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Indigenous Legal Orders in Canada - a literature review (updated to August 2022)

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Recognizing Indigenous Legal Orders:

*Their Content, Embeddedness in Distinct Indigenous Cultures, and Implications
for Reconciliation*



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The cover photo was taken at Chippewas of the Thames First Nation (Deshkaan Ziibing), during an Anishinaabe law camp hosted in March 2017 by the First Nation and Western University. Teaching at this law camp was led by Professor John Borrows, Professor Heidi Stark, and Lindsay Borrows.

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EXECUTIVE SUMMARY

This project is a survey of writings on the legal principles created by Indigenous peoples in Canada to guide their societies in maintaining social order. The task of describing and analyzing Indigenous legal orders is still at an embryonic stage in Canada. As this Report demonstrates, the past twenty years have seen a proliferation of writing in Canada about the nature and contemporary significance of traditional Indigenous legal orders as embodiments of distinctive Indigenous approaches to restoring harmony within communities and advancing the aspirations of Indigenous peoples towards self-determination.

I am a non-Indigenous university professor whose research focuses on Aboriginal rights. An outsider to Indigenous cultures, I first wrote about the importance of Indigenous legal traditions more than 35 years and I have worked as a mediator in negotiations involving Indigenous communities and the Crown for more than 30 years. As a mediator, I have learned that to address such conflicts requires helping the parties to build a process that respects both of their sets of values and allows both sides to evaluate settlement options in accordance with their own visions of justice. In many ways, those negotiations present, in a microcosm, the broader challenge that Canada faces today in advancing reconciliation between the state and Indigenous peoples through equal recognition of the core values, customs, and aspirations of Indigenous peoples.

My analysis of the published literature has been sensitive to Indigenous research methods, including the need to adopt a perspective that respects Indigenous belief systems and values, and recognizes the diversity of Indigenous cultures and legal traditions.

Approaching Indigenous Law

Following the Calls to Action by the Truth and Reconciliation Commission and the federal government's embracing of the United Nations Declaration on the Rights of Indigenous Peoples, the time is ripe for reflection about Indigenous legal traditions and opportunities for revitalizing those traditions. The recent explosion of writing about Indigenous legal traditions in Canada will be a valuable tool for Indigenous communities, government policy-makers, judges, and scholars. The writings offer important insights into questions like how to identify and interpret Indigenous laws, what are their sources, and how to understand Indigenous legal reasoning.

The works surveyed here agree that the legal orders of Indigenous peoples cannot be described or interpreted in the same way as contemporary state law. Law students, lawyers, judges, and legislators whose work involves state law are used to finding law in published statutes, regulations and court decisions. They organize that law in accordance with categories that reflect the framework of the modern state and the legal artifacts (corporations, marriage, property, etc.) recognized by the state's legal system. By contrast, understanding Indigenous legal principles and why they are meaningful to the communities involved requires sensitivity to each peoples' distinctive belief systems, their language structures, and their distinct conceptions of the individual's relations with their community and the outside world. The majority of writers in this area rejects a "Western-based" approach that would neatly separate Indigenous legal orders from the knowledge systems, values and social norms that surround them.

The sources reviewed do not try to set out “universal” Indigenous legal principles. Indigenous legal orders in Canada are diverse; each stems from a particular vision of ecological order and each is rooted in a distinct language, tradition and worldview. Together, though, the sources indicate that four important things must be kept in mind when approaching the legal traditions of Indigenous peoples on this land. First, *those traditions tend to place a central focus, not on individual “rights”, but on maintaining harmonious relationships among members of the community and between the community, the land and other life-forms.* Second, *a people’s language shapes their understanding of the world and the nature of their laws.* Third, *Indigenous legal orders come from different sources than state-based law* (like spiritual teachings, traditional stories, principles drawn from observing nature, customary law, and deliberative processes for transmitting and interpreting law). Finally, for all of the writers, *Indigenous legal orders continue to exist and evolve and they remain relevant to the challenges faced by Indigenous peoples.*

The Value of Recognizing and Revitalizing Indigenous Laws:

Canadian writings on Indigenous legal orders universally treat Indigenous law as a living force that embodies the distinct traditions of Indigenous peoples. Indigenous laws having long been marginalized by Canada, there is now a consensus among scholars that recognizing and revitalizing Indigenous law is an extremely valuable project that would support the overall goal of allowing Indigenous peoples to move away from colonial control and take control of their own governance. Critically, *strengthening the ability of Indigenous peoples to use their own laws would enhance their ability not merely to govern themselves, but to do so according to principles that reflect their own unique values.*

The vast majority of the sources reviewed make the argument, explicitly or implicitly, that Indigenous legal traditions have a valuable role to play within Indigenous communities today. They present several distinct arguments for revitalizing Indigenous legal traditions. They emphasize that Indigenous legal orders can be a valuable tool for preserving Indigenous knowledge and worldviews. Second, they indicate that Indigenous legal principles are a powerful and meaningful resource to help communities and their members to work through the contemporary challenges facing those communities. Third, they urge that reinvigorating Indigenous legal orders is central to the project of decolonization and self-determination.

There has been much criticism of Canadian governments’ failure to formally recognize Indigenous legal orders. Many argue that the state and its courts can do a much better job in recognizing the contribution of Indigenous law to reconciling Indigenous societies and the Canadian state. Canada’s federal system is already based on the idea that different legal orders apply to Canadians within different parts of their daily lives. These writers offer detailed ideas about how the Canadian courts and the Crown could decolonize their approach to recognizing Indigenous law. Some other scholars worry that recognition by the state would inevitably distort Indigenous ways of thinking into Euro-Canadian concepts and categories.

Canadian courts have so far generally avoided meaningful engagement with Indigenous legal orders and forms of legal reasoning. For them to do so in a manner that respects Indigenous peoples’ ways of thinking about their own law, *training should be provided to judges on*

Indigenous legal methods (including, for example, on appropriate ways of drawing out legal principles from traditional stories and customary deliberative processes). In addition, Canadian law schools and other university departments should in concert with Indigenous scholars continue and enhance their efforts to ensure that their students learn about the nature of Indigenous legal traditions and the distinct worldviews that underlie those traditions.

Implementation Issues:

i) Describing Indigenous Law. The written research on Indigenous legal orders is embryonic, though fast growing, in Canada. Publications on the “content” of Indigenous law have focused on a relatively small number of legal traditions. The recent AJR Project led by the University of Victoria, and independent projects that have begun within Indigenous communities, are a useful start in the project of describing the variety of Indigenous legal orders in Canada. These initiatives do not seem, however, to be mirrored by projects sponsored by the federal and provincial governments to assist Indigenous peoples in the “mapping” of their legal traditions and of contemporary legal orders based on those traditions.

To date, relatively few Indigenous communities have had access to the resources needed to engage in this project. The fact that Indigenous legal traditions have flourished orally and through the passing on of customary ways of addressing disputes means that the process of writing down their legal traditions may be seen as less important, or even inappropriate, by some communities. *To support communities that do wish to map, clarify, and revitalize their legal traditions, federal and provincial governments should offer funding and capacity support. Universities, law schools, and research funding agencies should also support those Indigenous knowledge projects, whether by providing funding for them or through working partnerships with academics trained in Indigenous worldviews and ways of legal reasoning.*

ii) Transmitting Indigenous Law. Regular courses on Indigenous law are now offered at nine out of twelve English-speaking Canadian law schools. In 2018 the University of Victoria Faculty of Law became the first law school in Canada to introduce a joint degree program in common law and Indigenous legal orders. According to the writers reviewed here, *Canadian law schools can play a valuable role, although subordinate to Indigenous communities, in the teaching of Indigenous legal reasoning. The teaching of such courses within law schools should be based on Indigenous worldviews.*

iii) Implementing Indigenous Law Within the Canadian State. Other than writings critiquing the Canadian courts’ hesitancy to treat Indigenous legal orders as dynamic, contemporary norms, little has been published about models that could be adopted to foster a more respectful engagement by the state with Indigenous laws. The focus has been on Indigenous legal methodologies, Indigenous legal principles, and the case for revitalizing Indigenous law, and logically, understanding Indigenous legal orders on their own terms should precede engagement with the state about those orders. (A number of writers have also raised concerns about the risk that state recognition might force Indigenous legal concepts to be distorted to fit within the legal structures of the state). Arguably, the work of proposing practical models for the recognition of Indigenous laws should fall to leaders within Indigenous communities and the agencies engaging with those communities. However, those sources have not yet made a significant contribution to

the literature. *The scarcity of proposed models for state recognition of Indigenous legal orders represents a gap in the study of Indigenous law and its operation in Canada.*

Although this report focuses on Canada, recent developments in French New Caledonia are worthy of attention by those studying options for formal state recognition. Since 1999, the law of New Caledonia has expressly recognized that New Caledonians with Indigenous (Kanak) legal status are governed “for all matters [within the scope of] civil law by their own customs.” Further, the ordinary civil courts tasked with applying Kanak custom must include Kanak custom assessors as members of the tribunal. It is noteworthy that the courts have ruled that even where no specific customary principle applies to a question covered by the Civil Code, the assessors and judges with whom they work are required to develop appropriate principles consistent with customary law. The situation of the Kanak people is unique in many ways. Still, *the fact that New Caledonia has formally operationalized Indigenous legal norms within its legal system, and the availability of empirical and qualitative studies of that experience, suggests that studies of that experience should be of considerable interest to Indigenous communities, scholars, and policy-makers in Canada.*

Context and Methodology

The constraints of this project required a focus on written materials (mostly book chapters, journal articles, and internet sources). This is a significant limitation of the Report, given that Indigenous legal traditions are largely oral and expressed through the living practices of Indigenous communities. Further, this Report focuses only upon English and French language sources; it was not possible for me to survey Indigenous language materials.

