Public Faces: Indigenous Law Today and Through the Futuristic Looking Glass [012]

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> Many of the starting points for understanding Indigenous law are laden with colonial interventions and yet, as a process of rebuilding and self-determination, Indigenous law research seeks Indigenous self-understandings that are not (or are not overly) coloured by that colonial history.[3]

1.0 Introduction

Historically, Indigenous societies in Canada and in the world over were complete with legal, political, social, and economic ordering. My basic argument is that while many or even most of these Indigenous societies were non-state, it stands to reason that the decentralized structuring of authorities and the institutions through which law operated would nonetheless have had public and private dimensions in order to constitute complete legal orders.[4] When contrasting the Indigenous public-private law divide to that of Canadian state law, what is different is not that there was and is a public-private divide, but about where and why the dividing line is drawn.

Much of the scholarship about the private and public law divide occurs in the field of administrative law which according to Paul Daly is concerned with, "the distinctively judicial public law task … [of protecting] individual rights and interests against undue encroachment in the name of social interests."[5] However, without state structures, Indigenous law is also concerned with legitimate public purposes, the common good, and balancing individual and collective interests.[6]

There is little scholarship on the public law questions of Indigenous law with the exception of Janna Promislow who provides a cautionary perspective for approaching this complex and developing field of Indigenous public law:

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[3] Janna Promislow, private conversation, June 8, 2022.

[4] There is public law scholarship concerned with the emergence of the divide between of public and private law in the 16th and late 17th centuries as generated by the industrial revolution, changes to the monarchy, secularization, and the emergence of the state. See for example Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford Scholarship Online, 2010), online at: https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199256853.001.0001/acprof-9780199256853-chapter-3.

[5] Paul Daly, Administrative Law: a Values-Based Approach in John Bell, Mark Elliott, Jason Varuhas and Philip Murray eds., *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart, Oxford, 2016) quotations omitted.

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

> [R]esearching a distinctive "public law" within an Indigenous legal order already presumes several distinctions and institutions within Indigenous legal orders, which are themselves questions to consider in defining the research. In Indigenous legal orders, is there a public law that might be identified as apart from and in relation to multiple areas of community and family decision-making and dispute resolution, such as resource and territorial stewardship, care for family and community members, and property and ownership of cultural heritage and intellectual property? In other words, whether the problems and concerns addressed by (common law) public law form a distinct category or type of law within a particular Indigenous legal order is itself a question that deserves attention before the research questions are settled.[7]

While I agree with Promislow's suggestion for further thought and research into the public law questions in each Indigenous legal order, I still begin this paper with the presumption that historic and present-day Indigenous legal orders include public law dimensions that operate to according to the structures, institutions, terms, and principles of each Indigenous society across a range of subject areas. From my experience in engaging with Indigenous legal orders', there are common law categories that are helpful to at least begin conversations about the scope and specific areas of Indigenous law. Not surprisingly, there are major differences between common law and Indigenous law, but these not so much in the functions of law, but rather in the purposes of law, particularly with foundational economic purposes such as those concerning forms of property and ownership.

My starting place is that Indigenous law must be comprehended and seriously engaged with as law. Here I set out my working premises for Indigenous law and legal orders to provide a frame of reference for readers unfamiliar with Indigenous peoples and legal orders in Canada. I will then provide three small discussions from several Indigenous legal orders about critical aspects of Indigenous public-private law. My overall purpose is to illustrate that Indigenous law is public with integral public and private law functions. Further, I propose that Indigenous law's public dimension is a continuing and essential Indigenous legality across Indigenous legal orders. To a limited extent, these examples will demonstrate how Indigenous law interacts and contrasts with Canadian law.

2.0 Working Premise

> A legal tradition … is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught.[8]

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[7] Promislow, *supra*, note 3.

[8] John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America, 3d ed*. (Stanford: Stanford University Press, 2007) at 2 [Merryman].

The above description of a legal tradition is instructive in thinking about what comprises an Indigenous legal order. For example, the Dunne-za and Cree[9] legal traditions, as well as others, include all of the intellectual elements referred to in Merryman's definition as well as the full complex that is a legal order with implicit and explicit laws, legal relationships and authorities, remedies and sanctions, collaborative legal reasoning processes (e.g., legal norms, obligations, and principles), and precedent and public legal memories (e.g., forms of oral histories, and expressions of law such as songs, crests, etc.). Following Merryman's lead, it is possible to conceptualize a Dunne-za or Cree (or other) legal tradition that broadly encompasses the history and attitudes about the nature of law, the ideas about the role of law in Dunne-za or Cree society and as part of governance, the proper structure and operation of the Dunne-za or Cree legal orders, and the necessary ongoing public contestation about the way law should be made, applied, studied, perfected, and taught.[10]

As with other legal orders, Dunne-za or Cree legal orders also require standards of legitimacy and coherence just as Canadian law does. The legitimacy and efficacy of any stable legal order requires the ongoing collective capacity to determine the substance of law as well as its: (1) ascertainment (agreement of what law is); (2) change (when and how law is changed and why), and (3) application of law (when law is broken and determination of an appropriate legal response).[11] Added to this, Matthew Fletcher, an Indigenous tribal judge, argues that legitimacy and coherence requires that Indigenous law is accessible, understandable and applicable.[12]

From what we know of Indigenous legal orders today, historically these would have been bottom-up, horizontally structured with collaborative, public decision-making processes and collective public memories or precedent. Within the present nation-state of Canada, Indigenous peoples are organized in eleven major linguistic groups, each with regional dialects. Within these larger linguistic groups, there are about sixty Indigenous societies in Canada, each with its own legal, economic, social, and political ordering. The Royal Commission on Aboriginal Peoples commented on the importance of comprehending Indigenous polities at this larger societal scale rather than at the ahistoric, but nonetheless prevailing notion of Indigenous peoples as being solely organized in small separate, independent communities or bands. Generally, the linguistic divisions reflect larger collectives with common sets of recognised legal principles that enabled

