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Written is more reliable than spoken. Getting there second means you have first right to it. Books are more informative than dreams. Singing is not relevant. Land is idle. When newcomer peoples take land it is rightful, before we can fulfil our obligations and remind you of our relationship with it, you label it a claim and insist we prove it. When Canadian judges assert that sovereignty crystallized, it is not fantastic, it is reality and cannot be argued. When Indigenous peoples and advocates assert that our sovereignty is inherent and ongoing as are our rights to land, that is fanciful and leads to an argument. Newcomer rights are presumed and Indigenous rights must be proven. Who is the savage? It is barbarism. This land is fertile because our ancestors and relations were here thousands of years and became that earth. Surely that is some measure of rightful belonging. We belong to that land.[1]

1. Introduction

Legal systems and traditions existed and were practised by Indigenous nations in Canada prior to the arrival of the colonialists[2]. These nations, among many others included the Assinaboine, Dakota, Gitksan, Innu, Mi'kmaq, Cree, Maliseet, Montagnais, Saulteaux, Dene, Blackfoot, Haudenosaunee, Lakota, Nagoya, Inuit, Metis, Anishinabek, and Haida.[3] They had rich laws, traditions, customs, cultures, and values which defined the nature of relationships within their Nations.

For many generations, the government of Canada targeted the legal, cultural, and political systems of Indigenous people. Indigenous peoples and traditions were viewed as barbaric; their cultures and religions subjugated; their languages described as crude and repressed; and their rights undermined and denied.[4] The overall aim of these acts of oppression was genocidal with the intents of eliminating indigeneity and absorbing Indigenous peoples into the Canadian body politics.[5] It was part of targeted policy of assimilation which employed methods of intimidation and diminishing the self-worth and self-belief of Indigenous people in the eventual hope of eliminating them culturally and

[1] Tracey Lindberg, "Critical Indigenous Legal Theory Part 1: The Dialogue Within" (2015) 27:2 CJWL 224 [Lindberg].
[2] John Borrows, "Indigenous Legal Traditions in Canada" (2005) 19 Wash U JL & Pol'y 167 [Borrows, Legal Traditions].
[3] Ibid.
[4] Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: TRC, 2015) at 1, online: <www.trc.ca/websites/ trcinstitution/File/2015/Honouring_the_Truth_Reconciling_for_the_Future_July_23_ 2015.pdf> [TRC *Report*].
[5] Ibid.

physically.[6] Despite the many assaults on these traditions, they have stood and continue to stand. Damages were undeniably done to the traditional and religious architecture; however, it is a credit to the strength of Indigenous people that they remain standing today having bravely withstood the legacies of colonialism.[7] Indigenous laws and legal systems were casualties of colonialism and crown sovereignty and supremacy.[8]

Understanding that governance or a system of governance is central to any legal systems, "Canada replaced existing forms of Aboriginal government with relatively powerless councils whose decisions it could override and whose leaders it could depose."[9] As a result, Indigenous legal systems have been embroiled in an asymmetrical struggle with colonial legal system which had become pre-eminent due to years of subjugation, oppression and suppression; however there have been a resurgence in discussions on the important place of Indigenous legal systems in the self-governing apparatus of Indigenous people.[10] The Truth and Reconciliation Commission of Canada identified the recognition and implementation of Indigenous laws and systems " [A]boriginal peoples must be recognised as possessing the responsibility, authority, and capability to address their disagreements by making laws within their communities. This is necessary to facilitate truth and reconciliation within Aboriginal societies."[11]

The paper analyses the struggles between the two legal systems, and the subjugation of Indigenous legal systems when it threatens the non-indigenous legal system, that is Canadian laws. To do this, the paper reviews the ongoing battle between the hereditary chiefs of the Wet'suwet'en First Nation and Coastal Gaslink in British Columbia. It particularly reviews the tension between elected band council and the hereditary chiefs, and how corporations like Coastal Gaslink exploits the elected band councils to further the agenda of the non-Indigenous legal system.

This paper is divided into five parts. The first section introduces the research subject and clarifies the intention and objectives of the paper. Section two reviews available literatures on Indigenous and non-Indigenous legal systems, including their origins and features. A discussion on the relationship between both systems forms the core of section three. Sections

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[6] Ibid.
[7] Val Napoleon & Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions through Stories" (2016) 61:4 McGill LJ 725–754 [Napoleon & Friedland].
[8] Ibid.
[9] TRC Report, supra note 4.
[10] John Borrows, *Recovering of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 125 [Borrows, Indigenous Laws].
[11] TRC Report, supra note 4 at 205.

three and four review the indigenous legal system of the Wet'suwet'en First Nation, outline the traditional and historic roles of the hereditary chiefs, delve into the ongoing tension between the hereditary chiefs and elected chiefs in respect of the Coastal Gaslink pipeline project in British Columbia. Chapter five concludes the paper.

2. Non-Indigenous versus Indigenous Legal Systems

This section traces the origin and key features of both non-Indigenous and Indigenous legal systems. The term non-Indigenous legal system in this paper refers to Canadian laws/legal systems and also includes its English and French law traditions. While acknowledging the fact that customs and traditions differ in different Indigenous Nations, the term Indigenous legal systems is cautiously used to refer to the conceptualisation of the legal traditions of Indigenous people in Canada. The section deconstructs the origins of Indigenous and non-Indigenous traditions by showing that though both are rooted in mythology, one prioritises power and individuality, the other prioritises nature and community. The fixation of non-Indigenous legal system on power and individuality is a tension point and the underlying reason for the subjugation of Indigenous legal systems.