Prologue

This project is a survey of writings on the norms, and particularly the legal norms, produced by Indigenous peoples in Canada to guide their societies in maintaining social order. That literature confirms that understanding Indigenous legal norms is only possible if they are viewed through the lens of the traditions, belief systems and worldviews of the communities that created them. The research strongly supports the view that the project of revitalizing Indigenous legal orders requires dispensing with established Euro-Canadian perspectives on what law "should" look like (hierarchical, written, supported by a state's threat of coercion). Treating Indigenous social norms with respect requires attention to the importance of storytelling and legends, diverse Indigenous perspectives on the interconnectedness of humans with other beings and landscapes that surround them, and the particular deliberative processes that Indigenous peoples have found effective in resolving disputes and maintaining social harmony. Law, in other words, cannot be separated from the cultures and conceptions of "right relationships" that make Indigenous cultures unique. Furthermore, the methodologies used by most of the contributors to the discussion of Indigenous law reflect those unique cultures, rather than the positivist and rights-based analyses typical of Euro-Canadian legal scholarship.

It is fitting then that I briefly situate myself as a non-Indigenous scholar tasked with summarizing what has been written about the nature and importance of Indigenous law in Canada today. In 1985, working as an assistant to Justice Patrick Hartt, at that time the Indian Commissioner of Ontario, I embarked on a project to describe the relevance of traditional Indigenous justice traditions to the problem of massive over-incarceration of Indigenous peoples in Canada at the time (a situation which sadly has not improved since then). The paper that I wrote took notice of the apparent efficacy of Cree, Anishinaabe, and Haudenosaunee traditional justice ways, and suggested that they had much to offer Canada's modern justice criminal system. At the time, almost nothing had been published about those justice traditions, in sharp contrast to the burgeoning scholarship reviewed in this Report. That paper seems dated in some ways today, but it started me on a path that led to my working as a mediator of land claim negotiations between First Nations and the federal and provincial governments, a role that I am still asked to perform today. In mediating conflicts between the Crown and Indigenous communities, I quickly learned that to address those conflicts effectively requires not just finding a "solution" to the substantive dispute, but also helping the parties to build a process that respects both of their sets of values and allows both sides to evaluate settlement options in accordance with the particular norms that mattered to them. In many ways, those negotiations represent, in a microcosm, the broader challenge that Canada faces today in advancing reconciliation between the state and Indigenous peoples through recognition of the distinct history of Canada and the core values, customs, and aspirations of Indigenous peoples.

Some of the central themes addressed by the research summarized in this Report raise the same questions with which I grappled in the paper I described above, published in 1986 in the *Osgoode Law Journal* as "Traditional Indian Justice in Ontario: A Role for the Present?"¹

- What is the function of law?
- What are the principles essential to the diverse Indigenous legal traditions that exist in Canada? Is there room for Canadian law to explicitly recognize those Indigenous legal principles?

- What might be the value of revitalizing Indigenous legal orders, for Indigenous peoples and the rest of Canada alike?

I continue to believe that these questions, and the related questions raised by the works summarized in this Report, are of vital importance today. I hope that this research survey will be useful to Indigenous communities and their leaders, to Crown policy-makers, judges, academics and lawyers, as they confront in their own lives the question of whether exploring and recognizing Indigenous legal norms can make a valuable contribution to the development of Canadian law and to the future relationship between Indigenous peoples and the already pluralistic legal system of Canada.

Methodology

The approach of this Report is normative, not empirical. This reflects the normative quality of the sources reviewed, which describe Indigenous legal belief systems, the sources and content of diverse Indigenous legal orders, and critiques of the treatment of Indigenous law by the Canadian state and court system. Throughout, my reading and analysis of the published literature has been sensitive to Indigenous research methods, including the need to take account of Indigenous rather than Euro-Canadian worldviews, the importance of accepting Indigenous ontologies, norms and ways of transmitting those norms, and finally, the diversity of Indigenous cultures and legal traditions. Second, time constraints and the practical limitations of this project required a focus on written materials (largely book chapters, journal articles, and internet sources). This is a significant limitation of the Report, given that Indigenous legal traditions and the manifestation of Indigenous legal principles are largely oral and expressed through the living practices of Indigenous communities. Third, this Report focuses only upon English and French language sources; it was not possible to attempt to survey Indigenous language sources. Finally, the vast majority of sources reviewed emphasize that there is no bright line between Indigenous legal principles and the norms, knowledge, traditions, and values that surround and undergird those legal principles. Space constraints have required that this Report focus on sources that have expressly identified their subject as Indigenous legal principles, rather than more general descriptions of Indigenous rights, cultures or worldviews.

To find published sources on Indigenous law, I used scholarly search engines and Google, looking for terms that included “Indigenous law and legal traditions”, “First Nations law and legal traditions”, “droit autochtone coutumière”, “Indigenous legal reasoning”, “ordre juridique autochtone”, “legal pluralism, Indigenous”, “pluralisme juridique, autochtone”, and a variety of searches using the word “law” combined with the name of particular Indigenous peoples, like “Mi’kmaq, Anishinaabe, Cree, Nisga’a, and Haudenosaunee”. Although similar searches were done for Indigenous peoples internationally, only sources referring to Canada, Aotearoa/New Zealand or New Caledonia were ultimately used in this Report.

Context

The suppression of Indigenous legal orders was an integral part of the colonial project to assimilate Aboriginal peoples in Canada, a project exemplified by Canada’s now notorious experiment with Indian Residential Schools. Long marginalized by the Canadian state, the

importance of Aboriginal peoples' own legal systems has recently been recognized by the Supreme Court of Canada in its elaboration of the inter-societal nature of Aboriginal rights, and by Canadian academics, including prominent Indigenous scholars who have characterized the revitalization of Indigenous legal orders as an essential part of the project of Indigenous self-determination. More recently, the Truth and Reconciliation Commission² and the Canadian federal government have both embraced the self-determination principles set out in the UN Declaration on the Rights of Indigenous Peoples³, including respect for Indigenous law, as a vital part of the roadmap towards reconciliation.

In the early colonial period, the Crown acknowledged its respect for Indigenous legal orders by memorializing treaties through metaphors (like the Covenant Chain and the Two Row Wampum) that spoke to Indigenous norms of kinship, mutual assistance, and respect for autonomy.⁴ Beginning in the mid-nineteenth century, however, Canadian legislation, federal policies and judicial decisions combined to suppress and marginalize Indigenous knowledge, perspectives, and processes for resolving disputes. Since the mid-1990s, the Supreme Court of Canada has expressly recognized the relevance of Indigenous legal traditions in interpreting the "intersocietal" Aboriginal and treaty rights guaranteed by s 35 of the *Constitution Act, 1982*.⁵ Nevertheless, Canadian court decisions to date that acknowledge and expressly apply Indigenous law have been generally confined to lower-level decisions in the areas of family law and child welfare.⁶

At the same time, several recently negotiated treaty settlements of Aboriginal title claims in Canada have expressly left space for the exercise of law-making authority by the Aboriginal peoples involved; and an amendment to the *Canadian Human Rights Act* (effective in 2013) and new federal laws governing, respectively, child welfare and matrimonial property on reserve⁷ provide for legal decision-making or the resolution of disputes in a manner that takes into account Indigenous laws or customs. These remain isolated developments in the overall relationship between Indigenous peoples and the Canadian state but, importantly, they are paralleled by recent contemporary treaty settlements in Aotearoa/New Zealand that give effect, going forward, to *Maōri* legal understandings of the land as a distinct legal person. So too, New Caledonia has recently provided for the application of Indigenous custom to resolve civil disputes between persons with *Kanak* status.⁸

Finally, in Canada two independent federal commissions have recently placed new focus on the significance of Indigenous legal orders in supporting the internal fabric of Indigenous communities and addressing inter-societal disputes between the state and Indigenous peoples.⁹ Indeed, the final report of the Truth and Reconciliation Commission, issued in 2015, included no fewer than eight calls to action that focus on the potential role of Indigenous law in advancing reconciliation between Indigenous peoples and other Canadians.¹⁰

At a time then when there is much attention being directed to the possible role of Indigenous legal traditions in Canada's project of seeking respectful reconciliation with First Peoples, *members of Indigenous communities, government policy-makers, judges, and legal scholars will be looking for answers to the following key questions: Where can one find descriptions of Indigenous legal principles and their operation in communities today? What are the sources of Indigenous law? How does one go about understanding how to interpret Indigenous legal norms? And, what can be done to better implement and recognize the legal systems of Indigenous peoples?*

Results

The task of describing and analyzing Indigenous legal orders is still at an embryonic stage in Canada. As this Report demonstrates, the past fifteen years have seen a proliferation of writing in Canada about the nature and contemporary significance of traditional Indigenous legal orders as embodiments of distinctive Indigenous approaches to restoring harmony within communities and advancing the aspirations of Indigenous peoples towards self-determination. This renewed focus on Indigenous law has been mirrored over the past ten years by the introduction of regular course offerings on Indigenous legal traditions at nine out of twelve English-speaking Canadian law schools, and at least four Canadian law schools have made such courses mandatory for all students. In the Fall of 2018, the University of Victoria Faculty of Law became the first law school in Canada (and apparently in the world) to introduce a joint degree program in common law and Indigenous legal orders.¹¹

Self-identified Indigenous scholars wrote the majority of the publications identified in this Report, an unsurprising finding given their lived knowledge of Indigenous norms and ways of thinking. Further, the majority of the authors are scholars in the field of Aboriginal law; with very few of the authors coming from other disciplines like political science, anthropology, or jurisprudence generally. This investigation reveals that the most prominent themes analyzed within this field are the following: methodologies appropriate to the study of Indigenous legal orders; arguments for the recognition and revitalization of Indigenous legal orders in Canada; descriptions of the principles and processes of the legal orders distinct to particular Indigenous peoples; contemporary examples of Indigenous legal principles in action; the relationship between Indigenous legal orders and state-based law; and approaches to transmitting and teaching Indigenous law.

