

# **INDIGENOUS LAWS: SOME ISSUES, CONSIDERATIONS AND EXPERIENCES**

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## 1.0 INTRODUCTION

In Canada and around the world, there is growing interest in how indigenous law might be articulated and applied to complex issues<sup>1</sup> such as cultural property,<sup>2</sup> crime,<sup>3</sup> governance,<sup>4</sup> women's rights,<sup>5</sup> human rights,<sup>6</sup> and resource management and climate change.<sup>7</sup> And, there is much political rhetoric that tends to idealize the pre-colonial relationship between aboriginal peoples and their environment. Generated by both aboriginal and non-aboriginal groups, much of this rhetoric contains declarative statements about "stewardship" and "harmony" and "respect".<sup>8</sup> While there are understandable reasons for this trend, such as advancing various aboriginal claims, it nonetheless creates some theoretical and practical difficulties, as well as many on-the-ground contradictions for aboriginal peoples who actually trying to research and work with their legal orders<sup>9</sup> and laws.<sup>10</sup>

However, despite the increasing national and international expectations for indigenous law, actually discussing the function of law, either in theory or practice, at the local level remains extraordinarily difficult. For example, several meetings were held in early 2007 with the Alexis Justice Committee to discuss whether their community justice work with criminal cases might usefully be considered an expression and form of local law,<sup>11</sup> or an adaptation of Nakota legal order and laws. While the committee members shared many valuable experiences of working with offenders and the judiciary for over twenty years, they were unable to discuss their work as having a basis in law. Instead, members talked more generally about responsibility, roles, kinship, values, gender, and ceremonies and practices. Consequently, insights into the function and content of local law or Nakota law must be drawn from people's behaviour and examples of implicit law that are deeply embedded in contemporary Nakota institutions. It is probable that talking about laws relating to the environment would be just as difficult for aboriginal communities.

Aboriginal law does not only exist somewhere in untouched cultures of the past. We contend that legal principles and obligations of aboriginal law are reflected in the actual work, structures, and life of present day aboriginal peoples and communities. Furthermore, in every society, legal norms and law are constantly changing. It is critical, therefore, that research strategies be designed to prevent creating static or reified constructs of aboriginal legal orders and law. Given this, we suggest that future research strategies include investigating past and present change processes, and whether and how aboriginal legal principles may be drawn from present-day decision-making, conflict, and relationships.

In this paper, we discuss ways to think about and research law concerning peoples' relationship with their natural environment that are potentially more useful for non-state aboriginal peoples with decentralized political structures and authorities. To conclude the paper, we suggest several long-term strategies that aboriginal peoples might consider to research and implement their law relating to their land, resources and non-human life forms, and more broadly, their environment.

## 2.0 THINKING ABOUT LAW

Given that there is no one aboriginal nation, but rather some fifty-plus diverse aboriginal nations across Canada, it follows that there is no one aboriginal legal order or set of aboriginal laws. We propose the development of a flexible conceptual legal framework that can guide culturally and geographically specific research into aboriginal peoples' legal orders and laws. Such an understanding of aboriginal legal orders and law may assist aboriginal groups to;

- (1) deal with internal contradictions and manage internal and external conflicts (e.g., good tradition as opposed to bad tradition, oppressive traditional practices, romanticism, and issues arising from "sacred" law<sup>12</sup>), and
- (2) build political relationships with others that are based on history and how people define themselves (i.e., not on the basis of difference).<sup>13</sup>

In distinguishing between legal systems and legal orders, we hope to avoid imposing western legal ideas onto aboriginal societies despite our use of western legal theoretical constructs. Of course, it is preferable to use aboriginal peoples' own language when referring to law and legal concepts. For example, the Gitksan people's word for law is *ayook*, which has been translated into English as law, custom, or precedent. In Western Australia, the Mardudjara have the word *julubidi* which has been described as "a body of jural rules and moral evaluations of customary and socially sanctioned behaviour patterns".<sup>14</sup>

It is useful to think about law is as a collaborative process that large groups of people employ to effectively management themselves. And since many aboriginal peoples in Canada were decentralized, but definitely had law, the question of where law comes from is raised. One way to answer this is to say that law may be sourced in the everyday social interaction of people rather than formal enactments and centralized state machinery.<sup>15</sup> In other words, there are at least two kinds of law: (1) explicit, formal law that is enacted or authoritatively declared and (2) implicit, informal interactive law (sometimes called customary law). This informal law has been described as a "language of interaction" that is necessary for people to meaningfully engage in anticipatory social behaviour. It is this language of interaction that enables the creation of social settings where people's behaviours generally fall within predicable patterns and known repertoires.<sup>16</sup>

A basic characteristic of law is that it lays down general rules that are open to interpretation.<sup>17</sup> These general rules, deriving from group interactions, form a predictable framework within which group members can manage their lives. For centralized states, this informal interactive framework actually forms the essential foundation for the successful functioning of formal enacted law between the law-maker and citizen.<sup>18</sup> That is, without interactive law to govern the relationships among citizens and between the citizenry and the state, the centralized system of enacted law simply would not be possible.<sup>19</sup>

To be effective for the purposes of large groups of people managing themselves, such social interactive law must withstand and adapt to ongoing norm contestation and conflict that are necessary aspects of every society for every generation.<sup>20</sup> In other words, there is no perfect state

that people can achieve wherein there is no conflict, but rather, conflict is an integral part of how groups of people work out how to live together.<sup>21</sup> In non-state aboriginal societies, these decentralized institutions and interactive processes result from the continual exercise of individual and collective agency and collaboration, and will be maintained and adapted as long as they are deemed legitimate by the group.<sup>22</sup>

While much of this interactive law is implicit,<sup>23</sup> aboriginal societies also made law explicit through public processes of legal reasoning, interpretation, and application.<sup>24</sup> Many peoples recorded their legal principles, precedents and decisions, and law in their oral histories (e.g., Gitksan, Wet'suwet'en), place names (e.g., Tlicho), kinship systems (e.g., Cree, Gitksan), and traditions (e.g., Tlicho).<sup>25</sup>