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[9] See generally, Robin Ridington, *Trail to Heaven: Knowledge and Narrative in a Northern Native Community* (Iowa City: University of Iowa Press, 1988); Robin Ridington, *Little Bit Know Something: Stories in a Language of Anthropology* (Vancouver: Douglas & McIntyre, 1990); Robin Ridington and Jillian Ridington, *When you Sing It Now, Just Like New: First Nations Poetics, Voices, and Representations* (Lincoln: University of Nebraska Press, 2006); and Robin Ridington and Jillian Ridington, *Where Happiness Dwells: A History of the Dane-Zaa First Nations* (Vancouver: UBC Press, 2013) [Ridington and Ridington, Where Happiness Dwells]. Also see Hadley Friedland, *Cree Legal Traditions Report* (Victoria: UVIC, 2014) [Friedland, Cree Legal Traditions Report]; Cree Legal Summary (A Part of the Cree Legal Traditions Report) online at: www.ILRU.ca; and Hadley Friedland, *The Wetiko Legal Principles* (Toronto: University of Toronto Press, 2018) [Friedland, Wetiko].

[10] Interestingly, much of Merryman's description formed the body of evidence provided by Gitxsan plaintiffs, testifying on their own behalf in their seminal title court action, *Delgamuukw v The Queen* (1991), 79 D.L.R. (4th) 185 (B.C.S.C.); *Delgamuukw v British Columbia* (1993), 104 D.L.R. (4th) 470 (B.C.C.A.) (This decision is actually erroneously cited as *Uukw v British Columbia.*); *Delgamuukw v British Columbia*, [1997] 3 S.C.R. 1010. [Merryman, *supra* note 8].

[11] H.L.A. Hart, *Concept of Law 2nd* ed. (New York: Oxford University Press, 1994) [Hart].

[12] See Mathew Fletcher, "Rethinking Customary Law in Tribal Court Jurisprudence" (2007) 13 Mich J of Race & L 57.

the member groups to interact with each other, through time, for resource sharing, trade, marriage and so on. For example, the Nisga'a, Tsimshian, and Gitxsan peoples are all part of the larger Tsimshian linguistic group but each of those peoples had shared legal principles and deliberate ongoing intersocietal relationships through trade and marriage.[13] According to the Royal Commission on Aboriginal Peoples, an Indigenous society or, in the language of the report, a nation, is a:

> 4. … a sizeable body of Aboriginal people with a shared sense of national identity that constitutes the predominant population in a certain territory or group of territories. ...
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> 5. The more specific attributes …
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> - the nation has a collective sense of national identity that is evinced in a common history, language, culture, traditions, political consciousness, laws, governmental structures, spirituality, ancestry and homeland;
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> - it is of sufficient size and capacity to enable it to assume and exercise powers and responsibilities flowing from the right of self-determination in an effective manner; and
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> - it constitutes a majority of the permanent population of a certain territory or collection of territories and, in the future, will operate from a defined territorial base.[14]

The boundaries around "Indian" reserves created by the *Indian Act* divided Indigenous peoples into over 600 bands in Canada[15] that have no correlation with their larger Indigenous legal orders. This colonial division of Indigenous peoples and lands has seriously undermined the cohesion and efficacy of the larger legal orders and has curtailed the application and practice of Indigenous laws today. For example, Tsimshian people on the Pacific north coast are divided into seven *Indian Act* bands with a number of small additional reserves. As with most other Indigenous peoples, many Tsimshian people live off reserve mainly in British Columbia, but elsewhere in the world as well.

These factors create the current challenging realities that are part of rebuilding of Indigenous law today. I have written elsewhere that while Indigenous law has not disappeared in Canada, and

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[13] These three societies share a common ancient heritage, and there are many similarities among their laws and languages. See Susan Marsden, Margaret Anderson, and Deanna Nyce, "Tsimshian" in Paul R. Magosci, ed., *Aboriginal Peoples of Canada: A Short Introduction* (Toronto: University of Toronto Press, 2002) 264 [Marsden *et al*.].

[14] Canada, Report of the Royal Commission on Aboriginal Peoples, *Restructuring the Relationship vol. 2* (Ottawa: Supply and Services Canada, 1996) at 235.

[15] For a critical examination of changing Indigenous and Canadian legal identities off-reserve and in urban settings, see: Yale D. Belanger, *Breaching Reserve Boundaries:* Canada v. Misquadis *and the Legal Creation of the Urban Aboriginal Community* in Evelyn Peters and Chris Andersen, *Indigenous in the City: Contemporary Identities and Cultural Innovation* (Vancouver: UBC Press, 2013) at 69. The federal *Indian Act,* R.S.C. 1985, c. I-5*,* only concerns those Indigenous peoples registered as status under its terms. It does not affect Inuit peoples, Metis peoples, or Indigenous people (often called First Nations) who are unregistered.

that there is no completely intact Indigenous legal order ready to spring to life in response to mere its mere recognition.[16] The colonial suppression of Indigenous laws has meant today, there are gaps and distortions. However, Indigenous peoples across North America are engaged in the hard work of rebuilding their legal orders.[17]

