

Taking the “Aboriginal Perspective” Seriously:

The (Mis)use of Indigenous Law in *Tsilhqot’in Nation v British Columbia*

FRASER HARLAND*

I	Introduction	1
II	Indigenous Legal Traditions as Living Law	4
III	The Place of Indigenous Law in <i>Tsilhqot’in</i>	7
	Background and Facts	7
	The Trial Decision	9
	The Supreme Court of Canada Decision	18
IV	Moving Forward	23
	Implications	23
	A New Approach	26
V	Conclusion	28

Leading Aboriginal title jurisprudence calls upon judges to give equal weight to the “Aboriginal perspective” — which includes Indigenous law — in their decisions. This article examines the trial and Supreme Court of Canada decisions in Tsilhqot’in Nation v British Columbia to uncover to what extent judges succeed at this task. The results, though mixed, are largely troubling. Positively, the trial judgment offered a methodology for treating Indigenous oral testimony with respect, and the Supreme Court issued the first declaration of Aboriginal title in Canadian history. However, Indigenous oral testimony — much of it law — was confined to the evidentiary stage. Considered only as evidence, Indigenous law

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was relegated to the realm of history and was accepted only as fact, and not as law, by the courts. This limited approach to Indigenous law will fail to contribute to meaningful reconciliation based on a relationship of reciprocal respect and will lead to increased concerns regarding the legitimacy of courts' adjudication of Indigenous claims. An alternative approach, based on the living tree doctrine, is required if courts are to take the "Aboriginal perspective" seriously, not just in rhetoric, but also in reality.

I Introduction

"Legends and stories are the law of the land. You call it *Dechen Ts'edilhtan* in Tsilhqot'in."¹

— Chief Roger William

"Law is the command of a sovereign power."²

— Crown Counsel, citing John Austin

The above statements were both uttered during the 339-day trial in the case of *Tsilhqot'in Nation v British Columbia*.³ They represent an ongoing conceptual, moral, and legal struggle over the place, acceptance, and understanding of Indigenous legal orders⁴ in Canadian law. On the one hand, the revitalization and resurgence of Indigenous law is an increasingly apparent reality in the academy, civil society, and, most importantly, on the ground in Indigenous communities. On the other hand, in the course of litigation, both provincial and federal governments — and their legal representatives — often seek to deny its existence and relevance.

At first glance, it would seem that this tension has already been resolved in Canada's Aboriginal title jurisprudence. Breaking from the prevailing marginalization of Indigenous oral evidence, in *Delgamuukw v British Columbia*⁵ Chief Justice Lamer handed down the remarkable instruction to judges faced with an Aboriginal title claim that proof "must rely on both the perspective of the common law and the aboriginal perspective, placing equal weight on each."⁶ Crucially, the Aboriginal perspective "includes, but is not limited to, *their systems of law*."⁷ When the *Tsilhqot'in* claim arrived at the Supreme Court

1 *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700, 163 ACWS (3d) 873 (Transcript, 10 September 2003) [*Tsilhqot'in* BCSC], cited in Lorraine Weir, "'Oral Tradition' as Legal Fiction: The Challenge of Dechen Ts'edilhtan in *Tsilhqot'in Nation v. British Columbia*" (2015) 29:1 Int'l J Sem L 159 at 173 [Weir, "Legal Fiction"].

2 *Tsilhqot'in* BCSC (Oral Argument, Canada), *supra* note 1, cited in Hamar Foster, "One Good Thing: Law, Elevator Etiquette and Litigating Aboriginal Rights in Canada" (2010) 37:1 Advocates' Q 66 at 83.

3 *Supra* note 1.

4 This article uses the terms "legal order" and "legal tradition" interchangeably to signify the culturally embedded non-state law of Indigenous nations. These terms can be contrasted with "legal system," which designates the law sanctioned and enforced by the state. For more detailed discussions on this terminology, see John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 7–11 [Borrows, *Constitution*]; Val Napoleon, "Thinking About Indigenous Legal Orders" in René Provost & Colleen Shepherd, eds, *Dialogues on Human Rights and Legal Pluralism* (New York: Springer, 2013) 229 at 231 [Napoleon, "Indigenous Legal Orders"].

5 [1997] 3 SCR 1010, 66 BCLR (3d) 285 [*Delgamuukw*].

6 *Ibid* at para 156.

7 *Ibid* at para 147 [emphasis added].

of Canada⁸ — its most recent major case on Aboriginal title — the Court affirmed these instructions from *Delgamuukw*. Chief Justice McLachlin, writing for a unanimous court, declared: “The question ... must be approached from both the common law perspective and the Aboriginal perspective. ... The Aboriginal perspective focuses on *laws*, practices, customs and traditions of the group.”⁹

In *Tsilhqot'in*, after carrying out the Aboriginal title analysis — and thus supposedly considering the Aboriginal perspective (and Indigenous law) — the Court issued the first declaration of Aboriginal title in Canada’s history. Much of the commentary, particularly in the world of legal practice, has celebrated the decision as an historic win for Indigenous peoples and as a positive step in the development of Aboriginal law.¹⁰ Others have analyzed what the outcome of the decision means for resource development¹¹ or third party interests.¹²

However, the “title victory” should not obscure the underlying issue of Canadian courts’ treatment of Indigenous law (or lack thereof) in *Tsilhqot'in* and what that means for future Aboriginal title jurisprudence. The key passages from *Delgamuukw* and *Tsilhqot'in*, cited above, are powerful. Numerous scholars argue that these phrases contain the necessary principles for the courts to recognize the normative value of Indigenous law on its own terms and the role that it can play in the analysis that shapes the meaning and determination of Aboriginal title.¹³ It is possible, in other words, to ground serious judicial engagement with Indigenous legal traditions in the current jurisprudence. Indeed, if we are really to give the Aboriginal perspective equal weight, and if Indigenous communities are to feel that substantive justice is being done, surely their laws must play a prominent role in the courts’ analysis. However, it is only by looking beyond these passages, to what the courts actually do with Indigenous law, that we can determine whether this promise is being realized.

8 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 [*Tsilhqot'in*].

9 *Ibid* at paras 34–35 [emphasis added].

10 See e.g. “Blazing a Trail for Reconciliation, Self-Determination and Decolonization”, online: Woodward & Company LLP <www.woodwardandcompany.com/?page_id=87>; Andrea Bradley & Senwung Luk, “In a First for a Canadian Court, SCC Recognizes Aboriginal Title for Tsilhqot'in Nation” (26 June 2014), online: Olthuis, Kleer & Townshend LLP <www.oktlaw.com/blog/in-a-first-for-a-canadian-court-scc-recognizes-aboriginal-title-for-tsilhqot-in-nation/>.

11 See e.g. Nigel Bankes, “The Implications of the *Tsilhqot'in* (*William*) and *Grassy Narrows* (*Keewatin*) decisions of the Supreme Court of Canada for the Natural Resources Industries” (2015) 33:3 J Energy Natural Resources L 188; Dwight Newman, “Is the Sky the Limit? Following the Trajectory of Aboriginal Legal Rights in Resource Development”, *McDonald-Laurier Institute* (June 2015) at 16–18, online: <www.macdonaldlaurier.ca/files/pdf/MLIAboriginalResourcesNo7-06-15-WebReady-V3.pdf>.

12 See e.g. Kent McNeil, “Reconciliation and Third Party Interests” (2010) 8:1 Indigenous LJ 7 [McNeil, “Reconciliation”]. For a critical take outlining how concern for third party interests misses larger questions related to the unilateral imposition of sovereignty, see Gordon Christie, “Aboriginal Title and Private Property” in Maria Morellato, ed, *Aboriginal Law Since Delgamuukw* (Aurora, Ont: Cartwright, 2009) 177 [Christie, “Private Property”].

13 See e.g. Ardith Walkem, “An Unfulfilled Promise: Still Fighting to Make Space for Indigenous Legal Traditions” in Morellato, *supra* note 12, 393 at 393 (explaining the promise found in *Delgamuukw*); Senwung Luk, “The Law of the Land: New Jurisprudence on Aboriginal Title” (2014) 67 Sup Ct L R 289 at 306–15 (outlining the potential for recognizing Indigenous law after *Tsilhqot'in*).

Through an examination of the *Tsilhqot'in* story — using the trial judgment and the Supreme Court of Canada decision as its central texts¹⁴ — this article undertakes just such an analysis. In his overview of other major Indigenous “judicial triumphs” in settler societies, Peter Russell argues that these victories require Indigenous claimants to submit to settler courts and settler law in order to validate their claims, which gives them a “bitter-sweet” quality.¹⁵ The way that the courts treat Indigenous law in *Tsilhqot'in* makes this case no exception to Russell’s rule. Positively, in addition to the result of the case, the trial judge’s treatment of Indigenous oral evidence is remarkably balanced and exemplifies the culturally sensitive approach that so many other judges have failed to live up to post-*Delgamuukw*.¹⁶ However, Indigenous oral testimony was all considered at the *evidentiary* stage. Indigenous legal scholars have repeatedly demonstrated that Indigenous oral traditions contain not only ancestral knowledge but also the law of Indigenous nations.¹⁷ Considered only as evidence, *Tsilhqot'in* law was relegated to the realm of history and was accepted only for the purposes of establishing the extent of occupation, and *not as law*, by the courts. Moreover, since questions of fact are the domain of the trial judge, there was barely any role left for Indigenous law to play when the case arrived at the Supreme Court. In essence, *Tsilhqot'in* demonstrates that Canadian courts are only willing to engage with Indigenous law as historical and evidentiary fact; they continue to deny its existence as a normative order in the present that could inform the legal test to determine title, the benefits that title bestows, or the law that would function in a title area. As such, there remains a marked gap between the promise of courts’ rhetoric and their actual practice.

The importance of this analysis and its stakes for decolonization in Canada are clear. There will likely be other Aboriginal title claims before the courts, and such claims will run up against the lack of engagement with Indigenous law established in *Tsilhqot'in*. This current approach will fail to contribute to meaningful reconciliation based on a relationship of reciprocal respect. Moreover, as Indigenous law is increasingly revitalized and recognized, and as Indigenous communities further seek to operationalize their laws both internally and externally, Canadian courts will face increased concerns about their legitimacy in their resolution of Indigenous claims. Alternatively, however, Canadian courts can seek to build on the promise that already forms part of the jurisprudence by

14 I have chosen not to address the British Columbia Court of Appeal (BCCA) decision (see *William v British Columbia*, 2012 BCCA 285, 48 BCLR (4th) 205 [*Tsilhqot'in* BCCA]). Since the judgment did not alter the trial judge’s findings of fact and was overturned on the law by the Supreme Court Canada, it holds little precedential value — and it is precisely these ongoing effects with which this article is most interested. However, for important critiques of the BCCA decision, see Douglas Lambert, “The *Tsilhqot'in* Case” (2012) 70:6 Advocate 819; Kent McNeil, “Aboriginal Title in Canada: Site-Specific or Territorial?” (Paper delivered at the Law on the Edge Conference, University of British Columbia, Vancouver, July 2013), online: <digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1018&context=all_papers> [McNeil, “Site-Specific”].

15 Peter Russell, “High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence” (1998) 61:2 Sask L Rev 247 at 247.

16 For criticism of the prevalence of trial judges’ failure to follow the instructions in *Delgamuukw*, see David Milward, “Doubting What the Elders Have to Say: A Critical Examination of Canadian Judicial Treatment of Aboriginal Oral History Evidence” (2010) 14:4 Intl J Evidence & Proof 287; Walkem, *supra* note 13.