One factor that might contribute to difficulties such as those experienced by the Alexis Justice Committee members, is that the courts and much of the aboriginal legal and anthropological scholarship have focused on the “rules” or the “practices” in aboriginal peoples’ law. Little attention has been paid to the intellectual processes of law that involve legal reasoning and deliberation, and the interpretation and application of law. From this perspective, it appears as aboriginal peoples did not and do not think, but merely followed rules or engaged in practices. Consequently, aboriginal peoples’ law has been called “simple law for simple societies” while western law became the symbol of civilization.<sup>26</sup>

In sum, we contend that flexible legal frameworks are necessary to design, implement, and monitor any research into how indigenous peoples relate to their environment. Such a legal framework must include thinking about the functions of law, source of law, legitimacy and authority, norm contestation and conflict management, recording of law, territory (e.g., how far did the legal order extend?), international law (e.g., what were the protocols for dealing with other people’s law at the edge of the territory?), how law changes, individual and collective agency, internal relations of equality and gender (e.g., how are power imbalances and oppression dealt with?), and the relationship between indigenous law and Canadian law (e.g., political and legal pluralism).

### **3.0 THINKING ABOUT NON-STATE LAW**

Aboriginal peoples applied law to harvesting fish and game, the access and distribution of berries, the management of rivers, and to all other aspects of political, economic, and social life. Arguably, law still functions as law whether it is centralized or decentralized in accordance to the culture that gives rise to it. So what does law do? A basic characteristic of law is that it lays down general rules that people interpret and apply. Admittedly, there is no agreed definition of law among jurists. However, one legal theorist, Lon Fuller, suggests that there are a minimum of eight requirements for formally declared law to function effectively:

1. There must be established rules or baselines.
2. People have to know about the rules.
3. The laws can’t be applied to the past, only to the present or future.
4. The laws have to be clear.
5. The laws have to make sense together – they can’t be contradictory.

6. There has to be a consistency of law through time.
7. The actions of the lawmaker and the declared law have to make sense together – they can't be at odds with each other.
8. A person can only have a legal obligation that is within his or her power to fulfill.<sup>27</sup>

Decentralized aboriginal legal orders fulfill these eight functions of law. The only function that doesn't quite fit with some aboriginal decentralized legal orders is item 7, which refers to the lawmaker and declared law. This is because the lawmaker in decentralized societies is often not part of a separate institution. But many aboriginal people made law explicit and the law still has to make sense to people. Examples of decentralized law show that the law-making function is collective and therefore distributed among many people according to how that society is organized. And, people in decentralized societies also have to have ways of distributing information about laws and teaching laws. Decentralized law is more difficult to see because it is not dealt with in a separate dedicated institution by specialized individuals and the rules that maintain its framework are implicit rather than explicit.

So what is the process of legal reasoning? According to Gerald Postema, there are six distinctive features of legal reasoning in the common law:

1. It focuses on problem solving.
2. There is deliberate regard for the larger public good beyond individual interests.
3. It requires skilled and knowledgeable adjudicators or mediators.
4. It cannot be turned into technical formulas to be followed by rote without thought.
5. There is a deliberate and planned reasoning process.
6. The legal reasoning and decisions are considered common or shared among the collective.<sup>28</sup>

These features of legal reasoning were evident in a Gitksan legal process dealing with a crest dispute.<sup>29</sup> In the dispute, the Gitksan chiefs considered Gitksan law, past cases, circumstances, and histories. The reasoning and interpreting process of the Chiefs was known to the participants because it was conducted through both formal and informal public gatherings. People with direct interests and with related interests were involved as well as those who could be considered neutral mediators. These Gitksan reasoning processes occur within the context of Gitksan culture, institutions, history, and experiences. In other words, appreciating the wisdom of Gitksan law “lies in recognition of the internal point of view of participants in the legal system”.<sup>30</sup>

Since legal orders and law are entirely created within cultures, it is often difficult to see and understand other cultures' laws. However, we can learn how to see law across cultures as long as we, first, pay attention to our own cultural biases so that we recognize them in our expectations, responses, and judgments,<sup>31</sup> and, second, take the time to understand how the law makes sense in that other culture.<sup>32</sup>

Law also originates in social interaction and activities on the land as demonstrated by Gwich'in berry pickers in the Northwest Territories.<sup>33</sup> In this example, Gwich'in women managed the

harvesting of different types of berries and included (1) access – who can pick berries and where, (2) sharing information about the location of the berries, and (3) sharing the actual harvested berries. In this way, Gwich'in women managed conflicts and effectively directed the harvesting and allocation of an important resource. And since rules by themselves are not law, the variable factors that the women consider in the interpretation and application of these rules are scarcity or abundance of berries, kinship relationships, social responsibilities, species of berries, and environmental factors such as climate change. These guidelines form the basis for Gwich'in resource law. They originate in people's interactions and activities over time, are maintained by continued social interaction on the land, and are recorded in oral histories.

Other aboriginal peoples have similar guidelines to manage land and resources such as rivers, fish, caribou, and forests.<sup>34</sup> The challenge today is to figure out (1) what these guidelines are, (2) how they are maintained, (3) how they might be changed and adapted to apply today, (4) how conflicts were and are managed, and (5) how to relate to the laws of external government (provincial, federal, and other indigenous peoples).<sup>35</sup> And, there is the reality of having to reconcile indigenous laws with centralized contemporary forms of law-making and band generated laws (e.g., land codes, governance, etc.).

The discussion about resources and land raises three critical questions regarding the territorial extent of the legal order:

- (1) Who is included in the indigenous legal order?
- (2) What territory does the legal order extend to?
- (3) How does the law relate to other peoples' law at the farthest reaches of the territory?

For the most part, these questions require aboriginal peoples to go beyond band structures in order to consider scale, the concepts of the public good and personal interests,<sup>36</sup> accountability, and the full extent of the relationships and responsibilities within the society. The reserve boundaries created by the *Indian Act*,<sup>37</sup> which divided and grouped aboriginal peoples into bands, effectively cut across aboriginal legal orders. This division of aboriginal peoples and lands has undermined the management of aboriginal legal orders and has undermined the application of aboriginal laws. At the band level, the larger legal order becomes unworkable, and some co-operative arrangements must be established to enable bands to draw upon broader-based relationships at a national level to more effectively implement their laws.