Dunne-za and Cree legal orders (and other Indigenous legal orders) each have their own internal modes of argumentation and legitimisation, and collective reason and accountability – all of which is evident in the Dunne-za and Cree oral histories. To treat Indigenous law more simplistically reduces it from a normative order[18] that requires collaborative intellectual engagement and reasoning, to mere behaviour. Without such a comprehensive and critical perspective, one cannot see how Indigenous legal orders manage and resolve arguments to solve human problems – essential elements in the actual practice of law.[19] What the practice of Indigenous law requires, as do other legal orders, is the adherence to public processes and the demand that the practitioners seek common judgment on a case-by-case basis despite disagreement and dispute. It is the shared common knowledge, as is evidenced in Indigenous oral histories and precedential memory commons, that is the essence of legal reasoning.[20] As Gerald Postema has argued:

> The use and acceptance of the law rested on a shared sense of its reasonableness and historical appropriateness. It was thought insufficient that each member of the law community believes the rules reasonable, or wise; they acted from the conviction that this sense was shared, a sensus communis. This learned capacity for reflective judgment – jurisprudence, we might call it – is a social capacity: the ability to reason from a body of shared experiences with normative significance to solutions for new practical problems.[21]

I have argued elsewhere that the Gitxsan legal reasoning process, as an example, meets Postema's standards for the form and structure of common law reasoning in a public forum. Specifically, Postema describes distinctive features of common law reasoning: (i) pragmatic focus on problem solving, (ii) self-conscious regard for the public good, (iii) contextual competence of the adjudicators, (iv) system-resistant nature, (v) discoursive-deliberative reasoning and argument in an interlocutory context, and (vi) reason that is considered common

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[16] Val Napoleon and Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions through Stories" 2016 Special Issue, McGill Law Journal 725.

[17] For example, see the Indigenous Law Research Unit at www.ilru.ca; the Wahkohtowin Law and Governance Lodge at the Faculty of Law, University of Alberta online at www.ualberta.ca/wahkohtowin.ca; and the Indigenous Legal Orders Institute at the Faculty of Law, University of Windsor.

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

[19] Val Napoleon, Legal Pluralism and Reconciliation: Journey or Arrival (November 2019) Maori Law Review 1 [Napoleon, Legal Pluralism].

[20] Napoleon, Living Together *supra* note 6 at 62.

[21] Gerald J. Postema, Classical Common Law Jurisprudence (Part II) (2003) 3:1 Oxford University Commonwealth Law Journal 1 at 9 [Postema, Classical Common Law].

or shared.[22] In a 1945 case involving a crest dispute, I applied Postema's criteria and argued that while the legal processes and expressions of Gitxsan law looked different from those taking place in Canadian courtrooms, the Gitxsan legal functions and reasoning were clearly recognizable and equivalent in practice.[23] Through this example of multi-party dispute management, each level of decision-making required consideration of the principles for the common good.

In each Indigenous society, citizens and their legal institutions, organized in various ways were, and are, responsible for the maintenance and operation of their legal order.[24] For example, in Cree society, there are four decision-making groups, and their role and authority depends on the type of legal decision required: the family, medicine people, elders, and the community.[25] In Dunne-za society, depending on the type of legal problem, the authoritative decision-makers are families, family members, individuals, medicine people or dreamers. Another example is Gitxsan society where law operates through the institutions of matrilineal kinship units of extended families and the four overarching clans.[26]

Indigenous peoples were and are reasonable and reasoning peoples.[27] Jeremy Webber argues that it is law that enables large groups of people to collectively manage themselves "against a backdrop of deep-seated normative disagreement" and to fashion "collective positions out of the welter of disagreement".[28] Law is an intellectual process that people must actively engage in to manage the full range of collective human life including all aspects of political, economic, and social life – families, governance, harvesting fish and game, accessing and distributing resources, managing lands and waters, etc.

Indigenous law is not perfect, nor does it have to be because no legal system ever lives up to its aspirations. Nonetheless, a people's collective aspirations inform standards and ethics, and they help to maintain the power of hope. As with all law, Indigenous law contains thinking processes and intellectual resources that necessarily adapt though time to solve the problems of each new generational era.[29] Today, as in the past, there is no room for romanticization of Indigenous law

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[22] Napoleon, Living Together *supra* note 6 at 62. Also see Richard, Overstall, Encountering the Spirit in the Land: 'Property' in a Kinship-Based Legal Order in John McLaren, ed., *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005) [Overstall].

23 *Ibid.* at 64 to 66.

24 For an important discussion about questions and issues concerning non-state law at an international level, see Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: and International Account* (Cambridge: Cambridge University Press, 2010). For a broad discussion about non-state law from a range of non-Indigenous perspectives, see Helge Dedek and Shauna Van Praagh, eds., *Stateless Law: Evolving Boundaries of a Discipline* (London UK: Routledge, 2015).

25 Friedland, Cree Legal Traditions Report *supra* note 4. Also Friedland, Wetiko s*upra* 4 note 26.

26 For an exploration into questions of Gitxsan democracy see, Val Napoleon, Gitxsan Democracy: On Its Own Terms, in James Tully and Pablo Ouziel, eds., *Democracy and Its Struggles* [provisional title], Cambridge University Press, forthcoming 2022 [Napoleon, Gitxsan Democracy].

27 Friedland referring the importance of John Borrows' scholarship, "Certainly, his starting assumptions of (1) reasoning people and traditions, his focus on (2) contemporary application of legal principles, and (3) on legitimate social reasoning processes, rather than individual pathology, help here." Friedland, *Wetiko supra* note 4 at 41.