17 See e.g. Borrows, *Constitution*, *supra* note 4 at 23–46; Napoleon, “Indigenous Legal Orders”, *supra* note 4 at 240–41.

giving Indigenous law a firmer jurisprudential and constitutional grounding. Drawing these pieces together, this article ultimately suggests that, even in the face of Indigenous legal revitalization, Canadian courts' use of Indigenous law — exemplified by *Tsilhqot'in* — is deeply limited, and that their pursuit of reconciliation¹⁸ and legitimacy will remain fruitless unless they recognize the rightful place of Indigenous law in the Canadian constitutional framework.¹⁹

This argument proceeds in three parts. Part II outlines the emerging consensus that Indigenous legal orders are existing and vibrant forces that are central to the preservation and governance of Indigenous communities. Part III, the central focus of the article, examines both the steps forward and the critical lapses in the two *Tsilhqot'in* decisions *vis-à-vis* Indigenous law. Part IV explains the implications for legitimacy and reconciliation if the current approach is maintained. It then sketches an alternative way forward, based on the living tree doctrine, that would allow Canadian courts to engage more meaningfully with Indigenous law.

II Indigenous Legal Traditions as Living Law

A fundamental premise of my argument is that Indigenous legal orders have historically been, and continue to be, foundational normative frameworks for the survival and well-being of Indigenous communities. This article is not the place for a detailed argument for the acceptance and recognition of Indigenous law.²⁰ However, it is worth briefly outlining how Indigenous legal orders were generally recognized historically, how they have been suppressed and silenced by colonial powers, and some key aspects of more recent revitalization.

When settlers came to what is now Canada, they arrived to land that was occupied not only physically, but also legally, by Indigenous peoples.²¹ The fact that Indigenous lands and societies were governed by legal orders was a fact readily acknowledged by new European arrivals.²² The numerous treaty relationships entered into by the Crown with Indigenous nations are a key example

18 On the Supreme Court of Canada's explicit goal of reconciliation, see e.g. *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 10, [2010] 3 SCR 104; *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para 1, 395 DLR (4th) 381.

19 I flag that there is a clear tension here. On the one hand, I am highlighting the independence and vitality of Indigenous law. On the other hand, I am calling for its recognition *within* Canada's constitution. I do not intend to suggest that the Canadian constitution obtain or retain primacy over Indigenous laws and constitutions. Rather, I begin from the position that the current power imbalance between Indigenous communities and settler society cannot be redressed by ignoring the role that courts play in that imbalance. Making courts and judges more attentive to Indigenous law will not on its own create right relations. At the same time, however, in the ongoing dialogue of the Indigenous-settler relationship, courts too must be sites of action and contestation. The changing practices of courts, judges, and practitioners *vis-à-vis* Indigenous law can be one part of finding new balance and respect in this relationship. It is toward this modest shift — one that can only be a small part of individual and collective action in other institutions and relationships — that this article aims.

20 For one of the most convincing such justifications, see Borrows, *Constitution*, *supra* note 4.

21 See Brenda L Gunn, "Protecting Indigenous Peoples' Lands: Making Room for the Application of Indigenous Peoples' Laws Within the Canadian Legal System" (2007) 6:1 Indigenous LJ 31 at 32–33; Minnawaanagogiizhigook (Dawnis Kennedy), "Reconciliation Without Respect? Section 35 and Indigenous Legal Orders" in Law Commission of Canada, ed, *Indigenous Legal Traditions* (Vancouver: UBC Press, 2007) 77 at 77–78; Walkem, *supra* note 13 at 396.

22 See e.g. Foster, *supra* note 2 at 69–70.

of this acknowledgment.²³ As Mark Walters puts it, understanding treaty relationships today requires an “appreciation of aboriginal legal traditions, for it was to those traditions that the Crown, through its representatives, submitted when treating with aboriginal peoples.”²⁴ In other words, both the Crown’s willingness to enter into treaty relationships and Indigenous peoples’ ability to form and maintain them provide strong evidence of the existence and recognition of Indigenous law.²⁵

Over time, however, as the Canadian state sought to assert the primacy of its legal system, Indigenous legal orders were increasingly ignored and suppressed by Canadian institutions, including the courts.²⁶ Although there were some examples of limited recognition of Indigenous laws,²⁷ as settler society became more powerful, Indigenous societies came to be frequently defined as “lawless” by Canadian authorities.²⁸ In essence, as Dawnis Kennedy puts it, “Indigenous legal orders have at different times been understood from within Canadian law as having never existed at all, as having been wholly displaced by Canadian law, or as existing only within and according to the terms set by Canadian law.”²⁹

The Canadian state’s unwillingness to recognize Indigenous legal traditions, however, has not led to their extinguishment. Rather, the evidence on the ground in Indigenous communities, combined with the actions and interest of Indigenous and non-Indigenous scholars, professionals, and even judges, embodies a veritable resurgence of Indigenous law in Canada. This renewal is perhaps most obvious in the academy. A burgeoning group of scholars has produced a remarkable, and quickly growing, body of literature on Indigenous legal traditions.³⁰ For example, John Borrows has meticulously documented that Indigenous legal traditions are derived from varied sources that he characterizes as sacred law, natural law, deliberative law, positivistic law, and customary law.³¹ Val Napoleon and Hadley Friedland have developed a methodology to help scholars access, understand, and apply Indigenous law to contemporary legal issues.³² Others have used Indigenous legal orders to offer a fuller understand-

23 See *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Supply and Services Canada, 1996) ch 5 [RCAP]. See also Kennedy, *supra* note 21 at 78.

24 Mark D Walters, “The Morality of Aboriginal Law” (2006) 31:2 Queen’s LJ 470 at 490.

25 See Walkem, *supra* note 13 at 396.

26 See RCAP, *supra* note 23, ch 6. See also Gunn, *supra* note 21 at 33; Walkem, *supra* note 13 at 396.

27 See e.g. *Connolly v Woolrich*, (1867) 17 RJRQ 75, 11 LC Jur 197 (Qc Sup Ct).

28 Walkem, *supra* note 13 at 397.

29 Kennedy, *supra* note 21 at 78 [footnotes omitted].

30 The few examples canvassed here are far from exhaustive. For a more detailed overview of the field, see John Borrows, “Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education” (2016) 61:4 McGill LJ 795.

31 Borrows, *Constitution*, *supra* note 4 at 23–58.

32 See Val Napoleon & Hadley Friedland, “An Inside Job: Engaging with Indigenous Legal Traditions through Stories” (2016) 61:4 McGill LJ 725. See also Hadley Friedland, “Methods for Accessing, Understanding and Applying Indigenous Laws” (2012) 11:1 Indigenous LJ 1. For an application of this methodology to the *Tsilhqot’in* case, see Alan Hanna, “Making the Round: Aboriginal Title in the Common Law from a Tsilhqot’in Legal Perspective” (2015) 45:3 Ottawa L Rev 365.

ing of treaty obligations³³ and Indigenous-settler conflict over resource development.³⁴ Still others have drawn on Indigenous legal traditions to address some of the most pressing issues facing Indigenous communities, from Indigenous identity and self-determination³⁵ to violence against women.³⁶ The vitality and existence of Indigenous law and its concomitant importance for Canada's constitutional order has even led one law school, the University of Victoria, to start the process of developing a dual-degree program in the common law and Indigenous legal orders.³⁷

This renewed engagement can also be seen in civil society. The most striking recent example comes from the Final Report of the Canadian Truth and Reconciliation Commission, which recently issued the following Call to Action:

In keeping with the *United Nations Declaration on the Rights of Indigenous Peoples*, we call upon the federal government, in collaboration with Aboriginal organizations, to fund the establishment of Indigenous law institutes for the development, use, and understanding of Indigenous laws and access to justice in accordance with the unique cultures of Aboriginal peoples in Canada.³⁸

The Commission articulates that Indigenous legal traditions have a fundamental role to play in Canada's legal system. In Jeremy Webber's words, "[the Commission] calls upon us to recognize Indigenous legal traditions as sources of normative insight in their own right, possessing traction within Indigenous communities today, which deserve our focused attention."³⁹

Finally, Canadian courts have not been entirely unreceptive to the revitalization of Indigenous legal traditions. The Supreme Court of Canada has, on several occasions, acknowledged the continued existence of Indigenous laws. In

33 See Aimée Craft, "Living Treaties, Breathing Research" (2014) 26:1 CJWL 1; Aaron Mills, "The Treaty of Niagara 1764, Political Community and Non-Domination: A Perspective from Anishinaabe Constitutionalism on Being Well Together" (Lecture delivered at the Faculty of Law, McGill University, 15 September 2014).

34 See Wapshkaa Ma'iingan (Aaron Mills), "Aki, Anishinaabek, kaye tahsh Crown" (2010) 9:1 Indigenous LJ 107 [Mills, "kaye tahsh Crown"].

35 See Gordon Christie, "Culture, Self-Determination and Colonialism: Issues Around the Revitalization of Indigenous Legal Traditions" (2007) 6:1 Indigenous LJ 13.

36 See Emily Snyder, Val Napoleon & John Borrows, "Gender and Violence: Drawing on Indigenous Legal Resources" (2015) 48:2 UBC L Rev 593.

37 For an early articulation of this project, see John Borrows, "Creating an Indigenous Legal Community" (2005) 50 McGill LJ 153 at 171–72. Based loosely on McGill's transsystemic model, the JD/JID Program would not only train students in Canadian common law but would also have them learn about Indigenous law. This would see students go beyond some abstract notion of pan-Indigenous law to grapple with the legal traditions as they are actually lived in Indigenous nations. According to the Dean of the University of Victoria Faculty of Law, Jeremy Webber, "much of the program [would] occur in communities, engaged directly with those knowledge-holders and exploring the procedure by which knowledge is shared, tested, different interpretations reconciled, deliberations conducted" (Jeremy Webber, "The Law Schools and the Future of Legal Education", *Slaw* (4 August 2015), online: <www.slaw.ca/2015/08/04/the-law-schools-and-the-future-of-indigenous-law-in-canada/> [Webber, "Legal Education"]).

38 Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: TRC, 2015) at 5–6, online: <www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf>.

39 Webber, "Legal Education", *supra* note 37.

R v Van der Peet, the Court held that “traditional laws” are “those things passed down, and arising, from the pre-existing culture and customs of aboriginal peoples.”⁴⁰ As noted in the Introduction, in *Delgamuukw*, the Court affirmed that Indigenous law could be used to demonstrate the exclusive occupation of land subject to an Aboriginal title claim.⁴¹ Of course, the mere recognition that Indigenous law exists is only one small step. How the courts then understand, engage with, and apply this law is an entirely different question and one that much of the rest of this article seeks to address. For now, however, it is sufficient to show that the Court’s jurisprudence contains a “nascent framework” for understanding and extending the reach of Indigenous law.⁴²

The above survey of Indigenous law in Canada is not meant to be comprehensive. Nor should it be taken to assert that the aim of better recognizing, understanding, and applying Indigenous law does not present immense challenges.⁴³ However, it makes abundantly clear two pivotal ideas that undergird the rest of this article. First, Indigenous law and legal traditions continue to exist and it is “illogical to assume otherwise.”⁴⁴ Second, Indigenous legal orders are vitally important to Indigenous communities and have a profound impact on the identity and self-governance of Indigenous communities.⁴⁵ If there is not a consensus on these points, this section has at least demonstrated that there is overwhelming evidence to support them.

