

AYOOK: GITKSAN LEGAL ORDER, LAW, AND LEGAL THEORY

by

Valerie Ruth Napoleon  
LLB, University of Victoria, 2001

A Dissertation Submitted in Partial Fulfillment  
of the Requirements for the Degree of

DOCTOR OF PHILOSOPHY

in the Faculty of Law

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## **Supervisory Committee**

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Dr. John Borrows, Faculty of Law  
**Co-Supervisor**

Dr. John McLaren, Faculty of Law, Professor Emeritus  
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Hamar Foster, Faculty of Law  
**Faculty Member**

Dr. Michael Asch, Department of Anthropology, Professor (Limited Term)  
**Outside Faculty Member**

Dr. Wendy Wickwire, Department of History, School of Environmental Studies  
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## Abstract

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Conflict is an integral and necessary aspect of human societies. The challenge is not to prevent conflict or even to resolve it, but rather, to effectively manage it so that it does not paralyse people. Historically, Gitksan society managed conflict through their legal traditions and governance practices, and I argue that it is the undermining of this conflict management system that has generated the pervasive conflicts among the Gitksan people today. While it is not possible to attribute the current internal conflict experienced by the Gitksan to the major legal action of *Delgamuukw* (inclusive of the several decades of preparation, levels of litigation and court decisions, and political aftermath), it was, and arguably still is, a very powerful force and influence in the lives of the Gitksan people. The extensive present-day internal conflicts in Gitksan communities must be reflexively appreciated within the complex of power relationships between the Gitksan people and Canada, and between Gitksan law and Canadian law. In Canada and beyond, *Delgamuukw* and the Gitksan were (and still are) part of a much larger continuum of political, social, and economic change as well as local economic shifts involving natural resources.

The Gitksan people's legal traditions enabled them to effectively manage themselves in a complex, decentralized, non-state society. Gitksan oral histories and other records such as the songs, crests, kinship roles, and traditions contain implicit and explicit law both as

content and in their architecture as cognitive units that enable the sorting of information and dynamic intellectual processes of legal reasoning by analogy and metaphor. Gitksan legal traditions include intentional and deliberative collective processes to change law over time, transform implicit law into explicit law, and create legal precedent and a formal memory archive. These legal traditions are integral to the Gitksan people's ongoing political perseverance and are the basis for the enduring connections to their territories. Moreover, the legal traditions are part of the dynamic political and social change processes that enable the Gitksan to be Gitksan in the past as well as in the present – complete with all the contested, pragmatic, entangled, contemporary forms of Gitksan politics.

A deeper, critical, and more complex appreciation of Gitksan legal traditions is necessary if they are to be practically useful to the Gitksan people in today's world for application to today's issues. I have taken the position that Gitksan conflict management processes must be grounded within a substantive and critical articulation of Gitksan laws and legal practices, legal order, and legal theory. I propose a Gitksan legal theory that derives from a substantive treatment of the legal order, laws, and law cases. I draw resources from both western and indigenous legal theorists to explore, describe, and analyse Gitksan legal traditions. My proposed Gitksan legal theory comprises a broad overview, general principles, normative principles, and general working principles. While my work is based on a number of Gitksan law cases, my theoretical approach may be extrapolated to other non-state, decentralized peoples.

## Table of Contents

Supervisory Committee	ii
Abstract	iii
Table of Contents	v
List of Tables	viii
List of Figures	viii
Acknowledgments	ix
Dedication	x
Glossary of Gitksan Terms	xi
<b>CHAPTER 1</b>	<b>Beginning</b>
	<b>1</b>
1.1	Introduction
	1
1.2	Gitksan Primer
	4
1.3	Background
	10
1.4	Chapter Briefs
	11
1.5	Chapter Conclusion
	14
<b>CHAPTER 2</b>	<b>Methodology</b>
	<b>16</b>
2.1	Introduction
	16
2.2	Placing My Research in the Scholarship on Indigenous Legal Traditions
	24
2.3	Drawing From Legal Theory Scholarship
	38
2.4	My Learning – Research Process
	40
2.5	Chapter Conclusion
	44
<b>CHAPTER 3</b>	<b>It is in the Earrings: Articulating Gitksan Law in the Trial Transcripts</b>
	<b>49</b>
3.1	Introduction
	49
3.2	Trial Transcripts
	53
3.2(a)	Coherence
	53
3.2(b)	Everything is Law
	62
3.2(c)	Law Embedded in Narrative
	67
3.2(d)	Historical Duress
	72
3.2(e)	Gitksan Society as Dynamic
	91
3.3	Selected Gitksan Cases
	93
3.3(a)	Legitimacy of Authority
	96
3.3(a)(i)	<i>Stanley Williams, Gwis Gyen</i>
	99
3.3(a)(ii)	<i>Pete Muldoe, Gitluudahlxs</i>
	101
3.3(a)(iii)	<i>Edith Gawa, Yahl</i>
	102
3.3(a)(iv)	<i>Mabel Forsythe, Wet'suwet'en</i>
	103
3.3(a)(v)	<i>Roddy Good, Ax gwin desxw</i>
	104
3.3(a)(vi)	<i>General – Feast Attendance</i>
	106
3.3(b)	<i>Xsiisxs (Compensation/Cleansing)</i>
	107
3.3(b)(i)	<i>Accidental Death by Motor Vehicle</i>
	110
3.3(b)(ii)	<i>Olive Ryan, Hanamuxw</i>
	110
3.3(b)(iii)	<i>David Wells, Sakum Higookw</i>
	111
3.3(b)(iv)	<i>Yagosip</i>
	112