28 Webber, Agency *supra* note 9 at 202.

29 Val Napoleon, Angela Cameron, Colette Arcand, and Dahti Scott, Where is the Law in Restorative Justice? in Yale Belanger, ed., *Aboriginal Self-Government*, 3rd ed. (Saskatoon: Purich Press, 2008) 348–72 [Napoleon *et al*, Where is the Law].

or peoples. Brunée and Toope provide this helpful caution, "Communities of practice are not intrinsically positive; practices emerge that can undermine legality, just as they can support it."[30]

There are a number of sources or authorities of Indigenous law. According to internationally renowned Indigenous legal scholar John Borrows:

> Not all law flows from courts, legislatures, or parliaments. Law was made in varied local settings before nation-state formation. Law is also developed in these locations after state formation too, particularly in Indigenous contexts where state law is ineffective because of its imposed, foreign, authoritarian, or dismissive nature. The failure of state law to be persuasive and credible within Indigenous contexts propels people to turn to their own authorities, standards, measures, precedents, and norms to regulate behaviour and resolve disputes.[31]

Borrows argues that Indigenous societies have at least five sources of law: sacred, deliberative, custom, positive, and natural.[32] Drawing on Lon Fuller, I have argued that there is another source of law, human interaction deriving from the general patterns of how we treat one another through time.[33] Borrows cautions, and I agree, against treating these sources or authorities as separate or artificially watertight because, in actuality, "Indigenous legal traditions usually involve the interaction of two or more . . . sources".[34] All sources or authorities of law require collaborative interpretive choices about precedent and its application on a pragmatic case-by-case basis. It is through this sustained engagement with law[35] that people create the necessary intellectual space to critically examine norms, power, and assumptions – a healthy exercise of citizenship and individual and collective legal agency and so integral to healthy societies.

3.0 Indigenous Public-Private Law – Several Examples

In this section, I set out three small explorations of what might be considered Indigenous public law. Ultimately, each Indigenous people must attend to what Promislow calls the markers of public law values and concerns, namely decision-making processes, decision-makers, institutions, transparency, accountability, and fairness.[36] Further, Promislow argues that this requires Indigenous communities to:

> [M]ake explicit their self-knowledge of the laws and values that shape decision-making and dispute resolution in particular contexts in their legal orders, … so that state questions in self-government negotiations relating to public law (e.g., expressions of fairness, respect for the rule of law and democracy, accountability,

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[30] See Jutta Brunnée and Stephen Toope's important discussion on torture: *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010) 262.

31 John Borrows in Friedland, *Wetiko supra* note 4 at xii.

32 John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 23 [Borrows].

33 Val Napoleon, Thinking About Indigenous Legal Orders in René Provist and Colleen Sheppard, eds., *Dialogues on Human Rights and Legal Pluralism* (Dordrecht: Springer, 2012) at 242 [Napoleon, Thinking About Indigenous Legal Orders].

34 Borrows, *supra* note 32 at 55.

[35] Promislow, *supra* note 3.

[36] Ibid.

transparency) can be responded to, deflected, and re-oriented as appropriate, in efforts to avoid further impositions.

3.1 Impact Benefit Agreements[37]

Commonly referred to as IBAs, the simplest Canadian legal description of impact benefit agreements is that they are contracts made between Indigenous communities and private companies in order to allow a range of industrial type projects to proceed with Indigenous consent.[38] There are many types of similar agreements variously referred to as participation agreements, supraregulatory agreements, and benefits sharing agreements.[39] I am using the IBAs as a placeholder in this discussion, but my analysis applies more broadly to other forms of agreements between Indigenous peoples and industry. While appearing simple if one simply accepts the Canadian legal definition, what actually becomes clear on closer examination is that IBAs are complex because they concern issues of paramount importance to Indigenous peoples and which span environmental protection, territories, land and resource rights in Canadian law, resource jurisdiction, treaties, governance, economies, and social/cultural health. In contrast to these paramount Indigenous concerns, are the basic goals and purposes of industry, namely that of resource development and extraction usually backed by more financial resources beyond what Indigenous communities and groups have access to.

IBAs themselves are a moving target – they are continually being reshaped by the ongoing legal and political activism of Indigenous peoples, the Canadian political and legal climate, and the goals of industries as determined by world markets.[40] There is an important critical scholarship about IBAs and since IBAs have now been around for some years, there are some assessments drawing from the actual experiences of Indigenous peoples, state government, and industry.[41]

There are a host of issues that have been identified as to the scope and rigour of IBA assessments, the methodologies and standards for these assessments, the extent and power of the state's role, the extent and power of industry's role, whether and how long-term sustainability is

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[37] I have written about IBAs more extensively in Bartholemew Smallboy and Arielle Dylan, eds., *Impact Benefit Agreements* [working title, accepted University of Toronto, forthcoming 2022].

[38] Ginger Gibson and Ciaran O'Faircheallaigh, *IBA Community Toolkit, Negotiation and Implementation of Impact Benefit Agreements* (2015) Gordon Foundation online at www.gordonfoundation.ca/sites/default/files/publications/IBAToolkit.pdf at 10.

[39] *Ibid*.

[40] For example, the original 2010 IBA Toolkit was expanded beyond employment and contracting opportunities to capture recent changes and additions such as royalty payments, profit sharing, equity stakes, greater transparency and disclosure as per new federal requirements for Indigenous communities, and prevention measures and compensation in the event of environmental problems. See Vivian Danielson, "Fall Debut for updated IBA Community Toolkit, Whitehorse sheds light on Yukon First Nations' agreements with mining companies" (October 2014) Canadian Institute of Mining, Metallurgy and Petroleum (CIM) magazine online: www.cim.org/en/Publications-and-Technical-Resoruces/Publications/CIM-Magazine/2014/October/fall-debut-for-updated-IBA-Community-Toolkit.aspx.