2.1. Origin and features of Non-Indigenous (Western/European) Legal System

It is often the case that Indigenous legal traditions are subjugated to its non-Indigenous counterpart on the false believe that it is inferior. However, both systems have similar origins – mythology.[12] Manley-Casimir argued that non-Indigenous legal system is founded on cultural values that are European in origin which prioritizes the status of the nation state.[13] This tradition goes back to ecclesiastical laws and Roman traditions over many centuries during which the church exerted influence on the world order, the authority of the church and state being supreme and unquestionable. In addition to ecclesiastical and Roman laws, the English law was largely influenced by Greek jurisprudence.[14]

In Anglo-Saxon England "[s]ecular and ecclesiastical courts were not sharply separated, and the two jurisdictions were hardly distinguished."[15] The absence of separation between state and church, and between secular and ecclesiastical laws meant that religious traditions were imported into norms governing secular relationships. These hardly

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[12] Kirsten Manley-Casimir, "Incommensurable Legal Cultures: Indigenous Legal Traditions and the Colonial Narrative" (2012) 30: Windsor YB Access Just [Manley-Casimir].
[13] Ibid
[14] Frederick Pollock & Frederic William Maitland, *The History of English Law: Before the Time of Edward I* (Cambridge: Cambridge University Press, 1895) at 18 [Pollock & Maitland].
[15] Ibid.

distinguishable traditions eventually trickled down to the advent of common law traditions which began after the Norman Conquest of 1066 when mediaeval kings began instituting a system of writs, consisting of royal orders for regulating societal interactions.[16] All of these traditions were preoccupied with the notion of legitimacy.

Legitimacy can only be obtained by adhering to the norms acceptable to and by the church or the state; these norms were written code which were generally accepted as authoritative and unquestionable - it is founded in the belief that what is written is true and not to be challenged.[17] Basically, this means that non-Indigenous legal systems have a preoccupation on rules and authoritative norms governing human interaction or creating one where none exists. Attached to the system is also the idea of objectivity and universality which originated from the English courts of equity.[18] The idea of objectivity of the non-Indigenous legal system is construed as such in that judges are required to eliminate their subjective opinion in dispensing justice and that these values are universally accepted.[19]

Manley-Casimir writes that the "non-Indigenous legal system therefore is characterised by state-centrism in which state law is constructed as authoritative. Through written and coded laws, that state regulates the lives of its members through the ideals of objectivity and universal values."[20] Interestingly, the non-Indigenous legal system is entrenched in the language of the law, the origin of which language is entrenched in ecclesiasticism of the Latin, Greek and Roman languages.[21]

Societal order and cohesion are values essential to these languages. Gordon Christie while discussing Canadian Law, noted that "[T]he domestic legal system as an institution is a social and historical construct, a structure built on words and meanings, designed to promote certain values in an ordering system."[22] One other feature identified as relating to the non-Indigenous legal system is the importance of the narrative that non-Indigenous law is devoid of "mythology, narrative and collective memories."[23]

2.2.Origin and Features of Non-Indigenous Legal System

Indigenous legal systems are built on stories transferred orally through many generations. Within these stories are the wisdom, logic and reasoning for understating

[16] Ibid.
[17]Manley-Casimir, supra note 12
[18] Pollock & Maitland supra note 14.
[19] Ibid.
[20]Manley-Casimir, supra note 12, page 140.
[21] Ibid.
[22] Gordon Christie "Law, Theory and Aboriginal Peoples" (2003) 2 Indigenous LJ 67 at 69 [Gordon Christie].
[23] Manley-Casimir, supra note 12, page 141.

political structures of Indigenous Nations, rules governing social interactions and the relationship between physical elements of the earth.[24] Indigenous legal system emerged from "a combination of wisdom gleaned from mythological time and thousands of years spent reflecting on the best ways to live."[25] The stories and the transmission of same hold an essential role in Indigenous Nations and provide crucial understanding of the environment and the role of Indigenous people in preserving the earth. Behind every story is an explanation which when critically analysed reveals the rules governing a subject matter,[26] as such "Indigenous stories embed law, legal principles, and legal processes."[27]

Tuma Young, a professor of Mi'kmaq studies explained at the MMIWG National Inquiry hearings that in cultural practices and language one can find the legal principles inherently guiding the affairs of a people "our principles come from our stories, our ceremonies, our songs, our languages, and our dances.... and most of our legal principles are there."[28] The legal principles vary in each Indigenous Nation, but they are generally built on the principles of responsibilities, respect, reciprocity, interconnectedness and interdependency.[29] Indigenous laws are living laws which draw from the norm that individual and collectives' rights are dependent on living organisms such as land, water, animals, spirits, the rain, rivers and the moon, with the aim of promoting safety and justice.[30]

It is naive to assert that Indigenous Nations were lawless and savage prior to European contact. Indigenous Nations have long established political and legal order which outlined the structures of the society. Examples abound to support this fact. For instance Manley-Casimir pointed to the Haudenosaunee Nation's governance system which includes consensus, veto powers and representative decision making[31] or the Plains Blackfoot and Cree law in which there is no private ownership of land as land is an object to be shared with all.[32] In many Indigenous Nations, perpetrating violence on other clan members was not permitted and such acts were punished.[33]

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[24] Napoleon & Friedland, supra note 7.
[25] Gordon Christie, supra note 22, page 91.
[26] Napoleon & Friedland, supra note 7 page 737.
[27] Ibid.
[28] Canada, National Inquiry on Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Volume 1a,* (Ottawa: Privy Council Office, 2019) [MMIWGI Report] at 136.
[29]Ibid.
[30] Ibid.
[31] Manley-Casimir, supra note 12 page 142.
[32] Ibid.
[33] MMIWGI Report supra note 28 page 138.