It remains to be seen what Canadian courts do in the face of Indigenous law’s revitalization. I share Hadley Friedland’s hope that “we will one day shudder at the collective colonial ignorance and arrogance that once submerged the resources of Indigenous legal thought from the broader Canadian political and legal imagination.”⁴⁶ However, that day has not yet come. In order to move toward it, we must continue to ask where Indigenous law continues to be submerged and how it might better be brought to the surface. It is to such an analysis, in the context of the *Tsilhqot’in* judgments, that this article now turns.

III The Place of Indigenous Law in *Tsilhqot’in*

Background and Facts

The Tsilhqot’in Nation is a group of six bands that share a common culture, history, and language.⁴⁷ Their ancestors lived for thousands of years in their traditional territory on the Chilcotin Plateau, which is surrounded by mountain ranges and crisscrossed with major rivers.⁴⁸ As with many Indigenous nations in

40 [1996] 2 SCR 507 at para 40, 23 BCLR (3d) 1.

41 *Delgamuukw*, *supra* note 5 at paras 126, 147.

42 Borrows, *Constitution*, *supra* note 4 at 11.

43 In this respect, Indigenous scholars writing in this area are remarkably self-reflexive and often address these problems head-on as part of the project of revitalization (see e.g. Borrows, *Constitution*, *supra* note 4 at 137–76; Friedland, *supra* note 32 at 13–17).

44 Friedland, *supra* note 32 at 6.

45 See Napoleon, “Indigenous Legal Orders”, *supra* note 4 at 230; Friedland, *supra* note 32 at 3; Andr ee Lajoie, “Introduction: Which Way Out of Colonialism” in Law Commission of Canada, *supra* note 21, 3 at 3.

46 Friedland, *supra* note 32 at 6.

47 *Tsilhqot’in*, *supra* note 8 at para 3. For more on the history of the Tsilhqot’in people see John Sutton Lutz, *Makik: A New History of Aboriginal-White Relations* (Vancouver: UBC Press, 2008) at 119–62.

48 See Lutz, *supra* note 47 at 123.

British Columbia, the Crown never signed a treaty with the Tsilhqot'in. From the Tsilhqot'in perspective, "the land has always been theirs."⁴⁹

The litigation that is the focus of this article stemmed from steadfast resistance, over decades, by one of the six bands — the Xenigwet'in — to the use of their land without consent. In the 1980s, the Province of British Columbia authorized logging activity in the territory. The trial judge found that this left many Tsilhqot'in people "frustrated and angry" as timber left the land without providing any economic benefit to communities suffering from a lack of housing and employment.⁵⁰ When logging companies responded to an injunction in one part of the territory by seeking to log in another part of it, members of the Tsilhqot'in Nation blockaded a bridge that provided access to the logging route. The blockade only ended after the premier of British Columbia promised that any logging in the territory would only be undertaken with the consent of the Xenigwet'in.⁵¹ Negotiations between the Xenigwet'in and the Ministry of Forests, however, came to a standstill when the government denied the Tsilhqot'in a right of first refusal, which government representatives argued was beyond their legislative authority.⁵² Then, in 1997, the province granted further licences for logging in the territory.⁵³ In response to the failed negotiations and the continued presence of logging companies, Chief Roger William of the Xenigwet'in brought a representative claim on behalf of the Tsilhqot'in Nation seeking a declaration of Aboriginal title and of Aboriginal rights to hunt, trap, and trade.

The resulting trial was heard in 339 trial days that lasted over a period of nearly five years. Oral tradition evidence was crucial to the case, and twenty-nine Tsilhqot'in witnesses, nearly all of them Elders, testified at trial.⁵⁴ Several of the stories told — stories that I will argue represent Tsilhqot'in law — were told in special evening sittings to respect Tsilhqot'in protocol.⁵⁵ At the end of this long trial, the presiding judge, Justice Vickers, refused to grant a declaration of Aboriginal title because, in his view, the pleadings had framed the case as an "all or nothing" claim.⁵⁶ Unable to find title over the whole claim area, he thus found title in none of it. The British Columbia Court of Appeal also refused to grant title, holding that title claims can only be made out if the claimant proves intensive use and occupation over specific sites.⁵⁷ However, the Supreme Court of Canada overturned the Court of Appeal's decision and granted title over nearly half the claim area — a first in Canadian history. This article will now look beyond the outcomes of these decisions to see how they were influenced, if at all, by Indigenous law.

49 *Tsilhqot'in*, *supra* note 8 at para 3.

50 *Tsilhqot'in BCSC*, *supra* note 1 at para 25.

51 See *ibid* at para 70.

52 See *ibid* at para 72.

53 See *ibid* at paras 75–76.

54 See Weir, "Legal Fiction", *supra* note 1 at 16; Lambert, *supra* note 14 at 819.

55 See *Tsilhqot'in BCSC*, *supra* note 1 at para 167; Weir, "Legal Fiction", *supra* note 1 at 16.

56 I note that Justice Vickers repeatedly stated that a refusal to recognize title was far from ideal. However, for him, negotiation was a far better medium than the courts for coming to a resolution in the dispute.

57 See *Tsilhqot'in BCCA*, *supra* note 14 at para 344.

The Trial Decision

There are two layers of analysis to bring to bear on the trial decision of Justice Vickers. At the first layer, Justice Vickers should be applauded for a careful and respectful engagement with Indigenous oral testimony. At this level, Justice Vickers lays out an important approach for how judges should approach their work in future Aboriginal title and rights cases. At the second, and deeper, layer, however, the treatment of all Indigenous oral testimony as evidence reveals the hard limits of this approach. In a fundamental way, Justice Vickers did not treat Indigenous law *as law*, which not only affected the appellate courts' decisions, but set a precedent for similarly problematic treatment by future judges.

Assigning Proper Weight to Oral Evidence

To understand Justice Vickers's contribution in this respect, it is necessary to first consider the evidentiary rules and principles at play. The issue of the treatment of Indigenous oral history came to a head in the trial of *Delgamuukw*.⁵⁸ In that case, the claimant Gitksan and Wet'suwet'en peoples, who sought to present their oral histories as testimony, came into direct conflict with two foundational evidentiary issues: admissibility and probative value. First, regarding admissibility, the hearsay rule generally prohibits testimony of out-of-court statements that are introduced as proof of the facts they assert.⁵⁹ Of course, Indigenous oral histories, "by their very nature," fall into this category.⁶⁰ However, there are numerous exceptions to the hearsay rule, including in a situation where that evidence is necessary.⁶¹ Second, even if admissible, oral history is still subject to the trial judge's determination of probative value; that is, if it is deemed unreliable, it can be given very little or no weight in the analysis of the facts. In *Delgamuukw*, Justice McEachern (the trial judge), under the hearsay exception of necessity, allowed oral history of events that occurred before living memory (although he refused to accept oral testimony on more recent events).⁶² He ultimately determined, however, that this oral history was entirely unreliable (that is, it was given no weight) unless it was confirmed by other evidence.⁶³

When the Supreme Court eventually heard the appeal in *Delgamuukw*, it sharply rebuked Justice McEachern for his treatment of Indigenous oral testimony. Chief Justice Lamer wrote that "the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents."⁶⁴ The Court outlined in no uncertain

58 *Supra* note 5.

59 For the authoritative statement on this rule and the justifications underlying it, see *R v Khelawon*, 2006 SCC 57 at para 35, [2006] 2 SCR 787 [*Khelawon*].

60 Milward, *supra* note 16 at 292.

61 Canadian law now uses a principled approach in the determination of hearsay evidence, where it will be allowed if the evidence is shown to be reliable and necessary (see *Khelawon*, *supra* note 59 at para 42). See also Milward, *supra* note 16 at 292–93.

62 See *Delgamuukw v British Columbia* (1991), 79 DLR (4th) 185, 1991 CanLII 2372 at 58 (BCSC) [*Delgamuukw* BCSC]. See also Val Napoleon, "Delgamuukw: A Legal Straightjacket for Oral Histories?" (2005) 20:2 CJLS 123 at 131 [Napoleon, "Straightjacket"].

63 See *Delgamuukw* BCSC, *supra* note 62 at 58; Napoleon, "Straightjacket", *supra* note 62 at 131.

64 *Delgamuukw*, *supra* note 5 at para 87.

terms the potential prejudice to Indigenous claimants of failing to adapt evidentiary rules: “The net effect may be that a society with such an oral tradition would never be able to establish a historical claim through the use of oral history in court.”⁶⁵ As such, the Court instructed that trial judges must not replicate Justice McEachern’s refusal to give independent weight to oral traditions.⁶⁶

The Supreme Court, however, appeared to pull back from *Delgamuukw*’s path-breaking and generous approach to Indigenous oral testimony in *Mitchell v MNR*.⁶⁷ In that case, Chief Justice McLachlin issued the strong caution that there remains “a boundary that must not be crossed between a sensitive application and a complete abandonment of the rules of evidence.”⁶⁸ While she acknowledged the special considerations trial judges must give to Indigenous oral evidence, she concluded that evidence must not be “artificially strained to carry more weight than it can reasonably support.”⁶⁹ She ultimately found that the trial judge’s reasons suffered from “an unreasonably generous weighing of tenuous evidence.”⁷⁰

Trial judges found themselves seeking to strike a difficult balance to avoid being admonished for treating Indigenous oral evidence too strictly as in *Delgamuukw* or too generously as in *Mitchell*. Numerous scholars have documented, however, that the trend in the jurisprudence is definitively toward a skeptical, if not outright scornful, view of Indigenous oral evidence. In his survey of trial judgments’ treatment of Indigenous oral testimony, David Milward details an uncritical preference for written and documentary evidence and a frequent insistence on corroboration, which results in a denial of substantive justice for Indigenous claimants.⁷¹ Similarly, Ardith Walkem catalogues numerous techniques through which judges have dismissed or undervalued Indigenous evidence that constitute what she calls a “methodology of suspicion.”⁷²

A particularly flagrant example of this skepticism is found in the Federal Court of Appeal’s judgment in *Benoit v Canada*.⁷³ In that case, the trial judge accepted Indigenous oral history as proof that Indigenous signatories genuinely believed that Treaty 8 contained a promise for tax exemption. At the Court of Appeal, however, explicitly drawing on *Mitchell*, Justice Nadon substituted his own view for that of the trial judge and found that the testimony of key witnesses was “rambling, repetitive and far, far from definitive,” and “not deserving of any weight.”⁷⁴ In *Benoit*, a particularly problematic finding was that

65 *Ibid* at para 106.

66 See *ibid* at para 98.

67 2001 SCC 33, [2001] 1 SCR 911 [*Mitchell*]. For more on the caution issued in *Mitchell*, see Walkem, *supra* note 13 at 420; Mariana Valverde, “‘The Honour of the Crown is at Stake’: Aboriginal Land Claims Litigation and the Epistemology of Sovereignty” (2011) 1:3 UC Irvine L Rev 955 at 961.

68 *Mitchell*, *supra* note 67 at para 39.

69 *Ibid*.

70 *Ibid* at para 51.

