Taking the “Aboriginal Perspective” Seriously

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

FRASER HARLAND

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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

* MA, University of Victoria; BCL/LLB, McGill University, Faculty of Law. The author thanks Aaron Mills, Professor Kirsten Anker, and Dean Robert Leckey for helpful guidance on earlier drafts. The author is also grateful for the thoughtful comments of two anonymous reviewers and for the hard work of the Indigenous Law Journal’s editorial team. In August 2017, the author began a clerkship at the Supreme Court of Canada; this article was fully revised before this work began and has in no way been influenced by his work at the Court.
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.”

— Chief Roger William

“Law is the command of a sovereign power.”

— 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. They represent an ongoing conceptual, moral, and legal struggle over the place, acceptance, and understanding of Indigenous legal orders 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 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.” Crucially, the Aboriginal perspective “includes, but is not limited to, their systems of law.” When the Tsilhqot’in claim arrived at the Supreme Court

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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 Canada — 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.”

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. Others have analyzed what the outcome of the decision means for resource development or third party interests.

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. 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.

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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-tsilhqotin-nation/>.
Through an examination of the *Tsilhqot’in* story — using the trial judgment and the Supreme Court of Canada decision as its central texts\(^\text{14}\) — 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.\(^\text{15}\) 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*.\(^\text{16}\) 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.\(^\text{17}\) 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

\(\text{14} \) 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”].


\(\text{17} \) 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 reconciliation and legitimacy will remain fruitless unless they recognize the rightful place of Indigenous law in the Canadian constitutional framework.

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. 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. The fact that Indigenous lands and societies were governed by legal orders was a fact readily acknowledged by new European arrivals. The numerous treaty relationships entered into by the Crown with Indigenous nations are a key example

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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.


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-

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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.
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... of treaty obligations and Indigenous-settler conflict over resource development. Still others have drawn on Indigenous legal traditions to address some of the most pressing issues facing Indigenous communities, from Indigenous identity and self-determination to violence against women. 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.

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.

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.”

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

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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”]).


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.”\textsuperscript{40} As noted in the Introduction, in \textit{Delgamuukw}, the Court affirmed that Indigenous law could be used to demonstrate the exclusive occupation of land subject to an Aboriginal title claim.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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 \textit{Tsilhqot’in} judgments, that this article now turns.

\section*{III The Place of Indigenous Law in \textit{Tsilhqot’in}}

\textbf{Background and Facts}

The Tsilhqot’in Nation is a group of six bands that share a common culture, history, and language.\textsuperscript{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.\textsuperscript{48} As with many Indigenous nations in

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\textsuperscript{40} [1996] 2 SCR 507 at para 40, 23 BCLR (3d) 1. \\
\textsuperscript{41} \textit{Delgamuukw}, supra note 5 at paras 126, 147. \\
\textsuperscript{42} Borrows, \textit{Constitution}, supra note 4 at 11. \\
\textsuperscript{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, \textit{Constitution}, supra note 4 at 137–76; Friedland, \textit{supra} note 32 at 13–17). \\
\textsuperscript{44} Friedland, \textit{supra} note 32 at 6. \\
\textsuperscript{45} See Napoleon, “Indigenous Legal Orders”, \textit{supra} note 4 at 230; Friedland, \textit{supra} note 32 at 3; Andrée Lajoie, “Introduction: Which Way Out of Colonialism” in Law Commission of Canada, \textit{supra} note 21, 3 at 3. \\
\textsuperscript{46} Friedland, \textit{supra} note 32 at 6. \\
\textsuperscript{48} See Lutz, \textit{supra} note 47 at 123.
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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 Xeni Gwet’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 Xeni Gwet’in.51 Negotiations between the Xeni Gwet’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 Xeni Gwet’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’ 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. In that case, the claimant Gitxsan 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. Of course, Indigenous oral histories, “by their very nature,” fall into this category. However, there are numerous exceptions to the hearsay rule, including in a situation where that evidence is necessary. 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). 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.

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.” The Court outlined in no uncertain

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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.
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.”  As such, the Court instructed that trial judges must not replicate Justice McEachern’s refusal to give independent weight to oral traditions.

The Supreme Court, however, appeared to pull back from Delgamuukw’s path-breaking and generous approach to Indigenous oral testimony in *Mitchell v MNR*. 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.” 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.” She ultimately found that the trial judge’s reasons suffered from “an unreasonably generous weighing of tenuous evidence.”

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.

Similarly, Ardith Walkem catalogues numerous techniques through which judges have dismissed or undervalued Indigenous evidence that constitute what she calls a “methodology of suspicion.”

A particularly flagrant example of this skepticism is found in the Federal Court of Appeal’s judgment in *Benoit v Canada*. 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.” In *Benoit*, a particularly problematic finding was that

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65 Ibid at para 106.
66 See ibid at para 98.
69 Ibid.
70 Ibid at para 51.
71 Milward, *supra* note 16 at 296–301.
72 Walkem, *supra* note 13 at 403.
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 Gitxsan and Wet’suwet’en in Delgamuukw. Such a finding represents an utter failure to consider the special context of Indigenous groups’ oral history more seriously than others. 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.” 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.”

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’ judgment up as an encouraging example that bucks this trend. 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.” In a powerful moment of self-awareness, he declares that “[i]n order to truly hear the oral history and oral tradition evidence presented in these cases, courts must undergo their own process of decolonization.”