In Indigenous Nations, although collective rights are individualised, in the sense that they are exercised by individual members, it seems that priority is placed on the collective as against the individual as obvious in non-Indigenous legal system.[34] The priority of Indigenous law is the importance of responsibilities - the responsibility to other members of the clan, nature, the environment and spirituality.[35] This is perfectly summed up in the following "some people call it the Great Law, or the Great Law of Peace, and it is. This law, our law, does not define 'rights'; it does not defend 'rights'. In our ways, there are no 'rights', only responsibilities: to observe the clans, to bring honour, trust, friendship and respect; to share; to be kind, honest and knowledgeable; to maintain a relationship with all the natural world."[36]

2.3. Privileging Non-Indigenous Legal System

John Borrow wrote that some have argued that Indigenous peoples are pre-legal because they do not possess the positivist orientation and non-Indigenous conceptualisation of power and authority.[37] The problem with this narrative is the intentional mischaracterisation of Indigenous legal traditions – the mere fact that Indigenous institutions are not structured in the legalistic framework of non-Indigenous legal systems does not invalidate their authenticity and relevance. As John Borrow writes:

> In fact, despite the doubts some might hold concerning the presence of law in indigenous societies, there has been a long history of recognition of indigenous peoples' government or legal traditions by those who encountered these societies. Europeans' pronouncements that indigenous people had no government or law were contradicted by their practice of dealing with them through treaties and agreements. There was a long period of interaction between indigenous peoples prior to the arrival of Europeans and explorers from other continents. There were treaties, inter-marriages, re-settlements, war and extended periods of peace. When Europeans and others came to North America, they encountered a complex socio-legal landscape. The complexity and scale of the interaction is demonstrated in early treaty and marriage relationships.[38]

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[34] Gordon Christie, supra note 22 page 84.
[35] Manley-Casimir supra note 12 page 150.
[36] Osennontion & Skonagenleh:ra, "Our World" (1989) 10:2 Can. Woman Stud.
[37] Editorial, One Tier Justice, NAT'L POST, Nov. 23, 2004, at A19. Cited in Borrows, Legal Traditions supra note 2 page 171.
[38] Borrows, Legal Traditions, page 178.

Based on this classification of Indigenous legal system as pre-legal and primitive, they are excluded from the non-Indigenous legal systems. The idea of universality, neutrality, and objectivity of European values were adopted as tools for the exclusion of Indigenous legal systems. However, universality is a myth conceived from the biased Eurocentric worldview - this notion privileges Eurocentric values on power, authority and legitimacy.[39] It is a skewed and chauvinistic worldview that paints Europeans as bringing civilisation to the inhabited and "lawless wilderness of North America."[40] The earth is generally amoral and origin of non-Indigenous legal system as Manley-Casimir argued is not universal but culturally normative, the privileging of one tradition over another is immoral.[41]

Records of inter-communal bilateral relationships solidified through oral contracts detail the sophistication of Indigenous legal systems and contradict the false image of lawless and savage North America prior to colonialization. The Haudenosaunee and the Anishinabek had an oral agreement which was recorded on a wampum belt to the effect that the two nations would honourably share hunting grounds for food gathering purposes.[42] This concept was subsequently adopted in the peace and friendship accord between Mi'kmaq, Maliseet, Passamaquoddy, and the British Crown between 1685 and 1779.[43] Clearly, early interactions between colonial authorities and Indigenous Nations were governed by Indigenous legal and cultural traditions.[44] Beyond treaty relations, European traders willingly agreed to Indigenous customs as governing laws regulating their business transactions, and marriages between European and Indigenous people were conducted under relevant customs.[45]

Laws are dynamic phenomena emerging from and evolving with societal cultural values and norms. Since norms are culturally relative, universality is impracticable and impossible. Therefore, to assert that North America was lawless prior to the arrival of Europeans is sanctimonious. The evolution of Indigenous legal system is not tied to the promulgation of the *Indian Act;*[46] on the contrary the introduction of the English common law was the genesis of the clash of two civilisations. Although recognised at the early stages, the promulgation of the *Indian Act* and the introduction of the English common law contributed to the suppression of Indigenous legal traditions.[47]

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[39] Manley-Casimir supra note 12 page 142.
[40] Ibid.
[41] Ibid
[42] Borrows, Legal Traditions supra note 2 page 179.
[43] Ibid.
[44] Ibid.
[45] Ibid.
[46] RSC 1985.
[47] Ibid.