71 Milward, *supra* note 16 at 296–301.

72 Walkem, *supra* note 13 at 403.

73 2003 FCA 236, 228 DLR (4th) 1 [*Benoit*]. For criticism of this judgment, see Marie Houde & Ghislain Otis, “Les logiques de la rationalité judiciaire et le processus de la preuve dans le contentieux des droits des peuples autochtones: le cas des récits oraux” (2011) 41 RGD 7 at 43; Napoleon, “Straightjacket”, *supra* note 62 at 134; Walkem, *supra* note 13 at 418; Milward, *supra* note 16 at 298–99.

74 *Benoit*, *supra* note 73 at paras 60, 69.

oral history was unreliable because it was not passed on in the formal and organized manner of the Gitksan and Wet'suwet'en in *Delgamuukw*. Such a finding represents an utter failure to consider the special context of Indigenous claims and instead inscribes a "hierarchy of evidence" that takes certain Indigenous groups' oral history more seriously than others.⁷⁵ While *Benoit* is just one case, it is representative of Milward's argument that "the majority of Canadian reported cases have witnessed judges minimizing the value of oral history evidence."⁷⁶ It seems, then, that it is the restrictiveness of *Mitchell* rather than the openness of *Delgamuukw* that prevails in the jurisprudence. As Walkem concludes, the result is that "the original assessment of oral tradition evidence at the trial phase of *Delgamuukw* — as faulty and lightweight historic evidence — continues to dominate considerations of Indigenous oral evidence."⁷⁷

It is against this backdrop that Justice Vickers found himself faced with the claims and oral evidence of the Tsilhqot'in. Some of the above scholars, who are so critical of the dominant approach in courts' use of Indigenous oral evidence, hold Justice Vickers's judgment up as an encouraging example that bucks this trend.⁷⁸ In four important ways, Justice Vickers presents a model approach for carefully and sensitively analyzing Indigenous oral traditions and history at the evidentiary stage.

First, from the start, Justice Vickers seeks to frame his judgment as one that disavows ethnocentrism and instead participates in decolonization. He recognizes the concerning trend in the jurisprudence in which courts have "favoured written modes of transmission over oral accounts" and done little "to foster Aboriginal litigants' trust in the court's ability to view the evidence from an Aboriginal perspective."⁷⁹ In a powerful moment of self-awareness, he declares that "[in] order to truly hear the oral history and oral tradition evidence presented in these cases, courts must undergo their own process of decolonization."⁸⁰ In that spirit, Justice Vickers goes on to quote *Delgamuukw* at length, seeking to approach the evidence based on its special circumstances and without suspicion.⁸¹

Second, Justice Vickers subjects non-Indigenous written historical evidence to the same scrutiny as Indigenous oral evidence. Too often, judges find that conventional historical evidence does not need to be tested or explained by experts, with the consequence that it automatically receives preferential treatment over Indigenous oral evidence. Robert Williams Jr. states the problem this way: "Because the conqueror writes history in the colonial situation, the cultural archives maintained by the conquering society frequently neglect to record or adequately document the many different and distinct visions of law that have contributed to the traditions of resistance forged by the colonized people."⁸²

75 Walkem, *supra* note 13 at 418. This same issue has arisen in other cases (see e.g. *Buffalo v Canada*, 2005 FC 1622 at para 457, 269 FTR 1).

76 Milward, *supra* note 16 at 301.

77 Walkem, *supra* note 13 at 421.

78 See e.g. Milward, *supra* note 16 at 295; Houde & Otis, *supra* note 73 at 39–40.

79 *Tsilhqot'in BCSC*, *supra* note 1 at para 132.

80 *Ibid.*

81 See *ibid* at paras 134–36. See also Dwight G Newman & Danielle Schweitzer, "Between Reconciliation and the Rule(s) of Law: *Tsilhqot'in Nation v. British Columbia*" (2008) 41:2 UBC L Rev 249 at 267.

82 Robert A Williams Jr, *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600–1800* (New York: Routledge, 1999) at 12.

However, in what one commentator called an “unusual demonstration of fairness,” Justice Vickers, in an interlocutory hearing on reliability, required documentary evidence to be subjected to expert analysis.⁸³ His justification for doing so is worth quoting at length:

The meaning of documents is not always self evident and can only be understood in context. ... Historical documents need to be read and evaluated for internal consistency as well as established in the context in which they were written. I require explanations of the historical documents and I need to know if the historical documents can be relied upon in making findings of fact. All of the evidence relied upon to prove or understand past events must be critically evaluated.⁸⁴

While Justice Vickers’s statement would likely seem evident to historians, who are constantly criticizing and revising what were once settled representations of the past, it is a crucial reminder for judges who often assume the reliability of historical documents in their attempts to construct an “objective truth.”⁸⁵

Third, Justice Vickers makes clear that Indigenous oral evidence must be given independent weight where appropriate. Here he unequivocally rejects the testimony of a Crown witness, Alexander von Gernet, who recommended that the court give no weight to Indigenous oral testimony in the absence of corroborating evidence.⁸⁶ Such an approach, according to Justice Vickers, “would fall into legal error on the strength of the current jurisprudence.”⁸⁷ Instead, Justice Vickers saw his duty as examining the evidence from the Aboriginal perspective: “If the oral history or oral tradition evidence is sufficient standing on its own to reach a conclusion of fact, I will not hesitate to make that finding.”⁸⁸ Further, contrary to the troubling hierarchizing of some Indigenous nations’ oral evidence over others, as seen in *Benoit*, Justice Vickers was sensitive to the fact that oral traditions “differ from Aboriginal nation to Aboriginal nation.”⁸⁹ The lack of formality, characteristic of the Tsilhqot’in’s “non-hierarchical society and culture” would “not detract from the weight to be given to the oral histories and traditions.”⁹⁰ With this sensitive approach and the appropriate willingness to grant Indigenous oral testimony independent weight, he ultimately found that such evidence “does assist in the construction of a reasonably reliable historical record of the actual use of some portions of the Claim Area.”⁹¹

Finally, Justice Vickers should be applauded for his extensive use of the Tsilhqot’in language. While the use of Indigenous language in the judgment

83 Weir, “Legal Fiction”, *supra* note 1 at 18.

84 *William v British Columbia*, 2004 BCSC 1237 at paras 10–11, 41 BCLR (4th) 183.

85 Milward, *supra* note 16 at 307.

86 See *Tsilhqot’in BCSC*, *supra* note 1 at para 154. See also Newman & Schweitzer, *supra* note 81 at 268.

87 *Tsilhqot’in BCSC*, *supra* note 1 at para 154. See also David M Robbins & Jack Woodward, “Tsilhqot’in Nation v. British Columbia: A Decade After Delgamuukw” in Morellato, *supra* note 12, 291 at 297; Milward, *supra* note 16 at 307–10 (outlining the reliability and value of Indigenous oral evidence).

88 *Tsilhqot’in BCSC*, *supra* note 1 at para 196. See also Milward, *supra* note 16 at 295.

89 *Tsilhqot’in BCSC*, *supra* note 1 at para 166.

90 *Ibid* at para 167.

91 *Ibid* at para 168.

does not go directly to questions of admissibility or weight, it represents Justice Vickers's desire to take Indigenous oral testimony seriously on its own terms. The judgment integrates hundreds of words from the Tsilhqot'in language — enough to make up a nine-page glossary at the end of the judgment.⁹² As Mariana Valverde illustrates, Justice Vickers does not “estrangle Tsilhqot'in words” through the use of italics or quotation marks and he uses the terms cumulatively throughout the judgment.⁹³ This use of Indigenous language is more than an acknowledgment of a different cultural group. The language and concepts used to address normative challenges have their own “normative dispositions,” such that people's behaviour, reflections, and deliberations are affected by the words and concepts they employ.⁹⁴ Moreover, from an Indigenous perspective, where law is often communicated through oral traditions, “laws are contained in language,” such that a failure to attend to the effects of language on law can lead to serious mistranslation and misunderstandings of legal commitments.⁹⁵ As Valverde articulates, through his “major effort to understand, and to convey to nonaboriginal Canadians, many important features of Tsilhqot'in life and thought,” Justice Vickers's judgment is “a welcome change from the demeaning judicial attitudes of the past.”⁹⁶

Ultimately, the declaration of title eventually pronounced by the Supreme Court is at least partially tied to Justice Vickers's approach to the evidence in front of him.⁹⁷ More importantly, the trial judgment in *Tsilhqot'in* provides other judges with a rigorous and culturally sensitive methodology for approaching Indigenous oral evidence. In this way, Justice Vickers's work over five years — culminating in his nearly five hundred-page judgment — is an important legacy and one that is now being applied by other trial judges.⁹⁸ The analysis, however, cannot stop here. While Justice Vickers was right to follow *Delgamuukw* and put oral tradition evidence on an “equal footing” with historical documents, it still remains that he only considered Indigenous oral testimony in that limited frame — that is, *as evidence*. Moving to a deeper layer, it is time to return to the question at the heart of my argument.

What of Indigenous Law?

If Canadian courts are to take Indigenous law seriously, we can posit two basic requirements for meaningful engagement. First, judges must be able to identify, or at least attempt to identify, Indigenous law when it is presented in court — through oral history, documents, songs, dances, wampum belts, or otherwise. Second, judges must be willing to apply Indigenous law *as law*.⁹⁹ That is, it

92 *Ibid* at 475–84 (here I refer to page numbers as opposed to paragraph numbers).

93 Valverde, *supra* note 67 at 965.

94 Jeremy Webber, “The Grammar of Customary Law” (2009) 54:4 McGill LJ 579 at 605.

95 Craft, *supra* note 33 at 15.

96 Valverde, *supra* note 67 at 965.

97 See Eric H Reiter, “Fact, Narrative, and the Judicial Uses of History: *Delgamuukw* and Beyond” (2010) 8:1 Indigenous LJ 55 at 76.

98 See e.g. *The Ahousaht v Canada*, 2008 BCSC 769 at paras 7–8, 14–15 (CanLII).

99 I acknowledge that this feat is more complicated than it sounds. Kirsten Anker outlines these complexities by showing that when a state court recognizes Indigenous law, that action itself renders it fact. However, Anker does not despair and goes on to outline how our understanding of law might transform through engaging in legal pluralist dialogue. See Kirsten Anker, “Law, Culture, and Fact in Indigenous Claims: Legal Pluralism as a Problem of Recogni-

must have a bearing not only on factual considerations, but also on the normative and legal determinations made in the judgment. Despite Justice Vickers's admirable handling of evidence as outlined in the last section, his judgment fails to meet both of these requirements in important ways.

Before proceeding to examine these problems, I wish to emphasize that the critique in this subsection is not meant to be an attack on Justice Vickers's judicial style nor on his remarkable legacy. Indeed, as I hope the previous subsection illustrated, Justice Vickers handled a groundbreaking Aboriginal title decision in a deeply thoughtful and respectful way. Moreover, there is always a certain danger in levying an academic critique against a trial decision nearly a decade after it was written. Theoretical critique is more nimble than the common law and can easily be used to make an older decision look dated. It is also, of course, always the case that a common law judge must make their intervention in the context of judicial decisions that have come before. Nonetheless, even the most well-intentioned participants in settler institutions often miss vital points of the Indigenous perspective or exemplify the constraints that their institutions place on them *vis-à-vis* Indigenous law. Justice Vickers's judgment remains one of the most important examples of how far the Canadian common law has come regarding Indigenous law, but also of its limits and of how far it has to go. It is in this spirit that the following paragraphs seek to illustrate two of the trial judgment's key shortcomings in relation to Indigenous law.

