. The next paragraph of *Van der Peet* answers that question. “[B]oth the majority and the dissenting judges in the Court of Appeal erred,” the Court said, “with respect to this aspect of the inquiry”: the majority, for assuming that the defendant, who was charged with having sold 10 fish caught by her common law spouse, was asserting an Aboriginal right to sell fish “on a commercial basis”; the dissenting judges, for “cast[ing] the [A]boriginal right in terms that are too broad ....” Having thus found fault with what the Court of Appeal had said the case was about, the Supreme Court went on to describe what it considered the proper approach:

To characterize an applicant’s claim correctly, a court should consider such factors as the nature of the action which the applicant is claiming was done pursuant to an [A]boriginal right, the nature of the governmental regulation, statute or action being impugned, and the practice, custom or tradition being relied upon to establish the right. In this case, therefore, the Court will consider the actions which led to the appellant’s being charged, the fishery regulation under which she was charged and the practices, customs and traditions she invokes in support of her claim.

It added that “a characterization of the nature of the appellant’s claim from the actions which led to her being charged must be undertaken with some caution. In order to inform the court’s analysis the activities must be considered at a general rather than at a specific level.” In the result, the Court held that “the most accurate characterization of the appellant’s position is that she is claiming an [A]boriginal right to exchange fish for money or for other goods.” This was so for two reasons: because the activity for which she was charged—selling 10 salmon for $50—“cannot be said to constitute a sale on

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9 *Van der Peet*, supra note 6 at para 51.
10 *Ibid* at para 52.
12 *Ibid* at para 52.
13 *Ibid* at para 53.
14 *Ibid* at para 54.
15 *Ibid* at para 76; emphasis in the original omitted.
a ‘commercial’ or market basis’; and because “[s]he does not need to demonstrate an [A]boriginal right to fish commercially” to defend herself against a regulation that “prohibits all sale or trade of fish caught pursuant to an Indian food fish licence.”

The Supreme Court applied this same general approach in identifying the subject matter of the Aboriginal rights inquiry in *N.T.C.* and in *Gladstone*. Unlike the facts in *Van der Peet*, however, which pointed unequivocally towards the narrower characterization of the Aboriginal right, the facts in both *N.T.C.* and *Gladstone* pulled in differing directions. In both, as in *Van der Peet*, proof of the narrower right would have sufficed to anchor a good defence to the charge, because the relevant regulation prohibited all sale of fish under the relevant conditions. In each, however (unlike *Van der Peet*), the activity for which they were charged “appear[ed] to be best characterized as the commercial exploitation of” the fishery resource. The Court dealt with this apparent antinomy by entertaining both possible characterizations of the Aboriginal right. Because “[t]he claim to an [A]boriginal right to exchange fish commercially places a more onerous burden on the appellant than a claim to an [A]boriginal right to exchange fish for money or other goods,” proof of the former suffices as proof of the latter, and failure to prove the latter entails concomitant failure to prove the former.

Do you see what just happened here? The Supreme Court of Canada appropriated for the courts, but ultimately to itself, the power to decide, after all the evidence is in and the parties have gone home to await the decision, what Aboriginal right the Aboriginal party is going to be deemed to have claimed. By doing so, it created the distinct possibility, in any given proceeding about a claim of Aboriginal right, that the case would turn out to be about something different from what the claimant party had set out to prove and from what the Crown (or whoever) had set about to answer. It created, in other words, irreducible potential for surprise. And whether it meant to do so or not, it gave the courts the capacity to reach pretty much whatever result they preferred in a given case by characterizing the claim of Aboriginal right before them in a

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16 Ibid at para 77.
17 Ibid at para 78; emphasis in the original.
18 *N.T.C.*, supra note 6 at para 16.
19 *Gladstone*, supra note 6 at para 23.
20 See supra notes 15-17 and accompanying text.
21 *Gladstone*, supra note 6 at para 24. Compare *N.T.C.*, supra note 6 at para 18 (“The sale of in excess of 119,000 pounds of salmon by 80 people, an amount constituting approximately 1,500 pounds of salmon per person, would appear to be much closer to an act of commerce . . . than was engaged in by Mrs. Van der Peet . . .”).
22 *N.T.C.*, supra note 6 at para 20.
23 Ibid. See also *Gladstone*, supra note 6 at para 24.
way that comported—or in a way that did not comport—with the evidence offered in support of it.

Why would the Supreme Court do that? We shall never know for sure, of course, but one hypothesis is that the Court was seeking to compensate for the inchoate condition in which it found Canadian Aboriginal rights law at the time it decided the Van der Peet trilogy. It was only in Van der Peet, after all, that we learned definitively that an Aboriginal right is “an element of a practice, custom or tradition integral to the distinctive culture of the [A]boriginal group claiming the right,” one whose origin dates from before the claimant community’s first contact with Europeans. There was, and to some extent still is, confusion and controversy over where the conceptual boundaries of one Aboriginal right might end and those of another begin. It is possible that the Supreme Court reserved the power to characterize, after the fact, claims of Aboriginal right to be able to protect the interests of those who had framed and advanced such claims in unavoidable ignorance of what they would have to prove to establish them.

In Côté, for example, another prosecution involving Aboriginal fishers (but that time food fishers), the Court, applying Van der Peet’s characterization formula, rescued the defendants from their earlier mistaken assumption that Aboriginal rights to fish depended on proof of Aboriginal title. All they needed to prove to exonerate themselves from

24 Before that, it had been “unnecessary for the Court to answer the question of how the rights recognized and affirmed by s. 35(1) [of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11] are to be defined” (Van der Peet, supra note 6 at para 2).
25 Ibid at para 46.
26 Ibid at paras 60-67. We now know, of course, that the reference date for Métis claims of Aboriginal right is the date of effective European control over the relevant territory (see R. v. Powley, 2003 SCC 43, [2003] 2 SCR 207 [Powley] at paras 17-18) and that the reference date for claims of Aboriginal title is the moment the Crown acquired sovereignty over the relevant land (see Delgamuukw v. British Columbia, [1997] 3 SCR 1010 [Delgamuukw] at paras 144-145).
27 One finds quite similar reasoning explicit, albeit in a somewhat different context, in Delgamuukw, supra note 26. There, the Supreme Court allowed (at paras 74-75) a de facto amendment to the Aboriginal plaintiffs’ pleadings in a civil action asserting Aboriginal rights of land ownership and jurisdiction, because “that ruling ... was made against the background of considerable legal uncertainty surrounding the nature and content of [A]boriginal rights, under both the common law and s. 35(1) [of the Constitution Act, 1982]. The content of common law [A]boriginal title, for example, has not been authoritatively determined by this Court and has been described by some as a form of ‘ownership’. As well, this case was pleaded prior to this Court’s decision in [R. v.] Sparrow[, [1990] 1 SCR 1075 [Sparrow]], which was the first statement from this Court on the types of rights that come within the scope of s. 35(1). The law has rapidly evolved since then. Accordingly, it was just and appropriate for the trial judge to allow for an amendment to pleadings which were framed when the jurisprudence was in its infancy” (ibid at para 75).
29 See supra note 13 and accompanying text.
30 See Côté, supra note 28 at paras 35-36.
the relevant charges, the Court observed, was an Aboriginal right to fish for food within the relevant waters,\textsuperscript{31} and the evidence, though not led for that purpose, sufficed to establish that.\textsuperscript{32}