In sum, researching aboriginal peoples' laws about the environment requires, at a minimum, asking how the law functions for each aboriginal cultural group. The second step requires the study of informal and formal decision making processes, behaviours and ethics, roles and responsibilities, and kinship networks. Most often, these opportunities are provided by conflict (and there are extensive examples within some aboriginal groups), contemporary organizations and activities (e.g., Alexis Justice Committee), and relationships with other peoples. Finally, this research design should be informed by an appreciation of the ontology and cosmology of the peoples. After all, legal institutions, including "rational" western law, are founded on a cultural understanding of human beings, and life and death.<sup>38</sup>

#### 4.0 THINKING ABOUT NATION-STATE LAW

For indigenous peoples world-wide and, indeed, most peoples until the last millennium, the legal order outlined above operated in a context of avoiding risk. In particular, it meant minimising risk to food supplies, shelter and warmth, as well as the essence of the group's legal and social order. From peoples' oral histories we know that such a risk-aversion was hard learned from the dire consequences of salmon, seals or caribou failing to return in sufficient numbers, or of weather conditions preventing adequate preservation and over-winter storage of meat, fish and berries. But equally, if not more importantly, maintaining a risk-aversion ethic came and comes from the high value people put on their future and past generations. Both ancestors and descendants were and are experienced as part of the present and their wellbeing incorporated into the day-to-day legal order.

A risk-adverse culture thus sacrifices significant immediate political and economic gains for long-term stability. As an important part of that stability is living within the bounds of natural ecosystem resilience, societies in such cultures do not need explicit environmental laws.

In contrast, risk-embracing cultures sacrifice significant long-term stability for immediate political and economic gains. For example, nation-state cultures emerging out of Europe in the last millennium have developed such risky initiatives as wide-scale war as a policy instrument and market or state capitalism as an economic instrument.

In the last century, these instruments have been increasingly employed on a global scale. But in that expansion, a disjunct has been revealed. The scientific methods and global communications used to develop them have also combined to show their severe long-term effects. These include not only nuclear, biological and other strategic weapons, but colonialism, mass dispossession, and genocide. Similarly, severe effects have been shown from pesticides, air and water pollution, resource over-harvesting, and high fossil-fuel use. At the same time, grassroots political movements for world peace, human rights, environmental safety and indigenous rights have forced governments to at least make a show of accommodating these concerns.

Governments in nation-states have attempted to bridge the disjunct by introducing positivist laws. These are rules decided upon within a hierarchical structure, adhered to by consent and backed by more or less coercive enforcement. With these laws, governments say, in effect, the system works but needs adjusting. Thus, in the face of global war and displacement, they enact human rights charters and institute refugee agencies. In the face of ecosystem degradation, they enact environmental laws and institute regulatory agencies. Environmental laws are often of a command and control type where specified harmful acts are forbidden unless conducted in a certain way or with the permission of certain officials. While the process of sanctioning environmental law-breakers is modelled on criminal codes, the scheme is effectively a lop-sided negotiation between the offending industry and the regulatory agency.

Indigenous peoples included within the boundaries and administrative structures of nation states have, with greater or lesser amounts of coercion, sometimes adopted state-like institutions. Thus, the *Indian Act* has provisions for band councils to enact environmental bylaws<sup>39</sup> and the Nisga'a Final Agreement<sup>40</sup> provides for command and control laws for fishery<sup>41</sup>, forestry<sup>42</sup> and other

resource-use activities. But for the most part, aboriginal people in Canada have attempted to protect their lands and its natural environment by participating in adversarial administrative or legal processes. These include inquiries and environmental assessments of large-scale resource extraction or transportation projects – pipelines,<sup>43</sup> roads,<sup>44</sup> mines – or aboriginal rights and title litigation,<sup>45</sup> ironically enough often in the context of defending aboriginal hunters and fishers from environmental regulatory offences.<sup>46</sup>

As many aboriginal leaders have pointed out, the settlement negotiations following these adversarial processes rarely involve the people in their own decision-making processes and more often than not lead to community disruption, distortion and dissent.

## **5.0 RESEARCH STRATEGIES FOR INDIGENOUS PEOPLES**

Aside from their values and legal orders – both pre- and post-colonial, aboriginal peoples differ from the rest of Canadians in that they live, or at least grew up in, small communities of inter-related and inter-married persons. Moreover, these communities exist within the framework of the European-derived administrative structures and legal order of Canada. Research into legal structures and processes to maintain, restore or enhance environmental and resource values should thus be at the community level and should focus on:

1. existing, present-day informal and formal decision-making processes and relationships that already exist within the community, even though these may be undermined by state laws and seem incapable of effective implementation;
2. being informed by, but not prescribed by, the people's historic legal order when it interacted with similar legal orders and not those of the nation-state; and
3. not undermining the culture of either the particular indigenous people or that of the Canadian state.

Other questions that might be helpful for designing research of an aboriginal group's legal order and laws are:

1. What do people recognize and treat as law through their social practices?<sup>47</sup>
2. How has their legal order and laws evolved over time?
3. What are the intellectual and reasoning processes that are necessary to understand and apply aboriginal law?
4. What are the internal contradictions that emerge from the research?
5. How was conflict managed historically? How have these practices changed? What are the implications of these changes for the group's internal power dynamics, relationships, and roles and responsibilities?