[41] For example, Marcia Langton and Judy Longbottom, eds., *Community Futures, Legal Architecture: Foundations for Indigenous Peoples in the Mining Boom* (Oxford: Routledge, 2012); Marcia Langton, Odette Mazel, Lisa Palmer, Kathryn Shain, and Maureen Tehan, *Settling With Indigenous People* (Annandale, NSW: The Federation Press, 2006); Marcia Langton, Lisa Palmer, Maureen Tehan, and Kathryn Shain, *Honour Among Nations? Treaties and Agreements with Indigenous People* (Carlton, Vic.: Melbourne University Press, 2004). Also see references listed in the IBA Database online at www.impactbenefit.com. This website provides a list of Canadian IBAs and other information about IBAs in Canada.

accounted for, and the widely varying levels of direct local Indigenous community engagement.[42] There are a number of serious concerns relating to the lack of transparency and the typical confidentiality requirements of IBAs with Indigenous communities. There are also Indigenous worries about whether the IBAs create or are part of a reactive stance as opposed to facilitating forward planning, about the internal community tensions regarding the IBA arrangements, and for some communities, the political and economic vulnerability created by the dire need for local employment and contracting opportunities.[43]

While all these concerns are important, one of the critical issues is that they are characterized as private agreements according to Canadian law – contracts – negotiated between industry and Indigenous communities. It is worthwhile noting that private law is still law, so it necessarily involves public legal institutions. To assert a private claim against another is to direct this demand through those public state institutions of law, though as I argue above, the public aspect of a state's legal institutions is a requirement for all law. In other words, IBAs are private insofar as Canadian law in that they do not directly involve state governments as legal actors either as plaintiffs or defendants, but they are still governed under the auspices of public state law. However, it is also arguable that IBAs are private law because the principles that would be adjudicated in a court (i.e., a public forum, unless the IBA included a provision for arbitration in a different forum) would be private law about the nature and meaning of the contract, and in what conditions. My colleague, Kathy Chan, helpfully notes that, "For private persons, the rule is that you may do anything you choose which the law does not prohibit… But for public bodies the rule is opposite, and so of another character altogether. It is that any action to be taken must be justified by positive law."[44]

If we understand law, including Indigenous law, to be a public collaborative process through which legitimate legal decisions are made, can we understand the characterization of IBAs as private from an Indigenous perspective?[45] Again, it is usually Indigenous public governments that are negotiating IBAs with industry, arguably about Indigenous public issues, so they cannot be considered private insofar as Indigenous law. If IBAs are considered private according to Canadian law, does this locate them outside of Indigenous law? What might be the consequence of taking issues of paramount importance (i.e., lands, environment, etc.) to Indigenous peoples out of their Indigenous public legal processes? Does this place IBAs beyond the reach of legitimate and lawful Indigenous processes, and beyond accountability and lawfulness according to the applicable Indigenous legal order? At the end of the day, does this strengthen or undermine Indigenous legal traditions and their efficacy? There are of course Canadian public law processes such as judicial review that might be available to a band member (as per the *Indian Act*) to challenge their government's (i.e., Indian Band) decision to enter into an IBA without proper process in the community.

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[42] *Ibid.*

[43] Ken J. Caine and Naomi Krogman, Powerful or Just Plain Power-Full? A Power Analysis of Impact Benefit Agreements in Canada's North (2010) 23(1) Organization and Environment 76.

[44] Kathy Chan, course notes, quoting from *R v Somerset County Council*, *ex parte Fewings* [10/02/1994] TLR 3, online at: https://app.justis.com/case/r-v-somerset-county-council-ex-parte-fewings/overview/c4ydm0CZm1Wca.

[45] The public/private divide in western law is murky. For example, the law of torts, contracts, and property are considered private, but again they are regulated and operated within public law and government.

IBAs are treated as an unavoidable, but necessary everyday aspect of doing business as usual by governments, third parties, and often by Indigenous communities. Consequently, IBAs are either taken for granted without a larger critical analysis, and if Indigenous community members are suspicious of the IBA, it is often because they do not believe they had a meaningful voice or role in their negotiation and implementation. The question of the legality of IBA's under Indigenous law is not addressed, and this continues the same old colonial dynamic of undermining and rendering invisible Indigenous legal orders.

So what if we took Indigenous law seriously as law? This would mean not presupposing the outcomes of Indigenous legal processes according to any predetermined political expectation of Indigenous peoples and what they 'should' do to meet those expectations. Again, there are legitimate legal processes of deliberation and reasoning through which Indigenous communities have and will continue to make hard decisions about lands, governance, and resources. To foreclose the outcomes of Indigenous legal decisions by assuming what such decisions would be or should be without the actual engagement of Indigenous law is to fundamentally disregard that law. One should certainly be critical, and one can disagree with Indigenous decisions, but the actual decisions should stand if they meet the terms of Indigenous legalities and legitimacy. As stated earlier, critique, debate, and disagreement are a necessary part of any healthy human society and this should continue to be a part of an active Indigenous public discourse about law, its aspirations, operation and function, application, and interpretations. What I am advocating here is that Indigenous legal processes be fully engaged, that their integrity be maintained, that change is explicit and public, that accountability is factored in, and that decisions are public and form part of an accessible public record, at least within Indigenous communities. Clearly these are all public law concerns or values.

I want to make two final points here. First, it is not fair or accurate to categorically say that all IBAs are simply neoliberal constructs that Indigenous peoples are either forced or simply duped into signing. Indigenous peoples, as with other peoples, are individual and collective agents with reasons for the decisions they make. In other words, Indigenous peoples are managing as best as they can despite colonial history and within the relations of power that they are a part of. However, if left unexamined, IBAs may well be another way to neoliberalize Indigenous relationships to their lands, and this is fine if that is what they deliberately choose to do. Second, Indigenous peoples do have historic legal and political intellectual resources from which to draw to constructively resist the relentless pressures that seek to displace them from their lands – and many Indigenous peoples are doing just that – resisting and protecting their lands.