Closer inspection, however, casts some doubt on this supposition. We know from \textit{Van der Peet} that the inquiry into the soundness of a claim of Aboriginal right turns on “the practice, custom or tradition being relied upon to establish the right”;\textsuperscript{33} specifically, on the antiquity of the practice, tradition or custom and on its centrality to the way of life of the community to which the right is said to belong. Despite equipping itself in \textit{Van der Peet} to tailor claims of Aboriginal right to the relevant custom, tradition or practice,\textsuperscript{34} the Supreme Court, when embarking on the characterization exercise, has rarely done so.\textsuperscript{35} Instead, its focus has been on the offence provision to which the defendant must respond and on the activity for which the defendant was charged. “At this stage of the analysis,” Lamer C.J. said in \textit{Gladstone}, “the Court is, in essence, determining what the appellants will have to demonstrate to be an [A]boriginal right in order for the activities they were engaged in to be encompassed by s. 35(1). There is no point in the appellants’ being shown to have an [A]boriginal right unless that [A]boriginal right includes the actual activity they were engaged in.”\textsuperscript{36} These considerations have little, if anything, to do with the merits of a claim of Aboriginal right, once characterized. Reliance on them, therefore, afforded no protection or assistance to claimants asserting Aboriginal rights at a time of doctrinal uncertainty.

Perhaps for that reason, \textit{Côté} is the only Supreme Court Aboriginal rights decision in which judicial intervention at the characterization stage has worked to the advantage of the Aboriginal claimant.\textsuperscript{37} As a general rule, the Court’s forays into characterization have had no effect on the outcome of Aboriginal rights appeals. In \textit{Van der Peet},\textsuperscript{38} \textit{N.T.C.}\textsuperscript{39} and \textit{Pamajewon},\textsuperscript{40} the Court held that the evidence did not support even the narrowed claim; in \textit{Gladstone},\textsuperscript{41} it held that the facts supported even a full-strength Aboriginal

\textsuperscript{31} See \textit{ibid} at paras 56-57.
\textsuperscript{32} See \textit{ibid} at paras 59-71.
\textsuperscript{33} \textit{Van der Peet}, supra note 6 at para 53.
\textsuperscript{34} \textit{Ibid}.
\textsuperscript{35} \textit{Mitchell v. Minister of National Revenue}, 2001 SCC 33, [2001] 1 SCR 911 [\textit{Mitchell}], is an exception. At para 20, the court said that “the [A]boriginal practice relied upon ... is what defines the right.” But attentiveness in \textit{Mitchell} to what the Court considered the relevant Aboriginal practice did not assist the Aboriginal claimant. The Court in \textit{Mitchell} reversed the decisions of the lower courts, both of which had accredited Grand Chief Mitchell’s claim of Aboriginal right.
\textsuperscript{36} \textit{Gladstone}, supra note 6 at para 23.
\textsuperscript{37} \textit{Côté}, supra note 28.
\textsuperscript{38} \textit{Van der Peet}, supra note 6.
\textsuperscript{39} \textit{N.T.C.}, supra note 6.
\textsuperscript{40} \textit{R. v. Pamajewon}, [1996] 2 SCR 821 [\textit{Pamajewon]}.
\textsuperscript{41} \textit{Gladstone}, supra note 6.
right to harvest and sell herring spawn on kelp commercially; in Sappier,\textsuperscript{42} the claim of Aboriginal right, successful below, succeeded on appeal despite its judicial reconfiguration. (In Adams\textsuperscript{43} and Powley,\textsuperscript{44} the Court was content with the manner in which the trial judge had understood the claim, and decided accordingly.) But on at least two occasions, the characterization game has worked to the distinct disadvantage of the Aboriginal claimants. In Mitchell,\textsuperscript{45} unlike the others, a civil, not a penal proceeding, the claim of Aboriginal right, a claim that the trial judge had construed in much the manner of Van der Peet,\textsuperscript{46} had succeeded in both courts below. The Supreme Court reconfigured it,\textsuperscript{47} and then held that the evidence could not support the claim of right it had substituted. And in Marshall/Bernard,\textsuperscript{48} a case like Côté,\textsuperscript{49} in which the defendants based their defence not on an Aboriginal right to engage in the conduct for which they were charged (commercial logging on Crown land) but on Aboriginal title, the Court refrained altogether from characterization analysis. Instead, it took the claim at face value as a claim of Aboriginal title,\textsuperscript{50} and found it wanting.\textsuperscript{51}

These results do not disclose a uniform approach; Marshall/Bernard, in particular, departs altogether from the approach to claim identification originating in Van der Peet and seems utterly irreconcilable with Côté. But if these cases do display a general pattern or trend, it appears to be to size the claim of Aboriginal right to fit closely the activity for which the Aboriginal claimant seeks protection in response to the legislation or government action alleged to infringe the putative right.\textsuperscript{52} Put differently, the Supreme Court has gener-

\begin{itemize}
\item \textsuperscript{42} R. v. Sappier; R. v. Gray, 2006 SCC 54, [2006] 2 SCR 686 [Sappier].
\item \textsuperscript{43} R. v. Adams, [1996] 3 SCR 101 [Adams].
\item \textsuperscript{44} Powley, supra note 26.
\item \textsuperscript{45} Mitchell, supra note 35.
\item \textsuperscript{46} See \textit{ibid} at 21, rejecting the trial judge’s characterization of the right asserted as “a right to engage in ‘small, noncommercial scale trade.’” Compare \textit{Van der Peet, supra} note 6, where the Court, having noted (at para 77) that “Mrs. Van der Peet sold 10 salmon for $50,” concluded that “the most accurate characterization of the appellant’s position is that she is claiming an [A]boriginal right to exchange fish for money or other goods” (\textit{ibid} at para 76; emphasis in original omitted).
\item \textsuperscript{47} See Mitchell, supra note 35 at paras 14-25.
\item \textsuperscript{49} Côté, supra note 28.
\item \textsuperscript{50} See Marshall/Bernard, supra note 48 at para 60: “In this case, the only claim is to title in the land .... The question is whether the practices established by the evidence, viewed from the [A]boriginal perspective, correspond to the core of the common law right claimed.” This despite having acknowledged in the paragraphs just preceding (\textit{ibid} at paras 58-59) that Aboriginal rights short of title could exist in respect of lands whose use and occupation by members of the claimant community did not suffice to ground Aboriginal title.
\item \textsuperscript{51} See \textit{ibid} at paras 78-83.
\item \textsuperscript{52} See \textit{supra} notes 17, 34-36 and accompanying text.
\end{itemize}
ally characterized such claims no more broadly than is necessary to capture the relevant activity and answer the legislation or government action being challenged.  

What real difference does any of this make? Why should we care that the Supreme Court has given the courts, and itself, the final word on what an Aboriginal rights case is about? I can think of several reasons. 

First, it deprives the person claiming the Aboriginal right (and the benefit of that right) of ownership of the claim. There are many reasons why an Aboriginal party might choose to present a claim of Aboriginal right in a particular way, even in the prosecutorial context. It might sometimes be, as the Court’s most frequent practice seems to assume, that the claimants would be happy with whatever Aboriginal right might protect them from the offence with which they are charged. But the case might just as easily be a test case and the claim an attempt to establish, perhaps for some larger strategic purpose, the existence of a specific Aboriginal right with particular features or dimensions. Either way, judicial intervention in the business of claim definition complicates the exercise for the claimant. It cannot now be assumed that the claim advanced is going to be the claim that the courts adjudicate; some triangulation may well be required to obtain an answer to the question the claimant really wants to have answered. And uncertainty about what the claim is about inevitably complicates the task of gathering evidence and developing argument in support of the claim. Such impediments discourage the assertion of Aboriginal rights in judicial proceedings. 