In summary, the past two decades have witnessed an explosion of writing about Indigenous legal traditions in Canada. Those writings will be a valuable tool for Indigenous communities, government policy-makers, judges, and scholars. They offer important insights into questions like how to identify and interpret Indigenous laws, what are their sources, and how to understand Indigenous legal reasoning.

This Report's findings are organized on the basis of the main themes addressed in the publications reviewed as identified above.

The common starting point of the scholarship reviewed in this Report is the legal fact that over the past 150 years the Canadian state, its legislation and its courts, have left little space for the recognition and application of Indigenous law. As noted, until relatively recently the policy of the Canadian state has been to suppress the autonomy of Indigenous peoples and their ability to regulate their societies in accordance with their own values and norms. The tragic effects of that intrusion were widely publicized by the reports of the federal Truth and Reconciliation Commission. The Supreme Court of Canada has acknowledged in several decisions over the past two decades that Aboriginal peoples' customary laws survived the assertion of Canadian sovereignty and, in concert with the common law tradition, helped shape the Aboriginal and treaty rights guaranteed by Canada's constitution.¹² However, having identified this promising opportunity for the recognition of Indigenous legal orders, the Court has yet to identify and apply a specific Indigenous legal concept or principle in deciding an Aboriginal rights or treaty dispute.

As for Canadian legislation, since 1876 the federal *Indian Act* has expressly imposed non-Indigenous rules of governance and law-making on First Nation communities.

Approaches to Indigenous Legal Orders

A key area of consensus across the works surveyed is that the legal orders that emanate from Indigenous peoples cannot be identified, described, or interpreted in the same manner as contemporary state law. Law students, lawyers, judges, and legislators whose work involves state law are accustomed to identifying law in statutes, regulations and court decisions. They categorize that law in accordance with rubrics (family law, administrative law, criminal law, etc.) that reflect the institutional framework of the modern state and the legal artifacts (corporations, marriage, property, intellectual property, etc.) decisions and jurisdictions recognized by the state's legal system. They are trained to interpret state-sanctioned law in accordance with accepted "canons" of statutory interpretation, and common law (or civil law) analytical tools that crystallize a specific set of understandings about how to parse the legally authoritative parts of court judgments.

In addition, those steeped in state-based law are accustomed to structuring law according to hierarchies. Thus, "laws" are promulgated by persons or groups recognized as having particular authority within the state, a tradition that dates back to Hammurabi and Solon. In the modern federal state, for example, a written constitution will typically prescribe which levels of government have the highest authority in a particular area of its citizens' lives, a pattern reflected in the hierarchical ordering of the state's courts. Some prominent legal philosophers within the state tradition have gone so far as to conclude that such patterns of hierarchical authority are essential to the very definition of "law"; commonly accepted norms only achieving the status of law when "enforced by the power of the state".¹³ The latter view now appears overly simplistic, even from a state-based approach, as much of modern Canadian law is not enshrined in prescriptive rules, but rather accords discretion in decision-making to administrative bodies, contracting parties, and the interpretive powers of courts. Further, as legal pluralists have pointed out, there are many rules that effectively constrain citizens of the modern state that do not emanate from the state itself, but from organizations within and outside the state who have the effective power to impose constraints on their members and those who seek to use their services. In general, however, those who study or practise within state systems of law are trained to identify "law" through hierarchical institutions, written legal texts, and ultimately the threat of state-authorized sanctions for the violation of a prescriptive rule.

All of the sources examined in preparing this Report explicitly or implicitly start from the premise that a departure is required from Euro-Canadian understandings of "law" and legal method when approaching the subject of Indigenous law. The function of law in Indigenous societies, its principles and the processes by which laws are developed and implemented reflect the values, needs and social norms of the societies that create them. An understanding of Indigenous legal orders, then, is possible only if one is sensitive to the internal perspectives of the Indigenous peoples involved. In the words of Anishinaabe scholar Aaron Mills (Waabishki Ma'ingan), "[w]ithout having begun to internalize our lifeworld, one has no hope of understanding our law".¹⁴

All of the writings reviewed are normative in their approach: that is, they do not attempt to apply criteria external to Indigenous societies in describing Indigenous legal orders. The vast majority of the sources conclude that understanding Indigenous legal principles and why they are meaningful to the communities involved requires sensitivity to each people's distinctive epistemologies (their understandings of how truth is determined and where truth comes from), their language structures, and their distinct conceptions of the individual's relations with their community and the outside world. Indeed, the method adopted by the majority of writers in this area eschews a "Western-based" approach that would neatly separate Indigenous legal orders from the knowledge systems, values and social norms that surround them. Finally, the literature reviewed here draws attention to the distinct means by which Indigenous laws are transmitted, interpreted, contested and developed (through shared stories, ritual feasts, talking circles, deliberative councils, etc.), reflecting the social institutions of the Indigenous peoples involved.

The literature surveyed does not contain efforts to set out "universal" Indigenous legal principles. The Indigenous legal orders present in Canada are diverse; each stems from a particular vision of ecological order and, as we have seen, each is firmly rooted in a distinct language, tradition and worldview.¹⁵ Nonetheless, the works reviewed indicate that, in addition to the need for a general sensitivity to the cultural distinctiveness of Indigenous legal orders, four things must be kept in mind when approaching the legal traditions of Indigenous peoples on this land. First, those traditions tend to place a central focus on the maintenance of harmonious relationships between members of the community and between the community, the land and other life-forms. Second, each people's language shapes their understanding of the world and the nature of their laws. Third, Indigenous legal orders derive from varied sources, distinct from the sources relied on by state-based law (spiritual teachings, traditional stories, principles derived from observing nature, custom, distinct deliberative processes for transmitting legal principles. Fourth, Indigenous legal orders continue to exist and evolve in Canada; and they remain relevant to the challenges faced by Indigenous peoples today. Each of these observations will be described in turn.

i) A Relational Focus. All of the sources stress that understanding Indigenous law requires sensitivity to the distinct place of relationships within individual Indigenous societies. To the extent that traditional Indigenous law tends to foreground distinct conceptions of the individual in relationship with extended family, clan, and the community, it is inappropriate to approach those legal orders from a Euro-Canadian perspective of liberalism and "bundles" of individual rights.¹⁶ That focus on the primacy of relationships can be seen historically in the metaphors of the Two Row Wampum, the Covenant Chain and the use of clan *dodems*, for example, as "signatures" on the written forms of the treaties between Indigenous peoples and the Crown. The traditional Indigenous focus on harmonious relationships generally includes accountability to the natural world, a stewardship-like concept translated in Anishinaabemowin, for example, as "*bimeekumaugaewin*".¹⁷ Indeed, this relational conception of the world often extends to the categorization of non-human entities as "kin" to the community or to particular clans in the community. Further, the ordering of relationships as observed in the natural world can be drawn upon as a source of norms to guide human conduct. Many of the sources note that traditional stories call attention to an implicit order in the creation of the natural world, an order that shapes legal relationships.¹⁸ The literature also indicates that traditional Indigenous legal orders tend to differ from contemporary state-based systems in extending legal responsibilities beyond the current generation to both past and future generations. Those norms setting out relational obligations to the members of future generations condition the communities' stewardship

responsibilities in the present. Understanding Indigenous legal traditions then, will typically require jettisoning the Euro-Canadian perspective that humans exist separate from and above the rest of the natural world, and independent of the needs of future generations.

ii) *The Role of Languages in Shaping Indigenous Law.* A further noteworthy aspect of the literature reviewed, and particularly the writings of Indigenous authors, is its emphasis on the importance of Indigenous languages and grammatical structures to a proper understanding of Indigenous legal principles. Of course, Indigenous languages themselves have suffered from the same assimilationist policies that historically suppressed Indigenous legal orders. Although all of the works reviewed were written in English or French, presumably to assure their accessibility (including to the large number of Indigenous persons who no longer speak their traditional language), many of the writers use Indigenous words to describe legal concepts that cannot be accurately translated into English or French. Thus, terms used by the writers to explain legal principles in the context of Indigenous understandings of obligation and relationships include, for example, the Anishinaabe word “*daebizitawaugaein*” (roughly denoting “responsibilities”), the Sto:ló people’s term “*qui:quelstóm*” (for a way of living in harmony), the Mohawk “*kayanerehkowa*” (for the Great Law of Peace); the Mi’kmaq concept of “*netukulimk*” (encoding obligations relating to respect). Further, several of the writers note that an understanding of the structures of an Indigenous language (whether verb-centred or non-binary, etc.) helps to reveal the distinct worldviews that underlie a traditional legal order.¹⁹

iii) *The Diversity of Sources of Law.* The literature also indicates the importance of attending to the distinctness and diversity of the sources of Indigenous legal principles.²⁰ Significant sources of legal principles highlighted by the literature describing Indigenous legal traditions include the following:

Oral Histories and Stories are repeatedly identified in the literature as an important source of legal principles. Professors John Borrows, Valerie Napoleon and Hadley Friedland are prominent among those who describe how traditional storytelling is used in the transmission and interpretation of Indigenous law. In Napoleon and Friedland’s words, such stories “record relationships and obligations, decision making and resolutions, legal norms, authorities, and legal processes. Still others record violations and abuses of power, as well as responses to and consequences of these breaches of law. All of these stories provide an architecture that enables reasoning by analogy and metaphor as a form of collaborative problem solving”.²¹ Such writers present methods of drawing standards for legal judgment from stories that have been passed down through generations.