In 1867, the Quebec Superior Court in *Connelly v. Woolwich*[48] recognised the Cree laws as forming part of the common law. Justice Monk opined that:

> Will it be contended that the territorial rights, political organisation such as it was, or the laws and usages of India tribes were abrogated – that they ceased exist when these two European nations began to trade with Aboriginal occupants? In my opinion it is beyond controversy that they did not – that so far from being abolished, they were left in full force, and were not even modified in the slightest degree.[49]

The judge in this case strongly believed that Indigenous legal traditions in existence prior to the arrival of English and French explorers should and are part of the common law because colonial relationship did not abrogate or modify Indigenous laws in the slightest degree. The assertion of crown sovereignty was not intended to in any form to terminate Indigenous laws because they "were presumed to survive the assertion of sovereignty and were absorbed into the common law as rights."[50]

3. Clash of Civilizations – Conflict of Laws? Or Crown Supremacy?

Despite the recognition of Indigenous laws as forming part of the common law at the early stage of colonial interactions and the principles of continuity, subsequent rules were formulated, which limited the application of Indigenous laws. These rules were to the effect that Indigenous laws were inapplicable[51]: (a)if they were incompatible with the Crown's assertion of sovereignty; (b)if Indigenous Nations through treaty voluntarily surrenders indigenous rules; and (c)where the government extinguished them. This practically infringed on Indigenous self-determination and autonomy – for Indigenous people, Crown supremacy simply stated was an outright statement of subjugation. Given the reciprocal and respectful nature of the relationship during the first European contact, one wonders why the subjugation of customary laws began to take root as colonial relationship evolved. Julie Evans while discussing the use of international law as tools of competition between imperial powers noted that non-indigenous laws were applied to "justify violence and discrimination against Indigenous peoples in order to dispossess them of their traditional lands."[52]

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[48] [1867] 17 R.J.R.Q. 75 (Quebec Sup. Ct.) affirmed as Johnstone v Connelly (1869), 17 RJRQ 266 (QB).
[49] *Connelly v. Woolwich*; Borrows, Legal Traditions supra note 2 page 18.
[50] R v. Mitchell, [2001] S.C.R. 911, 927; Borrows supra note 2 page 183
[51] Ibid
[52] Julie Evans, "Where Lawlessness is Law: The Settler-Colonial Frontier as Legal Space of Violence" (2009) 30 Aust Feminist LJ 3 at 4.

The subjugation of Indigenous laws will continue for many years until the constitutionalisation of Aboriginal rights in 1982 under section 35 of the *Constitution Act.*[53] Section 35 recognised the rights of Aboriginal peoples to self-determination, yet Manley-Casimir suggests that the instances where the legal traditions of Indigenous Nations were recognized by the Canadian courts after 1982 were those which are non-threatening to the status quo and the Canadian nation state.[54]For example, federal and provincial governments did not challenge the Spallumcheen Indian Band child welfare by-law outlining the Band's exclusive jurisdiction over Band children regardless of their place of residence;[55] Canadian law also recognised and adopted customary marriages and use of traditional processes for selecting Band and Council members.[56]

However, the state's recognition of Indigenous laws was possible because "these instances of jurisgenesis are seen as appropriate and non-threatening to the status quo and nation state's power."[57] Despite the existence of section 35, the courts recognised non-threatening laws yet they continued to reinforce the notion that recognition, appreciation and acceptance of Indigenous laws was mutually exclusive with maintaining state power.

Where Indigenous laws appear threatening, Canadian legal system enters into the battle mode by prioritising its laws. A clear example is land rights and Aboriginal title. An indication of the priority of Canadian state with regards to lands is clear in the fact that during land disputes the state tends to violently exercised its "exclusive jurisdiction" through police brutality; the Oka standoff and Ipperwash disputes are evidence of this tendency.[58] It also explains the terminology ascribed to Aboriginal title. Lindberg gives examples of the colonial impacts of Canadian legal language as for example, Aboriginal land rights are 'claims' which must be proven and citizenship rights of Indigenous peoples being a privilege that one must apply for.[59]

In many other ways, the supremacy of the Canadian law and language was imposed upon Indigenous peoples. For example, the 'point of contact' rule set by the Supreme Court of Canada in *Van der Peet*[60] completely attempted to change the landscape of Aboriginal rights as guaranteed by section 35. In that case, two men with valid native food fish licenses

[53] 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11
[54] Manley-Casimir supra note 14.
[55] Ibid.
[56] Ibid.
[57] Ibid, page 143.
[58]Ibid
[59] Lindberg supra note 1.
[60] [1996] 2 S.C.R. 507.

caught fishes near Chilliwack. Under the license, they were legally permitted to fish for food purposes only. One of the men brought the fish to his partner, Dorothy Van der Peet, a Stó:lō woman from British Columbia who then sold ten of the fishes to a non-Indigenous woman. Van der Peet was charged with illegally selling fish under a license intended only for food and ceremonial purposes. At trial, Van der Peet challenged the charges on the ground that section 35(1) of the *Constitution Act* protected her right to sell fish.[61]

Convicted by the magistrate, she appealed all the way to the Supreme Court of Canada. The SCC held that whilst the Stó:lō have the right to fish, this ancestral right does not include selling fish. The court established a new test for proving Aboriginal rights to wit that acts that constitutes Indigenous rights must be of a distinctive cultural element. Thus to constitute an Aboriginal right, an activity must be an element of a custom, practice or tradition forming an integral part of a distinct culture of the Aboriginal peoples.[62] The implication being that Indigenous peoples cannot claim their constitutional rights to their rights, customs and traditions which developed after European contact. By this very decision, the court stalled the further growth of the jurisprudence of Indigenous legal traditions that would have otherwise developed if the "magical moment of contact" rule had not been laid in Van der Peet[63]. Indigenous peoples have inherent rights which are not dependent on them asserting and proving that their actions are distinctive and existing pre-contact with the Europeans.