3.2 Gitxsan Compensation Law

I turn now to the Gitxsan law of compensation, which is usually, but not always, in the form of land. This area of law demonstrates another public-private divide, and which provides an interesting contrast with Canadian law. The importance of examining compensation cases provides some insight into the on-the-ground practice of Gitxsan law. How do people understand and work with injury, liability, and compensation? To gain an understanding of Gitxsan law and legal practices, I examined a number of ancient cases as well as some that are more recent. The challenge in the later cases is the varying degrees of involvement by Canadian law or State

authorities.[46] In all, these cases serve to demonstrate the continuing resilience of the Gitxsan legal traditions since European arrival.

The law governing compensation is called *xsiisxw*, and it is applied only in the most serious of situations involving loss of life or a major debt, and it is formally announced and witnessed in a public feast[47] hall after the requisite private deliberations. Xsiisxw (compensation/cleansing) may be applied when a life is taken either accidentally or with intent, in which case the offending House[48] may publicly transfer land to the wronged House. The principle behind land as compensation is that land does not wear out and the compensation must last at least a lifetime, often more. If, and when the land is to be returned to the original owner, the head chief of the House that received the land as compensation will announce its return at the main public forum of the Feast. Gitxsan Chief Xamiaxyetxw, Solomon Marsden, explains:

> This is when a person's life is taken, and it's a serious matter to…give compensation to the…family. And a life has been taken here, and that's what they look at. This is why they have to – to give a lifetime thing, like the land, another person they would give, because the – the life of a person has been taken.[49]

Richard Overstall provides an overview of xsiisxw and its significance to Gitxsan territories and operation of law:

> Once acquired, a relationship with territory is inalienable unless the House is unable to produce sufficient wealth to perform its feast responsibilities or is required to relinquish one of its territories as compensation. The compensation system, known as *xsiisxw,* requires a House to relinquish wealth, names, crests, or territory to repay an offence committed against another House. The amount paid is gauged more to settle the disquiet felt by the other party than to replace the lost value. In the past, if the compensation process was not started quickly, homicides and other serious offences could escalate into feuds, as retaliation killings were lawful after warnings had been given.

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[46] Val Napoleon, Ayook: Gitksan Legal Order, Law, and Legal Theory (2009) Doctoral Dissertation, UVIC (unpublished) [Napoleon, Ayook].

[47] The Feast (often referred to outside Gitksan circles as the potlatch) is a complex political, legal, economic, and social institution in which the main business of the hosting House is transacted and formally witnessed by the guest Houses. Jurisdiction among the Gitksan is exercised through the feast. In former times, feasts were held for all major legal, social, and political transactions. See generally Richard Daly, *Our Box Was Full: An Ethnography for the Delgamuukw Plaintiff's* (Vancouver: UBC Press, 2005)57-106.

[48] A House (English name) is a matrilineal kinship unit, the Gitxsan term is wilp. The wilp is the basic conceptual political, social, economic, and legal unit in Gitxsan society. Each Gitxsan person is born into his or her mother's House, a group of around 150 persons who share a common ancestry. The term "House" originates from the historical longhouses, although members of the same House did not actually live under one roof. Rather, they were and are widely scattered by marriage and occupation. House members have rights and responsibilities in other Houses by virtue of their roles as spouses and clan members. See Richard Daly and Val Napoleon, "A Dialogue on the Effects of Aboriginal Rights Litigation and Activism on Aboriginal Communities in Northwestern British Columbia" (2003) 47:3 Social Analysis: The International Journal of Cultural and Social Practice 108.

[49] Solomon Marsden (Xamiaxyetxw) 9 May 1988, B.C.S.C. trial transcript, 5932 at 5938, evidence for *Delgamuukw v The Queen,* [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185 at 5957 [Solomon Marsden (Xamiaxyetxw) 9 May 1988].

> For the death of an individual, compensation might involve a gift of material wealth; for the intentional death of an important chief, it might involve the transfer of territory for the lifetime of the immediate family of the deceased; and for a series of unprovoked attacks on a neighbouring people, it might involve the permanent transfer of territory to the innocent party. The legal principle coming into play in the latter case is that not only has an offence been committed against an innocent human party, but also against the laws of respect for the land itself. In such cases, the original bond [with the land] is broken and divorce is the sole remedy.[50]

According to the oral histories or *adaawk*,[51] land is the ultimate compensation payment. In order for land to be paid as compensation for varying periods of time – sometimes generations – a well organized system was required that allowed those with recognized legal authority for land to transfer it to another House. These compensation payments in land would have to be publicly and widely communicated, through precedent over generations, so that everyone affected would be informed of the ownership changes (i.e., original transfer of land and the possible return of that land). These transfers are not restricted to the distant past but are recalled and dealt with in today's Feasts.

In this example, Gitxsan Chief Guuhadakw Thomas Wright from the House of 'Wiik'aax (wolf/lax gibuu), described an accidental death that occurred in Kisgagas "a long time ago" for which no compensation was paid.[52] In this case, while the families were eating, the nephew of Yagosip died when he accidentally fell onto Yagosip's knife. Because Yagosip and the nephew were both members of the House of 'Wiik'aax there was no need for a xsiisxw. According to Thomas Wright, "It was resolved. There was peace. Nobody mentioned it."[53] Mr. Wright explained that a xsiisxw would have been held if Yagosip and the nephew were from two different Houses, "[T]here will be Xsiisxw if that person was from a different house [and different clan]; there will be an exchange of blood."[54]

The case of Yagosip reveals a division between those matters that are dealt with publicly, in the sense of being out in the open and in the nature of being a public concern, as opposed to those matters that are dealt with privately within the House which are not for external consumption. Admittedly, this is a different cast on the question of the Indigenous public as the focus is not on an actor delegated by the state and whether they acted within the grant of that authority. Nonetheless, it is my contention that the grounding of such decisions lies in the commitment to the public good which is necessary to maintain the chief's public authority in this system.