First, regarding identification: in a judgment that spans 1,382 paragraphs, Justice Vickers allots only seven of them to what he calls "Tsilhqot'in Laws."¹⁰⁰ The laws in this section are historical laws of the Tsilhqot'in people as documented by settler legal historian Hamar Foster. For Foster, there is evidence that the Tsilhqot'in had laws to govern murder, theft, and property. More closely linked to the question of title, Foster led evidence to show that chiefs had land that was descended on a hereditary principle. That evidence was accepted by Justice Vickers, who declared himself "satisfied that an examination of the historical records leads to a conclusion that Tsilhqot'in people did consider the land to be their land."¹⁰¹

Beyond these seven paragraphs, though, Justice Vickers dedicates significantly more space to "Legends and Stories." Indigenous legal scholars would almost certainly contend that these too should have fallen under the heading of "Tsilhqot'in Laws." For example, one of these "legends", Lhin Desch'osh, is a Tsilhqot'in creation story that serves as "an account of both their origins as a people and of their homeland."¹⁰² John Borrows makes a compelling case that "[w]ithin Indigenous legal traditions, creation stories are often one source of sacred law."¹⁰³ In this way, then, as Lorraine Weir puts it, Justice Vickers "con-signs to the trivializing realm of 'legend' two of the great origin stories of the Tsilhqot'in people, which is to say laws about the reciprocal relations among land, waters, humans and animals, laws which instruct about relationships, respect, the consequences of things being out of balance, spiritual power and the

tion" in René Provost, ed, *Culture in the Domains of Law* (Cambridge: Cambridge University Press, 2017) 127.

100 *Tsilhqot'in* BCSC, *supra* note 1 at paras 426–32.

101 *Ibid* at para 429.

102 *Ibid* at para 666.

103 Borrows, *Constitution*, *supra* note 4 at 25.

negative energy of fear in relation to danger.”¹⁰⁴ As such, even before it could be applied, much of the Indigenous law so carefully presented to Justice Vickers was devalued through this error in ontology and categorization.

Second, and more importantly, is how this Tsilhqot’in law is applied. Justice Vickers focuses on Indigenous law as a matter of historical and evidentiary fact that may contribute to proof of the exclusive occupation of the claim area. The laws that he specifically categorizes as Tsilhqot’in laws are labelled as distinctly historic. As such, they really only serve as evidence that the “Tsilhqot’in people *were* a rule ordered society.”¹⁰⁵ There is no inquiry as to what effect such laws, if any, continue to have in the present day or how they may have changed and adapted to address the needs of the Tsilhqot’in over time. In other words, if Justice Vickers acknowledges the existence of Indigenous law, it is only as a historical phenomenon. Similarly, Justice Vickers is ultimately not interested in the “stories and legends” for their normative content. Rather, they are mined for any indication of borders, boundaries, or landmarks that might serve as evidence of occupation. One of Justice Vickers’s main findings here was that “the references to lakes, rivers and other landmarks formed a part of these legends for Tsilhqot’in people at the time of sovereignty assertion.”¹⁰⁶

This focus on historical fact is all the more troubling given that, at various points in his judgment, Justice Vickers undoubtedly appreciates the normative value that inheres in Indigenous law. He describes the stories and legends as the “binding social fabric for Tsilhqot’in people”¹⁰⁷ that carry with them an “underlying message or moral that is intended to instruct and inform Tsilhqot’in people in the way they are to lead their lives. They set out the rules of conduct, a value system passed from generation to generation.”¹⁰⁸ Quoting Chief William, he goes on to say that the legends “reveal how one is to become a ‘Tsilhqot’in person’; they are ‘what we live by’ and provide an understanding of Tsilhqot’in land.”¹⁰⁹ Despite this recognition, though, Justice Vickers does not take the further step of saying these qualities allow for a finding of Indigenous law. According to Weir, Justice Vickers failed to take advantage of the “many opportunities to familiarize himself with aspects of the Tsilhqot’in legal, interpretive and cultural framework which contextualizes the narratives shared with him.”¹¹⁰ In their written submissions to the court, the Plaintiff also made clear that “[l]egends and stories are the primary vehicle for passing down the *Dechen Ts’edilhtan* [Tsilhqot’in law] from one generation to the next.”¹¹¹ As such, if Justice Vickers brought a heightened critical awareness to the Crown’s limited understanding of title and to the role of Indigenous oral testimony in the evidentiary process, his interpretive approach regarding Indigenous law remain-

104 Weir, “Legal Fiction”, *supra* note 1 at 4.

105 *Tsilhqot’in BCSC*, *supra* note 1 at para 431 [emphasis added].

106 *Ibid* at para 665. See also Weir, “Legal Fiction”, *supra* note 1 at 22.

107 *Tsilhqot’in BCSC*, *supra* note 1 at para 363.

108 *Ibid* at para 434.

109 *Ibid* at para 668.

110 Weir, “Legal Fiction”, *supra* note 1 at 22.

111 *Tsilhqot’in BCSC*, *supra* note 1 (Argument of the Plaintiff at para 701).

ed limited and constrained.¹¹² A full engagement with the Indigenous law presented to him would have required Justice Vickers to go beyond looking for specific facts or rules and to understand more deeply that law may be lived and experienced in one culture — here Tsilhqot'in — in ways a non-Indigenous Canadian jurist may not expect.

The problems and negative effects on Indigenous claimants when Indigenous law is categorized and applied in this way are legion. Most obviously and importantly, it represents a failure “to understand or appreciate the ways that these traditions are tied to the land and embody legal content.”¹¹³ This approach fundamentally misunderstands Indigenous law and asks it to do something for which it is not designed. While it might be possible to use Indigenous oral history to trace Tsilhqot'in jurisdiction over the land,¹¹⁴ oral history evidence was generally not meant to serve as a detailed catalogue of physical space. Such minutiae would have been part of an Indigenous group's “shared daily existence” and the “implicit understandings between the oral historian and the audience.”¹¹⁵ Tsilhqot'in laws contain so much more than mere geography; they describe how to confront social problems, how to construct relationships with others, and how to live well on the land. Imagine the absurdity of asking the Canadian constitution to stand as evidence for a particular date in history or of settler occupation of the Ottawa Valley.¹¹⁶ While it might be able to do so — and originalists might even place a special emphasis on this place and time — it would be illogical and insulting for it to stand *only* for those ideas. Surely, the same goes for Indigenous peoples and their laws.

On a related note, this approach leaves little room for Indigenous law to construct the normative determinations of a given case. In her analysis of the trial judgment in *Delgamuukw*, Val Napoleon argues that the *adaawk* — the oral histories of the Gitksan — should have themselves, “as a complete system,” been determinative of the title analysis through proof of *legal* occupation.¹¹⁷ Similarly, in an incisive critique of the trial judgment in *R v Marshall*, Borrows laments the damage done to Indigenous legal traditions when they are treated as history instead of as law. In his words:

Indigenous legal traditions should not be measured primarily as expressions of past historical events, but rather as contemporary normative frameworks for peace and order. If Chief Augustine had been considered to be interpreting Mi'kmaq legal tradition, rather than historical evidence, different inferences and a very

112 See Lorraine Weir, “‘Time Immemorial’ and Indigenous Rights: A Genealogy and Three Case Studies (*Calder, Van der Peet, Tsilhqot'in*) from British Columbia” (2013) 26:3 *J Historical Sociology* 383 at 406.

113 Walkem, *supra* note 13 at 421.

114 See Hanna, *supra* note 32.

115 Milward, *supra* note 16 at 301.

116 Borrows makes a similar argument when writing about Mi'kmaq law: “Law is not simply a matter of history; law uses a normative framework to interpret past events and make contemporary assessments. Historians risk applying inappropriate criteria to Indigenous legal traditions when they read them solely as proof of past events. It is wrong to treat Mi'kmaq law simply as history, just as it would be inappropriate to see the common law only as history in decisions before the Canadian courts. Mi'kmaq history is related to Mi'kmaq law because past events structure contemporary legal options; however, history is not law” (*Constitution*, *supra* note 4 at 65).

117 Napoleon, “Straightjacket”, *supra* note 62 at 152.

different methodology would be in play. We would be more interested in why creation stories, wampum, councils, and districts are important in contemporary Mi'kmaq interpretations of their relationships.¹¹⁸

What inferences and findings might Justice Vickers have been able to draw had he approached the Indigenous law in front of him in this way? A brief example might help elucidate the possibility here. Justice Vickers heard the story of Ts'il?os and ?Eniyud. These two ancestors were married with children. When they decided to separate they eventually transmogrified into mountain formations and were given the responsibility of "protecting and watching over the Tsilhqot'in people forever."¹¹⁹ Reading Justice Vickers's recounting of this story highlights that he is most interested in it for the geographic indicators that it contains. However, the story also discloses the ancestral connection to these mountains, the sacred nature of the land, and the Tsilhqot'in people's duty to protect it. Taking this story seriously as law, then, would have required Justice Vickers to articulate more than simply *where* the mountains were found. It also instructs on *how* the Tsilhqot'in were to live and continue to live. Such an analysis may have led him to conclude that their actions in fighting against a logging project were not just about a claim over territory that was once historically occupied, but also about ongoing legal obligations that Tsilhqot'in people have to their human and non-human ancestors who live upon it. As a non-Indigenous person untrained in Tsilhqot'in law, it is all but inevitable that I am missing something important in this story. But Justice Vickers had the opportunity to hear numerous stories firsthand, to interact with Tsilhqot'in lawkeepers, and to visit Tsilhqot'in territory. He therefore missed a great opportunity to outline not just the geography of the stories but also their legal content.

Further, treating law as history poses the danger of freezing Indigenous law at a specific moment in time. Some of the most persuasive criticism of Aboriginal rights jurisprudence attacks it for freezing Indigenous culture in the past through its requirement that protected rights must have continuity with pre-contact practices.¹²⁰ Viewing Indigenous law merely as historical fact creates similar problems. The scholarship on Indigenous law (and indeed legal theory in general) is replete with the assertion that law must be able to evolve continually to address the needs of Indigenous communities on an ongoing basis.¹²¹ Any judge who claims to take Indigenous law seriously, then, must grapple with it as a dynamic, living source of normative value in the present.

Finally, as a basic principle of appellate review, if Indigenous law is only considered as part of the evidence of a case, then any error made by a trial judge will have the significant protection of a strict standard of review. In order to overturn a trial judge's findings, an appellate court would have to find "overriding and palpable error" in the factual determinations.¹²² Canadian jurists would balk at the idea that an error in law would not be reviewed on a standard of cor-

118 Borrows, *Constitution*, *supra* note 4 at 70.

119 *Tsilhqot'in BCSC*, *supra* note 1 at 660.

120 See e.g. John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22:1 *Am Indian L Rev* 37.

121 See Borrows, *Constitution*, *supra* note 4 at 10; Napoleon, "Indigenous Legal Orders", *supra* note 4 at 232; Walkem, *supra* note 13 at 424; Kennedy, *supra* note 21 at 88.