The SCC sadly followed this precedent in *R v. Pamajewon*[64] in which Anishinaabe First Nations of Eagle Lake and Shawanaga argued in favour of the inherent rights of Indigenous peoples to self-government, particularly in respect of the right to control gambling practices on reserves and the rights to self-regulate its communal economic activities. The Supreme Court held that the section 35 does not protect the right to gambling because gambling was not proven to be a distinctive culture of the two groups pre-contact. The Supreme Court by this decision defined what constitutes indigenous cultures – only pre-contact activities qualify as indigenous culture.[65] These decisions completely contradicted the ideal of self-determination which section 35 set out to achieve. Hinging peoples' rights and cultures on the moment of European contact implies that legal cultures are stagnant and that

[61] Ibid.
[62] Ibid.
[63] John borrows "Revitalizing Canada's Indigenous Constitution: Two Challenges". In UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws (Waterloo: Centre for International Governance Innovation, 2007) at 20.
[64] [1996] 2 S.C.R 821.
[65] Ibid.

Indigenous peoples are not permitted to evolve with changing times and the unique circumstances in which they find themselves. It connotes that Indigenous people are incapable of changing norms due to interactions with non-Indigenous legal system or responding to survival instincts.

As Manley-Casimir argues "Indigenous communities within Canada continue to redefine their normative worlds in ways that support their continued cultural existence. Both forms of jurisgenesis – the revival of the old legal traditions and the development of the new legal traditions in the face of the colonial experience – are equally valid forms of legal interpretation."[66] The laws are not static, if they were Canada ought to still be practicing laws in existence during the first arrival of Europeans. Laws evolve with changes in circumstances and to deny that Indigenous peoples' cultures must remain what they were at the point of first contact is an act of continued oppression. Similar to other legal systems, Indigenous legal system has the ability to self-evolve, to develop from one reality to another without being forced to so do by the laws. Aboriginal rights are sui generis – inherently different and incomparable with any other – its concepts may not be accurately translatable to non-Indigenous languages or context.[67] Thus, it must be understood within its own meaning and standards.

What then is the best framework for the implementation of indigenous laws? Manley-Casimir suggests incommensurability – the theory that two concepts are incomparable because there is no common standard for measuring them, and such should not be compared. The co-existence of both systems is not strained by competition.[68] Applying this to the competition between Indigenous and non-Indigenous legal systems, it may be true that it is difficult to situate Indigenous legal concepts within the language of Canadian law and that these legal systems are not easily translatable into non-Indigenous legal culture. However, Napoleon and Friedland believe that Indigenous legal traditions must be allowed to undergo critical analysis like the non-indigenous systems, they further argued that the notion of incommensurability indicates fragility.[69] It has also been suggested that Canadian legal system must adapt to and adopt legal pluralism in which Indigenous laws can thrive as its kind.[70] An argument against legal pluralism is the idea that its suggests a competition

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[66] Manley-Casimir supra note 14 page 145.
[67] John borrows and Leonard Rotman, "The Sui Generis Nature of Aboriginal Rights: Does it Make a Difference?" (1997) Alta L Rev 36 at 38.
[68] Manley-Casimir, supra note 11 page 159
[69] Napoleon & Friedland, supra note 7.
[70] Gordon Christie, supra note 22.

between different legal orders in which one nomos must prevail other.[71] To eliminate competition, Gordon Christie suggests cooperative federalism which will enable cooperative relations between Canadian governments and Indigenous authorities.[72]

4. Wet'suwet'en People and Coastal Gaslink Pipeline Project

The Wet'suwet'en (People of the Wa Dzun Kwuh River) are the Indigenous with an Athabaskan culture with relationship to the inland Dene groups to the, residing in an unceded territory in northwestern British Columbia.[73] The territory is comprised of 22,000 square kilometres which the people have lived on and used for thousands of generations.[74] They are a matrilineal society divided in clans, with each clan based on a matrilineal kinship groups called Yikhs.[75] Each clan exercises jurisdiction over some defined areas of the clan territory.[76] The right to the use of the land is considered as collective in terms of access to resources and food, ceremonial uses and economic pursuits generally; and ownership was viewed through the lens of responsibilities, rather than rights.[77] According to Daly,[78] prior to contact, the Wet'suwet'en people adopted migratory patterns in line with the season – they gathered food and supplies at villages and sites in the summer and hold ceremonies after which they return to their different yikhs for the winter season. The use of the lands by the clans is regularly validated through the feast of baht'lat, the Wet'suwet'en parliament and central governance institution.[79] The system of responsibilities is rooted in "yintahk", meaning "everything is connected to the land" a cultural belief that the people do not just live on the land, they belong to the land – they are inseparable from the land and everything connected with it.[80]

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[71] Geoffrey Swenson, "Legal pluralism in Theory and Practice" (2018) 20,3 *International Studies Review* at 438.
[72] Gordon Christie "Indigenous Legal Orders, Canadian Law and UNDRIP". In UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws (Waterloo: Centre for International Governance Innovation, 2007) at 48.
[73] Office of the Wet'suwet'en "Wet'suwet'en Titles and Rights: Regarding Canada Department of Fisheries & Ocean and Pacific Trails Pipeline" (2013) http://www.wetsuweten.com/files/PTP_FHCP_Response_to_DFO-25Nov13-Final.pdf [Office of the Wet'suwet'en].
[74] Ibid.
[75] Ibid.
[76] Office of the Wet'suwet'en, supra note 73 at 7.
[77] Ibid
[78] Richard Daly, *Our Box was Full: An Ethnography for the Delgamuukw Plaintiffs* (Vancouver: UBC Press, 2005).
[79] Office of the Wet'suwet'en, supra note 57 at 8.
[80] Office of the Wet'suwet'en, supra note 73 at 14.