By way of example, consider the Supreme Court’s stated unwillingness even to entertain Aboriginal rights claims that it considers too broad, or too narrow. In Pamajewon, for instance, the appellants, charged with illegal

53 Gladstone, supra note 6, is one conspicuous exception. There, the Court held (at para 26) that the evidence “support[ed] the appellants’ claim that exchange of herring spawn on kelp for money or other goods was a central, significant and defining feature of the culture of the Heiltsuk prior to contact” and noted (at para 24) that proof of that right would suffice to answer the offence with which the appellants were charged. Nonetheless, it concluded (at para 28) that “the Heiltsuk have demonstrated an [A]boriginal right to sell herring spawn on kelp on a scale best described as commercial,” because the evidence led at trial also sufficed to establish that such a practice was integral to their pre-contact way of life; see ibid at paras 26-28. Mitchell, supra note 35, is an exception of a different kind. At para 20, the Court there warns against the temptation “to tailor the right claimed to the contours of the specific act at issue.” See the quotation below in note 66. 

54 Pamajewon, supra note 40, is an obvious, if remarkably ill-considered, example. 

55 Having granted leave to appeal from the British Columbia Court of Appeal’s decision in Moulton Contracting Ltd. v. Behn, 2011 BCCA 311, 335 DLR (4th) 330 [Behn], leave to appeal granted April 5, 2012, the Supreme Court of Canada will have an opportunity to clarify the circumstances, if any, in which individual members of an Aboriginal collectivity may assert or rely in civil proceedings upon unproved Aboriginal rights said to belong to that collectivity. 

56 Pamajewon, supra note 40.
gaming under s. 201 of the Criminal Code, sought to shelter their activity under what the Supreme Court called “a broad right to manage the use of their reserve lands”, in effect, an Aboriginal right of self-government. The Court said this:

To so characterize the appellants’ claim would be to cast the Court’s inquiry at a level of excessive generality. Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the Aboriginal group claiming the right. The factors laid out in Van der Peet ... allow the Court to consider the appellants’ claim at the appropriate level of specificity; the characterization put forward by the appellants would not allow the Court to do so.

It is hardly surprising that the Pamajewon decision, whose reasons were released the day after those in the Van der Peet trilogy, applied the Van der Peet metric in characterizing the claim of right. But notice the difference in tone and rationale between those decisions and this one. The point in Pamajewon was not, as it had been in Van der Peet, that the appellants did “not need to demonstrate an Aboriginal right” broader than the one the circumstances appeared to require; it was that they would not be allowed to try to demonstrate the broader Aboriginal right. Whereas in N.T.C. and Gladstone the Court was prepared to look and see if the evidence could support a full-strength Aboriginal right to fish commercially, in Pamajewon it was unprepared even to entertain the possibility that the Shawanaga and Eagle Lake peoples might have the broad self-government rights they had asserted. Thus, in Delgamuukw, a civil proceeding whose principal purpose was to ascertain whether the Gitksan and Wet’suwet’en peoples had Aboriginal title and self-government rights over particular territory, the Court, invoking Pamajewon, held that the claimants had “advanced the right to self-government in very broad terms, and therefore in a manner not cognizable under s. 35(1).” Conversely, in Mitchell, the Court rejected the claimant’s attempt to present a

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57 RSC 1985, c. C-46, as amended.
58 Pamajewon, supra note 40 at para 27.
59 Ibid.
60 On February 26, 1996, the Supreme Court had dismissed the Pamajewon appeal from the bench, with reasons to follow. See Ibid at para 2.
61 See, again, Van der Peet, supra note 6 at para 78.
62 N.T.C., supra note 6; Gladstone, supra note 6.
63 Delgamuukw, supra note 26.
64 Ibid at para 170. Despite this, the Court was careful, in both Pamajewon, supra note 40 (at paras 24, 27) and Delgamuukw, supra note 26 (at paras 170-171), not to foreclose the possibility that rights of self-government, properly characterized, might qualify for constitutional protection as Aboriginal rights under s. 35(1) of the Constitution Act, 1982.
65 Mitchell, supra note 35.
claim in a form that it considered “artificially narrow.” Such gateway restrictions on the kinds of claims of Aboriginal right the courts will even entertain make the prospect of mounting and trying to substantiate such claims unattractive and daunting.

But the claimant party is not the only one at risk of compromise from judicial intervention in the task of defining claims of Aboriginal right. The Crown, which must respond, in court and elsewhere, to such claims, has reasons of its own to be concerned about this practice. For one thing, it has, if anything, even less control than the claimant over the ultimate outcome of the characterization game. It too stands at risk of surprise when a court releases its decision indicating that the claim adjudicated is different from the claim it thought it was defending against. Like the Aboriginal claimant, it must marshal its evidence and develop its argument without knowing for sure what claim it must oppose. It too, therefore, must endure the ever-present possibility of prejudice when the courts determine, after the fact, the subject matter of Aboriginal rights litigation.

But another operational problem besets the Crown in its dealings with claimant Aboriginal communities. We have known since 2004 that the Crown has an enforceable duty, derived from the honour of the Crown, to consult a given Aboriginal community when it “has knowledge, real or constructive, of the potential existence of [an] Aboriginal right or title [that may belong to that community] and contemplates conduct that might adversely affect it.”

66 See ibid at para 20: “It may be tempting for a claimant or a court to tailor the right claimed to the contours of the specific act at issue. In this case, for example, Chief Mitchell seeks to limit the scope of his claimed trading rights by designating specified trading partners …. These self-imposed limitations may represent part of Chief Mitchell’s commendable strategy of negotiating with the government and minimizing the potential effects on its border control. However, narrowing the claim cannot narrow the [A]boriginal practice relied upon, which is what defines the right …. As a matter of necessity, pre-contact trading partners were confined to other First Nations, but this historical fact is incidental to the claim …. Thus, the limitations placed on the trading right by Chief Mitchell and the courts below artificially narrow the claimed right and would, at any rate, prove illusory in practice.”

67 The courts have acknowledged in civil-side Aboriginal rights litigation that the Crown stands at risk of prejudice when an Aboriginal party amends its pleadings too much or too late in the proceedings. In Delgamuukw, supra note 26, for example, the Supreme Court held (at para 76) that a pleadings amendment consolidating into two collective claims—one for the Gitksan, the other for the Wet’suwet’en—the self-government and Aboriginal title claims of the 51 Gitksan and Wet’suwet’en houses prejudiced the Crown because “the collective claims were simply not in issue at trial.” As a result, it sent back to trial a case that had consumed 374 trial days and resulted in a trial judgment nearly 400 pages in length (see ibid at paras 5-6) and a Court of Appeal decision more than 300 pages in length. It is interesting that the courts have not been similarly solicitous when surprise has resulted from their own reconfigurations of the Aboriginal rights claims before them.

scope of the Crown’s consultation obligation, where that obligation exists, depends on the *prima facie* strength of the claim of Aboriginal right and on the seriousness or severity of the adverse impact of the proposed Crown conduct on the right claimed.69 A growing body of British Columbia case law holds that the fulfillment of the Crown’s consultation duties in a given instance requires that the Crown have properly assessed, at the outset of the process, the scope of those obligations in that instance.70 It is generally accepted that this assessment must be correct, not merely reasonable.71 But the Crown’s chances of being correct in assessing, at the relevant time, the strength of the claim, and even the severity of the potential adverse impact on the right being claimed, diminish dramatically in a regime in which no one can know what the right being claimed even is until it receives definitive characterization from the final court adjudicating upon it.