Metaphysical and Spiritual Beliefs: A large number of the sources note that conceptions of the sacred may be another significant source of Indigenous legal principles. As reflected in the preamble to the *Constitution Act, 1982* and many of the provisions of Canada’s *Criminal Code* and *Charter of Rights*, deeply-held beliefs about the metaphysical dimensions of human existence are often the ultimate source of specific legal norms that are widely accepted within diverse communities today, whether Indigenous or non-Indigenous.²² And for members of contemporary Indigenous communities who may or may not still adhere to those spiritual traditions, Borrows, Napoleon and Friedland also describe how the *metaphorical* role of such spiritual figures offers a way into understanding contemporary Indigenous legal norms and the organization of traditional legal orders.²³

Customary Law: The literature also identifies custom as a particularly significant source of law in Indigenous legal orders, where orality rather than writing has long been the dominant form of knowledge transmission. “Customary law” describes the body of norms considered binding within a society which have been generated through repeated interactions over time that eventually lead to commonly-accepted principles that are expected by members of the society to govern future interactions.²⁴ As scholars outside the field of Indigenous law have noted, *the norms embodied in customary law are not crystallized merely through repetition in the past: rather, they reflect the experience and evolving reasoning of a community at large.*²⁵ Understood in this sense, the processes and principles devised, relied upon and revised by Indigenous peoples to maintain social harmony within their communities in the past appear to play a significant role in informing the legal reasoning of Indigenous peoples today.²⁶

Deliberative Processes: Another key strand of Indigenous legal orders identified in the literature is the body of distinct deliberative processes through which disputes are resolved and binding principles governing human interaction are generated or confirmed. The literature demonstrates that these processes vary widely across Indigenous peoples in Canada, although very frequently they involve formalized deliberations aimed at achieving consensus. Many of the writers reviewed here describe recent examples of the use of such processes, from the complex feast traditions of the West Coast,²⁷ to the use of healing circles in response to violence within a community,²⁸ to the contemporary use of traditional Haudenosaunee processes to promote healing and to aid decision-making in condolence ceremonies,²⁹ to cite only a few examples. Norms relating to process form an important part of Indigenous legal orders (just as procedural rules form an important part of other systems of law). The literature suggests that distinct deliberative processes are a feature and source of Indigenous law that permit communities to draw on their own norms of consensus-building to address contemporary disputes and other social challenges.

iv) Indigenous Legal Orders as Living Traditions. All of the literature reviewed here describes Indigenous legal orders not as a dead, historical artifact, but rather as a continuing and distinct feature of Indigenous societies. The sources treat Indigenous law as a dynamic phenomenon. To use Borrows’ words “Indigenous law as practiced today may have connections to ancient history - or it may not. Law is fluid; it changes over time. ... Indigenous legal traditions exist to address current and future needs”.³⁰ This implies that the legal principles applicable to a conflict, and the appropriate interpretation and application of those principles, must be open to community debate and capable of evolving through deliberative processes embraced by Indigenous communities.³¹ Unlike the approach of the Supreme Court of Canada, which has focused so far on the state of Indigenous law as it existed at the time of first contact with Europeans and the establishment of Canadian sovereignty, the writers concentrate on those aspects of Indigenous legal traditions that the authors believe have a continuing relevance to the challenges faced by Indigenous peoples today. Indeed, the premise that Indigenous patterns of legal ordering have continuing power, and the fact that those legal orders have been historically marginalized by the Canadian state, has given rise to a large body of writing urging that those orders be revitalized today.

The Value of Recognizing and Revitalizing Indigenous Laws:

The vast majority of the sources reviewed make the argument, explicitly or implicitly, that Indigenous legal traditions have a valuable role to play within Indigenous communities today. The very survival of Indigenous societies prior to contact with Europeans indicates that they had effective means of maintaining social order, and of resolving intra-societal conflicts. The Supreme Court of Canada has explicitly recognized that the Aboriginal and treaty rights guaranteed by the Canadian Constitution find their source in the encounter between assertions of Crown sovereignty and the pre-existence of Indigenous legal orders on the same land.³² Professors Borrows, Henderson and others argue that this encounter, combined with the historical treaty-making process between First Peoples and the Crown, mean that Indigenous legal orders constitute a foundational pillar of Canada's constitution.³³ Nonetheless, centuries of assimilative colonial legislation and policy, together with the tendency to date of the Supreme Court of Canada to consider Indigenous legal orders as relevant to a modern dispute only to the extent that those orders were reflected in distinct Indigenous practices long ago at the time of settlers' first interactions with Indigenous peoples, means that from the state's perspective, in the words of James [Sákéj] Youngblood Henderson, the existence of Indigenous law in Canada today may have been reduced to a mere "constitutional whisper".³⁴

The literature presents several distinct arguments for the revitalization of Indigenous legal orders. Many writers underscore the promise of Indigenous legal orders as a valuable tool for preserving Indigenous knowledge and worldviews.³⁵ In that sense, the survival of Indigenous law is inextricably tied to the survival of the distinct Indigenous worldviews they embody. Second, Indigenous scholars argue, Indigenous legal principles form a powerful and meaningful set of resources that can assist communities and their members to work through the contemporary challenges facing those communities.³⁶ This includes, for example, the potential value of traditional legal norms in tackling the critical question of violence against women.³⁷ Third, a large number of the writers argue that the reinvigoration of Indigenous legal orders is central to the project of decolonization and self-determination. Echoing the findings of the Truth and Reconciliation Commission,³⁸ they argue that it is essential if First Peoples are to regain control over their own destinies in accordance with their own ways of defining themselves as communities and of preserving and transmitting their own values.³⁹

In short, strengthening the ability of Indigenous peoples to use their own laws would enhance their ability not merely to govern themselves, but to do so according to principles that reflect their own values. Accordingly, Indigenous communities must be at the heart of any revitalization project.

There is, however, a divergence of views as to the role the Canadian state should play in recognizing Indigenous law as part of that project of self-determination. Many of the writers argue that the Canadian state and its courts can do a much better job in giving value to the contribution of Indigenous legal orders to the relationships between Indigenous societies and the Canadian state.⁴⁰ These writers build their case from the premise that Canada already incorporates legal pluralism in the regulation of its citizens' lives, and the existence of different legal orders that apply within their distinctive spheres. They present detailed arguments as to how the Canadian courts and the Crown could decolonize their approach to recognizing

Indigenous law. Some of these writers draw on the insights of legal pluralism theory, which has tended to open up the question of what constitutes ‘law’, emphasizes the role of customary law within modern states, and which critiques the notion that state-based law is the only set of legal norms that governs the lives of individuals within the state.⁴¹ Most of these writers are critical of how the Canadian state and its courts have implemented legal pluralism, and of the assumptions that have guided that implementation to date, in connection with Indigenous peoples, but many are prepared to offer constructive ideas about how the state and its courts could address Indigenous legal perspectives so as to promote the overarching goal of reconciliation between the state and Indigenous peoples.⁴²

Others, however, are deeply skeptical of the very idea of working with the Euro-Canadian system to revitalize Indigenous law.⁴³ For them, the project of seeking recognition within the state system raises at least three concerns. First, building arguments for recognition through forms of reasoning familiar to the courts and the state poses a risk that Indigenous norms and values will be distorted in the process. Second, they argue that Indigenous legal orders, which predate the Euro-Canadian state in this territory, do not depend for their validity on external recognition by the state. Third, the practical linkages through which state law could give effect to Indigenous legal principles are often not congruent with Indigenous categories, creating the risk that Indigenous legal concepts will be distorted through “translation” into the legal concepts already recognized by the state. Where, for example, Indigenous relationships with land cannot be translated into common law or civil law property concepts, or Indigenous approaches to substitute care for children do not fit neatly within the state’s category of ‘adoption’, formal recognition of Indigenous law by the state may further colonize the Indigenous peoples involved.⁴⁴ All of these are important concerns for the revitalization of Indigenous law and it is noteworthy that most of the writers who support the reinvigoration effort conclude that the “rediscovery” and revitalization of Indigenous legal orders should start from within Indigenous communities themselves.

Implementation Issues

The challenge of revitalizing Indigenous legal orders brings us to another central theme in the literature: theoretical and practical models for the implementation of Indigenous law. The writings here can be grouped into three topics: the rediscovering and description of Indigenous legal principles; the transmission of Indigenous legal knowledge; and issues relating to the implementation of Indigenous law in practice. I will deal with each in turn.

i) Rediscovery and Published Descriptions of Indigenous Legal Orders. The published material describing the content of Indigenous legal orders reflect the fact that the research in this area is at an embryonic, though fast growing, stage in Canada. Professor Borrows notes, from an Indigenous scholar’s perspective that, “we generally only work with legal traditions in communities of which we are a part, or through invitation to assist a specific community in their own efforts to revitalize law”.⁴⁵ The works published to date focus on a relatively small number of specific legal traditions. Those works include descriptions of key principles in a particular legal tradition and, frequently, concrete examples of the use of Indigenous legal institutions or processes to address contemporary problems.⁴⁶ An important recent initiative in mapping out the

content of Indigenous legal orders is the Accessing Justice and Reconciliation Project (AJR Project), launched in 2012 by the University of Victoria's Indigenous Law Research Unit, the Indigenous Bar Association, and the Truth and Reconciliation Commission of Canada. The mission of the AJR Project is to recognize how Indigenous peoples in Canada use their own legal traditions to deal with harms and conflicts, and to identify and describe how those legal traditions can be applied by communities today.⁴⁷ Recognizing the diversity of Indigenous legal traditions, the AJR Project worked with seven Indigenous communities representing six legal traditions. In addition to producing summaries of the legal principles embraced by those communities, the project developed a unique analytical framework for engaging respectfully with Indigenous communities and their legal traditions. This project, and other similar projects that have begun within Indigenous communities, together with the materials prepared for Indigenous law courses within Canada's law schools, offer a useful start in the overall project of describing the great variety of Indigenous legal orders in Canada in a way that would make them easily accessible to Indigenous communities and, if desired, to academia and the non-Indigenous public.