4.1.Governance and Legal Structure of the Wet'suwet'en

The Wet'suwet'en practiced a decentralized system of government in which the yikhs congregate at the baht'lat to discuss collective decision on matters regarding the territory.[81] At the baht'lat, clan relationships and maintenance of the lands as well as inter-clan disputes are discussed and resolved.[82] Disputes over clan boundaries are typically presented at the baht'lat and negotiations over same are conducted and decided using traditional and oral histories – through features such as creeks, rivers, or lakes.[83]

Appointment of and the rights and responsibilities of clan hereditary chiefs are also validated during the baht'lat congregation.[84] Hereditary chiefs are selected while in the womb, by elder shamans and chiefs who may so decide after feeling an expectant mother's womb. [85]A child destined to be chief is groomed from thereon and instructed in the ways of the elders.[86] Succession rules include traveling into the bush to live and interact with the animals, learn their ways and upon return demonstrate the knowledge gained from the expedition.[87] At clan feasts and ceremonies, new chiefs are assigned their titles, robes and crests, conferring on them the authority associated with their office.[88] The role of the hereditary chiefs is "to ensure the territory is managed in a responsible manner, so that the territory will always produce enough game, fish, berries and medicines to support the subsistence, trade, and customary needs of house members."[89]

According to the office of Wet'suwet'en, "[T]he highest hereditary titles among the Wet'suwet'en are the twelve house chiefs. These twelve house chiefs own both fishing sites and distinct tracts of territory. The second highest titles or feast names are those of the twelve sub-chiefs who have important responsibilities for the administration of discreet parts of their House's territory."[90] This was the thriving governance structure prior to European contact.

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[81] Office of the Wet'suwet'en, supra note 73 at 8.
[82] Ibid.
[83] Matthew Sparke "A Map that Roared and an Original Atlas: Canada, Cartography, and the Narration of Nation" (1998) 83:3 Annals of the Association of American Geographers, https://doi.org/10.1111/0004-5608.00109.
[84] Office of the Wet'suwet'en, supra note 73 at 8.
[85] Office of the Wet'suwet'en "Governance: Becoming a Hereditary Chief" online: http://www.wetsuweten.com/culture/governance.
[86] ibid
[87] Ibid
[88] Office of the Wet'suwet'en, supra note 73 at 17.
[89] Office of the Wet'suwet'en, supra note 73, page 8.
[90] Office of Wet'suwet'en "House Groups" online: http://www.wetsuweten.com/culture/house-groups.

4.2.Elected Band Leadership System

Indigenous systems of governance came under attack from 1869 when Canada promulgated *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to the extend the provisions of the Act 31st Victoria, Chapter 42.*[91] Section 10 of the Act created the Band Council to govern Indian affairs. This imposed European styled elections to undermine hereditary and other traditional leadership structures.

The *Indian Act* retained the band councils to manage reserves, but they held no jurisdiction over traditional territories, these continued to be under the leadership of hereditary chiefs.[92] The system disrupted the political governance structures of many Indigenous Nations and disrespected the system which had been in place for thousands of years.

5. Wet'suwet'en Governance: Hereditary Law vs. Elected Band Councils

In 2012, LNG Canada approved the build, own and operate Coastal Gaslink project to TC Energy. After undergoing various additional negotiations, the construction project was publicly announced in October 2018.[93] According to the project website, the Coastal Gaslink project "will run approximately 670 km (416 miles) in length. The proposed pipeline will safely deliver natural gas from the Dawson Creek area of B.C. to a facility near Kitmat, B.C. where it will be converted to a liquid form by for export by LNG Canada."[94]

It appears that in a bid to evade the consultation process with the hereditary chiefs, Coastal Gaslink exploited the leadership structure created by the non-Indigenous legal system – the elected band council of the Wet'suwet'en Nation. It is important to note that the elected band councils are funded by the federal government,[95] meaning that when confronted between choosing between traditions or economics, they may be tempted to defend policies which are traditionally unacceptable.

Coastal Gaslink claimed it signed project agreements with all the 20 First Nations on the route of the pipeline including the Wet'suwet'en First Nation. The said agreement was signed by the elected band councils. The hereditary chiefs have asserted sovereignty over the

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[91] [Assented to 22nd June 1869].
[92] *Delgamuukw,* [1997] 3 SCR 1010.
[93] Coastal Gaslink, "A Pipeline to support the liquefied natural gas (LNG) industry" (15 February 2020), online: http://www.coastalgaslink.com/about/
[94] Ibid
[95] *The Indian Act (An Act Respecting Indians.)* R.S., 1951, c. I-5; Anthony Gatensby, "The Legal Obligations of Band Councils: The Exclusion of Off-Reserve Members from Per-Capita Distributions," (2004) Indigenous LJ 12.

unceded territory, as a result of which, the elected band council have no jurisdiction to enter into agreements that bind the Wet'suwet'en Nation. The Wet'suwet'en hereditary chiefs have asserted that their "free, prior and informed consent" was not obtained regarding the construction of the pipeline across their land.[96]

The hereditary chiefs asserted authority over the territory on the strength of *Delgamuukw v. British Columbia.*[97] The Gitxsan and Wet'suwet'en Nations hereditary chiefs had sought a declaration of Aboriginal title over 58,000 square kilometres in northwest British Columbia. At trial, the province of British Columbia counterclaimed on the ground that the two Nations had no right or interest in the territory. The chiefs supported their 'claim'[98] using oral evidence indicating use and possession of the lands in dispute, they pointed to their spiritual connection to the land including the feast hall which identifies their connection with the land.[99] The trial judge rejected the oral evidence, opining that any title to the claimed territory was extinguished when BC joined the confederation and declared the provincial government's right to unoccupied and vacant lands subject to the laws of the province[100]. The hereditary chiefs contested this decision up to the Supreme Court.