### **5.1 Legal Pluralism**

The concept of legal pluralism is useful to begin imagining a non-colonial relation between aboriginal and non-aboriginal peoples in Canada. One definition of legal pluralism is, "the state of affairs in which a category of social relations is within the fields of operation of two or more

bodies of legal norms.”<sup>48</sup> For legal pluralism to have any practical or theoretical value, it is critical to avoid essentializing the law of aboriginal peoples or the state.<sup>49</sup>

According to Sally Engle Merry, the dichotomy between informal, non-state law and formal, enacted law is false,

[A] concern with legal pluralism moves away from the ideology of legal centralism – the predisposition to think of all legal ordering as rooted in state law – and suggests attention to other forms of ordering and their interaction with state law. It highlights competing, contesting, and sometimes contradictory orders outside state law and their mutually constitutive relations to state law.<sup>50</sup>

In Western Australia, Greg McIntyre argues that the common law has the capacity to accommodate aboriginal customary law, and legislative declarations directing the incorporation and acknowledgement of aboriginal customary law would be appropriate to facilitate such state adaptation.<sup>51</sup> Such plurality of law could flow from state acknowledgement of aspects of customary law that, (1) would interface with state law, and (2) are a continuation of some aspects of aboriginal custom and norms which do not require state recognition or acknowledgement for a co-existence of law.<sup>52</sup>

At a practical level, a legal pluralist approach could begin with a river, a caribou herd, a mountain valley, or other geographic site. What are the laws of the aboriginal group regarding that place, those resources, non-human life forms, and other humans? What are the various state laws regarding that same place, those resources, and so on? What is the basis of the laws? How do each society’s laws make sense to it? How might one build intellectual bridges, founded on a normative and functioning understanding of law, between the societies? Again, this must be a rigorous process that does not essentialize the law of either society.

Finally, the work of aboriginal groups developing their own legal pluralist model would benefit from a dialectical analysis of the relations among the aboriginal group’s normative order and that of the Canadian state. Such an analysis would provide a “framework for understanding the dynamics of the imposition of law and of resistance to law, for examining the interactive relationship between dominant and subordinate groups or classes.”<sup>53</sup> Attention to the dialectic of state relations would ensure that both the internal and external interactions are brought into focus, and that aboriginal peoples’ agency – historical and contemporary – is emphasized.

## **5.2 Resource Management Trusts**

At the end of the Supreme Court of Canada’s *Delgamuukw* aboriginal title decision, the Chief Justice summarised the parties’ task ahead as “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.”<sup>54</sup> At a practical level, the Court makes clear that case was about resource use, and that what had to be reconciled was the “special bond” between aboriginal groups and their lands on the one hand<sup>55</sup> and industrial resource development on the other.<sup>56</sup> The Court also said “protection of the environment” was a Crown legislative objective that could justify infringing aboriginal title.<sup>57</sup> Environmental laws, then, were seen to be on the Crown’s side of the reconciliation equation.

Here we propose one practical way to reconcile the land governance interests of aboriginal groups with the land governance interests of Canadian governments and the resource corporations they licence. Unlike much reconciliation so far in Canada, our proposal attempts to tackle the task without undermining the legal or economic integrity of either interests' social order. In other words, putting into practice the legal pluralism concepts outlined above.

### ***Rationale***

In the past and today, governments have used the *Indian Act*, treaty provisions, economic joint-ventures, permits, licences and other means to force aboriginal communities into western-style governance structures. These structures usually have a small group of people at the top of a hierarchy that runs the show.

It makes more sense, however, for aboriginal communities to organise their governance and land management institutions under their own laws and social structures. Among the reasons for this are:

- they accommodate the people's own culture, which they know best (***cultural necessity***)
- they maintain consistency between the legal proof and the content of aboriginal rights and title (***legal necessity***)
- only they can successfully govern small communities of inter-related and inter-married people (***social necessity***)

At the same time, people have to find ways of relating their own governance systems to those of the federal and provincial governments, their agencies and public and private corporations. Such relationships include

- treaties (including treaty-related measures, interim measures, consultation and accommodation),
- local, non-aboriginal communities (including municipalities and regional governments),
- *Indian Act* relationships (including band councils, tribal councils, etc.), and
- commercial relationships (including joint ventures, partnerships, contracts, etc.).

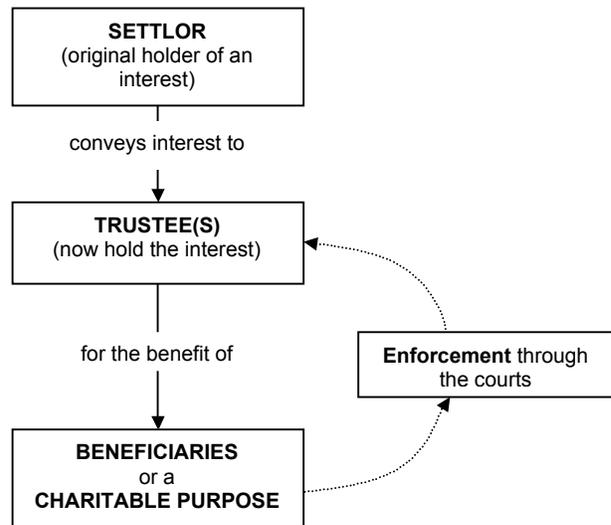
We propose using the trust as a legal device to form a useful interface between aboriginal institutions and western governments and corporations.<sup>58</sup> First, we briefly describe the concept of the trust. Then, we look at how the concept might be applied to governance issues with aboriginal groups.

### ***What is a Trust?***

In Anglo-Canadian law, the person who owns something is usually the person who can benefit from its use (live in a house, collect rent, harvest crops, etc.). The trust, however, separates those who own something (property or other rights) from those for whose benefit it must be used.

Generally, a trust is set up when someone who owns something (the settlor) conveys it to someone else (the trustee) with instructions (the trust agreement) about how it is to be managed for the benefit of others (the beneficiaries). Trusts may be for individual, identifiable beneficiaries or for a purpose, which usually means a charitable purpose that must benefit the whole community.

A settlor may appoint a single individual as trustee or a group of joint trustees. They may be members of the community that will benefit from the trust or may be from outside of it. In either case, if the trustee does not fulfil the settlor’s instructions as contained in the trust deed, the beneficiaries can enforce those instructions upon the trustee through the Canadian courts.



The trust, particularly the charitable purpose trust, is a useful legal device to help aboriginal societies interface with western organisations. On the one hand, the trustee (or body of trustees) presents a single “authority” with which governments and corporations can recognise and deal. On the other hand, the instructions contained in the trust agreement constrain and inform the trustees’ actions so that they are accountable to the beneficiaries, which in this case is the aboriginal community.

***A Trust Model***

A simple example may serve to illustrate how the trust concept could be used to help resolve some resource-use and environmental issues currently faced by many aboriginal communities.