122 *Housen v Nikolaisan*, 2002 SCC 33 at para 33, [2002] 2 SCR 235.

rectness. However, this is the standard that Indigenous peoples must live with whenever they present their law to a Canadian court.¹²³

In sum, under the current approach, Indigenous law is not treated as *law* at all. Legitimizing the Crown's insistence of its non-existence,¹²⁴ "indigenous laws ... [are] recognized only as 'evidence' of the Aboriginal community's claim. Thus indigenous laws are submerged within the dominant legal system's general law of 'evidence.'"¹²⁵ This reasoning allows Canadian courts to keep a monistic and sovereign Canadian law in place. If the Indigenous claimant is lucky enough to have a judge — like Justice Vickers — who will make findings of fact based on Indigenous law, they still remain just that: findings of fact. The relevance of those findings for any legal determination continues to fall under a singular Canadian law.¹²⁶

As indicated at the beginning of this subsection, it would be wrong to hold Justice Vickers entirely responsible for his approach. While the case arguably presented him with an opportunity to break new ground in his treatment of Indigenous law, "[n]o matter how sympathetic the judges may be and how willing they are to take account of Aboriginal perspectives ... [t]o a large extent, their hands are tied by the role they are obliged to play."¹²⁷ In this case, Justice Vickers repeatedly expressed his frustration at the constraints of the court system in handling an Aboriginal title claim.¹²⁸ Moreover, he was clearly bound by the test for Aboriginal title that had been laid down by the Supreme Court in *Delgamuukw* and *R v Marshall; R v Bernard*.¹²⁹ The case gave the Supreme Court itself, however, an opportunity to revisit the Aboriginal title analysis and potential place of Indigenous law within it.

The Supreme Court of Canada Decision

The Supreme Court decision can also be examined in two layers. At the first layer, the case provides an important clarification on the test for Aboriginal title by reintroducing Indigenous law as a possible consideration within it. Moreover, the judgment shows that a group characterized by the Court as "semi-nomadic", like the Tsilhqot'in, can still successfully ground a title claim. Probing more deeply, though, an analysis of the Aboriginal title test reveals that Indigenous law is, in reality, nowhere to be found. Moreover, once title is granted, the Court refuses to recognize that Indigenous law has any role to play in the governance of the title territory.

The Test for Title

Whether Indigenous law plays a role in the test to determine Aboriginal title was a subject of marked uncertainty in the pre-*Tsilhqot'in* jurisprudence. As with the evidentiary questions at trial, the starting point here is *Delgamuukw*. In

123 See Walkem, *supra* note 13 at 403.

124 See Foster, *supra* note 2 at 74.

125 Larry Chartrand, *The Political Dimension of Aboriginal Rights* (LLM Thesis, Queen's University Faculty of Law, 2001) at 81, n 202 [unpublished]. See also D'Arcy Vermette, "Colonialism and the Suppression of Aboriginal Voice" (2009) 40:2 Ottawa L Rev 225 at 243.

126 See Kirsten Anker, *Declarations of Interdependence: A Legal Pluralist Approach to Indigenous Rights* (Burlington, Vt: Ashgate, 2014) at 72–75.

127 Vermette, *supra* note 125 at 244.

128 See *Tsilhqot'in* BCSC, *supra* note 1 at paras 1368, 1373.

129 2005 SCC 43, [2005] 2 SCR 220 [*Marshall; Bernard*].

that case, the Supreme Court laid out three factors that must be proved to ground a title claim: (1) occupation, (2) continuity (if present occupation is relied on), and (3) exclusivity.¹³⁰ The Court explained that prior occupation can be proved in two different ways. First, following the common law, the claimant can show the “physical fact of occupation.”¹³¹ Second, however, the claimant can demonstrate legal occupation based on pre-existing systems of Indigenous law.¹³² For some scholars, this test created the possibility “for the expansion of space within Canada for the recognition of Indigenous legal traditions.”¹³³

This possibility, however, seemed to be erased less than a decade later with the decision of *R v Marshall; R v Bernard*.¹³⁴ In that case, Chief Justice McLachlin made clear that occupation meant *physical* occupation. In this way, the Court turned away from the second possible source of title outlined above, eliminating Indigenous law as a factor that must be considered in title claims. For this reason, the judgment was strongly criticized by numerous commentators¹³⁵ as well as by Justice LeBel in his concurrence. Citing Borrows, Justice LeBel argued that “[t]he role of the aboriginal perspective cannot be simply to help in the interpretation of aboriginal practices in order to assess whether they conform to common law concepts of title. The aboriginal perspective shapes the very concept of title.”¹³⁶ Chief Justice McLachlin also questioned whether “nomadic and semi-nomadic peoples can ever claim title to land,” but decided to leave the issue for determination on specific facts in future cases.¹³⁷

In the lead up to *Tsilhqot'in*, then, some observers feared — particularly given the British Columbia Court of Appeal’s refusal to find title — that the Court would affirm that Indigenous law need not be considered in the title test and then deny title to the “semi-nomadic” claimants.¹³⁸ In the end, these fears were unfounded. First, the Court issued its first declaration of Aboriginal title in Canadian history. Rejecting a “postage stamp” view of title, they held, based on the facts found by Justice Vickers, that the claimants had demonstrated sufficiency of occupation over a broad territory rather than over discrete and localized areas marked by intensive use. Second, the Court seemed to return to the approach laid down in *Delgamuukw* by reinserting Indigenous law as a consideration in the test for Aboriginal title: “The Aboriginal perspective focuses on laws, practices, customs and traditions of the group.”¹³⁹

130 See *Delgamuukw*, *supra* note 5 at para 114.

131 *Ibid.*

132 See *ibid* at paras 126, 147.

133 Walkem, *supra* note 13 at 393.

134 *Supra* note 129.

135 See e.g. Kent McNeil, “Aboriginal Title and the Supreme Court: What’s Happening?” (2006) 69:2 Sask L Rev 281 at 297; McNeil, “Site-Specific”, *supra* note 14 at 8; Brian Slatery, “The Metamorphosis of Aboriginal Title” (2006) 85 Can Bar Rev 255 at 280–81.

136 *Marshall; Bernard*, *supra* note 129 at para 130.

137 *Ibid* at para 63.

138 Indeed, this fear was likely heightened at key moments during the Supreme Court hearing itself. In a particularly troubling exchange, Justice Rothstein, questioning the idea of legal occupation said: “I’m just not understanding how that could operate. There were no courts, police, that sort of thing. It seemed to me that it’s not hard to understand physical occupation, it’s hard to understand what today we would call legal occupation” (*Tsilhqot'in*, *supra* note 8 (Oral Hearing, Webcast at 108:40)).

139 *Tsilhqot'in*, *supra* note 8 at para 35.

Tsilhqot'in should be celebrated for what it is: “a momentous step for the Canadian legal system.”¹⁴⁰ Nonetheless, the instruction that the claimant’s laws are to be considered are only a rhetorical flourish unless courts meaningfully attempt to do so. We must, then, consider to what extent Indigenous law was actually considered by the Court.

Ignoring the Indigenous Perspective

A close reading of the Supreme Court’s *Tsilhqot'in* decision demonstrates that Indigenous law is essentially vacated from the judgment. In part, this problem has to do with the Court affirming Justice Vickers’s findings of fact. Since Justice Vickers, in addressing the legal tests on Aboriginal title, viewed Indigenous law primarily as historical fact, this is how it was used by the Supreme Court as well. Yet, if the Supreme Court sought to introduce considerations of Indigenous law, it certainly had the jurisdiction to do so. Indeed, the bigger issue is how the Court applies its own test.

In its comparatively brief decision, the Supreme Court repeats the refrain that occupation can only be determined with reference to the Aboriginal perspective six different times.¹⁴¹ According to Chief Justice McLachlin, in the title analysis, the three elements that must be proved — sufficiency, continuity, and exclusivity — must each be considered from both the Aboriginal and common law perspectives.

In order to properly understand what the Court means when it invokes the Indigenous perspective and Indigenous law, it is worth taking a step back to look at what a strictly common law analysis of occupation would look like. Classic common law property cases tell us that in order to prove possession, a claimant must prove: intention (*animus possidendi*), sufficient control, and the ability to exclude others.¹⁴² Immediately, then, we can see that the Court’s three requirements for proving title mirror the common law examination for possession, with the addition of continuity given the historical nature of the claim.

With these common law requirements in mind, what does the Court take into account when considering the Aboriginal perspective? Regarding sufficiency of occupation, the Court says it must examine the Aboriginal group’s “laws, practices, size, technological ability and the character of the land.”¹⁴³ At first glance, this may look like an important shift away from the common law perspective. However, the common law of possession already requires that sufficiency be determined based on “the use and occupation of which the subject-matter was capable.”¹⁴⁴ As such, when the Court — allegedly from the Aboriginal perspective — looks at the characteristics of the Aboriginal group and the carrying capacity of the land,¹⁴⁵ it is actually just gathering the necessary evidence to undertake the sufficiency analysis — even from a purely common law perspective. As for the ability to exclude, the Court’s language that the *Tsilhqot'in* “repelled other people from their land and demanded permission

140 Luk, *supra* note 13 at 306.

141 See *Tsilhqot'in*, *supra* note 8 at paras 14, 34, 41, 49, 54, 81.

142 See *The Tubantia*, [1924] All ER 615. For a detailed account of other common law occupation cases, see McNeil, “Site-Specific”, *supra* note 14 at 10–14.

143 *Tsilhqot'in*, *supra* note 8 at para 41.

144 *The Tubantia*, *supra* note 142.

145 See *Tsilhqot'in*, *supra* note 8 at para 37.

from outsiders who wished to pass over it¹⁴⁶ seems almost custom-made to fulfill the common law requirement that the claimant bring evidence of their “power to exclude strangers if they did not use unlawful force.”¹⁴⁷

The point here is that when the Court looks to the Aboriginal perspective, it is only to gather facts that are necessary for the common law inquiry. In other words, the Court really seems only to be examining the *claimant's* perspective — the perspective that would be required for *any* common law possession case — but that perspective becomes the Aboriginal perspective because the claimant in the case happens to be Aboriginal. That is, the title test merely seems to give Indigenous peoples “access to a right that already exists under the common law.”¹⁴⁸ As Kennedy puts it, “the only thing Indigenous about Aboriginal title is the people who are found to possess it.”¹⁴⁹ In citing only Aboriginal law jurisprudence (*Delgamuukw*, *Marshall*; *Bernard*) and not citing the common law cases in which its analysis is rooted, the Court is able to obscure the fact that its analysis is really just a traditional common law analysis of possession.¹⁵⁰

As such, it becomes difficult to take seriously the court’s assertions that the “dual perspectives of the common law and of the Aboriginal group bear equal weight in evaluating a claim for Aboriginal title”¹⁵¹ or that “the court must be careful not to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts.”¹⁵² Conspicuously absent from the Court’s analysis is any meaningful engagement with Indigenous *law*. There’s no indication that Indigenous law even factored in as a piece of evidence in the common law analysis. Let alone, then, the idea that Indigenous law would actually contribute to defining the content of Aboriginal title.¹⁵³

For much of the judgment, it seemed that this omission of Indigenous law would remain unstated. However, after its discussion of Aboriginal title, the Court turned to the question of interjurisdictional immunity to determine whether British Columbia had the constitutional authority to regulate forests on the newly declared Tsilhqot’in title land. Here, Chief Justice McLachlin makes the Court’s restricted understanding of Indigenous law explicit. Noting the potential practical difficulties, she states:

applying the doctrine of interjurisdictional immunity to exclude provincial regulation of forests on Aboriginal title lands would produce uneven, undesirable results and may lead to *legislative vacuums*. The result would be patchwork regulation of forests — some areas of the province regulated under provincial legislation, and other areas under federal legislation or *no legislation at all*.¹⁵⁴

146 *Ibid* at para 58.