No one involved in the litigation of Aboriginal rights claims, therefore, can reasonably expect to benefit from the uncertainty that results from judicial interposition in the task of characterizing claims of Aboriginal right. Compounding the uncertainty are the discrepancies (displayed above) in the way the Supreme Court has dealt, from case to case, with the question of characterization.72

The consequences of such confusion and uncertainty are especially acute when the subject matter is Aboriginal rights. Unlike the rights contained in treaties or guaranteed in the *Charter*,73 Aboriginal rights do not come prepackaged and individuated for easy application. The only way—the *only* way—of ascertaining what Aboriginal rights, considered as such, exist and to whom they belong is through judicial determination as a result of litigation. Pending such determinations, everyone—non-Aboriginal settlers, proponents of private or public/private developments, tribunals and officials on whose approval such developments quite frequently depend, members of Aboriginal communities, governments that must enforce their existing regulatory regimes in a

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69 See, for example, *Haida*, supra note 68 at paras 43-45; *Taku*, supra note 68 at para 32; *Rio Tinto*, supra note 68 at para 36.


71 See, for example, *Haida*, supra note 68 at para 63; *West Moerley*, supra note 70 at paras 151, 174.

72 See *supra* notes 37-51 and accompanying text.

manner consistent with the rule of law, and, of course, the potential claimant Aboriginal communities themselves—must perforce operate on the basis of conjecture or assumption. Everyone stands to benefit from having an accurate map, fairly acquired, of the physical and conceptual geography of Aboriginal rights in Canada. We are all quite simply better off knowing what kinds of Aboriginal rights there are, where and to whom they pertain, and which, if any, of a given community’s claims of Aboriginal right are sound. Arrangements that discourage and frustrate determination of the merits of Aboriginal rights claims are, for this reason, especially unfortunate.

Which brings us, finally, back to Lax Kw’alaams.

III The Appeal

When I first learned that the Lax Kw’alaams appellants were seeking leave to appeal to the Supreme Court on a characterization issue, I assumed that their goal would be to wrest back from the courts control over the definition of the Aboriginal rights they were claiming. As it turned out, I could not have been more mistaken.

Lax Kw’alaams, like Delgamuukw but unlike all the Supreme Court’s other Aboriginal rights jurisprudence, was a purely civil proceeding, not a proceeding that arose from Crown enforcement activity. It began as a claim asserting fishing rights and Aboriginal title, but an early procedural decision

74 See, for example, R. v. Catagas (1977), 38 CCC (2d) 296 (Man CA).
75 When an Aboriginal community has a weak but credible claim of Aboriginal right, for instance, the Crown must continue consulting with that community about proposed measures that “might adversely affect it” unless and until the courts determine decisively that the claim is unsound. See, for example, Haida, supra note 68 at para 37.
76 It is for this reason that I have serious reservations about the British Columbia Court of Appeal’s decision in Cheslatta Carrier Nation v. British Columbia, 2000 BCCA 539, 80 BCLR (3d) 212. There, the Court held that an Aboriginal community could not seek and obtain determination of a claim of Aboriginal right except in circumstances where it could allege that the right is being infringed. (This conclusion may very well follow from the Supreme Court’s remarks in the Van der Peet trilogy on the characterization of Aboriginal rights; see supra notes 13-23 and accompanying text.) The practical effect of this restriction is to ensure that confrontation or dispute must precede any judicial clarification of Aboriginal rights, not to promote the reconciliation of Aboriginal and non-Aboriginal interests of which the Supreme Court so often speaks: see, for example, Van der Peet, supra note 6 at para 31; Gladstone, supra note 6 at para 72; Delgamuukw, supra note 26 at paras 141, 148, 161; Haida, supra note 68 at paras 14, 17, 20, 26, 32-33, 35, 38, 45, 49-51; Beckman, supra note 70 at paras 10 (“The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the Constitution Act, 1982”), 12, 52
77 Lax Kw’alaams, supra note 1.
78 Delgamuukw, supra note 26.
79 Mitchell, supra note 35, had the form of a civil proceeding, but it resulted from the Crown’s seizure of goods that Grand Chief Mitchell sought to bring, free of duty, into Canada from the United States.
severed the Aboriginal title claim. At the time the Supreme Court released its decision, the title claim was still in abeyance.\footnote{80} The claim for fishing rights proceeded alone.

In their pleadings, the Lax Kw’alaams sought “an Aboriginal right ‘to harvest, manage and sell on a commercial scale Fisheries Resources and [processed] Fish Products ... for the purpose of sustaining their communities, accumulating and generating wealth, and maintaining their economy.’”\footnote{81} At trial,\footnote{82} they succeeded in proving that “the harvesting and consumption of Fish Resources and Products, including the creation of a surplus supply for winter consumption, was an integral part of their distinctive culture”\footnote{83} at the time of contact,\footnote{84} so was the “exchange of luxury goods such as ... eulachon grease.”\footnote{85} But these findings of fact proved insufficient, in the trial court’s view, to establish a contemporary Aboriginal right to harvest all available species of fish for commercial sale.\footnote{86} Trade in other fish or fish products did not, it said, figure regularly or substantially enough in the claimant peoples’ pre-contact way of life to anchor an Aboriginal right,\footnote{87} and “it would be stretching the concept of an evolved Aboriginal right too far to say that the Coast Tsimshian practice of trading in eulachon grease is equivalent to a modern right to fish commercially all fish in their Claimed Territories.”\footnote{88}

Before the Supreme Court of Canada, the Lax Kw’alaams argued,\footnote{89} unsuccessfully, as mentioned above,\footnote{90} that the facts as found at trial did suffice to substantiate a modern Aboriginal right to fish all species for commercial sale. But—more to the point for present purposes—they argued in the alternative

\footnotesize{\begin{itemize}
  \item \footnote{80} Lax Kw’alaams, supra note 1 at para 1.
  \item \footnote{81} Ibid at para 23, quoting from para 62 of the plaintiffs’ Second Amended Statement of Claim; emphasis added in SCC quotation deleted.
  \item \footnote{82} 2008 BCSC 447, [2008] 3 CNLR 158.
  \item \footnote{83} Ibid at para 494.
  \item \footnote{84} Ibid at para 495.
  \item \footnote{85} See, for example, ibid at para 501.
  \item \footnote{86} Ibid at paras 495-496.
  \item \footnote{87} Ibid at para 501.
  \item \footnote{88} 2009 BCCA 593, 314 DLR (4th) 385.
  \item \footnote{89} See ibid at para 62.
  \item \footnote{90} Factum of the Appellants, the Lax Kw’alaams Indian Band et al., filed November 2, 2010 [Appellants’ Factum], at paras 67-77, 81-89, 105-107.
  \item \footnote{91} See supra note 4 and accompanying text.
\end{itemize}}
that they should not be held to their pleadings because it was the role of the courts, not the role of the parties, to characterize claims of Aboriginal right asserted in litigation. Here is the heart of the argument they made:

In this case, the courts below refused to consider whether a variation of the character of the right was necessary in light of the pre-contact practice and way of life of the Coast Tsimshian. Rather, the trial judge considered the characterization of the right to be determined by the specific relief sought in the pleadings and the Court of Appeal declined to interfere.