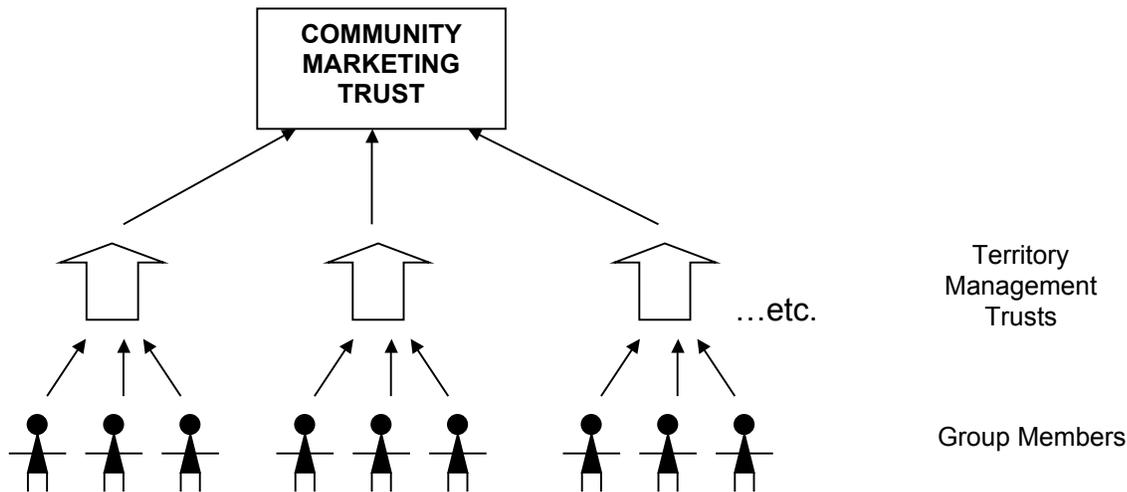
Some aboriginal peoples recognise certain groups within the community, such as clans or families, as the legitimate holders of their land and fishing territories. With such recognition, it would be inappropriate, if not contrary to their own laws, for a central entity to say what should happen on any of those territories. At the same time, however, community economic activities, such as a fishery or a logging operation, need to find ways of dealing with government agencies and with buyers of their products.

One way of doing this is for each territory-holding group to set up a charitable purpose trust and provide detailed instructions to its trustees to manage the resources in a sustainable manner for the purpose of providing spiritual and economic benefit to all current group members and to all future generations. In this way, the people’s own law would be backed by Anglo-Canadian trust law.

The need to restore depleted resources, such as logged over forests or depleted fish runs, however, will likely mean few immediate benefits for some groups within a community. As well, restoration projects and allocation for a migratory animal such as salmon or caribou requires co-

operation among groups. It would make sense then for groups of to pool their marketing, allocation and restoration activities through more centralised entities. Each such entity could, say, manage a resource-marketing trust for all the territory-holding trust groups. It could provide management and marketing assistance for such activities as timber harvesting and management, mushroom harvesting, eco-tourism, medicine plant gathering, trapping, and so on.

The two suggested levels of trust are shown in the diagram below:



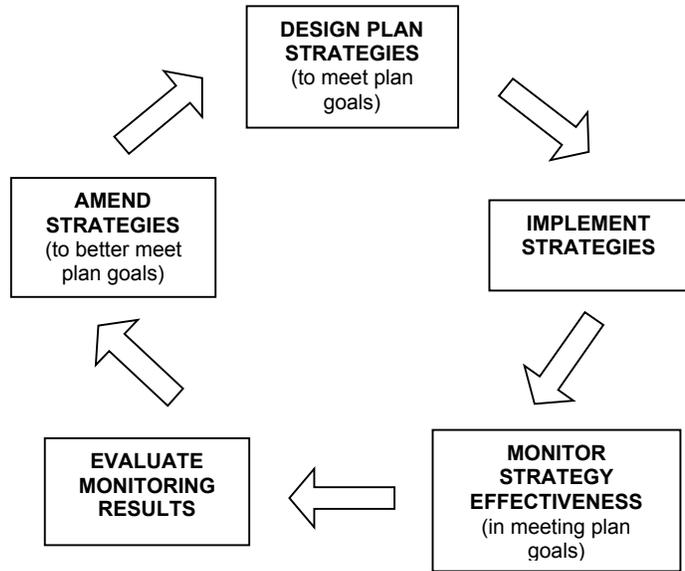
Note that the arrows in the diagram show the “bottom-up” authority of group members through their Territory Trusts to the more centralised Marketing Trust.

### 5.3 Adaptive Management

We suggest that the development of sustainable environmental practices needs to be in the context of place-based, participatory models. Because many environmental problems are in fact complex systems problems, they may not be amenable to the simple application of environmental laws. Alternative approaches, such as adaptive management, have been proposed to deal with such complexity. The sharing of management power between governments and local people is necessary to produce flexible, multi-level governance systems in which institutional arrangements, such as the resource management trusts outlined above, and ecological knowledge are tested and revised in an ongoing process of trial and error. This is known as adaptive co-management.<sup>59</sup>

Adaptive management thus can be seen to have two learning cycles. One is the ethic cycle, in which the basic values of the community towards its environment are settled. This cycle is not so much one of change but one of affirmation, drifting away and reaffirmation of the group’s basic world-view. Many aboriginal oral histories, such as the Nanabush and Raven stories, are of this type.

The second is the knowledge cycle (shown right). This adapts to changing environmental conditions, such as global warming, as well as the controlling group's ethical evolution. The knowledge learning cycle involves being faced with profound uncertainties, taking a purposeful step forward, monitoring the consequences of that step, and learning to avoid future failures from the results.<sup>60</sup>



The ecological knowledge can be what is known as traditional ecological knowledge (TEK), what is known as scientific knowledge, or both combined.