The Supreme Court held that "Aboriginal title is *sui generis,* and so distinguished from other proprietary interest, and characterised by several dimensions. It is inalienable and cannot be transferred, sold or surrendered to anyone other than the crown"[101] and that oral evidence is valid and must treated as equal to other forms of evidence.[102]

Departing from the *Van der Peet* decision, the court held that it is sufficient to show that the occupied land was integral to the Nations' cultures at the time of contact. To prove Aboriginal title, it must be shown that the claimants have sufficient, continuous and exclusive occupation of the lands. The court also held that traditional lands cannot be used in a manner which destroys that cultural value which was distinctive to the lands.[103]

The court also held that for government to infringe on Aboriginal title, it has an obligation to consult and provide fair compensation to the Nation.[104] The Court however

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[96] Office of the Wet'suwet'en, supra note 72, page 88.
[97] [1997] 3 S.C.R. 1010.
[98] The term is used loosely because the language of non-Indigenous legal system changed the rights of Aboriginal people to claims that needed to be asserted and proven.
[99] *Delgamuukw*, para 7.
[100] Ibid*,* para 34.
[101] Ibid, per Lamer C.J.
[102] Ibid, para 85-87.
[103] *Delgamuukw*, para 128.
[104] Ibid, para 168.

ordered a retrial as a result of deficiencies relating to the pleadings.[105] Despite the fact that a new trial never occurred, the principles set out in the case are clear, title to unceded territories resides in the First Nation able to demonstrate its connection to the lands. The principles laid out in *Delgamuukw* was reaffirmed and restated in *Tsilhqot'in Nation v. British Columbia.*[106]

The Wet'suwet'en hereditary chiefs relied on the principles laid out in *Delgamuukw* to assert their sovereignty over the lands and denounce the Coastal Gaslink project. They argued that the project will have adverse effects on the health and socio-economic conditions, physical and cultural heritage and the current traditional uses of the lands by the Wet'suwet'en Nation.[107] They further assert that despite the SCC's pronouncement in *Delgamuukw*, government and private companies have continued to take steps on unceded territory that are "[w]ithout good faith negotiation, treaties or agreement, consultation and accommodation, or free, prior, and informed consent."[108]

The chiefs established three camps along the roads (including the Unist'ot'en healing camp and cabin built on the exact location of the pipeline corridors)[109] in order to prevent pipeline workers from accessing the territory. These actions by the hereditary chiefs re-echoes Manley-Casimir when she wrote that "Indigenous peoples within Canada continue to resist the violence of the non-Indigenous legal system. They continue to assert, despite assimilative governmental policies and laws, unique visions of their normative worlds through adherence to legal traditions that reflect their cultural values. Through such resistance, Indigenous peoples challenge the non-Indigenous legal system's clan to authoritative interpretation."[110]

The authoritative interpretation of the non-Indigenous legal system was confirmed by RCMP's use of force in January 2019. Acting on an interim injunction obtained by Coastal Gaslink in 2018, the RCMP invaded the Gidumt'en camp and arrested 14 clan members.[111] As justification for the invasion, the RCMP released a statement which included the following paragraph:

> For the land in question, where the Unist'ot'en camp is currently located near Houston, BC, it is our understanding that there has been no declaration of

[105] Ibid, para 208.
[106] 2014 SCC 44
[107] Office of the Wet'suwet'en, supra note 72 page 89.
[108] Ibid.
[109] Unist'ot'en "Background of the Campaign", online: http://unistoten.camp/no-pipelines/background-of-the-campaign/.
[110] Manley-Casimir, supra note 12, page 156.
[111] Ibid.

> Aboriginal title in the Courts of Canada. In 1997, the Supreme Court of Canada issued an important decision, Delgamuukw v. British Columbia, that considered Aboriginal titles to Gitxsan and Wet'suwet'en traditional territories. The Supreme Court of Canada decided that a new trial was required to determine whether Aboriginal title had been claimed for these lands, and to hear from other Indigenous nations which have a stake in the territory claimed. The new trial has never been held, meaning that Aboriginal title to this land, and which Indigenous nation holds it, has not been determined.

This statement represents the interpretation that the non-Indigenous legal system chose to assign to *Delgamuukw*¸ and is a perfect example of the cultural nuance and unfamiliarity with Indigenous legal tradition that judges miss when making certain decisions, such as the injunction granted against the hereditary chiefs by Justice Marguerite Church of the British Columbia Supreme Court.[112] The Supreme Court decision in *Delgamuukw* recognized that more that "mere consultation" is required prior in respect of unceded territory, yet the court granted an injunction in the face of clear disregard for consultations with Wet'suwet'en Indigenous governance. In addition, RCMP's statement aligned with non-Indigenous legal system's assertion of power and authority.