On this reasoning, Aboriginal rights plaintiffs must forecast in their Prayer for Relief the proper characterization of their rights by precisely anticipating the findings of fact that will be made at trial about the long-ago practices of their ancestor societies. The significance of this risk is demonstrated by the fact that this Court has changed the proposed characterization of the right in almost every Aboriginal rights case that has come before it. Had those cases been brought as civil actions, each would have been dismissed on the basis of their pleadings .... Members of this Court have expressed concern about adjudicating Aboriginal rights in regulatory prosecutions, suggesting that Aboriginal claims should "properly be the subject of civil actions for declarations." However, on the Court of Appeal’s reasoning, there is little incentive to bring a claim as a civil action when a regulatory prosecution presents no risk of incorrectly forecasting the characterization of the claimed right in the pleadings.93

Pared to its essence, the appellants’ complaint was that the courts were not second-guessing their claim of Aboriginal right, not that they were. Given its strongest formulation, their argument is this: (1) In its previous Aboriginal rights jurisprudence, most of which resulted from regulatory prosecutions, the Supreme Court has generally given little, if any, weight to the manner in which Aboriginal claimants have characterized their own claims, reserving instead the prerogative of defining the subject matter of the claim in relation to the circumstances of the litigation. (2) Given these precedents, there was no reason for the appellants (or for Aboriginal rights claimants generally) to assume that the courts would begin ascribing any special significance to the manner in which they happened to frame their claims of Aboriginal right. It was reasonable to suppose instead that the courts would continue doing what they generally have done—themselves defining the claim in the way they thought most appropriate. (3) Denying the benefit of such judicial flexibility to those who assert their Aboriginal rights claims in civil proceedings specifically discourages resort to civil proceedings and encourages reliance on

92 They argued as well, again unsuccessfully, that their pleadings were indeed phrased broadly enough to put in play claims of Aboriginal right to fish for food, social and ceremonial purposes or for trade on a more limited, modest scale; see Appellants’ Factum, supra note 90 at paras 91-95.
93 Ibid at paras 97-99; footnote omitted.
prosecutions for that purpose. (4) Any such result would be unwise and inap-
propriate because civil proceedings are the better means of litigating claims 
of Aboriginal right.

For reasons given at length above,94 I doubt the wisdom, and the benefit 
to Aboriginal claimants, in the Supreme Court’s hitherto prevailing practice 
of redefining the claims of Aboriginal right brought before it. Apart from 
that, however, I think the appellants’ line of argument warrants some serious 
consideration.

Let us begin with the final two points set out in my redraft of the argument 
above. As early as Sparrow,95 the first Supreme Court decision to deal with 
Aboriginal rights as constitutional rights, a unanimous Court had expressed 
concern that “the trial for a violation of a penal prohibition may not be the 
most appropriate setting in which to determine the existence of an [A]borigi-
nal right.”96 In Marshall/Bernard,97 LeBel J., in his concurring reasons, ob-
served that “[t]here is little doubt that the legal issues to be determined in the 
context of [A]boriginal rights claims are much larger than the criminal charge 
itsell and that the criminal process is inadequate and inappropriate for dealing 
with such claims.”98 He called attention to “[p]rocedural and evidentiary diffi-
culties inherent in adjudicating [A]boriginal claims[, which] arise not only 
out of the rules of evidence, the interpretation of evidence and the impact of 
the relevant evidentiary burdens, but also out of the scope of appellate re-
view of the trial judge’s findings of fact” and to the “special difficulties [that] 
come up when dealing with broad title and treaty rights claims that involve 
geographic areas extending beyond the specific sites relating to the criminal 
charges.”99 “These claims,” he added, “may also impact on the competing 
rights of a number of parties who may have a right to be heard at all stages of 
the process.”100 “[A]ll interested parties should have the opportunity to par-
ticipate in any litigation or negotiations” of them, because the “question of 
Aboriginal title and access to resources ... is a complex issue that is of great 
importance to all the residents and communities of the provinces.”101 “Accord-
ingly,” he concluded, “when issues of [A]boriginal title or other [A]boriginal 
rights claims arise in the context of summary conviction proceedings, it may 
be most beneficial to all concerned to seek a temporary stay of the charges so 
that the [A]boriginal claim can be properly litigated in the civil courts.”102 In
Lax Kw’alaams, the Court agreed unanimously: “If litigation [of Aboriginal rights claims] becomes necessary,” Binnie J. wrote for the Court,

we have ... said that such complex issues would be better sorted out in civil actions for declaratory relief rather than within the confines of regulatory proceedings. In a fisheries prosecution, for example, there are no pleadings, no pre-trial discovery, and few of the procedural advantages afforded by the civil rules of practice to facilitate a full hearing of the relevant issues.

In view of these well-founded concerns expressed in earlier Supreme Court judgments, it would seem perverse to design an incentive structure for Aboriginal rights litigation that rewarded those who chose to assert their claims by breaking the law to attract prosecution. Such incentives would not encourage reconciliation of Aboriginal rights and claims with mainstream law or sensibilities.

But consider as well the two initial propositions derived from the appellants’ argument. As the Lax Kw’alaams were correct to observe, the Supreme Court’s previous jurisprudence on Aboriginal rights had given no clear indication that the Aboriginal claimant had any significant role to play in determining the shape of the claim of Aboriginal right. Except in Marshall/Bernard, the Court had insisted routinely that the task of characterizing claims of Aboriginal right in litigation lay with the courts. It is true that almost all this doctrine emerged in appeals from prosecutions, but never before had the Court expressly confined its reach to the prosecutorial context. And there had been two previous Supreme Court decisions on Aboriginal rights appeals that did not derive from prosecutions. In Mitchell, the Court had conspicuously revised (to his detriment) the claim of Aboriginal right that Grand Chief Mitchell had brought, even though the parties had chosen their evidence, and argued the case in three courts, on the basis of the claim as he had presented it. And in Delgamuukw, where the Court did find the Crown to have been prejudiced by a defect in the pleadings, it had not dismissed the claim, as the courts below had done in Lax Kw’alaams, but had sent the case back to trial to be reconsidered on proper pleadings. Never, apart from Marshall/
Bernard (a prosecution!), had an Aboriginal rights claim failed because of the way the claimant had chosen to articulate it. It hardly seems unreasonable for the Lax Kw’alaams to have supposed that this pattern might continue.

The appellants in Lax Kw’alaams were therefore in for yet one more surprise on the carousel of characterization.

IV The Decision

But first, the good news. The Supreme Court in Lax Kw’alaams acknowledged, for the first time (to the best of my knowledge), the surpassing importance to everyone of Aboriginal rights litigation: of ascertaining, fairly and accurately, the soundness of claims of Aboriginal right. It reaffirmed that civil proceedings are clearly preferable to prosecutions for this purpose but warned that “[s]uch potential advantages are dissipated ... if the ordinary rules governing civil litigation, including the rules of pleading, are not respected.” Accordingly, the Court continued, the appropriate course for a court dealing with a claim of Aboriginal right at the characterization stage is to “identify the precise nature of the First Nation’s claim to an Aboriginal right based on the pleadings.”