Adaptive management has been described as a learning process, not by individuals but by a community, often over several generations. Fikret Berkes suggests that for animals with very long natural population cycles, such as the George River caribou herd, only aboriginal oral histories contain the knowledge and the teachings needed to effectively manage hunting pressure on the herd.<sup>61</sup>

#### 5.4 Conflict

Cultural ethics regarding authority, legitimacy, and behaviour underlie much of the pervasive conflict experienced in some aboriginal communities today. For example, the Innu in Labrador practiced conflict avoidance which worked effectively with small highly mobile groups of people that were able to travel across a large territory. However, since the establishment of settled communities, the cultural practice of conflict avoidance no longer works. In fact, when people are living close together, the practice of conflict avoidance operates to exacerbate the conflict.<sup>62</sup>

Similarly, the governance structure and authorities of Gitksan people were highly decentralized. This cultural ethic of decentralization still operates in the form of individual and collective resistance to hierarchy and centralization.<sup>63</sup> For the most part, these cultural ethics remain implicit and unexamined. Given this, understanding aboriginal legal orders and laws requires identifying underlying cultural ethics and making them explicit so they can be critically discussed. Such an analysis requires an exploration of the original purpose of the behaviour and considering either change or reconciliation of cultural ethics with present day circumstances. Drawing from her work in South Africa, Celestine Nyamu helpfully provides a three-stage “critical pragmatic approach”:<sup>64</sup>

1. Challenge any legal framework or social process that protects cultural, spiritual, or religious practices from questioning. Create space for diverse voices and challenges to the norms.

2. Gather evidence of varied and alternative local practices to counteract negative, static cultural rhetoric (there are always variations). These could be used to develop new case law within indigenous law.
3. Identify concepts of fairness and equality within the culture and apply these principles to issues relating to gender, sexual orientation, ageism, and other imbalances.

To sum up, we have proposed that aboriginal legal orders and law should be understood practically and critically. It is not about trying to go back in time, but about drawing on the strengths and principles of the past to deal with modern-day problems and situations.

## **6.0 CONCLUSION**

This paper has set out a broad, theoretical basis to begin critically thinking about how aboriginal peoples' relate to their environment through their own legal orders and law. Further, we have suggested that one way to more effectively structure an "aboriginal environmental law" research project would be to develop a flexible legal framework within which to begin considering the function, content, and structure of aboriginal peoples' legal orders and law. We have given conceptual and practical examples of legal devices that could assist this exercise of legal pluralism.

## ENDNOTES

<sup>1</sup> For a series of background papers on various customary law issues relating to human rights, state recognition, women's concerns, criminal offences, family and child welfare disputes, community governance, social services, and intellectual property, see online: Law Reform Commission of Western Australia <http://www.lrc.justice.wa.gov.au/>. For another series of background papers and a final report on customary law, see online: Northern Territory Law Reform Committee <http://www.nt.gov.au/justice/graphpages/lawmake/index.shtml>. Also see Peter Bartholomew, "Recognition Given to Various Aspects of Indigenous Customary Law in Queensland" (1998) 8 Research Bulletin, Queensland Parliamentary Library, online: Queensland Parliament <http://www.parliament.qld.gov.au/publications/view/publications>.

<sup>2</sup> See for instance, World Intellectual Property Organization, *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Final Report on National Experiences with the Legal Protection of Expressions of Folklore* (Third Session, 2002) WIPO/GRTKF/IC/3/10 at 59; and Terri Jenke & Robynne Quiggin, "Indigenous Cultural and Intellectual Property and Customary Law" (2005) Background Paper # 12, Law Reform Commission of Western Australia..

<sup>3</sup> See for example, Kathryn Trees, "Contemporary Issues Facing Customary Law and the General Legal System: Roebourne – A Case Study" (2004) Background Paper # 6, Law Reform Commission of Western Australia.

<sup>4</sup> See for example, the various publications of the National Centre for First Nations Governance at [www.fngovernance.org](http://www.fngovernance.org).

<sup>5</sup> Jo-Anne Fiske & Evelyn George, *Seeking Alternatives to Bill C-31: From Cultural Trauma to Cultural Revitalization through Customary Law* (Ottawa: Status of Women, 2006).

<sup>6</sup> Some of the recent literature explores the relationship between customary law and state-centred law in Tanzania, Rwanda, South Africa, Kenya, and Uganda. See for example, Janet Walsh, "Double Standards: Women's Property Rights Violations in Kenya" (2003) 15:5(A) Human Rights Watch, online: Human Rights Watch <http://www.hrw.org>; Celestine Nyamu-Musembi, "Review of Experience in Engaging with 'Non-State' Justice Systems in East Africa" (2003), online: Institute of Development Studies <http://www.ids.ac.uk/ids/law/pdfs/eanyamu.pdf>; and Leila Chirayath, Caroline Sage, & Michael Woolcock, "Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems" (2005), online: World Bank [http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Customary\\_Law\\_and\\_Policy\\_Reform.pdf](http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Customary_Law_and_Policy_Reform.pdf).

<sup>7</sup> For instance, Brenda Parlee, Fikret Berkes, & the Teet'it Gwich'in Renewable Resource Council, "Indigenous Knowledge of Ecological Variability and Commons Management: A Case Study on Berry Harvesting from Northern Canada" (2006) 34:4 Human Ecology 515-528.

<sup>8</sup> For an interesting and critical discussion about this phenomena, see Laura Nader and Jay Ou, "Idealization and Power: Legality and Tradition in Native American Law" (1998) 23:1&2 Oklahoma City University Law Review 13-42. Also see Laura Nader, *Harmony Ideology: Justice and Control in a Zapotec Mountain Village* (Stanford: Stanford University Press, 1990).

<sup>9</sup> I use the term "legal order" in this paper to describe legal rules and procedures that are undifferentiated from social life and from political and religious institutions. "Legal systems", on the other hand, may be described as distinct, integrated bodies of law, consciously systematized by professionals with specialized institutions, legislation, and the "science of law". See Harold J. Berman, *Law and Revolution* (Cambridge: Harvard University Press, 1983) at 49-50.

<sup>10</sup> Some of these contradictions have been created for aboriginal peoples by recent efforts to recognize, classify, and universalize the traditional ecological knowledge (TEK) of indigenous peoples. For example, according to Julie Cruikshank, *The Social Life of Stories: Narrative and Knowledge in the Yukon* (Vancouver: UBC Press, 1998) at 60, "The pitfall of both axioms – one linking hunters with harmony, the other of conflating norms with behaviour – is that each so easily becomes a weapon when indigenous people fail to pass arbitrary tests of authenticity".