	3.3(b)(v)	<i>Dim Xsaan</i>	113
	3.3(b)(vi)	<i>Art Mathews, Tenimgyet</i>	114
	3.3(b)(vii)	<i>Samuel Brown, House of 'Niikyap</i>	115
	3.3(b)(viii)	<i>House of 'Wiilitxsw</i>	116
	3.3(b)(ix)	<i>Art Mathews, Tenimgyet</i>	118
	3.3(b)(x)	<i>Bilaatx</i>	119
	3.3(b)(xi)	<i>Gubihl gan</i>	121
	3.3(b)(xii)	<i>Yal and Guxsan</i>	123
	3.3(c)	Disputes	124
	3.3(d)	Corrections in the Feast Hall	128
	3.3(e)	Ts'imil Guut	131
	3.3(f)	Summary – Law Case Table	137
3.4		Glimmers of Structure: Gitksan Legal Order	146
	3.4(a)	Embedded and Implicit Law	147
	3.4(b)	Internal Tensions	148
	3.4(c)	Focus on Compensation versus a Focus on Guilt	156
	3.4(d)	Public Witnessing and Accountability	160
	3.4(e)	Cosmology and Concept of Self: Beneath Gitksan Law	164
	3.4(e)(i)	<i>Reincarnation</i>	165
	3.4(e)(ii)	<i>Relationship to Territories</i>	168
	3.4(e)(iii)	<i>Relationship with Non-Human Life Forms</i>	175
	3.5	Chapter Conclusion	177
<b>CHAPTER 4</b>		<b>Learning from the Interviews</b>	<b>181</b>
	4.1	Introduction	181
	4.2	Interviews	184
	4.3	Backdrop	186
	4.4	My Expectations	190
	4.5	Conflict – Past and Present	196
	4.6	The Nature of the Gitksan Legal Order	213
	4.7	Analysis	220
	4.7(a)	Maps	222
	4.7(b)	Reification of the House as a Corporation	225
	4.7(c)	Resistance to Hierarchy	230
	4.7(d)	On the Land	234
	4.7(e)	Larger Political Project	235
	4.7(f)	Turning to the Canadian Legal System	236
	4.8	Chapter Conclusion	237
<b>CHAPTER 5</b>		<b>Gitksan Legal Theory</b>	<b>240</b>
	5.1	Introduction	240
	5.2	Drawing from Positivist Legal Theory	245
	5.3	Law from Social Interaction	261
	5.3(a)	Implicit Gitksan Law	264

	5.3(b) Implicit Law to Explicit Law	270
	5.3(c) Agency in the Gitksan Legal Order	281
	5.4 Resources from Indigenous Legal Scholars	285
	5.5 A Gitksan Legal Theory	294
	5.5(a) Overview	295
	5.5(b) General Concepts	301
	5.5(c) Normative Principles	306
	5.5(d) General Working Principles	308
	5.6 Chapter Conclusion	310
<b>CHAPTER 6</b>	<b>Returning to the Research Questions</b>	<b>313</b>
	6.1 Introduction	313
	6.2 Research Question: Conflict Management Findings	317
	6.3 Main Research Question: Indigenous Articulation Theory	324
	6.4 Case Study: Suu Dii	329
	6.5 Conclusion	332
<b>APPENDIX A</b>	<b>Information Handout</b>	<b>334</b>
<b>APPENDIX B</b>	<b>Interview Guide</b>	<b>336</b>
<b>APPENDIX C</b>	<b>Consent Form</b>	<b>337</b>
<b>APPENDIX D</b>	<b>Maps</b>	<b>339</b>
	D-1 Provincial Map	339
	D-2 Gitksan Reserves	340
	D-3 Gitksan House Territories	341
	D-4 Wet'suwet'en House Territories	342
<b>BIBLIOGRAPHY</b>		<b>343</b>

**List of Tables**

Summary – Law Case Tables	137 - 145
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**List of Figures**

D – 1 Provincial Map	339
D – 2 Gitksan Reserves	340
D – 3 Gitksan House Territories	341
D – 4 Wet’suwet’en House Territories	342

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## **Dedication**

To Will for being Will and for everything,  
Tamara Olding for the brightness she brings to my life,  
Tamara, River, and James because, and  
all my family – craziness and all.

## Glossary of Gitksan Terms

*adaawk* – formal ancient collectively owned oral history

*a hla gansxw* – broke the Gitksan law

*a luu giget* – Gitksan people

*amet hexw* – spiritual power involved with singing the limx oo’y; spiritual power; life is the good spirit (*amet* “good” + *hexw* “spirit”)

*am gigyet* – House members; commoners, followers, warriors, workers, and helpers

*am gosinxw* – gifts of food and money to absent chiefs at a feast

*amnigwootxw* – privilege to use territories belonging to the father’s House

*an jok’* – camp

*an leetiks* – territorial markers; “place on firmly-placed”<sup>1</sup>

*an luu to’os’t* – “storage area” (metaphor for territories)

*anskiiyee* – succeeding generations

*antamahlaswx* – stories and collective properties of all Gitksan (as opposed to the *adaawk*)

*aye’* – voluntary contribution by grandchildren to grandfather’s feast

*ayook* – law, custom, or precedent

*ayuuk* (*ayuk*) – crests, images that commemorate the historical events of the lineage and that are recorded on the poles, house fronts, chiefly regalia, and other items

*bax magam gyet* (*baxmaga*) – pole-raising feast; to erect upwards

*begwinsxw* – feast before cremation

*daxgyet* – chief’s power and authority, strength of a people

*dii ye’m get* –funeral

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<sup>1</sup>Susan Marsden, “Northwest Coast Adawx Study” in Catherine Bell & Val Napoleon, eds, *First Nations Cultural Heritage and Law: Case Studies, Voices, and Perspectives* (Vancouver: UBC Press, 2008) 114 at 118 [Marsden].