Although “the public interest in the resolution of Aboriginal claims calls for a measure of flexibility not always present in ordinary commercial litigation,”

the necessary flexibility can be achieved within the ordinary rules of practice. Amendments to pleadings are regularly made in civil actions to conform with the evidence on terms that are fair to all parties. The trial judge adopted the proposition that “he who seeks a declaration must make up his mind and set out in his pleading what that declaration is,” but this otherwise sensible rule should not be applied rigidly in long and complex litigation such as we have here. A case may look very different to all parties after a month of evidence than it did at the outset. If necessary, amendments to the pleadings (claim or defence) should be sought at trial. There is ample jurisprudence governing both the procedure and outcome of such applications. However, at the end of the day, a defendant must be left in no doubt about precisely what is claimed.

appellants, the correct remedy for the defect in pleadings is a new trial, where, to quote the trial judge ... “[i]t will be for the parties to consider whether any amendment is required to make the pleadings conform with the evidence” (ibid at para 77).

Aboriginal rights litigation is of great importance to non-Aboriginal communities as well as to Aboriginal communities, and to the economic well-being of both. The existence and scope of Aboriginal rights[,] protected as they are under s. 35(1) of the Constitution Act, 1982, must be determined after a full hearing that is fair to all the stakeholders” (Lax Kw’alaams, supra note 1 at para 12).

Ibid at para 11, quoted in text supra at note 104.

Ibid.

Ibid at para 46.

Ibid.

Ibid at para 45; emphasis in the original.
This is an eminently sensible result, as far as it goes. It leaves with the parties, who by now “are generally well resourced and represented by experienced counsel,” both the power and the responsibility to define the subject matter of Aboriginal rights litigation. By holding the parties to their pleadings while allowing them to amend those pleadings (in more or less the usual ways) in response to developments in the course of trial, it ensures that all participants know what claims of Aboriginal right are at stake throughout civil proceedings and can tailor their preparations, and compile their evidence, accordingly. This is exactly as it should be. It is, to be frank, exactly the kind of approach a reasonable person would have expected the courts to take in adjudicating such claims if the Supreme Court had not, in decisions beginning with Van der Peet, inserted judicial discretion so precipitously into the characterization game. Perhaps it bespeaks some recognition that judicial usurpation of the task of claim definition after the close of argument operates to destabilize, and therefore to discourage, the orderly litigation of claims of Aboriginal right.

If so, it is so far, alas, only partial recognition. And therein lies the bad news in the Lax Kw’alaams decision. At least three grounds for ongoing concern arise from it. The first is particular to the Lax Kw’alaams; the second to potential Aboriginal claimants more generally. The third is more general still.

For the Lax Kw’alaams, it is bad news indeed that the Supreme Court penalized them for believing the Court’s own repeated affirmations that claims characterization was a task for the courts, not a task for them. In dismissing their claim, the Court took no account of, and no responsibility for, the confusion its own jurisprudence had wrought on their expectations about the proper conduct of Aboriginal rights litigation. In Delgamuukw, by contrast, the Court had acknowledged “the background of considerable legal uncertainty surrounding the nature and content of [A]boriginal rights,” and it had given the Aboriginal plaintiffs some slack in respect of their pleadings, even sending back to trial a claim it could have dismissed outright on account of defective pleading. Under the circumstances, it would have been gracious for the Su-

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119 Ibid at para 12.
120 “Pleadings not only serve to define the issues but give the opposing parties fair notice of the case to meet, provide the boundaries and context for effective pre-trial case management, define the extent of disclosure required, and set the parameters of expert opinion. Clear pleadings minimize wasted time and may enhance prospects for settlement” (ibid at para 43).
121 Van der Peet, supra note 6.
122 Delgamuukw, supra note 26.
123 Ibid at para 75, quoted at greater length supra at note 27.
124 See ibid at paras 76-77, quoted in part supra at notes 111 and 112.
Supreme Court to consider doing likewise in *Lax Kw’alaams.*\(^{125}\) (A few months later, the Court did something similar on a Crown appeal in *Ahousaht.*\(^{126}\)) Such nuances can make claimant Aboriginal communities wary of the welcome that awaits them in mainstream Canadian judicature.

For other Aboriginal communities contemplating civil proceedings to establish Aboriginal rights, the *Lax Kw’alaams* decision gives additional cause for apprehension.\(^ {127}\) Under the characterization rules that developed pursuant to *Van der Peet,* the courts reserved two different, though related, powers to intervene in the claim definition exercise: the power to reconfigure, even after the close of argument, a claim of Aboriginal right as they considered appropriate;\(^ {128}\) and the power to determine summarily that a claim as presented was unacceptable on its face because it was either artificially narrow,\(^ {129}\) or too broad to be cognizable.\(^ {130}\) In *Lax Kw’alaams,* the Supreme Court es-

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125 *Lax Kw’alaams,* supra note 1. In fairness, retrial might well not have made a difference to the disposition of a Lax Kw’alaams claim to “lesser included” Aboriginal rights to trade in fish generally, because such a claim lacked an evidentiary basis. “[B]y rejecting the claim to the ‘greater’ commercial fishery on the basis that trade in fish other than eulachon was not integral to pre-contact society,” the Supreme Court said, “the trial judge was equally required to reject a ‘lesser’ commercial right to fish ‘all species.’ Her problem on this branch of the argument was not only the scale of the commercial fishery but whether and to what extent ‘trade’ in the pre-contact period could support any sort of modern commercial fishery—whether full-scale or lesser in scope. Her conclusion that trade in fish apart from eulachon grease was not integral to Coast Tsimshian pre-contact society was as fatal to the lesser commercial claim as it was to the greater commercial claim” (*ibid* at para 62; all emphasis in the original). The same was not true, however, of the Lax Kw’alaams claim of Aboriginal right to fish for food, social or ceremonial purposes, or of a “lesser included” right to continue trading in eulachon grease; the facts found at trial did provide an evidentiary basis for such claims (see *ibid* at para 16 and text accompanying supra note 84). The Supreme Court gave no weight to that claim because “[t]he Lax Kw’alaams presently hold federal fisheries licences for these purposes. Their entitlement seems not to be a contentious issue. It was therefore not an issue of significance in the present litigation. Courts generally do not make declarations in relation to matters not in dispute between the parties to the litigation and it was certainly within the discretion of the trial judge to refuse to do so here” (*ibid* at para 14). The Court does not say clearly here whether the “entitlement” to which it refers is entitlement to the federal licence or entitlement to the Aboriginal right. But even if it were the latter, remitting the case for retrial on that issue would have given the Lax Kw’alaams the option of satisfying themselves whether their claim to subsistence fishing rights really was contentious.

126 *Ahousaht Indian Band and Nation v. Canada (Attorney General),* 2011 BCCA 237, 19 BCLR (5th) 20 [*Ahousaht*] is another case in which the courts had to characterize a claim of Aboriginal right to harvest fish for commercial sale. In *Ahousaht,* however, the Aboriginal plaintiffs were largely successful, both at trial and at the Court of Appeal. On March 29, 2012, in response to the Crown’s application for leave to appeal the decisions below, the Supreme Court remanded *Ahousaht* “to the Court of Appeal for British Columbia to be reconsidered in accordance with the decision of this Court in *Lax Kw’alaams*” (2012 CanLII 16558 (SCC)).