Legitimus is another significant research project that worked in partnership with Indigenous communities to describe their legal orders and the relationship between those legal orders and the state. *Legitimus* was led by Ghislain Otis at the University of Ottawa and funded by SHRC and the Agence Universitaire de la Francophonie, among others. It was international in scope and produced a particularly large number of publications in French.⁴⁸

These initiatives represent an important start in the process of "mapping" Indigenous legal orders in Canada. In addition, it appears that an increasing number of Indigenous communities are currently engaged in internal projects to document and implement their own legal orders. Those projects include the development of written constitutions, setting out overarching legal principles to guide community governance, and community consultation protocols that document how Indigenous norms will guide their engagement with corporations and federal and provincial governments in relation to resource use within their traditional territories.⁴⁹ Finally, other Indigenous governments, like the Mohawk Council of Akwesasne, are now developing criminal justice processes that blend aspects of Canada's justice system with traditional principles.⁵⁰ Unfortunately, at present there is no centralized list of such draft community-driven initiatives.

These initiatives do not appear, however, to be mirrored by equivalent projects sponsored by the federal and provincial governments to assist Indigenous peoples in the "mapping" of their legal traditions or the development of contemporary legal orders based on those traditions.

To date, relatively few Indigenous communities have had access to the resources needed to engage in this project. The fact that Indigenous legal traditions have flourished orally and through the passing on of customary ways of addressing disputes means that the process of writing down their legal traditions may be seen as less important, or even inappropriate, by some communities. *To support communities that do wish to map, clarify, and revitalize their legal traditions, federal and provincial governments should offer funding and capacity support.* (At present, it appears that federal and provincial agencies are doing very little to actively support that process). *Canadian universities, law schools, and research funding agencies should also support Indigenous legal knowledge projects, whether by providing funding for them or through working partnerships between communities and academics trained in Indigenous worldviews and legal reasoning.*

ii) *Transmission of Indigenous Law.* I have already noted the range of methods traditionally used in the transmission and interpretation of Indigenous legal traditions. It is noteworthy, however, that a number of the writers surveyed also focus on the potential role of law schools in the formal teaching of Indigenous legal orders. According to these writers, Canadian law schools can play a valuable role in the teaching of Indigenous legal reasoning. In their view the teaching of such courses within Canadian law schools should be conducted through engagement with distinct Indigenous epistemologies.⁵¹ Interestingly, some of these writers suggest that methodologies analogous to some of those used in teaching common law might usefully be adapted to the teaching and interpretation of traditional stories and practices.⁵² We have already seen that the majority of Canadian common law faculties now offer courses in Indigenous law and the University of Victoria has recently introduced a joint *juris doctor* program in common law and Indigenous legal orders. Finally, Professor Borrows and his former colleagues at the University of Victoria have for some time now led an important initiative that involves law students and professors visiting Indigenous communities, to introduce them to Indigenous legal reasoning “on the land”. Students from at least six Canadian faculties of law have participated in these Indigenous law camps, in coordination with local communities and their members.⁵³

iii) *Reconciliation and respect for the uniqueness and diversity of Indigenous legal traditions.* We have seen that the Canadian state and its courts have in the past generally avoided meaningful engagement with Indigenous legal orders and forms of legal reasoning. *For them to be able to do so in a manner that respects Indigenous peoples’ ways of thinking about their own law, adequate training should be provided to judges⁵⁴ and federal and provincial policy-makers on Indigenous legal methods (including, for example, on appropriate ways of drawing out legal principles from traditional stories and customary deliberative processes).* Further, as discussed above, *Canadian law schools and other university departments, in concert with Indigenous faculty, should continue and enhance their efforts to ensure that their students learn about the nature of Indigenous legal traditions and the distinct worldviews and social norms that underlie those traditions.*

iv) *Practical Implementation of Indigenous Legal Orders in Relation to the Structures of the Canadian State.* With the exception of a large body of work critiquing the Canadian courts’ hesitancy to treat Indigenous legal orders as dynamic and contemporary norms⁵⁵ and various analyses of contemporary restorative justice projects within the criminal law sphere,⁵⁶ there has been less published to date on the types of general models that could be adopted by the Canadian state and Indigenous peoples to foster a more respectful engagement with Indigenous legal orders. Notable exceptions include contributions like Borrows’ *Canada’s Indigenous Constitution*,⁵⁷ which addresses a range of issues from the appropriate reception by judges of submissions regarding Indigenous law, the question of who might be subject to Indigenous laws in Canada, to proposals for federal legislation recognizing Indigenous laws, and the development of institutional support for the protection of Indigenous legal traditions. There have also been recent publications on the ways Canadian courts could respectfully address the application of Indigenous laws,⁵⁸ and on the appropriate use of Indigenous norms in treaty and other negotiations with the Crown.⁵⁹ At a more general level, the scholarship has also begun to address the opportunities for the creation of new institutions of legal pluralism that could respectfully manage interactions between Indigenous legal orders and state laws.⁶⁰ Finally, the contentious issue of the extent to which contemporary Indigenous legal orders should reflect modern human rights principles, has also been the subject of careful reflection.⁶¹

The relative scarcity of publications outlining practical proposals to reform the interaction of state and Indigenous legal orders undoubtedly reflects the conscious choice of those writing in this area to prioritize discussion of Indigenous legal methodologies, descriptions of Indigenous legal principles and processes, and developing the theoretical arguments that support revitalizing Indigenous laws. Logically, the recognition and description of Indigenous legal orders on their own terms must precede engagement with the state about those orders. It is also true, as we have seen, that a number of the writers surveyed have expressed deep concerns about the risk that recognition by the state might require Indigenous legal concepts to be distorted so as to fit within the policy and legal structures of the state. Those writers are unlikely to sketch out detailed models of how such recognition might be implemented. It might also be argued that the work of proposing practical models for the implementation of Indigenous laws should fall to leaders and policy-makers within Indigenous communities and the federal and provincial agencies engaging with those communities. Finally, lack of documentation regarding the contemporary interaction of Indigenous legal orders and state authorities (apart from the courts' treatment of Indigenous law, and the various provisions recognizing Indigenous jurisdiction in modern treaties) means there is less material for normative or empirical analysis of those interactions.

Whatever the reason, the scarcity of descriptions or analyses of models for possible state recognition of Indigenous legal orders represents a significant gap in the study of Indigenous law and its operation in Canada. *For communities that do seek formal recognition of their legal orders by the Canadian state (or at least its non-interference with those laws), communities and policy-makers need to develop practical models to allow that recognition to occur on terms that respect the distinct and diverse nature of Indigenous legal traditions, and that will foster the broader mission of reconciliation.*

v) *New Caledonia: A Useful Reference Point for Recognition?* Although this report focuses on the study of Indigenous law within Canada, recent developments in French New Caledonia are worthy of attention for those studying options for formal state recognition. Since 1999, the law applicable in New Caledonia has expressly recognized that New Caledonians with Indigenous (Kanak) legal status are governed “for all matters [in the scope of] civil law by their own customs”.⁶² Further, the ordinary civil courts tasked with applying Kanak custom must include Kanak custom assessors as members of the tribunal, in practice chosen by a representative of the traditional Kanak territories. The law applied by those assessors is almost entirely to be found in orally transmitted principles and it is noteworthy that the courts have ruled that where no specific traditional principle applies to a question covered by the general Civil Code, the assessors and judges with whom they are working are required not to revert to the Civil Code, but to develop appropriate principles consistent with customary law.

This has resulted, in a country whose law is generally characterized by the uniformity of citizens' rights, in the application of Indigenous customary law to a wide range of areas, including marriage, divorce, parental authority and property law. The jurisprudence that has developed also gives formal recognition to the authority of clans in governing membership and status issues, and in managing the resolution of disputes in accordance with customary processes. Further, the courts have ruled that those clans have juridical personality, allowing them to go to court to defend clan interests in legal disputes.⁶³ Further strengthening the role of Kanak legal principles, the territory now has a Kanak senate with advisory jurisdiction in a number of areas, including

proposed laws concerning Kanak identity. The senate played a key role in the development of the Kanak Charter (“la charte du peuple Kanak”), adopted in 2014 by the customary Kanak chiefs of the islands.⁶⁴ The product of community consultations that lasted a year, the Charter does not seek to codify Kanak customary law, but instead to summarize the fundamental values, underlying beliefs (about stewardship responsibilities, leadership structures, customary relationships within clans, and relations with the land, for example) and the other guiding principles that inform Kanak civilization and customary law.

The situation of the Kanak people in New Caledonia is unique in many respects. The Kanak people represent almost 40% of the population of the islands, their cultural commonalities and historic separation from the non-Indigenous population has permitted clan authority and customs to remain relatively intact, and the islands witnessed a strong Indigenous independence movement, beginning in the 1970s, that undoubtedly influenced France’s decision to recognize Kanak customary law. My visit in 2017 with the Kanak Senate, with judges, and academics working in New Caledonia revealed that a number of issues central to the recognition of Kanak law remain the subject of considerable debate and critique. These include the non-application of Kanak custom to significant areas of law, including criminal law and procedure; the lack of a Kanak voice within the academic scholarship on this issue; concerns expressed within Kanak communities about the extent to which Kanak custom should reflect contemporary human rights; the lack of specialized training for French judges who work on the cases that involve Kanak custom and, the temporary nature of judges’ presence in New Caledonia after they have gained experience within with Kanak customary law. Nevertheless, the fact that New Caledonia has formally operationalized Indigenous legal norms within its court system, and the availability of empirical and qualitative studies of that experience, suggests that writings about the New Caledonian experience may be of considerable interest to Indigenous communities, scholars, and policy-makers in Canada.