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<sup>11</sup> The term local is used here to mean law that is oriented specifically to one settled, geographic community, the Alexis First Nation, formerly the Alexis Indian Band. Alexis is located about 100 kilometres west of Edmonton, Alberta.

<sup>12</sup> There is an important difference between (1) believing that the laws themselves are spiritual and sacred, and outside human control, and (2) understanding that all law, including western law, is founded on a world view – how we see human beings, non-human life forms, and the spirits and the universe. What are the consequences of law being sacred? Who gets to say whether the law has been broken? How can people disagree with sacred law? Can sacred laws change?

<sup>13</sup> For an excellent discussion of political pluralism that is not founded in notions of difference, see Tim Schouls, *Shifting Boundaries: Aboriginal Identity, Pluralist Theory, and the Politics of Self-Government* (Vancouver: UBC Press, 2003).

<sup>14</sup> Heather McRae, Garth Nettheim, Laura Beacroft & Luke McNamara, *Indigenous Legal Issues: Commentary and Materials, 3<sup>rd</sup> Ed.* (Sidney, Aust.: Lawbook Co., 2003) at 77.

<sup>15</sup> Lon L. Fuller, “Human Interaction and the Law” (1969) 14 Am. J. Juris. 1 at 11 [Fuller, Human Interaction].

<sup>16</sup> *Ibid.* at 2.

<sup>17</sup> *Ibid.* at 23.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.* Fuller has also written about the difficulties experienced by “new” nations that try to institute a single system of rules over peoples of different cultures. In these instances, the lack of long established state-influenced customary law (i.e., language of interaction) necessary to create and guide the relationships between law-maker and citizenry, can easily result in political corruption. I think this perspective might be usefully applied to aboriginal societies whose customary law has been disoriented by centralized powers and authorities of the federal government and the colonial band structures. However, such an exploration is beyond the scope of this paper. See Fuller, *The Law’s Precarious Hold*, *supra* note 11 at 542-45.

<sup>20</sup> Jeremy Webber, “Legal Pluralism and Human Agency” (2005) 44:1 Osgoode Hall Law Journal 167 at 171.

<sup>21</sup> See generally, Stuart Hampshire, *Justice is Conflict* (Princeton: Princeton University Press, 2000).

<sup>22</sup> According to Jeremy Webber, dialogic theories of consent conceptualize “a community’s legitimacy as a function of the quality of its interactions, rather than of an historic (and indeed generally mythical) act of adherence”. See Jeremy Webber, “Challenges of Consent”, (Paper prepared for the Inaugural 2004 Conference of the Consortium on Democratic Constitutionalism: “Consent as the Foundation for Political Community”), online: University of Victoria [http://www.law.uvic.ca/demcon/2004\\_program.htm](http://www.law.uvic.ca/demcon/2004_program.htm) at 22 [Webber].

<sup>23</sup> Gerald Postema, “Implicit Law” in Willem Witteveen & Wibren van der Burg, eds., *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam: Amsterdam University Press, 1999) 255-275.

<sup>24</sup> See Val Napoleon, “Living Together: Gitksan Legal Reasoning as a Foundation for Consent” (2004), paper presented at Consent as the Foundation for Political Community, Consortium on Democracy and Constitutionalism, University of Victoria. The conference papers will be published in an inaugural consortium journal, forthcoming in 2007.

<sup>25</sup> Also see H. Patrick Glenn, *Legal Traditions of the World, Sustainable Diversity in Law, 2<sup>nd</sup> Ed.* (Oxford: Oxford University Press, 2004).

<sup>26</sup> This has been observed by Janna Promislow. See Janna Promislow, *Toward a Legal History of the Fur Trade: Looking for Law at York Factory, 1714–1763* (LL.M. Thesis, Osgoode Hall, 2004) [unpublished] at 36.

<sup>27</sup> Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964) 39.

<sup>28</sup> Gerald J. Postema, “Classical Common Law Jurisprudence (Part II)” (2003) 3:1 Oxford University Commonwealth Law Journal 1 at 6-9.

<sup>29</sup> Napoleon, *supra* note 22.

<sup>30</sup> Gerald J. Postema, “Classical Common Law Jurisprudence (Part I)” (2002) 2:2 Oxford U. Commonwealth L.J. 155 at 155.

<sup>31</sup> William Alford, “On the Limits of ‘Grand Theory’ in Comparative Law” (1986) 61 Wash. L. Rev. 945.

<sup>32</sup> See generally, William Ewald, “Comparative Jurisprudence (I): What was it Like to Try a Rat?” (1994-95) 143 U. Pa. L. Rev. at 1889-1905, 1912-1916, 1924-1925, 1936-1943.

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<sup>33</sup> Brenda Parlee, Fikret Berkes & the Teetl'it Gwich'in Renewable Resource Council, "Indigenous Knowledge of Ecological Variability and Commons Management: A Case Study on Berry Harvesting from Northern Canada" (2006) *Human Ecology* [in press].

<sup>34</sup> See generally, Marc Hertogh, "The Conscientious Watermaster: Rediscovering the Interactional Concept of Law" in Willem Witteveen & Wibren van der Burg, eds., *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam: Amsterdam University Press, 1999) 364.

<sup>35</sup> Gordon Woodman advocates the need for extensive research into "practiced customary law". Woodman also suggests that such research be conducted in small localities rather than on a state basis. See Gordon Woodman, "Customary Law in Common Law Systems" (undated) online: Institute of Development Studies <http://www.ids.ac.uk/ids/govern/accjust/pdfs/idswoodman.pdf> at 10.

<sup>36</sup> John Ralston Saul, *The Unconscious Civilization* (Concord: Anansi Press, 1995) at 167. Saul argues that some distance creates a level of personal disinterest that is necessary in order for people to effectively maintain and protect the larger public good.

<sup>37</sup> *Indian Act*, R.S.C. 1985, c. I-5.

<sup>38</sup> Val Napoleon, "By Whom, and by What Processes, Is Restorative Justice Defined, and What Bias Might this Introduce?" in Howard Zehr & Barb Toews (eds.), *Critical Issues in Restorative Justice* (Criminal Justice Press, New York, 2004) 33.