127 It is here, and in the three subsequent paragraphs of text, that my debt to Alyssa Holland and Lauren Edwards is greatest. But for their intervention, I likely would have overlooked this concern and its significance.

128 See supra notes 9-51 and accompanying text.

129 See supra notes 65-66 and accompanying text.

130 See supra notes 56-64 and accompanying text.
chewed the first of these prerogatives in respect of civil proceedings but said nothing about the second.

Consider the possible consequences of this. Under the Van der Peet rules, a court would reconfigure a claim of Aboriginal right—or, as happened in Delgamuukw, perhaps send it back to trial\(^{131}\)—when it concluded that the claim, as brought, was either too broad or artificially narrow.\(^{132}\) For all the reasons given above, this outcome was fraught with potential for prejudice for one side or the other in the litigation. It, did, however, have for the Aboriginal claimant the one distinct advantage of keeping its claim of Aboriginal right in play, albeit revised, for adjudication on its merits. In a regime that holds claimants to their pleadings, even as amended, the power to dismiss Aboriginal rights claims summarily for excessive breadth or narrowness becomes a power to ambush. In the absence of clear direction—much clearer direction than the Supreme Court has chosen to provide so far—about the permissible size and scope of Aboriginal rights, the claimant community has no way of knowing how to ensure that it has framed its claim in a way the courts will be willing to entertain. From this standpoint, what looked like a poker game in which several cards were wild now looks a lot more like Russian roulette.

This is, of course, only the most disturbing scenario, not the only possible one. Mechanisms are available during the course of trial through which the parties can test, and if need be adjust, the scope of a given claim of Aboriginal right or plead alternative claims, or versions of it. If courts are content to deal with issues of cognizability solely on the basis of the submissions tendered within a proceeding, not as opportunities for judicial improvisation, there need be no occasion for concern or for unpleasant surprise. Neither need there be cause for surprise if the courts disclose the basis on which they are going to be making cognizability determinations: if, in other words, they indicate what must be true of a given claim of Aboriginal right for it to avoid disqualification, irrespective of the evidence offered in support of it. Finally, the courts have the option of considering on its evidentiary merits the Aboriginal right claim as pleaded, whatever the claim might be. Nothing in the Lax Kw’alaams decision precludes any such approaches.\(^{133}\)

The trouble is that nothing in Lax Kw’alaams ensures endorsement of any of these approaches, either; nothing there precludes the courts from continuing, if so moved, to disqualify claims of Aboriginal right peremptorily

\(^{131}\) See Delgamuukw, supra note 26 at paras 170-171.

\(^{132}\) See, for example, Pamajewon, supra note 40 at paras 23-27; Mitchell, supra note 35 at paras 14-22.

\(^{133}\) It is interesting that the Court in Lax Kw’alaams, supra note 1, makes no mention of screening Aboriginal rights claims for scope or cognizability when it sets out in some detail, at para 46, how “a court dealing with a s. 35(1) claim would appropriately proceed.” This invites speculation about whether the Court has abandoned the gatekeeping function of scrutinizing Aboriginal rights claims for permissibility.
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on grounds of improper scope or cognizability. As long as this is so, there remains in the wake of Lax Kw’aalaams an inherent risk for Aboriginal claimants contemplating civil action to establish Aboriginal rights. Even framing a claim of Aboriginal right in civil proceedings—especially a novel one that reaches beyond familiar rights of subsistence—is now an act of hope. Such a development hardly encourages the orderly mapping of existing Aboriginal rights.

With this as background, consider now perhaps the greatest cause for general concern about the Lax Kw’aalaams decision: the sharp distinction the Court has drawn between civil and penal proceedings that feature claims of Aboriginal right. In the penal context, the Court observed, “it is the prosecution that establishes the boundaries of the controversy by the framing of the charge. Here, however, the Lax Kw’alaams First Nation is the moving party, and it lay in its hands to frame the action ... as it saw fit.”134 This deserves some elaboration.

In respect of prosecutions, the Supreme Court sought in Lax Kw’alaams to explain and rationalize its role in the characterization enterprise. Sappier,135 for example, the Court said,

was a prosecution for unlawful possession or cutting down of Crown timber from Crown lands and the Court’s inquiry was whether the accused could establish an Aboriginal right to engage in that particular conduct. The Aboriginal right asserted by the defence was broader than necessary and in its broad generality risked being rejected as invalid. In that context (as in many other prosecutions), it was necessary for the court to re-characterize and narrow the claimed right to satisfy the forensic needs of the defence without risking self-destruction of the defence by reason of overclaiming.136

(Never mind that the claim of Aboriginal right in Sappier had succeeded on the evidence in the courts below.) Citing Van der Peet137 and Pamajewon138 as other examples of this propensity (somewhat curious choices given that, as the Court acknowledged, “it was held” in both “that even the narrower claim was not established on the evidence”139), the Court described its task as that of defining a claim of Aboriginal right in a way that “would suffice to obtain an acquittal,”140 without being “broader than required to defeat the prosecution.”141

134 Ibid at para 39.
135 Sappier, supra note 42.
136 Lax Kw’alaams, supra note 1 at para 44.
137 Van der Peet, supra note 6.
138 Pamajewon, supra note 40.
139 Lax Kw’alaams, supra note 1 at para 44.
140 Ibid.
141 Ibid.
Considered as legal history, this account is somewhat selective and revisionist. It overlooks *Gladstone*\(^\text{142}\) and *Marshall/Bernard*,\(^\text{143}\) for instance, where the Court did no such thing,\(^\text{144}\) and *Mitchell* (not a prosecution, true, but an enforcement proceeding),\(^\text{145}\) where the effect and intention of the characterization analysis were neither to “satisfy the forensic needs” of the Aboriginal claimant nor to protect Grand Chief Mitchell from “overclaiming.”\(^\text{146}\) But considered as jurisprudence, *Lax Kw’alaams* may very well constitute explicit prospective judicial endorsement in the prosecutorial context of the “size to fit” approach that, as I suggested above,\(^\text{147}\) most closely approximated the Court’s prevailing previous practice in construing Aboriginal rights claims: entertaining for accreditation the narrowest version of the claim that would, if established, “suffice to obtain an acquittal” in a given prosecution.

By contrast, when an Aboriginal party initiates civil proceedings to establish an Aboriginal right, the task of claim definition, according to *Lax Kw’alaams*,\(^\text{148}\) rests with that party:\(^\text{149}\) “The statement of claim” in a civil proceeding “defines what is in issue. The trial of an action should not resemble a voyage on the Flying Dutchman with a crew condemned to roam the seas interminably with no set destination and no end in sight.”\(^\text{150}\) In particular, the Supreme Court said, the appellants were wrong to assert that a court “must first inquire and make findings about the pre-contact practices and way of life of the claimant group” before characterizing a claimed Aboriginal right.\(^\text{151}\) (Here again, it took no notice of *Mitchell*,\(^\text{152}\) which had adopted a version of the very approach the Court rejected here.)\(^\text{153}\) It is, it seems, all right for the courts to help an accused in a prosecution identify a suitable candidate Aboriginal right, but impermissible for them to do so when the claimant elects instead to initiate civil proceedings.

\(^{142}\) *Gladstone*, supra note 6.

\(^{143}\) *Marshall/Bernard*, supra note 48.