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. 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.”

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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.
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. 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.

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.”

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. Such an approach, according to Justice Vickers, “would fall into legal error on the strength of the current jurisprudence.” 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.” Further, contrary to the troubling hierarchizing of some Indigenous nations’ oral evidence over others, as seen in Benoît, Justice Vickers was sensitive to the fact that oral traditions “differ from Aboriginal nation to Aboriginal nation.” 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.” 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.”

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

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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.
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 “estrange 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.
95 Craft, supra note 33 at 15.
96 Valverde, supra note 67 at 965.
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.” 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.”

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.” John Borrows makes a compelling case that “[w]ithin Indigenous legal traditions, creation stories are often one source of sacred law.” In this way, then, as Lorraine Weir puts it, Justice Vickers “consigns 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

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.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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-

\textsuperscript{104} Weir, “Legal Fiction”, \textit{supra} note 1 at 4.
\textsuperscript{105} Tsilhqot’in BCSC, \textit{supra} note 1 at para 431 [emphasis added].
\textsuperscript{106} \textit{Ibid} at para 665. See also Weir, “Legal Fiction”, \textit{supra} note 1 at 22.
\textsuperscript{107} Tsilhqot’in BCSC, \textit{supra} note 1 at para 363.
\textsuperscript{108} \textit{Ibid} at para 434.
\textsuperscript{109} \textit{Ibid} at para 668.
\textsuperscript{110} Weir, “Legal Fiction”, \textit{supra} note 1 at 22.
\textsuperscript{111} Tsilhqot’in BCSC, \textit{supra} note 1 (Argument of the Plaintiff at para 701).
ed limited and constrained. 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.” 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, 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.” 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. 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 Gitxsan — should have themselves, “as a complete system,” been determinative of the title analysis through proof of legal occupation. 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

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’ilʔos andʔEniyud. 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.
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.
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. Legitimating 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-Tsilkot’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.
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 Tsilkot’in in BCSC, supra note 1 at paras 1368, 1373.
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. 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.” Second, however, the claimant can demonstrate legal occupation based on pre-existing systems of Indigenous law. For some scholars, this test created the possibility “for the expansion of space within Canada for the recognition of Indigenous legal traditions.”

This possibility, however, seemed to be erased less than a decade later with the decision of *R v Marshall; R v Bernard*. 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 commentators 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.” 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.

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. 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.”

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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.
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.
Fraser Harland — Taking the "Aboriginal Perspective" Seriously

*Tsilhqot’in* should be celebrated for what it is: “a momentous step for the Canadian legal system.” 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. 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. 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.” 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.” 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, 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 it"146 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 Tabantia, 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 shortsighted. 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.”

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.” Or, consider the Indigenous Bar Association’s claim that, “Indigenous legal traditions are living legal traditions that pre-date Crown assertions of sovereignty.” 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.” 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.

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 importance\(^{160}\) 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 persistent 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.

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\(^{159}\) 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.


\(^{163}\) Ibid at 190.

\(^{164}\) Mills, “kaye tahsh Crown”, supra note 34 at 162.
or mining companies.\footnote{See “Dasiqox Tribal Park: Nexwagwëz’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, Kiihe 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>).} 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.\footnote{For more on this point, see David L Shapiro, “In Defense of Judicial Candor” (1987) 100:4 Harv L Rev 731.} 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.\footnote{See Lon Fuller, The Morality of Law (New Haven: Yale University Press, 1969) at 33. See also Walters, “Jurisprudence”, supra note 162 at 189.} 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.”\footnote{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.} 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.\footnote{See “Dasiqox Tribal Park: Nexwagwëz’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, Kiihe 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>).} Judges, too, have noted the constraints of their role in the courts. Indeed, Justice Vickers lamented the “invidious position” in which he found himself.\footnote{Tsilhqot’in BCSC, supra note 1 at para 1368.} For all of these commentators, any meaningful re-
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. Other scholars 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.

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. 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. 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.


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

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

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.” 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. 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.” 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.” 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.”

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

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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: Wilfrid 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.”\textsuperscript{181} Or take \textit{Mitchell}, which outlined the continuity of Indigenous rights after sovereignty.\textsuperscript{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.\textsuperscript{183} If this approach is preferable in theory, though, can it actually work in practice?

\textit{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.”\textsuperscript{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.”\textsuperscript{185} There would be a “bewildering diversity of courts” that enforce laws that come from a “great diversity of cultures.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{188} As this article has

\textsuperscript{181} [1990] 1 SCR 1075 at 1112, 46 BCLR (2d) 1.
\textsuperscript{182} See \textit{Mitchell}, \textit{supra} note 67 at para 10.
\textsuperscript{183} See Borrows, “(Ab)Originalism”, \textit{supra} note 177 at 385–88.
\textsuperscript{186} Borrows, \textit{Constitution}, \textit{supra} note 4 at 111.
\textsuperscript{187} See Luk, \textit{supra} note 13 at 311.
\textsuperscript{188} See Walkem, \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 \textit{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

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

\textsuperscript{190} This idea is the main thrust of the argument in Borrows, \textit{Constitution}, \textit{supra} note 4.

\textsuperscript{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”, \textit{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.

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