*dim k'aphl wilp* – add to the house through adoption

*ent'im nak* – obligatory contribution to feast by spouses of hosting clan (to show support of spouses)

*ganeda* – frog clan (west)

*gawagani* – peace settlement feast

*gil k'al gimks* – cleansing feast to “wipe off the ocean” after falling into the sea

*ginitxw* – the feast held for girls upon reaching puberty

*gisgaast* – fireweed clan, linked to Tsimshian killerwhale clan

*Gitanmaaxs* – people who harvest salmon by torchlight

*Gitksan* – people of the River of Mist

*gwiikxw* – groundhog hides that came from the territory (now money) and demonstrate how a House fulfills its legal obligation to take care of and protect their territory

*guu'l'* – small

*guuxs ghagal gimxs* – money paid to “clean your blanket” after fighting

*guuxs tso'oxsxw* – money paid to “clean your blanket” after falling in the water

*gyetim gan* – painted or carved wooden territory markers

*halayt (halait)* – dance with regalia and eagle down by which the chief publicly affirms that he is properly prepared and trained, mature and thoughtful, and able to fulfill his legal and political responsibilities; also spiritual relations that are not connected with territory and crests

*haldim guutxws* – shame or cleansing feast

*ha'nii tookw* – banquet table, table (metaphor for territories, denotes inclusivity) also *an t'ookxw*

*ha'wehbxws* – onset of female puberty and ritual retreat

*hawaal* – obligatory contribution of money, goods, or feast food to one's own clan's feast

*hla ga kaaxhl simoogit* – wing chiefs

*hlihlingit* – slaves

*hlgimadaa sook* – stone (crest) figure at top of a pole

*kaltsap (galtsap)* – village

*kuuba wilxsihlxw* – (plural *hlguwilksahlxw*) member of the royalty class; child of two chiefs

*lax gibuu* – wolf clan

*lax gigyet* – young chiefs

*lax seel* – eastern frog clan

*las skiik* – eagle clan

*lax yip* – House territory

*limx oo 'y* – memorial song

*nax nox (naxnok, noxnok, naxnox)* – spiritual powers, supernatural force. “The power in the *naxnox* name is that of the chief who tames these anti-social forces. Taming is not the same as elimination, however, *naxnox* performances acknowledge the ever-present reality of anti-social forces and the need for the spiritual power of the chief to control them.”<sup>2</sup>

*n'id an luut t'ip magit* – giving of territory for compensation

*niid'nt* – guests at a feast

*'nii yuuwit* – the privilege to use territories belonging to the father's House; also the law that governs the crossing of someone else's territory

*'nii dil* – the House on the father's side in the opposite clan

*niid'nt* – feast guests

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<sup>2</sup> *Ibid.* at 122

*p'teex (pdeek)* – clan

*sa gimk ihlee'e* – feast to “wipe your blood off the street” after a motor accident

*sgano* – weave of reciprocal relationships forming the whole of Gitksan society that serves to maintain the legitimacy and therefore the authority of the House

*sihlguuhsxw diit* – adoption of an adopted individual (usually a child) into the House of the adopting parents

*simoogit* (pl. *simgigyet*) – House chief

*Simoogit Laxhagii* – (the) Creator

*sitx'asxw* –paying back (of a debt)

*sto'wilp* (*sto'owilp*) – following an amalgamation two Houses, the structure of one House survives inside another. If the amalgamated House divides into two at a later time, it will divide along the *sto'wilp* lines.

*suuwiiis'wen* – literally “blowing him/her out of the feast hall”

*t'imi'it* – certain berries forbidden to females during puberty retreat

*t'its* (*tiits*) – chief’s ambassadors to deliver invitations to the feast

*ts'ilimdoogam nidiit* – adoption of a person for whatever reason

*ts'imil guut* – bringing in one’s own (from *ts'im* “inside something” + *guut* “to take something away from someone”)

*ts'imil guudin ts'im wilp* – to take a person into a House (adoption processes for special situations)

*ubin* – pregnant

*umsuwah* – white person

*uun ts'iits* – supernatural being

*wam gyat* – male or female wing chiefs that are in line for a high chief’s name

*wilksi* ‘*witxw* (*wilksi leks*) – paternal side of a House; paternal relatives through the father’s House and clan

*wil’naat’ehl* (*wil’nat’ahl*) – kinship relations through the matrilineal House with closely aligned House groups in the same clan

*wil na tihl taahl* – group of sub-chiefs who help chief manage territorial resources

*wilp* (plural *huwilp*) – House (See section 1.2, Gitksan Primer.)