\(^{144}\) See supra notes 48-51 (*Marshall/Bernard*) and 53 (*Gladstone*) and accompanying text.

\(^{145}\) *Mitchell*, supra note 35.

\(^{146}\) See supra notes 45-47, 65-66 and accompanying text.

\(^{147}\) See supra notes 24-53 and accompanying text.

\(^{148}\) *Lax Kw’alaams*, supra note 1.

\(^{149}\) See supra notes 113-121 and accompanying text. To date, the party initiating the claim of Aboriginal right in proceedings other than prosecutions that reached the Supreme Court of Canada has always been the plaintiff or applicant: see, in addition to *Lax Kw’alaams*, *ibid*, *Delgamuukw*, supra note 26 and *Mitchell*, supra note 35. As a result, we do not yet know what characterization rules will apply to Aboriginal parties asserting Aboriginal rights as defences in civil proceedings. Perhaps the *Behn* appeal, supra note 55, will give the Supreme Court of Canada an opportunity to consider and comment on that issue.

\(^{150}\) *Lax Kw’alaams*, supra note 1 at para 41.

\(^{151}\) *ibid* at para 40, quoting from the Appellants’ Factum, supra note 90 at para 57 (emphasis in Appellants’ Factum).

\(^{152}\) *Mitchell*, supra note 35.

\(^{153}\) *ibid* at para 20 (“the [A]boriginal practice ... is what defines the right”), quoted at greater length in supra note 66.
The Supreme Court in *Lax Kw’alaams* reaffirmed, for some very good reasons, its preference for civil over prosecutorial process as the vehicle for adjudicating claims of Aboriginal right. Yet its ruling in that same decision on characterization—what it says and what it does not say—strongly encourages potential claimants to continue resorting preferentially to the prosecutorial stream: in effect, to advance their claims by engaging in civil disobedience. Why would any sensible claimant opt in these circumstances for the civil process, especially while the courts reserve the power to wield, without articulating clearly when or why they might do so, the hammer of cognizability? Is this really the optimal way of “reconcil[ing] ... the pre-existence of [A]boriginal societies with the sovereignty of the Crown”?  

V The Legacy

An optimally fair adjudication regime for Aboriginal rights will have at least four key features.

First, it will encourage Aboriginal communities to bring forward the claims that matter to them—those, at least, they believe they can prove—and to see them through to final determination. This is in everyone’s interest. No one benefits from the current climate of ignorance and controversy over which communities have which Aboriginal rights and where. We can all plan our affairs more rationally and more harmoniously once we know the answers to these questions.

Second, it will reduce to an absolute minimum the potential for unpleasant surprise in the course of Aboriginal rights litigation. If certain kinds of claims of Aboriginal right are going to be deemed impermissible, regardless of the strength of the evidence available in support of them, Aboriginal claimants need to know that this is so, why this is so and what kinds of claims those are: what principles are going to govern this threshold determination. In addition, no one, on whatever side of Aboriginal rights litigation, should be in doubt by the close of trial about the subject matter of the litigation: about the Aboriginal right claim that is in play. Claimants need to be able to choose with confidence the claims for which they will seek mainstream judicial accreditation; the Crown, and any relevant others, need to be able to know in time the case to which they must respond.

Third, it will use, and encourage the use of, the best and most powerful tools available to mainstream law to ascertain the merits of the various claims of Aboriginal right. Under the current dispensation, those are without question the tools of civil, not those of prosecutorial, process. Prosecutions will,

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154 See text accompanying *supra* note 104 for the relevant quotation.

155 Van der Peet, *supra* note 6 at paras 31-32 identifies this as the purpose of section 35(1) of the *Constitution Act, 1982.*
of course, continue to occur and Aboriginal rights and claims of right will sometimes be relevant when they do, but the scheme should be encouraging recourse to the more careful, inclusive process, not to the one that is by nature less well suited to the authoritative determination of such difficult issues.

Finally, it will function in a way that promotes, not compromises, the reconciliation of Aboriginal rights with the mainstream legal order.

Judged by these standards, Lax Kw’alaams is a decidedly mixed blessing. It is, in the long run, constructive for the Court to have prescribed judicial restraint in respect of claims definition in civil proceedings, vesting in the claimant party responsibility for identifying the claim to be adjudicated. (Whose claim is it, anyway?) This development can and should promote the eventual realization of both the first and the second of the optimal features identified above by ensuring that the courts adjudicate the claims the parties ask them to adjudicate, not somewhat different ones.

In the short run, however, Lax Kw’alaams risks jeopardizing compliance with any of these four standards. At present, claimants are still left to guess whether courts will be willing to entertain the Aboriginal rights claims they wish to bring in the forms in which they wish to bring them. As long as this is so, they may well hesitate to advance their claims at all: an outcome inconsistent with the first of our four desiderata. If they do decide to proceed, the option of abiding the judicial bowdlerization of their claims to achieve confirmation of some Aboriginal right will, despite seeming disrespectful and paternalistic, quite often have compelling strategic appeal. And as long as that option is available only in the prosecutorial stream, those claimants can hardly be faulted for preferring prosecution, despite the truncated process and the resulting threats to the prospect of reconciliation.

To convert the ruling in Lax Kw’alaams from a mixed to an unmixed blessing, there are at least two additional things the courts will have to do. The first is to structure and limit (at a minimum) their discretion to refuse to entertain claims on grounds of cognizability.156 (Players of any game are entitled

156 This is, of course, neither the time nor the place to discuss in detail what kinds of Aboriginal rights claims, if any, the courts should deem impermissible as such. But it may help to mention a precedent in imperial constitutional law that may have some relevance, if only as a place to start the discussion. Under what has come to be called the “doctrine of continuity,” the pre-existing laws, rights and interests of a colonized people survive the Crown’s acquisition of sovereignty unless they are either (1) incompatible with the assertion of Crown sovereignty, or (2) repugnant to natural justice, equity and good conscience. In Mitchell, supra note 35, the majority acknowledges (at para 10) the historical relevance of the “sovereign incompatibility” screen; Binnie J., in concurring reasons, articulates and applies the notion (at paras 141-154). In Mabo v. Queensland (No. 2) (1992), 175 CLR 1, Brennan J., writing for a plurality of the High Court of Australia, acknowledges (at 61) the ongoing relevance of the other one. I discuss the provenance of these two traditional screens, and their operation in Commonwealth jurisprudence, in Unchartered Territory: Fundamental Canadian Values and the Inherent Right of Aboriginal Self-Government (LLM Thesis, University of Toronto, 1998) [unpublished] at 189-195.
to know at the outset the shape and the boundaries of the playing field.) The second, once they have done the first, is to retire altogether—not just in the civil stream—from the game of characterizing Aboriginal rights in recognition of the fact that the law, and the sophistication of the parties to Aboriginal rights litigation, have matured to the point where claimants themselves may own and formulate their claims. (Referees and umpires ordinarily leave the play of the game to the players.) Coupled with these two further refinements, the Lax Kw’alaams decision would minimize the disincentives that now beset potential claimants with worthy claims of Aboriginal right, eliminate for all parties the potential for unpleasant surprise in the course of Aboriginal rights adjudication and do away with the perverse incentives that make prosecution an attractive means of bringing such claims before the courts.

If it helped bring about this state of affairs, the Lax Kw’alaams decision would deserve our praise as a turning point in Canadian law about Aboriginal rights. But whether it will indeed have that effect remains to be seen.
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