Obviously, the Wet'suwet'en people are challenging the violence of the non-Indigenous legal system, but much more, it is not only a vision of an alternative future as projected by Indigenous legal systems, but one purportedly accepted by non-Indigenous legal systems. Nothing reiterates this more than the Yellowhead Institute report that found that 76 per cent of injunctions filed by corporations against First Nations were successful, 82 per cent of injunctions by First Nations against federal and provincial governments were denied and 81 per cent of injunctions filed against corporations by First Nations were also denied.[113] This suggests that not only do non-Indigenous legal system dominate and silence alternative legal forms by asserting state-law but that where the law recognizes Indigenous legal precedents as valid, it shackles them to the dominant legal system's language or framework thereby restricting the growth of Indigenous legal system.

Canada's continued denial of Indigenous peoples capacity to evolve was clearly obvious in Justice Church's ruling in favour of Coastal Gaslink's application for interlocutory

[112] *Coastal Gaslink Pipeline Ltd v. Hudson*, 2019 BCSC 2264.
[113] Yellowhead Institute "Land Back: A Yellowhead Institute Red Paper" (October 2019), online: https://redpaper.yellowheadinstitute.org/wp-content/uploads/2019/10/red-paper-report-final.pdf

injunction: "[T]he defendants may genuinely believe in their rights under Indigenous law to prevent the plaintiff from entering Dark House territory, but the law does not recognise any right to blockade and obstruct the plaintiff from pursuing lawfully authorised activities" [Emphasis added].[114] The judge was quick to accept and describe the actions of Coastal Gaslink as lawful but that of the First Nation as unlawful and not recognised in law. Part of the reasons adduced by the court was in relation to competing claims between the hereditary chiefs and the elected band councils and Wet'suwet'en jurisprudence on whom is entitled to make decisions on behalf of the people. The court admitted that the land was unceded and as such negotiations should be held with the recognised Indigenous Nations. Why the court elected to align with the band council's declaration of the benefits of the project and disregard hereditary chiefs' position on the danger of the project further confirms the priority of Canadian legal system.

The nuances Justice Church failed to recognise and acknowledge is the fact that the elected band council is a phenomenon that is unknown to Indigenous legal system, it is not necessarily in alignment with the values inherent in the traditional governance structure of Indigenous nations. While it is possible that the capacity of Indigenous legal system to evolve may have translated to a system similar to western form of electoral system for leadership selection, the fact that the band councils are a creation and imposition of Indigenous legal system violates the sovereignty and self-determination of Indigenous peoples.

It may not be right to assert that band councils do not represent their Nations' interest, but they are conflicted given their connection to the non-Indigenous legal system. Nothing in the *Indian Act* empowers band councils to make decisions in respect of unceded territory, its jurisdiction appears limited to the reserves. The band council system is under the firm reach of the government, who can disband, amalgamate, or constitute new bands,[115] and declare testamentary documents of First Nations on reserves void.[116] The band council's conflict of interest was clearly outlined in *Coastal GasLink v Hudson* :"[T]he elected Band councils assert that the reluctance of the Office of the Wet'suwet'en to enter into project agreements, out of concern that it might negatively impact their claims to Aboriginal title, placed the responsibility on the band councils to negotiate agreements."[117] Given this tension between the band councils and the hereditary chiefs, Justice Church without questioning the grounds

[114] *Coastal Gaslink v Hudson*, para 225.
[115] *Indian Act*, section 17.
[116] *Indian Act*, section 45.
[117] Coastal Gaslink v. Hudson, supra note 82.

on which band councils can legally make decisions in respect of unceded territory suggested that it is questionable whether hereditary protocol governance is appropriate authority for decisions which affect the Wet'suwet'en Nation.[118] In granting the injunction, Justice Church appears to have suggested that the band council is an appropriate authority for making decisions in respect of unceded territory, in furtherance of the agenda of the non-Indigenous legal system.

6. Conclusion

Admittedly, Indigenous legal systems have suffered and continue to suffer from years of colonialism.[119] However the renewed clashes with the non-Indigenous legal system will increase critical engagement and analysis of the strength and depth of Indigenous laws and traditions by both Indigenous and non-Indigenous legal scholars. It is essential to move Indigenous legal traditions from being viewed as "over-simplified pan-Indigenous explanations, often couched in terms of 'values' or 'worldviews'" to being taken seriously as laws can be debated, analysed and contested .[120] How can this be achieved? Training to judges to understand Indigenous traditions may be insufficient because it is difficult for non-Indigenous judges to understand the nuances and to separate themselves from their inherent biases and the reliance on a legal tradition informed by their own history.

Lindberg suggests the development of a collective critical consciousness of Indigenous laws. She believes that it is difficult to achieve a strong system so long as the English language remains the language of interpretation of Indigenous laws. As such a common language may need to be developed which "defines and situates our nations" and "can strengthen the ways in which we address our critical existence".[121] It is unclear whether this means an actual language or some language structure that allows for collective interpretation of Indigenous traditions. Napoleon and Friedland suggest using tools of legal analysis and synthesis which will allow for the building of the expertise required for developing and implementing Indigenous laws. They assert that Indigenous legal system must be open to challenge so they can be more critically analysed like other legal traditions.

These are great approaches, however in addition to that, while these approaches are being tested or put into practice, Indigenous people must continue to use the tools of the non-Indigenous legal system to challenge it and to promote the values of Indigenous legal

[118] Ibid, para 134.
[119] Napoleon & Friedland, supra note 7 page 740.
[120] Ibid.
[121] Lindberg supra note 1 page 230.

tradition. The continued agitation by Indigenous Nations such as the Wet'suwet'en First Nation brings these issues to national consciousness.