*xaats* – intra-clan marriage

*xalyax lax yip* – ownership of territories, i.e., having jurisdiction of a land and the authority of that land

*xsan* – river

*x’miyeenasxw* – “smoke feast” at which funeral plans are announced to House members

*xsmayasxw* – feast put on for village by successful hunter on his return

*xsiisxw* – system of compensation including the feast. The Gitksan system of compensation is known as *xsiisxw*, in which one House relinquishes “wealth, names, crests or territory to repay an offence committed against another House. The amount paid is more gauged to settle the disquiet felt by the other party than to replace the lost value.”<sup>3</sup>

*yuugilatxw* – law governing access of non-members to a House’s territory

*xwtsaan* – carved totem pole. The crests (*ayuuk*) are the material representation of the *daxgyet* and the *adaawk* are recorded on the poles which are planted or rooted in the territory and serves to tie the lineage with the land.<sup>4</sup>

*ye’* – grandfather

*yukw* – “The feast, or *yukw*, is the institution through which the people formalize their social, political, and legal affairs. All acquisition and inheritance of territory, the declaration of formal access rights, and the formation of marriage and trade alliances are validated and witnessed at the feast. The *yukw* is hosted by the lineage wishing to conduct the business and is assisted by related lineages. Members of unrelated lineages attend as guests, who reciprocate their hosts’ generosity by witnessing that their

<sup>3</sup> Richard Overstall, “Encountering the Spirit in the Land: ‘Property’ in a Kinship-Based Legal Order” in John McLaren, Andrew R. Buck & Nancy E. Wright, eds., *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2004) 22 at 40 [Overstall].

<sup>4</sup> Marsden, *supra* note 1 at 116.

business is conducted legitimately. The witnesses' roles and degrees of responsibility depend on their relationship with the host group. There are many types of feast, each with the same basic structure as the yukw but tailored to a specific legal function."<sup>5</sup>

*yuugwilatxw* – law by which a House may grant access privileges to territory to a husband

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<sup>5</sup> Overstall, *supra* note 3 at 28.

## CHAPTER 1

### Beginning

#### 1.1 Introduction

According to James Boyd White, one of the fundamental desires human beings have is “to imagine the world, and ourselves within it, in a coherent way, a way that will make possible meaningful speech and action”.<sup>1</sup> This desire for meaning is about collectively and individually locating ourselves in a “coherent imagined universe” without which “there can be no justice, and that is what the law promises us above all”.<sup>2</sup> The imagined coherent universe within which meaningful speech and action is possible in Gitksan society is created, at least in part, by its legal traditions. The conceptual undergirding for this research project is about pragmatically explicating legal traditions in the coherent universe that is imagined by the Gitksan. However, lest we become conceited, White reminds us that

[o]f course no text does this perfectly, just as none of us can do it perfectly. To be able to imagine the world and its inhabitants in a coherent and bearable way is a central desire of the human mind, yet it is perhaps never quite achieved. Even at the moments when we come closest to success there is often an element of pathos and failure.<sup>3</sup>

I use the term legal tradition in the broadest sense, to mean “a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and

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<sup>1</sup> James Boyd White, *Living Speech: Resisting the Empire of Force* (Princeton: Princeton University Press, 2006) at 101.

<sup>2</sup> *Ibid.* at 102.

<sup>3</sup> *Ibid.* at 101.

about the ways law is or should be made, applied, studied, perfected, and taught.”<sup>4</sup> The Gitksan legal traditions include all of those intellectual elements contained in Merryman’s definition as well as the full complex that is a legal order with implicit and explicit laws, collective legal reasoning practices, oral histories (*adaawk* and *antamahlaswx*), law cases and precedent (*ayook*), public legal venues, legal norms and obligations, legal relationships and authorities, and songs (*limx oo’y*) and crests (*ayuuk*).

Following Merryman’s lead, it is possible to conceptualize “a Gitksan legal tradition” that broadly encompasses the history and attitudes about the nature of law, the ideas about the role of law in Gitksan society and as part of governance, the proper structure and operation of the Gitksan legal order, the many ways that law is in the world, and the ongoing contestation about the way law should be made, applied, studied, perfected, and taught. However, for my purposes herein, while there is a Gitksan legal tradition in the broadest sense, such a conception contains multiple constellations of legal traditions that are reflective constant change through time and the many specific forms of legal traditions that comprise areas of Gitksan law and practice. (Unless I am referring to the overall Gitksan legal tradition, I use the plural throughout this study.) Within the larger umbrella construct that is the Gitksan legal tradition and forming part of it, is the Gitksan legal order –the structure and composite parts of law captured at any point in time. The legal order imagined here includes areas of law, types of law, territoriality, processes and procedures,

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<sup>4</sup> John Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, 2nd ed. (Stanford, CA: Stanford University Press, 1985) at 1, quoted in John Borrows, *Canada’s Indigenous Constitution* (forthcoming in 2009) at note 7. In contrast to Roderick A. Macdonald and Jason McLean, I do not interpret Merryman’s definition of legal tradition to be limited to an unchanging institution – “consisting of ‘frozen answers to frozen questions’”. Roderick A. Macdonald & Jason McLean, “No Toilets in the Park” (2005) 50 McGill L.J. 721 at 729.

authorities, and organization of capacities, obligations, roles and responsibilities through the kinship system.