<sup>39</sup> *Indian Act*, R.S.C., 1985, c. I-5, s. 81(1)(a),(j) and (o).

<sup>40</sup> Nisga'a Final Agreement, Canada, British Columbia, and the Nisga'a Nation (4 August 1998, reprinted December 1998). The treaty has been ratified by the Nisga'a Nation, enacted by the British Columbia legislature as the Nisga'a Final Agreement Act, S.B.C., 1999, c. 2, and enacted by the Canadian parliament as the Nisga'a Final Agreement Act, S.C., 2000, c. 7. The treaty came into effect on May 11, 2000.

<sup>41</sup> *Ibid.* c. 8.

<sup>42</sup> *Ibid.* c. 5, ss. 5 to 56.

<sup>43</sup> Berger, T.R., *Northern frontier, northern homeland: the report of the Mackenzie Valley Pipeline Inquiry*, Mackenzie Valley Pipeline Inquiry (Canada), (Toronto: James Lorimer, 1977).

<sup>44</sup> *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550.

<sup>45</sup> For example, *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 101; *Calder v. Attorney-General of British Columbia*, [1973] 1 S.C.R. 313.

<sup>46</sup> For example, *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Adams*, [1996] 3 S.C.R. 101

<sup>47</sup> Tamanaha, *supra* note 62 at 320.

<sup>48</sup> Gordon Woodman, "Legal Pluralism and the Search for Justice" (1996) 40:2 *J. Afr. L.* 152 at 157.

<sup>49</sup> Brian Tamanaha, "A Non-Essentialist Version of Legal Pluralism" (2000) 27:2 *J.L. & Soc'y*, 296 at 297 [Tamanaha].

<sup>50</sup> Sally Engle Merry, "Legal Pluralism" (1988) 22 *Law & Soc'y Rev.* 869 at 889 [Merry].

<sup>51</sup> Greg McIntyre, "Background Paper on Aboriginal Customary Law: Can It Be Recognized?" (2005) Law Reform Commission of Western Australia, online: Law Reform Commission of Western Australia <http://www.lrc.justice.wa.gov.au/> at 62.

<sup>52</sup> *Ibid.* McIntyre explains that "acknowledgement" usually takes the form of a procedural approach to statutory recognition of aboriginal custom through the provision of local aboriginal courts that parallel state courts (at 9). "Recognition" of aboriginal customary law is described reinforcing the status quo power relationship that is antithetical to plural legal systems (at 6).

<sup>53</sup> Merry, *supra* note 63 provides this caution:

However, for some problems the concept has limitations. One is in the analysis of change within a single social field and a second is in the attention to the specific characteristics of particular social locations. A legal pluralist analysis tends to emphasize changes that occur through interactions between social fields but not those taking place within a social field. It is likely to miss the way a particular social field is gradually reshaped by a variety of ideological and political forces both within and outside it. (at 891).

<sup>54</sup> *Delgamuukw*, *supra* note 45 at para. 186.

<sup>55</sup> *Ibid.* at para. 128.

<sup>56</sup> *Ibid.* at para. 165 and Schedule 3.

<sup>57</sup> *Ibid.*

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<sup>58</sup> For a more exhaustive survey of these possibilities, see Richard Overstall, "Reconciliation Devices: Using the Trust as an Interface between Aboriginal and State Legal Orders" in Catherine Bell and David Kahane, eds., *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004).

<sup>59</sup> Carl Folke, Steve Carpenter, Thomas Elmqvist, et al., *Resilience for Sustainable Development: Building Adaptive Capacity in a World of Transformation*. (2002) 3 Rainbow Series, Paris, France: International Council for Scientific Unions (ICSU).

<sup>60</sup> Anthony Dorsey & Timothy McDaniels, "Great Expectations, Mixed Results: Trends in Citizen Involvement in Canadian Environmental Governance," in Edward Parson, ed., *Governing the Environment*. (Toronto: Toronto University Press, 2001) 247-302.

<sup>61</sup> Fikrit Berkes, *Do Resource Users Learn from Management Disasters? Indigenous Management and Social Learning in James Bay*, Conference Paper, Natural Resources Institute, University of Manitoba.

<sup>62</sup> For example, Hedda Schuurman suggests that the current conception of "community" does not derive from Innu language or culture, and the experience of living within a fixed settlement is entirely foreign. Historically, Innu lived in small, mobile social units with a dynamic pattern of social organization and coherent identities, but with shifting social and geographic boundaries. One of the consequences of 1960s settlements has been a social stratification of subgroups that were created by contact – external privileging according to the degree of acculturation or isolation of the subgroups. This hierarchy now determines status, social positions, and political leadership. For the Innu, settlement has meant individual households, a cash economy and dependence, changes to Innu economic and social practices, breakdown of social relationships, centralized schools, and increased conflict. According to Schuurman, settlement has resulted in an anti-community consciousness that raises particular difficulties for leadership and the implementation of self-government. Hedda Schuurman, "The Concept of Community and the Challenge for Self-Government" in Colin Scott, ed., *Aboriginal Autonomy and Development in Northern Quebec and Labrador* (Vancouver: UBC Press, 2001) 379. Also see Adrian Tanner explains that since settlement, the Innu have experienced an epidemic of social breakdown and dysfunction generally. The former practice of dealing with disputes was primarily that of avoidance; when a dispute occurred, hunting groups split up. However, once people settled in villages, this conflict avoidance was not longer possible. According to Tanner, while self-government offers the Innu a way to address their problems, a new conception of community must be developed that is based on Innu values and that is acceptable to the larger Canadian society. Adrian Tanner, "The Double Bind of Aboriginal Self-Government" in Colin Scott, ed., *Aboriginal Autonomy and Development in Northern Quebec and Labrador* (Vancouver: UBC Press, 2001) 397

<sup>63</sup> Richard Daly, *Our Box Was Full: An Ethnography for the Delgamuukw Plaintiffs* (Vancouver: UBC Press, 2005) at 202.

<sup>64</sup> Celestine Nyamu, "How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?" (2000) 41:2 Harv. Int'l L.J. 381 at 415.