Conclusion: State of Knowledge and Implications of this Review

The importance of recognizing and respecting Indigenous legal traditions has recently been highlighted by the report of the Truth and Reconciliation Commission and by Article 5 of the UNDRIP, which has now been embraced by the federal government of Canada. The time is ripe, then, for reflection about Indigenous legal traditions in Canada and opportunities for revitalizing those traditions. Indigenous communities, government policy-makers, judges, and legal scholars need answers to the following questions. How can Indigenous laws be identified? What are the sources of Indigenous law? What is unique about Indigenous ways of understanding law? And, what can be done to better implement and recognize the legal systems of Indigenous peoples?

The last 20 years have seen an explosion of writing on these topics, almost entirely by legal scholars. Despite their relatively small number within Canada’s law schools, Indigenous professors have produced the majority of this writing. The vast majority of what has been written treats Indigenous law as a living thing, and a valuable tool to help Indigenous communities address the challenges they currently face. Because law is embedded in broader Indigenous values and worldviews, moves to strengthen the role of Indigenous law also go hand in hand with the strengthening and survival of Indigenous culture. The revitalization of Indigenous

peoples' own legal orders is also tied to the ability of Indigenous peoples to regain control over their own lives, and in a manner that fits with their own traditional values. For these reason, all of the publications reviewed either imply or expressly argue that the revitalization of Indigenous law is a valuable project.

The Indigenous peoples in Canada have developed a diverse set of legal traditions, each embodying the particular culture, values, and accrued wisdom of the people in question. The written descriptions of those diverse legal orders are increasingly being made available to the public at large, so too are descriptions of tools needed to properly understand Indigenous legal principles and processes. To date, such descriptions cover a significant, but relatively small number, of the Indigenous peoples living in Canada. The fact that Indigenous legal traditions have flourished orally and through the passing on of customary ways of addressing disputes means that the process of writing down those traditions may be less important for many of the communities involved. Still, there is a notable gap in the geographic scope of written summaries of Indigenous law.

Most of the writers surveyed in this report agree that Indigenous communities themselves must be at the heart of efforts to describe their legal traditions and to implement legal orders that will reflect their own needs, beliefs, and values. Although it is clear that many communities have begun this process, there is undoubtedly a need for funding and capacity-building to allow them to complete that task. At present, it appears that federal and provincial governments are only beginning on a national basis to actively support that process.⁶⁵

What has been written to date about the unique methods of understanding and interpreting Indigenous laws will undoubtedly be very useful to communities, judges, and policy-makers. For judges and non-Indigenous policy-makers alike, there is a continuing need for training about the sources and interpretation of Indigenous law. The published sources reveal a tension between those Indigenous scholars who believe that Canadian courts and the state must be actively engaged in recognizing Indigenous legal orders, and those who believe that recognition by the state would inevitably distort ways of Indigenous thinking into Euro-Canadian concepts and categories. Still, for Indigenous peoples who do seek such recognition, models will need to be developed to allow that recognition to occur on terms that respect the distinct and diverse nature of their legal traditions. Relatively little has been published to date that explores and analyzes practical models of respectful recognition that could be developed on a national basis.

Still, as of the Summer of 2022, momentum is building. More and more law students, Indigenous and non-Indigenous alike, are reflecting on the nature of Indigenous legal orders and their relationship to state law. There has been a rapid increase in the number of Indigenous students who are devoting PhD research to the study of Indigenous laws, and a corresponding increase over the past five years in the number of Indigenous scholars hired by Canadian law faculties. Most importantly, more and more Indigenous nations are exploring and publicizing their commitment to applying their own norms and worldviews both in their internal governance and in their relations with others on their traditional territories. Ultimately, the development of new ways of revitalizing Indigenous legal orders promises to be a valuable step on the path toward reconciliation between Indigenous peoples and the Canadian state.

ENDNOTES

¹ Michael Coyle, “Traditional Indian Justice in Ontario: A Role for the Present?” (1986) 24 Osgoode Hall LJ 605.

² Truth and Reconciliation Canada. *Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015), esp. Call to Action 45 (re the recognition of self-determination and Indigenous laws) and Call to Action 50 (recommendation of federal funding for Indigenous law institutes).

³ The United Nations General Assembly. *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR (2007), online: <www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf>; Department of Justice Canada, “Government of Canada Sets a Principled Foundation for Advancing Renewed Relationships with Indigenous Peoples based on the Recognition of Rights” (Ottawa: Justice Canada, 2017). In 2021, the federal government enacted a law providing for the implementation of the Declaration: The United Nations Declaration on the Rights of Indigenous Peoples Act, SC 2021, c.14. This followed an earlier statute enacted by the province of British Columbia: The Declaration on the Rights of Indigenous Peoples Act, SBC 2-019, c. 44.

⁴ Robert A. Williams Jr, “Linking Arms Together: Multicultural Constitutionalism in a North American Indigenous Vision of Law and Peace” (1994) 82:4 Cal L Rev 981; Walters, Mark D. “Rights and Remedies within the Common Law and Indigenous Legal Traditions: Can the Covenant Chain be Judicially Enforced Today?” in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties*, (Toronto: University of Toronto Press, 2017) 187 [“*The Right Relationship*”].

⁵ See for example: *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289; *Delgamuukw v British Columbia*, [1997] 3 SCR 10; *Mitchell v Canada (Minister of National Revenue)*, [2001] 1 SCR 911.

⁶ For examples, see *Re Noah Estate* (1961), 32 DLR (2d) 185 (NWTSC); *Re Beaulieu’s Petition* (1969), 64 WWR 669 (NWT Terr Ct); *Kalaserk v Strickland*, 1999 CanLII 6799 (NWT SC); *Pastion v Dene Tha’ First Nation*, [2018] 4 FCR 467; *Whalen v Fort McMurray No 468 First Nation*, 2019 FC 732, and *J.E.O. v M.D.*, 2020 ONSC 6106 at para 47. For exceptions involving the legal recognition of Indigenous customary law at the appellate level, see *Connolly v Woolrich* (1867), 1 CNLC 70 (Que Sup Ct), aff’d *Johnstone c Connolly* (1869), 1 RL 253, [1869] JQ No 1 (QL) (Que CA); and *Casimel v Insurance Corp. of British Columbia* [1993] BCJ No. 1834 (CA).

⁷ See the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, SC 2013, c 20 and *The Canadian Human Rights Act*, R.S.C., 1985, c. H-6, amended in 2008 to provide in s. 1.2, “this Act shall be interpreted and applied in a manner that gives due regard to First Nations legal traditions and customary laws...”. See also *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c. 24, ss 20 to 24, which provide for the implementation of Indigenous jurisdiction and the application of Indigenous laws in relation to child and family services.

⁸ It is noteworthy that these initiatives have been implemented despite the close integration of New Caledonia within the French state and the predominance of the principle of equality in the French Constitution. Régis Lafargue, “The Unity of the Republic vs. Living Together on the Same Land: New Caledonia from Colonization to Indigenism: Law at the Center of a Major Culture Issue” (2014) 46:2 J Legal Pluralism 172; Étienne Cornut & Pascale Deumier, eds., “L’intégration de la Coutume dans le Corpus Normatif Contemporain en Nouvelle-Calédonie” (Mission de Recherche Droit et Justice, 2016); Norbert Rouland, *L’Anthropologie Juridique* (Paris, Presses Universitaires de France, 1990); Norbert Rouland, Stéphane Pierré-Caps & Jacques Poumarède, *Droit des Minorités et des Peuples Autochtones* (Paris: Les Presses Universitaires de France, 1996); François Féral, Anne-Lise Madinier, “Le règlement des conflits Kanaks en Nouvelle-Calédonie”, (2021) Les Cahiers de la Justice 51.

⁹ Law Commission of Canada, ed. *Justice Within: Indigenous Legal Traditions* (Ottawa: Law Commission of Canada, 2006) [“*ILT*”]; Truth and Reconciliation Commission of Canada. *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015).

¹⁰ Truth and Reconciliation Commission of Canada, *ibid.*

¹¹ University of Victoria, Law, “Joint Program in Canadian Common Law and Indigenous Legal Orders JD/JID,” online: <<http://www.uvic.ca/law/about/indigenous/jid/index.php>>.

¹² See *R v Van der Peet*, *supra* note 5; *Mitchell v Canada (Minister of National Revenue)*, *supra* note 5; *R v Marshall*, [1999] 3 SCR 456.

¹³ John Austin, *The Province of Jurisprudence Determined*, vol 1. 2nd ed., ed. by W. Rumble (1832; reprint, Cambridge: Cambridge University Press, 1995) 176.

¹⁴ Aaron Mills (Waabishki Ma'iingan), "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61 McGill LJ 847 at 852. See also James [Sákéj] Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58 Sask L Rev 241.

¹⁵ For a general introductions to the distinct challenges of research involving Indigenous epistemologies, see Margaret Kovach, *Methodologies: Characteristics, Conversations, and Contexts* (Toronto: University of Toronto Press, 2010); Shawn Wilson, *Research is Ceremony: Indigenous Research Methods* (Winnipeg: Fernwood Publishing, 2008); Marie Battiste & James [Sákéj] Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Saskatoon: Purich Publishing Ltd, 2000); and Alan Hanna, "Going Circular: Indigenous Legal Research Methodology as Legal Practice" (2020) 65:4 McGill LJ 671.

¹⁶ On this point see, e.g., Gordon Christie, "Aboriginal Rights, Aboriginal Culture, and Protection" (1998) 36:3 Osgoode Hall LJ 447; Val Napoleon, "Living Together: Gitksan Legal Reasoning as a Foundation for Consent" in Jeremy Webber & Colin M. McLeod, eds, *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010) 45; John Borrows, *Drawing Out Law: A Spirit's Guide*, (Toronto: University of Toronto Press, 2010) 222; Heidi Kiiwetinepinesik Stark, "Changing the Treaty Question: Remediating the Right(s) Relationship (2017)" in John Borrows & Michael Coyle, eds, *The Right Relationship*, supra note 4; Andrée Boisselle, "Law's Hidden Canvas: Teasing out the Threads of Coast Salish Legal Sensibility," Doctor of Philosophy (University of Victoria, 2017); Alan Hanna, "Reconciliation Through Relationality in Indigenous Legal Orders" (2019) 56 Alta L Rev 817; and Nigel Baker-Grenier, "*Kitimahkinawow Ekwa Kitimahkisin*: Pity and Compassion in Cree Law" (2021) 11 Western J Legal Studies 23.