My overarching goal in this research project is to articulate and theorize Gitksan legal traditions in a way that is both practical and useful to Gitksan people today. Gitksan legal traditions have changed, as all legal traditions must do, but this does not render them inauthentic according to some reductive or retrospective standard. In this research, I situate Gitksan society within and in relation to historic changes and surrounding contemporary power dynamics, not outside of them.<sup>5</sup> My theoretical approach includes an appreciation of indigenous social change that is capable of encompassing and reflecting the “pragmatic, entangled, contemporary forms of indigenous cultural politics.”<sup>6</sup> In other words, Gitksan people are Gitksan in today’s world – enduringly connected to their land and history, and inclusive of all their experiences and societal changes over time.

The past matters to people and is necessary to the future. In part, this research project is about finding and exploring the connections between the ancient Gitksan legal traditions, including oral histories (*adaawk*), with present-day forms, expressions, practices, and applications of Gitksan law. In this chapter, I will first provide a small Gitksan primer to help orient the reader to the following chapters. A glossary of Gitksan terms is also provided at page *xi* above. Second, I will provide a short background to this research project. Finally, I will briefly outline the main ideas of each chapter.

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<sup>5</sup> The work of James Clifford provides a useful starting place for these discussions. See James Clifford, “Indigenous Articulations” (2001) 13:2 *Contemporary Pacific* 467 at 473 [Clifford, “Articulations”].

<sup>6</sup> *Ibid.* at 472. Similarly, Sally Engle Merry writes, “As we engage in careful historical study, we throw off the notion that the pasts of traditional societies were unchanging.” Sally Engle Merry, “Legal Pluralism” (1988) 22:5 *Law & Soc’y Rev.* 869 at 870. While Clifford and others have helped to create the academic space for indigenous articulations, the work before the Gitksan and other indigenous peoples is to figure out what to do with the pragmatic, entangled, contemporary forms of politics – in real life.

## 1.2 Gitksan Primer

Along with the Nisga'a and the Tsimshian, the Gitksan are one of three closely related northwest coast peoples in British Columbia that form the "Tsimshian". These three groups share a common ancient heritage, and there are many similarities between their cultures and languages.<sup>7</sup> The Gitksan's non-Tsimshian neighbours include the Wet'suwet'en, Carrier, Tahltan, and Sekani peoples. As with other indigenous peoples, the Gitksan continuously interact with their neighbours through marriage, adoption, trade, and historically, sometimes with war. The cosmology of the Gitksan informs Gitksan legal traditions, and is briefly described here by Richard Overstall:

The relationship Gitksan people have with their world is complex and multi-dimensional. At its heart is the power created by fusing the spirit of a reincarnating human line with the spirit of a specific area of land – a partnership in which both the human and the non-human parties have reciprocal obligations and privileges.<sup>8</sup>

The basic conceptual political, social, economic, and legal unit in Gitksan society is the House (*wilp*). Each Gitksan person is born into his or her mother's House, a matrilineal kinship group of around 150 persons who share a common ancestry.<sup>9</sup> Historically, when a House had too few members to fulfill its Feast (*yukw*)<sup>10</sup> obligations and maintain itself

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<sup>7</sup> Susan Marsden, Margaret Anderson & Deanna Nyce, "Tsimshian" in Paul R. Magosci, ed., *Aboriginal Peoples of Canada: A Short Introduction* (Toronto: University of Toronto Press, 2002) 264 at 264.

<sup>8</sup> Richard Overstall, "Encountering the Spirit in the Land: 'Property' in a Kinship-Based Legal Order" in John McLaren, Andrew R. Buck & Nancy E. Wright, eds., *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2004) 22 at 31 [Overstall, "Encountering"]. There a number of spellings for Gitksan, e.g., Gitksan, Gitsen, etc. Richard Overstall was employed as the evidence coordinator during the *Delgamuukw* preparation and trial. Overstall is currently a lawyer with a law practice in Smithers, BC.

<sup>9</sup> *Ibid.* at 32-33. Today, Houses range in size from 20 to more than 200 people, but an optimum size for a House is about 30 families or 150 people. Historically, there were political, legal, and social pressures placed on under-populated Houses through the Feast hall and an extensive body of adoption law enables Houses to manage their population size (see chapter 3).

<sup>10</sup> Overstall, "Encountering", *supra* note 8 at 28. "The feast, or *yukw*, is the institution through which the people formalize their social, political, and legal affairs. All acquisition and inheritance of territory, the declaration of formal access rights, and the formation of marriage and trade alliances are validated and witnessed at the feast. The *yukw* is hosted by the lineage wishing to conduct the business and is assisted by related lineages. Members of unrelated lineages attend as guests, who reciprocate their hosts' generosity by witnessing that their business is conducted legitimately. The witnesses' roles and degrees of responsibility

economically, it would amalgamate with a closely aligned House or adopt adult members (see chapter 3).<sup>11</sup> Conversely, when a House became too large, it would divide into two, usually with a wing chief declaring a distinct House with territories, crests and songs of its own.<sup>12</sup> One of the consequences of colonial disruption has been that this effective House management strategy is no longer employed and, arguably, this has served to generate present-day conflicts among the Gitksan.<sup>13</sup> From another perspective, legal scholar Richard Overstall argues that post-contact disruption has meant that “the number of House groups that exist in Gitksan society is still settling out, but since closely related Houses always cooperate, the actual tally is of little consequence in the larger scheme. A chief may allow temporary access to resources in the territories of his or her House members to members of other Houses. The more closely the two Houses are related and have thus shared critical historical moments, the more readily this may be granted”. However, the problem is that some of the new political and economic currencies generated by the Houses and the chiefs’ positions are not shared. Other problems are created by the increasingly autonomous and less consultative, less relational reconceptualization of the House groups. These issues are further expanded in the following chapters

A person’s House membership serves as his or her terms of reference in the kinship complex. The term “House” originates from the historic longhouses, although members of the same House did not actually live under the one roof. Instead, House members were and

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depend on their relationship with the host group. There are many types of feast, each with the same basic structure as the yukw but tailored to a specific legal function.” The yukw is sometimes referred to outside Gitksan circles as the *potlatch*.