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[50] Richard Overstall, "Encountering the Spirit in the Land: 'Property' in a Kinship-Based Legal Order" in John McLaren, ed., *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2004) 40.

[51] The adaawk (collective oral history) is a formal and primary Gitxsan intellectual governing institution that each House owns. It is the adaawk that links each House to its territories and establishes ownership of the land and resources. The adaawk tell of the origins and migrations of groups to their current territories, explorations, covenants established with the land, and songs, crests, and names that result from the spiritual connection between people and their land.

[52] Olive Ryan (Gwaans) 15 June 1987, B.C.S.C. trial transcript, 5932 at 5938, evidence for *Delgamuukw v The Queen,* [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185 at 1252.

[53] *Ibid*.

[54] *Ibid*.

A central Gitxsan governing concept, *daxgyet,*[55] illustrates just how important the upholding the public good is to the integrity and maintenance of Gitxsan law and political ordering. Literally Daxgyet means chief's power and authority, and the strength of a people.[56] Each matrilineal kinship unit, the *Wilp*,[57] has the legal and political responsibility to maintain its power relationship, its *daxgyet* – its fundamental relationship to the land. Daxgyet is a relational concept in that it derives from the public fulfillment of legal, political, and economic obligations that are essential for the health, strength, continuation, and wealth of the matrilineal kinship units – whether those obligations are internal (private) or external (public). The loss of daxgyet, caused by profound disrespect or loss of face correlates to a diminishment of *daxgyet* for the Wilp, the most serious loss any Wilp can experience as it is essentially a loss of relational political power.

According to Gitxsan Chief Hanamuxw Don Ryan, if one House member intentionally harmed another member from the same House, this matter would be considered an internal matter but could, depending on the seriousness of the injury, involve the father's side of the person that was harmed at which time it would become a public matter, a matter of daxgyet. Mr. Ryan explains: "The injury would have to be dealt with, and the father's side would try to be involved, but it would be dealt with internally, not publicly in a feast.[58] Because of this, the witnesses did not provide the Court with any examples of internal (i.e., private) House legal processes for such injuries.

3.3 Administrative Law

In this section, I take up the question of how we might imagine Indigenous law being practicing through the various current administrative tribunals. One question is about how Indigenous law might reshape the design and structures of tribunals. How will Indigenous administrative law continue to develop in various Indigenous legal orders? What are the various expectations of Indigenous law in this field?[59]

Over the years, there has been much productive discussion about tribunals and administrative law. We know that in this country, tribunals are a very important and integral part of the Canadian legal fabric and the operation of Canadian law We know is that it is the legislative frameworks and terms for statutory interpretation that enables tribunals today. We also know that it is easier to talk about procedural matters and access than about substantive Indigenous law. More information or data is needed as to how the various tribunals, (1) serve Indigenous communities and what rights are involved, (2) serve Indigenous individuals and in what

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[55] Napoleon, Ayook supra note 46 at xi.

[56] According to Richard Overstall, *daxgyet means* a "firmly bound person", and is a "concept not easily translated although the English term 'powers' is often used". See Richard Overstall, (draft) A People of Themselves: Some Field Notes On Gitxsan Law in Val Napoleon, Rebecca Johnson, Richard Overstall, and Debra McKenzie, *An Interrupted Intergenerational Conversation: Indigenous Art and Societal/Cultural Expressions* (Toronto: University of Toronto Press, forthcoming) at 9.

[57] Napoleon, Ayook supra note 46 at xv.

[58] Telephone conversation with Don Ryan (Hanamuxw), 16 May 2008

[59] I do not take up the many further questions about how the obligations of DRIPA and UNDRIP should be acted on in field of administrative tribunals (*Declaration on the Rights of Indigenous Peoples Act* [Declaration Act] BC 2019).

tribunals, and (3) how to deal with access questions and what access issues remain to be addressed.[60]

The field of administrative law and the development of tribunals has been within and in response to Canadian law and its operational needs. Given this, if and when Indigenous law is considered, it is primarily as an add-on to an existing, hard-wired Canadian legal system. The consequence of not explicitly considering Indigenous law is that the terms of reference for administrative law continues to be Canadian law though there a several notable exceptions to this with the Haida Nation and the Deline Judicial Council.[61]

Taking Indigenous law seriously as law, means considering both the substantive and procedural issues from an Indigenous legal perspective from a specific legal order. Given that administrative law is a creature of the state, we cannot ask what Indigenous administrative law might have been historically, but rather, what it is in the present day. However, Janna Promislow has helpfully suggested asking, "What is the law of how the community administered its governance? How are public decisions made and enforced? And what Indigenous law (procedural or substantive) would be relevant to governance bodies making decisions that affect Indigenous people and communities today?"[62] Such inquiries mean asking which legal order is involved? Is it Wet'suwet'en? Or Secwepemc? Is it Gitxsan? Or Cree? It also means determining what is the legal issue according to that Indigenous legal order and that law, and who the Indigenous authoritative decision makers (past and present) are. Finally, one needs to ask about the legal processes for determining a response to the identified legal issue, what that range of legitimate legal responses are according to the specified Indigenous legal order, and the appropriate range of past and present sanctions and remedies are.[63]

Turning to the question of expectations, Indigenous law has not gone anywhere in multijuridical Canada, but as previously stated, it has been severely undermined and curtailed. The work today is fundamentally that of rebuilding – that is what we see taking place see across Canada.[64] Indigenous peoples need support to continue this rebuilding – this absolutely must be a central part of reconciliation and meeting the obligations of UNDRIP – whether this is for administrative law challenges or matters relating to governance, citizenries, or healthy communities.