147 See *The Tubantia*, *supra* note 142.

148 Kennedy, *supra* note 21 at 98.

149 *Ibid*.

150 See Reiter, *supra* note 97 at 70–71 (explaining how judicial decisions become facts to be applied in later cases). See also Vermette, *supra* note 125 at 242.

151 *Tsilhqot’in*, *supra* note 8 at para 14.

152 *Ibid* at para 32.

153 Vermette, *supra* note 125 at 242.

154 *Tsilhqot’in*, *supra* note 8 at para 147 [emphasis added].

This pronouncement underlines the Court's unwillingness to entertain the idea that Tsilhqot'in law might successfully regulate the forests in the claim area. Granted, the Court uses the language of "legislative vacuum" and not "legal vacuum." Nonetheless, for the Court, regulation of the forests means action from the provincial or federal governments—there is no indication whatsoever that the Tsilhqot'in are capable of regulating this land. Given the fact that the litigation started because the Tsilhqot'in sought to protect their forests from the province's granting of licences to clear-cut, this view is short-sighted. In the words of Nigel Bankes and Jennifer Koshan, "the Court is very adept at inventing inherent limits (allegedly grounded in the indigenous laws of all communities) to aboriginal rights but less imaginative when it comes to creating a space within which indigenous laws can operate."¹⁵⁵

The Court cannot justify their failure to take Indigenous law seriously by claiming that no submissions were made on the topic. Numerous interveners entreated the Court to consider Indigenous law in their determination of title. For instance, the Coalition of the Union of BC Indian Chiefs called on the Court to consider "solutions built on legal pluralism—a mutual recognition of co-existing legal orders, which can create enduring relationships and reflect justice."¹⁵⁶ Or, consider the Indigenous Bar Association's claim that, "Indigenous legal traditions are living legal traditions that pre-date Crown assertions of sovereignty."¹⁵⁷ They go on to argue that although "historical evidence can reveal the roots of Aboriginal title, history should not be used to limit the recognition, growth and development of Aboriginal rights in Canada's constitutional order."¹⁵⁸ The interveners, then, are clearly part of the increasingly recognized group seeking to support the revitalization of Indigenous legal orders as outlined in Part II of this article. The Supreme Court, though, could have done much more to support this revitalization in *Tsilhqot'in*.

Like the trial decision, the Supreme Court decision has complex outcomes with respect to the recognition of Indigenous law. On the one hand, it yielded a declaration of Aboriginal title and provides space to argue that Indigenous law is a key consideration in the determination of title. On the other hand, in its own application of the title test, it failed to take Indigenous law seriously as a normative order that still animates the lives of the Tsilhqot'in today. We must, then, consider the implications of the current approach and whether there is a better path forward.

155 Nigel Bankes & Jennifer Koshan, "Tsilhqot'in: What Happened to the Second Half of 91(24) of the Constitution Act, 1867?" (7 July 2014) *ABlawg* (blog), online: <ablawg.ca/2014/07/07/tsilhqot'in-what-happened-to-the-second-half-of-section-9124-of-the-constitution-act-1867/>.

156 *Tsilhqot'in*, *supra* note 8 (Factum of the Union of BC Indian Chiefs at para 2).

157 *Ibid* (Factum of the Indigenous Bar Association at para 1) [emphasis added].

158 *Ibid* at para 20.

IV Moving Forward

Implications

Reconciliation, Legitimacy, and Legality

The Supreme Court has called “reconciliation” the “fundamental objective of the modern law of aboriginal and treaty rights.”¹⁵⁹ The concept of reconciliation is pervasive in the *Tsilhqot’in* judgments. Justice Vickers dedicated a significant portion of his judgment to emphasizing its essential importance¹⁶⁰ and the Supreme Court also reaffirmed its significance.¹⁶¹ The considerable debate on what reconciliation means and what it requires cannot be properly synthesized or resolved here. However, the catalogue of problems and harms enumerated above demonstrate that if the courts’ current approach to Indigenous law brings the Canadian judiciary toward reconciliation, it does so in rhetoric more than in reality. To put it in the helpful terms of Mark Walters, *Tsilhqot’in* continues to promote “reconciliation as resignation” rather than “reconciliation as relationship.”¹⁶² As we have seen, the most that Indigenous groups can hope for is that their law will be accepted as evidence to prove a common law requirement. If they do succeed in proving title (something only the *Tsilhqot’in* have done), they are granted limited jurisdiction over a piece of land where their law continues to go unrecognized. In other words, courts demand that Indigenous people resign themselves to a monistic Canadian law. Reconciliation as relationship, on the other hand, would require that judges “take seriously the reconciliation of Aboriginal and non-Aboriginal legal traditions.”¹⁶³

Failure to move toward reconciliation as relationship has serious consequences on the ground. As explained in Part II, whether Canadian courts recognize it or not, the legitimacy and power of Indigenous law is being restored in Indigenous communities and its normative influence will have increasingly palpable effects. Aaron Mills explains that Indigenous resistance to resource projects is best explained by the conflict that arises when Indigenous peoples’ desire to obey their own laws runs up against settler society’s failure to understand them. Where this failure is pushed too far, Indigenous peoples will act to uphold the duties that their law makes incumbent upon them. In Mills’s words, “[w]e are ... uncompromisingly insistent on having our law legitimized and we’ll endure broken bodies for it.”¹⁶⁴ This description also fits for the *Tsilhqot’in*. Only months after their title victory, they established the Dasiqox Tribal Park over part of their traditional territory that goes beyond the claim area. Described as an “assertion of physical space on the basis of Indigenous law,” the park is designed to protect the land from further incursion by logging

159 *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 1, [2005] 3 SCR 388.

160 See *Tsilhqot’in BCSC*, *supra* note 1 at paras 1338–82.

161 See *Tsilhqot’in*, *supra* note 8 at paras 16, 23.

162 Mark D Walters, “The Jurisprudence of Reconciliation: Aboriginal Rights in Canada” in Will Kymlicka & Bashir Bashir, eds, *The Politics of Reconciliation in Multicultural Societies* (New York: Oxford University Press, 2008) 165 at 177, 183 [Walters, “Jurisprudence”].

163 *Ibid* at 190.

164 Mills, “kaye tahsh Crown”, *supra* note 34 at 162.

or mining companies.¹⁶⁵ Faced with a refusal to recognize their law, Indigenous peoples are defending it and asserting it on their own terms. Whether more conflict results will surely depend on non-Indigenous Canadians' willingness to engage with, understand, and recognize Indigenous law.

Ultimately, reconciliation as relationship, and the concomitant need to recognize Indigenous law in an adequate way, goes to the heart of the legitimacy and morality of Canadian law. At a basic level, courts ought to do what they say they are doing. If they profess to work toward reconciliation and recognize Indigenous law, but then fail to do so, they are failing to live up to their duty of candour.¹⁶⁶ More deeply, Lon Fuller argues that law must be able to hold moral, not simply coercive, sway over citizens — they must be able and willing to identify it as their own.¹⁶⁷ According to Walters, in important ways, colonial authorities, at least in the sense demanded by Fuller, are not “*legal* authorities in relation to indigenous peoples.”¹⁶⁸ But a shift from brute power to law is possible — and the more positive elements of *Tsilhqot'in* have arguably helped to effect it. There is, though, much more to be done and the more meaningful recognition of Indigenous law is an obvious place to start. Reconciliation as relationship demands no less. However, can courts compel reconciliation as relationship? Are they really appropriate institutions in which this shift can take place?

Counterargument: Courts are the Wrong Institution

An overarching counterargument to the idea that courts must take Indigenous law more seriously is that they are simply not an appropriate venue in which to resolve longstanding conflict or to work toward reconciliation between Indigenous and non-Indigenous peoples in an adequate way. Numerous scholars argue that too many features inherent in Western courts — the adversarial process, win-lose declarations, rules of evidence — do not exhibit the flexibility necessary to come up with subtle solutions to intractable problems, from third party interests to shared jurisdiction.¹⁶⁹ Judges, too, have noted the constraints of their role in the courts. Indeed, Justice Vickers lamented the “invidious position” in which he found himself.¹⁷⁰ For all of these commentators, any meaningful re-

165 See “Dasiqox Tribal Park: Nexwagwez?an — There For Us”, online: <www.dasiqox.org/>. The Dasiqox Tribal Park is far from the only example of an Indigenous group using their own law to assert jurisdiction. For example, Anishinaabe, Dakota, and Nehetho Elders presented *The Great Binding Law* to representatives of Enbridge and the National Energy Board regarding Enbridge's proposed Line Three Replacement Program (see Oshoshko Bineshiikwe – Blue Thunderbird Woman et al, “Ogichi Tibakonigaywin, Kihche Othasowewin, Tako Wakan: The Great Binding Law”, online: <www.turtlelodge.org/2015/11/manitoba-elders-share-a-message-with-national-energy-board-and-the-public/>) and West Coast Environmental Law has been working with First Nations through the RELAW project to assert Indigenous law in various regulatory projects (“RELAW: Revitalizing Indigenous Law for Land, Air, and Water”, online: <wcel.org/our-work/relaw-revitalizing-indigenous-law-land-air-and-water/>).

166 For more on this point, see David L Shapiro, “In Defense of Judicial Candor” (1987) 100:4 Harv L Rev 731.

167 See Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969) at 33. See also Walters, “Jurisprudence”, *supra* note 162 at 189.

168 Walters, “Jurisprudence”, *supra* note 162 at 189 [emphasis in original].

169 See e.g. Christie, “Private Property”, *supra* note 12 at 202; McNeil, “Reconciliation”, *supra* note 12; Russell, *supra* note 15 at 274; Slattery, *supra* note 135 at 286.

170 *Tsilhqot'in* BCSC, *supra* note 1 at para 1368.

conciliation requires *political* negotiation between Indigenous peoples and non-Indigenous Canadians. Other scholars worry that colonial courts filled with non-Indigenous judges who have been trained in Canadian law would never properly apply Indigenous law. Any attempts they might make to do so could instead perpetrate a form of violence against Indigenous peoples and their legal traditions.¹⁷¹ Others still suggest that Indigenous peoples ought to turn away from seeking colonial recognition in any way and instead seek to rebuild their languages, cultures, laws, and traditions on their own terms.¹⁷²

These arguments, though, are ultimately unconvincing. Nothing in this article should be taken as a suggestion that political negotiation is undesirable, or that courts are a perfect tool for building a foundation for reconciliation. Nor do I seek to undermine the very real concern that non-Indigenous judges may fail to interpret Indigenous law properly. And Canadians should celebrate the work that Indigenous people have undertaken to strengthen their laws for the internal governance of their communities. However, we cannot simply assume that negotiation will proceed easily and fairly. Indeed, it is often following failed or unsatisfactory negotiation that Indigenous communities resort to the courts in the first place.¹⁷³ It is also difficult to accept the idea that good faith attempts to engage with Indigenous law would cause more harm and violence than an outright refusal to do so. Like it or not, the fact remains that Indigenous communities continue to submit claims to Canadian courts. The result in *Tsilhqot'in* makes it unlikely that this reality will change.