<sup>11</sup> *Ibid.* at 33. A third, rarer option is for “a House [to] adopt an adult from an unrelated House straight into a chieftainship...until younger members of the lineage are old enough to take over”.

<sup>12</sup> *Ibid.* at 34. Some records of such divisions and amalgamations of Houses are maintained in the oral histories.

<sup>13</sup> *Ibid.*

still are widely scattered by marriage, kinship relations, and occupation. House members have both rights and responsibilities in other Houses through their spouses, paternal relations, and mother's paternal relations. It is the House that is the territory – and fishing site-owning entity.

Each House has the legal and political responsibility to maintain its power relationship, its *daxgyet* – the fundamental relationship between the House and the land. There is no higher political or legal authority than the House and there are ongoing consultative processes that work horizontally between House groups. Each Gitksan House belongs to one of the four larger clans (*p'teex*) which share a broader history – the *ganeda* (frog),<sup>14</sup> *gisgahast* (fireweed), *lax gibuu* (wolf), and *lax skiik* (eagle). The number of villages has fluctuated as a result of disease and changes to the economy, transportation and settlement patterns, and shifting religious alliances.<sup>15</sup> However, in recent history the number has decreased and there are currently six Gitksan villages: Gitanmaax, Kispiox, Glenvowell, Gitsegukla, Gitwangak, and Gitanyow.<sup>16</sup> Glenvowell was created by religious converts during the late 1800s. Please see the territorial maps attached as Appendix “D” (pages 339-342).

Each House owns and has authority and responsibility for a number of chiefly names – a head chief (*simoogit*) name and wing chiefs (*hla ga kaaxhl simoogit*) names.<sup>17</sup> The names form part of the intellectual property of each House and each name indicate the status of the members in the House. When an individual dies, his or her name returns to the

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<sup>14</sup> In the eastern villages, the frog clan is called *lax seel*.

<sup>15</sup> See generally Erica Ball, *Using Adaawk* (M.A. Thesis, University of Northern British Columbia, 2002) [unpublished].

<sup>16</sup> Gitanyow did not formally join the *Delgamuukw* legal action as a plaintiff, but supported the case, and a number of the witnesses that testified were from Gitanyow Houses.

<sup>17</sup> Each House has an inventory of names that it owns and that are assigned to its members.

House and the House may assign it to another House member. An individual may pass through a number of names before attaining a higher ranking name. When a chief dies, the name is usually immediately passed on to the person in line for the name.<sup>18</sup> A House also has independent *halayt*, spiritual relations that are not connected with territory and crests. The chiefs bring these spiritual relations to life by their *nax nox* performances at the Feasts. The *nax nox* performances are considered property of the House<sup>19</sup> and the chiefly names are infused with specific *nax nox* powers that become part of the chiefs who hold them.<sup>20</sup>

There are two forms of oral histories that I write about in this research project.<sup>21</sup> First, the *adaawk* (collective oral history) is a formal and primary Gitksan intellectual institution that each House owns. It is the *adaawk* that links each House to its territories and establishes ownership of the land and resources. The *adaawk* tell of the origins and migrations of groups to their current territories, explorations, covenants established with the land, and songs, crests, and names that result from the spiritual connection between people and their land.<sup>22</sup> Second, the *antamahlaswx* are considered to be the stories and

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<sup>18</sup> There is usually an ongoing internal competition for the chiefs' names in the Houses by the mothers who want to secure the names for their children. Succession of the head chief name can be contested (see chapter 4).

<sup>19</sup> Overstall, "Encountering", *supra* note 8 at 29.

<sup>20</sup> Susan Marsden, "Adawx, Spanaxnox, and the Geopolitics of the Tsimshian" (2002) 135 BC Studies 101 at note 8. "The chief, in controlling one of these forces, takes on its name as one of his own. If the person taking a *naxnox* name is not sufficiently strong, the spirit force in the name controls him and he himself becomes restless, thoughtless, or stupid." Susan Marsden, "Northwest Coast Adawx Study" in Catherine Bell & Val Napoleon, eds., *First Nations Cultural Heritage and Law: Case Studies, Voices, and Perspectives* (Vancouver: UBC Press, 2008) 114 at 121 [Marsden]. Susan Marsden was an expert witness on oral histories on behalf of the Gitksan in the Delgamuukw trial.

<sup>21</sup> According to Margaret Anderson & Tammy Blumhagen, the Tsimshian have a third type of oral history called '*txal 'ya'ansk*'. I have not yet found a Gitksan equivalent to '*txal 'ya'ansk*', but it would make complete sense to have a reminiscence category of oral histories. Margaret Anderson & Tammy Blumhagen "Memories and Moments: Conversations and Re-Collections" (1994) 104 BC Studies 85 at 94.