¹⁷ See e.g., John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010); Brenda L. Gunn, "Protecting Indigenous Peoples' Lands: Making Room for the Application of Indigenous Peoples' Laws Within the Canadian Legal System" (2007) 6 Indigenous LJ 31 at 53-55; James [Sákéj] Youngblood Henderson, "First Nations Legal Inheritances in Canada: The Mi'kmaq Model" (1995) 23:1 Man LJ 14; James [Sákéj] Youngblood Henderson, "Postcolonial Indigenous Legal Consciousness" (2002) 1 Indigenous LJ 1; Kerry Prosper et al, "Returning to Netukulimk: Mi'kmaq Cultural and Spiritual Connections with Resource Stewardship and Self-Governance" (2011) 2:4 Int Indigenous Pol'y J 5; Tuma Young, "L'nuwita'simk: A Foundational Worldview for a L'nuwey Justice System" (2016) 13:1 Indigenous LJ 75 at 78-79; Battiste & Youngblood Henderson, "Protecting Indigenous Knowledge", supra note 15.

¹⁸ See, e.g., Henderson, James [Sákéj]. "Mikmaw Tenure in Atlantic Canada" (1995) 18 Dal LJ 196, pp 216ff; Georges Sioui, *Huron Wendat: The Heritage of the Circle* (Vancouver: UBC Press, 1999) pp 112-143; Borrows, *Canada's Indigenous Constitution*, supra note 17; pp2 8-35, 61-64, 84-86, 244-8; Kirsten Anker, "Reconciliation in Translation: Indigenous Legal Traditions and Canada's Truth and Reconciliation Commission" (2016) 33:2 Windsor YB Access Just 15, pp 29ff.

¹⁹ See, e.g., Henderson, *ibid*; Lindsay Keegitah Borrows, *Otter's Journey Through Indigenous Language and Law* (Vancouver: UBC Press, 2018); Naiomi Metallic, "Five Linguistic Methods for Revitalizing Indigenous Laws," (2021) 68 McGill Law Journal, forthcoming, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4099156; and Dale Turner, "On the Politics of Indigenous Translation: Listening to Indigenous Peoples in and on Their Own Terms," in Aileen Moreton-Robinson, Linda Tuhiwai Smith, Brendan Hokowhitu, Chris Andersen & Steve Larkin, eds, *Routledge Handbook of Critical Indigenous Studies* (Abingdon: Routledge, 2021).

²⁰ An excellent summary of these sources can be found in Borrows, *Canada's Indigenous Constitution*, supra note 17, at 23-58.

²¹ Val Napoleon and Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions through Stories" (2016) 61:4 McGill LJ 725 at 739. On the role of stories in law see also Borrows, *Drawing Out Law*, supra note 16; Boisselle, *Law's Hidden Canvas*, supra note 16, ch. 2.

²² For the importance of the sacred as a source of Indigenous legal principles, see Borrows, *Canada's Indigenous Constitution*, supra note 17 at 24-35; Darlene Johnston "Respecting and Protecting the Sacred", paper prepared for the Ipperwash Inquiry (Toronto: Ministry of the Attorney General, 2006); Larry Chartrand, "Eagle Soaring on the Emergent Winds of Indigenous Legal Authority" (2013) 18 Rev. of Const Stud 49. It is interesting to note that Treaty elders and the Supreme Court of Canada alike have described the nature of Crown-First Nations treaties as "sacred". For the Court's affirmation of this, see *R v Sioui*, [1990] 1 SCR 1025 at para 96, per Lamer J writing for a unanimous court.

²³ See John Borrows, "Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education" (2016) 61:4 McGill LJ 795; Napoleon & Friedland, "An Inside Job", supra note 21; and Mills, "The Lifeworlds of Law", supra note 14.

²⁴ For further discussion of customary law generally, see e.g., Lon Fuller, "Human Interaction and the Law" (1969) 14 Am J of Jurisprudence 1; and Jeremy Webber, "The Grammar of Customary Law" (2009) 54:4 McGill LJ 579.

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- ²⁵ Those same scholars have pointed out that customary legal norms continue to exert a strong influence over the processes that govern the creation and implementation of state-based legal systems). See Fuller and Webber, *ibid.*
- ²⁶ Borrows, *Canada's Indigenous Constitution*, *supra* note 17, pp 51-55. For an analysis of Gitksan principles as a form of customary law, see Napoleon, "Living Together", *supra* note 16. On the meaning of "custom" in the context of First Nation elections under the Indian Act, see *Thomas v One Arrow First Nation*, [2019] FCJ No 1530 at paras 28-30.
- ²⁷ Lucy Bell, "Kwakwaka'wakw Laws and Perspectives Regarding Property" (2006) 5:1 *Indigenous LJ* 119; Paulette Regan, "An Apology Feast in Hazelton: Indian Residential Schools, Reconciliation, and Making Space for Indigenous Legal Traditions" in the Law Commission of Canada, *Indigenous Legal Traditions* *supra* note 9, 40; Napoleon, "Living Together", *supra* note 16.
- ²⁸ For a First Nation's modern experience in developing a healing circle to address wrongdoing in the community, see Ted Palys & Wenona Victor, "Getting to a Better Place": Qwi:qwelstóm, the Stó:lō, and Self-Determination," in the Law Commission of Canada, ed, *Indigenous Legal Traditions* (Vancouver: UBC Press, 2007) 19.
- ²⁹ Kirsten Anker, "Reconciliation in Translation: Indigenous Legal Traditions and Canada's Truth and Reconciliation Commission" (2016) 33 *Windsor YB Access Just* 15, 33-38.
- ³⁰ Borrows, "Heroes and Tricksters", *supra* note 23 at 832.
- ³¹ On the necessity for adaptation within Indigenous law, see e.g. Val Napoleon, "Raven's Garden: A Discussion about Aboriginal Sexual Orientation and Transgender Issues" (2002) 17:2 *CJLS* 149; and Friedland, Hadley, "IBA Accessing Justice and Reconciliation (AJR) Project: Final Report (Accessing Justice and Reconciliation Project, 2014). And see Borrows, *Canada's Indigenous Constitution*, *supra* note 17, 35-46.
- ³² See, e.g., *Delgamuukw v British Columbia*, [1997] 3 *SCR* 10 at para 145; and *Haida Nation v BC (Minister of Forests)*, [2004] 3 *SCR* 511 at para 20.
- ³³ Borrows, *Canada's Indigenous Constitution*, *supra* note 17; James [Sákéj] Youngblood Henderson, "Empowering Treaty Federalism", *supra* note 14.
- ³⁴ Henderson, *ibid.* at 55; for similar conclusions, see John Borrows, "The Durability of Terra Nullius" (2015) 48 *UBC L Rev* 701 at 738-40.
- ³⁵ See, e.g., Gordon Christie, "Culture, Self-Determination and Colonialism: Issues Around the Revitalization of Indigenous Legal Traditions" (2007) 6 *Indigenous LJ* 13 at 7, 25-26; John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002); Palys and Victor, "Getting to a Better Place", *supra* note 28.
- ³⁶ See, e.g., Perry Shawana, "Legal Processes, Pluralism in Canadian Jurisprudence, and the Governance of Carrier Medicine Knowledge" in the Law Commission of Canada, ed, *Indigenous Legal Traditions* (Vancouver: UBC Press, 2007); Hadley Friedland, "Waniska: Reimagining the Future with Indigenous Legal Traditions" (2016) 33:1 *Windsor YB Access Just* 85; Borrows, *Canada's Indigenous Constitution*, *supra* note 17, pp 8-11, 208-211.
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- ³⁹ See, e.g., Dawnis (Minnawaanagogiizhigook) Kennedy, "Reconciliation Without Respect? Section 35 and Indigenous Legal Orders in Law Commission of Canada, ed, *Indigenous Legal Traditions* (Vancouver, UBC Press, 2007) 77; Kirsten Manley-Casimir, "Incommensurable Legal Cultures: Indigenous Legal Traditions and the Colonial Narrative" (2012) 30:2 *Windsor YB Access Just* 137; Val Napoleon & Hadley Friedland, "Indigenous Legal Traditions: From Roots to Renaissance," in Markus Dr. Dubber & Tatjana Hörmle, eds, *Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014), 225.
- ⁴⁰ For some examples, see Kirsten Manley-Casimir, "Creating Space for Indigenous Storytelling in Courts" (2012) 27:2 *CJLS* 231; John Borrows, "Listening for a Change: The Courts and Oral Tradition" (2001) 39 *Osgoode Hall LJ* 1; Hadley Friedland, "Navigating Through Narratives of Despair: Making Space For The Cree Reasonable Person In The Canadian Justice System" (2016) 67 *UNB LJ* 269; Michael Coyle, "From Consultation to Consent: Squaring the Circle" (2016) 67 *UNBLJ* 235; Alan Hanna, "Reconciliation through Relationality in Indigenous Legal Orders" (2019) 56:3 *Alta L Rev* 817; Karen Drake, "Indigenous Oral Traditions in Court: Hearsay or Foreign Law?" in Karen Drake & Brenda L. Gunn, eds, *Renewing Relationships: Indigenous Peoples and Canada* (Saskatoon: Native Law Centre, 2019).
- ⁴¹ For a sustained analysis, see Borrows, "Canada's Indigenous Constitution", *supra* note 17. See also Kirsten Anker, *Declaration of Interdependence: A Legal Pluralistic Approach to Indigenous Rights* (Burlington, VT: Ashgate, 2014); Karen Drake, "Indigenous Constitutionalism and Dispute Resolution Outside the Courts: an Invitation" (2020) 48 *Fed L Rev* 570; Michael Coyle, "*E Pluribus Plures*: Legal Pluralism and the Recognition of

Indigenous Legal Orders”, in Paul Schiff Berman, ed., *Understanding Global Legal Pluralism: From Local to Global, from Descriptive to Normative* (Oxford: Oxford University Press, 2020).