If courts cannot create reconciliation on their own, they are still the background against which any negotiation takes place.¹⁷⁴ They set expectations and can articulate normative frameworks to guide the process. Part of that background can and must be the more meaningful recognition of Indigenous law — particularly when the test for Aboriginal title is based on a claim that Indigenous law is being balanced and considered. A new approach from the courts to Indigenous law can only ever be one part of a reconciliatory framework, but is one that might allow for more meaningful negotiation, for less harm to Indigenous law, and for greater protection of the work being done by Indigenous peoples in their communities. As a non-Indigenous Canadian and scholar, it is not my place to say when and how Indigenous communities should engage with Canadian courts. Moreover, I can only play a supportive role in encouraging the revitalization of Indigenous legal orders. It is incumbent upon me, however, to demand that where the institutions that represent me engage with Indigenous peoples, they do so respectfully, they are receptive to Indigenous law, and they

171 For this insight, I am indebted to many profound conversations with Aaron Mills. See also Russel Lawrence Barsh & James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand" (1997) 42 McGill LJ 993 at 1000.

172 See generally Taiaiake Alfred, *Wasáse: Indigenous Pathways of Action and Freedom* (Toronto: University of Toronto Press, 2005); Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014).

173 Indeed, this is precisely why the *Tsilhqot'in* took their claim to court (see Part III, Background and Facts, above).

174 See Walters, "Jurisprudence", *supra* note 162 at 187. See also Christie, "Private Property", *supra* note 12 at 202.

seek gradually to transform so that they might respond more adequately to the reconciliation-as-relationship imperative.¹⁷⁵

A New Approach

Indigenous Law and Living Tree Constitutionalism

The current approach contains a conflict between “specific Aboriginal title tests” and a paradigm of reconciliation such that “[t]he very fabric of the law is torn.”¹⁷⁶ Courts are often caught between strict common law tests and a principle of reconciliation that requires a more meaningful engagement with Indigenous law. While, as alluded to in the Introduction, the current jurisprudence arguably contains the principles necessary to take Indigenous law seriously, *Tsilhqot’in* shows that these principles have not been sufficient to guide judges to actually do so. A firmer grounding for these principles is therefore required. So how might judges ground an approach that operates within the constitutional framework but still takes Indigenous law more seriously?

John Borrows suggests that the normative and legal justification for a new approach can be found in the interpretation of the Canadian constitution as a living tree.¹⁷⁷ Borrows convincingly argues that while the Canadian judiciary has generally rejected originalism as an interpretative framework for constitutional law — embracing the living tree doctrine instead — it continues to apply an originalist (or what Borrows calls “aboriginalist”) analysis to Aboriginal law. In the Aboriginal title analysis, the focus revolves around a particular moment in history at which time sovereignty is deemed to have “crystallized.”¹⁷⁸ As we have seen, the relevance of Indigenous law to the analysis is only to prove historical facts as they existed at that time of crystallization. As Eric Reiter puts it, in order to “win their claims, [Aboriginal groups] must deny their modernity.”¹⁷⁹ Living tree constitutionalism, by contrast, recognizes the continuity and ongoing development of Indigenous societies and “highlights the existing nature of Aboriginal rights, which allows for the growth and development of Indigenous law and tradition as part of the law of Canada.”¹⁸⁰

As our defining interpretive framework for the constitution, there is extensive case law from the Supreme Court that employs living tree constitutionalism. There are also glimmers in the jurisprudence of the Supreme Court on Aboriginal rights that indicate that this approach might be possible. For instance, *R v Sparrow* articulated that the meaning of section 35(1) should be derived from constitutional interpretation, and also acknowledged that it is “crucial to be

175 For an eloquent argument that settlers must shift their focus away from the “Indian problem” and instead begin to ask what might constitute the “settler problem”, see Roger Epp, “We Are All Treaty People: History, Reconciliation, and the ‘Settler Problem’” in Carol Prager & Trudy Govier, eds, *Dilemmas of Reconciliation: Cases and Concepts* (Waterloo: Wilfred Laurier University Press, 2003) 223 at 228.

176 See Newman & Schweitzer, *supra* note 81 at 258.

177 See John Borrows, “(Ab)Originalism and Canada’s Constitution” (2012) 58 Sup Ct L Rev (2d) 351 [Borrows, “(Ab)Originalism”]. Other scholars also point to the living tree as a useful interpretive framework for approaching Indigenous law (see e.g. Mills, “kaye tahsh Crown”, *supra* note 34 at 141; Walkem, *supra* note 13 at 423–24).

178 *Delgamuukw*, *supra* note 5 at para 145. See also Borrows, “(Ab)Originalism”, *supra* note 177 at 361.

179 Reiter, *supra* note 97 at 63.

180 Borrows, “(Ab)Originalism”, *supra* note 177 at 383.

sensitive to the aboriginal perspective itself on the meaning of the rights at stake.¹⁸¹ Or take *Mitchell*, which outlined the continuity of Indigenous rights after sovereignty.¹⁸² An important set of tools is therefore available to judges should they be willing to use them in the context of Indigenous law. Perhaps more importantly, living tree constitutionalism finds analogues in numerous Indigenous legal traditions whose law often draws on the natural world.¹⁸³ If this approach is preferable in theory, though, can it actually work in practice?

Counterargument: It Is Impossible in Practice

A likely counterargument to the approach above would be to question whether a more meaningful engagement with Indigenous law is actually feasible. Such critics will want to know: What test will we use to determine Aboriginal title? If a different Indigenous legal order must be examined and understood in each Aboriginal title claim, how will there ever be certainty and predictability in the law? How can multiple legal orders operate over a single territory?

A first way to address these concerns is to start with a thought experiment. Imagine a legal system that is not grounded in any particular text but is better described as a tradition “expressed in action.”¹⁸⁴ This would mean that “rules fashioned from amalgams of what was proper in a situation, and anything that could be gleaned from ancient practice, [would be] applied and then handed over from each generation to the next.”¹⁸⁵ There would be a “bewildering diversity of courts” that enforce laws that come from a “great diversity of cultures.”¹⁸⁶ Legal pluralism would be an assumed and essential element of the legal system. For critics concerned with the recognition of Indigenous law, such a legal system might sound like exactly what we ought to avoid. In reality, however, it is a brief description of the early common law. The point here is not to draw a facile comparison between the common law and Indigenous legal orders, nor is it to say that the early common law would be an adequate legal system for modern Canada. It is simply to say that our own intellectual and legal history should serve as a reminder that recognizing this kind of law is far from impossible.

Second, and more concretely, we can look to numerous places where the common law already accepts legal pluralism in some form. Senwung Luk uses ecclesiastical law in England to demonstrate that English common law still allows a different legal order to maintain jurisdiction over important religious sites. In these places, physical occupation is not a requirement for jurisdiction to remain — it is the ecclesiastical law that must be examined.¹⁸⁷ For Luk, there are strong parallels to draw here when imagining the possibility and the practice of Canadian law recognizing Indigenous legal authority over land, and particularly over sacred sites. Moreover, on numerous occasions Canadian courts have recognized that it is Indigenous customary law, and not Canadian law, that must prevail over matters including marriage and adoption.¹⁸⁸ As this article has

181 [1990] 1 SCR 1075 at 1112, 46 BCLR (2d) 1.

182 See *Mitchell*, *supra* note 67 at para 10.

183 See Borrows, “(Ab)Originalism”, *supra* note 177 at 385–88.

184 AWB Simpson, *An Invitation to Law* (Oxford: Blackwell, 1998) at 23.

185 Gary Slapper, *How the Law Works*, 3rd ed (New York: Routledge, 2014) at 90.

186 Borrows, *Constitution*, *supra* note 4 at 111.

187 See Luk, *supra* note 13 at 311.

188 See Walkem, *supra* note 13 at 423–24.

clearly shown, such recognition is not extended to contexts involving property and land, but it remains possible to interpret our constitution in a way that would allow for this expansion. In the United States, there is an entire tribal court system that applies Indigenous law to numerous legal issues in Indigenous communities.¹⁸⁹ Finally, of course, Canada already embraces legal pluralism through the coexistence of common law and civil law traditions. Our bijuridical society is something that is now celebrated and not feared; we must act to allow space for Indigenous law in a multijuridical federation.¹⁹⁰

A last response is one that will be the least satisfying to some but is perhaps the most important: we cannot yet know exactly how this will work in any given situation. If we take Indigenous law seriously, then distinct and culturally rooted norms — many of them unfamiliar — will underpin the legal analysis. This recognition may lead us in new, and sometimes difficult, directions. Perhaps entirely new institutions will be deemed necessary to handle the normative pluralism at play in a satisfactory manner.¹⁹¹ Such an analysis might ultimately reveal that a title analysis is not appropriate at all, or at least that it is not appropriate for all Indigenous nations or in all contexts. Mistakes will probably be made and corrections required. It will be challenging and surely at times it will be uncomfortable. But that is so often the nature of the law.

V Conclusion

This article used the story of the *Tsilhqot'in* decision, from trial to the Supreme Court, to look at how Indigenous law is currently received, examined, and used by Canadian courts. The results of this study, though mixed, are largely troubling. On the one hand, the trial decision lays out an important method for sensitively analyzing Indigenous oral evidence. This analysis of the evidence allowed the Supreme Court to make its first declaration of Aboriginal title while also reaffirming that Indigenous law has a place in the title analysis. However, in Justice Vickers's judgment, Indigenous law was viewed, first and foremost, as historical fact that might support a finding of exclusive occupation. At the Supreme Court, despite making repeated reference to Indigenous law, Chief Justice McLachlin did not allow it to play any real role in her actual legal analysis. It was not a factor seriously considered in a test that is undeniably rooted in the common law. Nor was Indigenous law considered to be part of the normative order that would hold sway over the newly designated title area.

In Justice Vickers's explanation of *Tsilhqot'in* oral tradition, he made the following observation:

It should also be noted that the teller of these oral traditions does not, as a matter of routine, offer an explanation of the meaning of any particular legend. The listener is left to distill

189 See Friedland, *supra* note 32 at 4–5. For a good example of such laws being applied, see Borrows, “(Ab)Originalism”, *supra* note 177 at 395–96. This is not to indicate that the tribal law system does not face its own challenges.

190 This idea is the main thrust of the argument in Borrows, *Constitution*, *supra* note 4.

191 Consider, for example, the newly created court of the Akwesasne First Nation, the first of its kind in Canada (see Giuseppe Valiante, “Akwesasne Creates First Independent Indigenous Court in Canada”, *The Globe and Mail* (2 October 2016), online: <www.theglobeandmail.com/news/national/akwesasne-creates-first-independent-indigenous-court-in-canada/article32204779/>).

and then apply the meaning to their own life. This is a lifelong process and is enhanced by maturity and reflection on one's various life experiences.¹⁹²

This article has tried to show that, in many respects, Canadian judges still have much listening and reflection to do. Since a time when courts uniformly rejected the suggestion of Indigenous law, they have taken important steps forward. But in the face of Indigenous law's revitalization, much remains to be done; the process must continue. An approach to Indigenous law that sees it as a vital branch — if not the trunk — of Canada's living tree is an essential component of moving toward reconciliation as relationship.

192 *Tsilhqot'in BCSC*, *supra* note 1 at para 671.