<sup>22</sup> Susan Marsden, "Defending the Mouth of the Skeena: Perspectives on Tsimshian Tlingit Relations" in Jerome S. Cybulski, ed., *Perspectives on Northern Northwest Coast Prehistory* (Hull: Canadian Museum of Civilization, 2001) 61 at 62-63.

collective properties of all the Gitksan (as opposed to ownership by a House).<sup>23</sup> Gitksan education scholar Jane Smith has demonstrated how the antamahlaswx are a part of Gitksan pedagogy – a way of exploring and learning about the world.<sup>24</sup>

The *ayuks* (crests) are another part of the Gitksan political foundation. The ayuk is a specific named power or privilege drawn from the adaawk that may be represented on poles, robes, regalia, headdresses, or other objects.<sup>25</sup> Chiefs Gisday Wa and Delgamuukw explain how intertwined the crests, poles, and adaawk are with the Gitksan and their land:

The pole which encodes the history of the House through its display of crests, also recreates, by reaching upwards, the link with the spirit forces that give the people their power. At the same time it is planted in the ground, where its roots spread out into the land, thereby linking man, spirit power, and the land so they form a living whole. Integral to this link and the maintenance of the partnership, is adherence to the fundamental principles of respect for the land and for its life forms.<sup>26</sup>

The Feast is a complex political, legal, economic, and social institution in which the main business of the hosting House is transacted and formally witnessed by the guest Houses.<sup>27</sup> Jurisdiction among the Gitksan is exercised through the Feast. In former times, Feasts were held for all major legal, social, and political transactions including marriage, shaming (to control harmful and injurious behaviour), cleansing (to restore spirits after serious injury), restitution, birth, graduation (to celebrate achievements), naming, reinstatement (for Gitksan people who disobeyed the laws), coming of age, “smoke” (for

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<sup>23</sup> The antamahlaswx are described as stories that anyone can tell, such as Weget (Raven) stories and stories told to children.

<sup>24</sup> M. Jane Smith, *Placing Gitksan Stories in Text: Returning the Feathers. Guuxs Mak'am Mik'Aax* (Ph.D. Dissertation, UBC Faculty of Education, 2004) [unpublished]. Jane Smith is a grade 4 teacher in the John Field Elementary School in Gitanmaax, BC, and in addition to the provincial curriculum, she teaches the Gitksan language [Gitsanimx], and Gitksan history and culture.

<sup>25</sup> The crest is actually a complex category of intellectual property.

<sup>26</sup> Gisday Wa & Delgam Uukw, *The Spirit in the Land* (Gabriola, B.C.: Reflections, 1989) at 26.

<sup>27</sup> See generally Richard Daly, *Our Box Was Full: An Ethnography for the Delgamuukw Plaintiffs* (Vancouver: UBC Press, 2005) 57-106. Richard Daly was an expert witness on behalf of the Gitksan in the Delgamuukw trial, and he has maintained close working relations with Gitksan and Wet'suwet'en organizations and people.

obligations related to organizing settlement feasts), grave-stone placing, settlement (repayment of obligations arising from a death), divorce, and pole raising.<sup>28</sup> It is in the Feast that each House recreates its “defining power relationships while at the same time forming socially and economically viable” connections with other lineages.<sup>29</sup>

Once acquired, the House territory is inalienable unless the House is unable to generate enough wealth to fulfill its Feast responsibilities, or is required to relinquish one of its territories as compensation.<sup>30</sup> The Gitksan system of compensation is called *xsiisxw*, in which one House relinquishes wealth, names, crests, or territory to repay an offence committed against another House. (A number of *xsiisxw* case examples are provided in chapter 3.) According to Richard Overstall, the “amount paid [in compensation] is gauged more to settle the disquiet felt by the other party than to replace the lost value. In the past, if the compensation process was not quickly started, homicides and other serious offences could escalate into feuds, as retaliation killings were lawful after warnings had been given.”<sup>31</sup> While the compensation for the death of an individual might require the payment of material wealth, for an “intentional death of an important chief, it might involve the transfer of territory for the lifetime of the immediate family of the deceased; and for a series of unprovoked attacks on a neighbouring people, it might involve the permanent transfer of territory to the innocent party.”<sup>32</sup>

Gitksan legal traditions are based on a non-State, decentralized political structure that relies on the maintenance of reciprocal kinship relationships and negotiations rather

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<sup>28</sup> Margaret Anderson & Marjorie Halpin, eds., *Potlatch at Gitsegukla: William Beynon's 1945 Field Notebooks* (Vancouver: UBC Press, 2000) at ix.

<sup>29</sup> Overstall, “Encountering”, *supra* note 8.

<sup>30</sup> See generally, *ibid.*

<sup>31</sup> *Ibid.* at 40.

<sup>32</sup> *Ibid.*

than on centralized legal and enforcement bureaucracies. This Gitksan universe is based on a legal order that is stabilized by tensions between, on the one hand, the need for driving competitive individual and collective agency, and on the other hand, an opposing requirement for intense individual and collective cooperation. This Gitksan universe includes an understanding of human beings reincarnated through time, and enduring partnerships between people, land, and non-human life forms. As the following chapters illustrate, there are many challenges and questions along with incredibly rich potential in the continued applicability of Gitksan legal traditions to contemporary issues, problems, and conflicts.