In 2013, the then Chief Justice Beverly McLachlin said,

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[60] A couple papers with related calls for more information on who tribunals serve, "user" oriented design (an access to justice project) (and see the cites at the end of this comment too): Lorne Sossin, "Designing Administrative Justice" (2017) 34 Windsor YB Access Just 87; and Laverne Jacobs and Sule Tomkinson, *Examining the Social Security Tribunal's Navigator Service: Access to Administrative Justice for Marginalized Communities* (2022); https://scholar.uwindsor.ca/lawpub/133. Here I am not distinguishing between administrative bodies that serve the general population (e.g., human rights, residential tenancies, income support, workers compensation, or environmental appeals contexts) and those that are involved in planning and decision-making related to Indigenous agreements (e.g., co-management, joint management, or Indigenous treaty governments.

[61] Council of the Haida Nation online at https://www.haidanation.ca/ and Deline Justice Council online at https://www.deline.ca/en/justicecouncil/.

[62] Janna Promislow, *supra* note 3.

[63] This methodology is more fully described in Hadley Friedland and Val Napoleon, "Gathering the Threads: Indigenous Legal Methodology" 2015 1:1 Lakehead Law Journal 33.

[64] See for example www.ilru.ca. Also see the *Truth and Reconciliation Commission of Canada, Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) online: www.trc.ca.

> [W]ithout administrative tribunals, the rule of law in the modern regulatory state would falter and fail. Tribunals offer flexible, swift, and relevant justice. In an age when access to justice is increasingly lacking, they help to fill the gap. And there is no going back.[65]

In 2017, Lorne Sossin wrote that, every tribunal that has been established reflects a core premise that an alternative to court, on the one hand, and government, on the other, is both necessary and beneficial.[66]

There are at least two ways to think about these statements. First, Indigenous communities and individuals need these alternatives to present day courts. However, I am more interested second idea which needs much more exploration than what I am going to be able to offer here. My preliminary approach is this:

- If we are to consider what Indigenous administrative law is, then what is it an alternative to insofar as Indigenous adjudication and governance?

- What governance problems should Indigenous administrative law and tribunal processes deal with?

Context and history matter here. A historic answer must be contextualized by non-state Indigenous societies with political and legal authorities that were distributed horizontally, and which operated through decentralized institutions. These were and are institutions such as clans, lineage groups, families, governance structures, delegated groups, etc. In the past, the relationships that mattered were horizontal rather than vertical like today with Indigenous communities upwardly hardwired into the Canadian state through recent history, legislation, agreements, and funding.[67]

As with state societies, Indigenous law is also a public process that operates through legal institutions and to apply law, one draws from patterns and dissimilarities of past applications. It would appear that given the historic non-state organization of Indigenous societies, it is unlikely or less likely that there would be a need for a 'Canadian like' substantial and procedural administrative law. I could be wrong of course.

In contrast, asking this question in the present day, with many of today's forms of governance and the vertical changes to historic Indigenous political and legal institutions, would present a different picture. This is, fundamentally, a question of which public – that of the past or that of today – and of course there is further complication in that these are overlapping, sometimes conflicting publics. There is also the question of whether the tribunals' reasons are public and available to add to the public memories of each legal order. This is an important area that would benefit from a critical inquiry and further research.

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[65] Beverly McLachlin, former Chief Justice, Supreme Court of Canada, quoted in Lorne Sossin, supra note 60 at 88.
[66] *Ibid*.
[67] I address this question more fully in my Legal Pluralism and Reconciliation article, *supra* note 19.

So here is the thing, Indigenous administrative law that would deal with contemporary governing institutions can draw on historic Indigenous law and legal principles for application in a present-day context. This work is not about going back in time, but rather drawing on historic legal resources to manage the problems of each generation.

4.0 Conclusion

With this paper, my intent is to create a conversation about finding ways to broaden the state-based meaning of 'public law', and to find ways to consider and work with Indigenous 'constraints of public power'. While I am not taking up the 'special' coercive power of the state, I am still talking about Indigenous publics in relation to the existence of politics, community and accessibility/public nature of law as an essential part of the character of legality.

Rundle's relationship theory is very helpful to my intention as she argues that relationships and their demands were necessary to and constituted Lon Fuller's legalities. Further, that a society's institutional forms have carriage for those relationships because they hold the "responsibilities and opportunities for the authority of law itself".[68] According to Rundle, Fuller's jurisprudence applies to all governing relationships not just to a state's legislative function. This insight frees Rundle's analysis from being state-centric and releases its potential application to non-state societies such as the Gitxsan. It is this authority of law, captured by Gitxsan daxgyet, that is the enduring public imperative for Gitxsan society.

The challenge for Indigenous peoples is to rebuild their legal orders by the hard work of critically and collaboratively rearticulating and restating their historic legal resources. This approach will enable Indigenous peoples to restore the best practices of their historic forms of democracies complete with inclusive and active citizenship for today's political and legal negotiations, and self-determination and governance demands.

[68] Kristen Rundle, Fuller's Relationships (2019) Archiv für Rechts-und Sozialphilosophie (The Journal for Legal and Social Philosophy), Special Edition on 'The Rule of Law and Democracy' [Rundle, Relationships] at 19. Also helpful is Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Oxford, UK: Hart Publishing).