⁴² Some recent examples include Sébastien Grammond, “Recognizing Indigenous Law: A Conceptual Framework” (2022) 100 Canadian Bar Review 1 (en français: “Un cadre conceptuel pour la reconnaissance du droit autochtone” (2022) 52:1 Revue générale de droit); Alan Hanna, “Spaces for Sharing: Searching for Indigenous Law on the Canadian Legal Landscape” (2018) 51 UBC L Rev 105; Karen Drake, *ibid*.

⁴³ These include Gordon Christie, “Culture, Self-Determination and Colonialism”, *supra* note 35; Aaron Mills (Waabishki Ma’ingan), “Aki, Anishinaabek, kaye tahsh Crown” (2010) 9 Indigenous LJ 107; Shawana, *supra* note 36; Matthew Moulton, “Framing Aboriginal Title as the (Mis)Recognition of Indigenous Law” (2016) 67 UNB LJ 336.

⁴⁴ In the context of child care law and adoption see Grammond, *supra* note 42, pp. 6-8, and Sébastien Grammond & Christine Guay, “Comprendre la normativité innue en matière d’« adoption » et de garde coutumière” (2016) 61:4 McGill LJ 885 at 906.

⁴⁵ Borrows, *supra* note 23 at 804.

⁴⁶ Examples include Henderson, “First Nations Legal Inheritances: The Mi’kmaq Model”, *supra* note 17; Val Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (PhD Thesis, University of Victoria, 2009); Hannah Askew, *Anishinabek Legal Summary of Legal Principles: Examples of Some Legal Principles Applied to Harms and Conflicts within a Group* (Accessing Justice and Reconciliation Project, 2011), online: Indigenous Bar Association http://indigenousbar.ca/indigenouslaw/wp-content/uploads/2012/12/anishinabek_summary.pdf; Kris Statnyk and Aaron Mills, *Summary of Cree Legal Principles: Examples of Some Legal Principles Applied to Harms and Conflicts between Individuals within a Group* (Accessing Justice and Reconciliation Project, 2011), online: Indigenous Bar Association http://indigenousbar.ca/indigenouslaw/wp-content/uploads/2012/12/cree_summary.pdf; Sarah Morales, “Stl’ul Nup: Legal Landscapes of The Hul’qumi’num Mustimuhw” (2016) 33:1 Windsor YB Access Just 103; Boisselle, “Law’s Hidden Canvas”, *supra* note 16. See the bibliography, *infra*, for many more such reviews.

⁴⁷ The Indigenous Bar Association, online: <http://www.indigenousbar.ca/indigenouslaw/>.

⁴⁸ The Legitimus Project, online: <<http://www.legitimus.ca/en/nospublishations>. The updating of this site ended in May, 2016.

⁴⁹ Examples of Indigenous nations promulgating constitutions, consultation protocols and other formal documents that foreground their own values and laws are now so widespread that they would require a bibliography of their own. For only a few examples, see the Aamjiwnaang First Nation, “Aamjiwnaang Chi’Naaknigewin (Community Constitution)”; online: <https://www.aamjiwnaang.ca/constitution/>; Deshkan Ziibiing/Chippewas of the Thames First Nation, *Consultation Protocol*, online: <https://www.cottfn.com/wp-content/uploads/2022/02/Wiindmaagewin-CONSULTATION-PROTOCOL-website.pdf>; Kwikwetlem (k’w’ik’w’ə’ləm) First Nation, “Governance Policy Manual” (2020) online: <https://www.kwikwetlem.com/governance-policy.htm>.

⁵⁰ Mohawk Council of Akwesasne, “A First Nation Justice System”. Online: <http://www.akwesasne.ca/justice/>.

⁵¹ For Indigenous scholars’ analyses of how Indigenous legal orders might be taught in law schools, see, e.g., Borrows, “Heroes and Tricksters”, *supra* note 23; Hadley Friedland, “Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws” (2012) 11 Indigenous LJ 1; Mills, “The Lifeworlds of Law”, *supra* note 14; Hannah Askew, “Learning from Bear-Walker: Indigenous Legal Orders and Intercultural Legal Education in Canadian Law Schools” (2016) 33:1 Windsor YB Access Just 29; Jeffrey Hewitt, “Decolonizing and Indigenizing: Some Considerations for Law Schools” (2016) 33:1 Windsor YB Access Just 65; Karen Drake, “Finding a Path to Reconciliation: Mandatory Indigenous Law, Anishinaabe Pedagogy, and Academic Freedom” (2017) 95 CBR 9; and Scott Franks, “Towards Implementing the Truth and Reconciliation Commission’s Calls to Action in Law Schools: A Settler Harm Reduction Approach to Racial Stereotyping and Prejudice Against Indigenous Peoples and Indigenous Legal Orders in Canadian Legal Education” (LLM thesis, York University, 2020). See also Kirsten Anker, “Teaching Indigenous Peoples and the Law”: Whose Law?” (2008) 33:3 Alt LJ 132.

⁵² See for example, Napoleon and Friedland, “An Inside Job”, *supra* note 21; and Friedland, *ibid*. Compare the pioneering work of Hoebel and Llewellyn, two non-Indigenous American scholars, in Karl Llewellyn and E.A. Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman: University of Oklahoma Press, 1941).

⁵³ On the importance of land-based learning, see John Borrows, “Outsider Education: Indigenous Law and Land-Based Learning” (2016) 33:1 Windsor YB Access Just 1.

⁵⁴ The Canadian National Judicial Institute has recently begun to offer seminars on the recognition and application of Indigenous Laws. See <https://www.nji-inm.ca/index.cfm/judicial-education/in-review-2021-2022/>.

⁵⁵ See for example: Casimir-Manley, *supra* note 39; Borrows *supra* note 39; Kennedy, *supra* note 39; Matthew Moulton, “Framing Aboriginal Title” *supra* note 43.

⁵⁶ For only two of many examples, see Leslie McMillan, “Living Legal Traditions: Mi’kmaw Justice in Nova Scotia” (2016) 67 UNB LJ 187; Palys and Victor, “Getting to a Better Place”, *supra* note 28.

⁵⁷ Borrows, *supra*, note 17. for a recent analysis of how Indigenous law might be reconciled with state law using appropriate dispute resolution processes, see Karen Drake, “Indigenous Constitutionalism and Dispute Resolution”, *supra* note 41.

⁵⁸ See Grammond, “Recognizing Indigenous Law”, *supra* note 42; and Mark D. Walters, “Rights and Remedies within the Common Law and Indigenous Legal Traditions: Can the Covenant Chain be Judicially Enforced Today?” in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties*, (Toronto: University of Toronto Press, 2017) 187.

⁵⁹ See Stark, “Changing the Treaty Question”, *supra* note 16; Grace Nosek, “Re-imagining Indigenous Peoples' Role in Natural Resource Development Decision making: Implementing Free, Prior and Informed Consent in Canada through Indigenous Legal Traditions”(2016) 50 UBC L Rev 95 at 156 ff; Coyle, “Squaring the Circle”, *supra* note 40; Karen Drake, “Indigenous Constitutionalism”, *supra* note 41.

⁶⁰ See Coyle, “*E Pluribus Plures*”, *supra* note 41; Gover, “Legal Pluralism and Indigenous Legal Traditions”, *supra* note 41; Drake, *ibid*. For a detailed analysis of how Canadian institutions might be reformed to reflect the history of treaty relationships, see Henderson, “Empowering Treaty Federalism”, *supra* note 33, esp at 280ff.

⁶¹ See, however, Napoleon, “Raven's Garden”, *supra* note 31 on the need for Indigenous legal orders to address issues of gender and sexuality; Borrows, *supra* note 17 at 35-46; Snyder, “Gender and Violence”, *supra* note 37; Christine Bidaud-Garon, “Legal Pluralism and Diversity of Interpretation of Fundamental Rights (Common Law, Customary Law, Reservation Related to Rights): The Example of New Caledonia” (2019) Int'l Surv Fam L 219.

⁶² By virtue of Article 7 of *la Loi Organique no 99-209 du 19 mars, 1999 relative à la Nouvelle Calédonie*, *JORF*, 21 mars 1999. See Lafargue, “The Unity of the Republic”, *supra* note 8 at 179.

⁶³ Lafargue, *ibid* at 185.

⁶⁴ The Senate of New Caledonia, *Charte du Peuple Kanak*, online: <http://www.senat-coutumier.nc/phocadownload/userupload/nos_publications/charte_du_peuple_kanak_2014.pdf>; François Féral, “L’adoption de la Charte du peuple kanak de Nouvelle-Calédonie : Les prémices d’un pluralisme juridique : origine, fondements et perspectives des droits autochtones du peuple kanak” (Ottawa: Legitimus, 2014), online: <http://www.legitimus.ca/static/uploaded/Files/Documents/INTERVENTION_FRANCOIS_FERAL_NOUMEA_2014_1-libre.pdf>.

⁶⁵ In May 2021 the government of Canada announced that it would provide \$9.5 million to 21 Indigenous law projects across the country over the following five years. See <https://www.canada.ca/en/departement-justice/news/2021/05/revitalization-of-indigenous-laws-at-centre-of-government-of-canada-funding.html>.

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