### 1.3 Background

The Gitksan and Wet'suwet'en<sup>33</sup> Plaintiffs filed *Delgamuukw* in 1984 and the trial began on 12 May 1987. President of the former Gitksan – Wet'suwet'en Tribal Council, Neil J. Sterritt recalled the start of *Delgamuukw*: “That was 1984. We thought we would be finished in 1985 – pretty straightforward stuff.”<sup>34</sup> While *Delgamuukw* took many years to prepare, the trial did not actually start until September 1987, and it lasted 374 days (see chapter 4). The British Columbia Supreme Court (B.C.S.C.) decision by Chief Justice McEachern was released in 1991.<sup>35</sup> The Gitksan and Wet'suwet'en appealed the B.C.S.C. decision to the British Columbia Court of Appeal, which released its decision in 1993.<sup>36</sup>

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<sup>33</sup> The Gitksan are part of the Tsimshian language group. The Wet'suwet'en people are part of the Athapaskan linguistic group.

<sup>34</sup> Interview of Neil John Sterritt, (11 July 2005) Hazelton, BC, at 5.

<sup>35</sup> *Delgamuukw v. The Queen* (1991), 79 D.L.R. (4th) 185 (B.C.S.C.).

<sup>36</sup> *Delgamuukw v. British Columbia* (1993), 104 D.L.R. (4th) 470 (B.C.C.A.). This decision is actually erroneously cited as *Uukw v. British Columbia*.

Finally, the Supreme Court of Canada's decision was released in 1997.<sup>37</sup> *Delgamuukw* was a massive legal action for the Gitksan and Wet'suwet'en peoples. My research for this thesis focused only on the Gitksan.<sup>38</sup>

Initially my research inquiry was whether and how the entire experience of *Delgamuukw*<sup>39</sup> influenced or changed the social relationships between Gitksan people and Gitksan people's relationship to land. In addition, in my original research proposal, I set out three themes: (1) the erasure and simplification of indigenous law, (2) the romancing of aboriginal title, and (3) the reconfiguration of power relations. While the three themes are substantively dealt with in chapters 3, 4, 5, and 6, my main research inquiry focused on conflict among the Gitksan.<sup>40</sup> My research inquiry became whether and how the experience of *Delgamuukw*, in its entirety, increased the internal conflict among the Gitksan by undermining their conflict management system – as contextualized within my articulation of Gitksan law, legal order, and legal theory.

#### 1.4 Chapter Briefs

In chapter 2, I discuss the questions relating to insider-outsider research as a non-Gitksan indigenous person researching Gitksan legal traditions. Some of these questions are about objectivity, subjectivity, and political reflexivity. Also, I situate my research and theoretical orientations in the scholarship relating to indigenous legal traditions and legal theory, and

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<sup>37</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

<sup>38</sup> There is a long history of cooperation between the Gitksan and Wet'suwet'en peoples that pre-dates contact. *Delgamuukw* is a recent example of the close political and social relationships between the Gitksan and Wet'suwet'en. Including the Wet'suwet'en was not possible within the confines of space and time of this research project. See generally, Antonia Mills, *Eagle Down Is Our Law: Witsuwit'en Law, Feasts, and Land Claims* (Vancouver: UBC Press, 1994) and Antonia Mills, 'Hang Onto These Words': *Johnny David's Delgamuukw Testimony* (Toronto: University of Toronto Press, 2005).

<sup>39</sup> Unless I refer to one of the decisions, when I use the term, *Delgamuukw*, I am referring to the entirety of the *Delgamuukw* experience including years of preparation, trials, and on-the-ground organizing.

<sup>40</sup> I discussed these shifts during my candidacy review with the committee assigned by the University of Victoria Faculty of Law (Dr. John McLaren, Dr. John Borrows & Dr. Gordon Christie) in 2005.

describe how I approached and drew from the legal theory scholarship. Finally, I describe the bare bones of my research process, my approach to substantively articulating Gitksan legal traditions, and my development of a Gitksan legal theory.

In chapter 3, I describe how I worked with and learned from the *Delgamuukw* trial transcripts of the Gitksan witnesses. This includes a discussion of the difficulties I encountered when reading the transcripts, a description of some of the complex background issues leading up to and surrounding *Delgamuukw*, the identification and substantive analysis of a series of Gitksan law cases, and an articulation of the emerging legal principles and the broad contours of the Gitksan legal order.

In chapter 4, I analyze the interview transcripts to explore some of the changes facilitated by the *Delgamuukw* litigation and resulting legal decisions. Interviewees described the initial political strategy and genesis of *Delgamuukw*, and their experiences throughout the *Delgamuukw* preparation, litigation, and post-Supreme Court of Canada decision. The interviewees also provided information on historic conflict management processes and insight into current conflicts within Gitksan territories. In the end, I conclude that the current conflict experienced by the Gitksan cannot be entirely attributed to *Delgamuukw*, but rather must be appreciated within a deeper and broader understanding of the complex of power relationships between Gitksan people and Canada, and between Gitksan law and Canadian law.

In chapter 5, I establish a theoretical basis for my articulation and development of a Gitksan legal theory that is founded on empirical research and a substantive treatment of the Gitksan legal order and laws in chapters 3 and 4. While I draw on resources from western legal theory, I am not doing so to find external validation for either Gitksan legal

traditions or Gitksan legal theory. Rather, it is my position that there are internal features of Gitksan law that resonate with some parts of several western legal theories. Basically, I consider a combination of several legal theories because, while each theory on its own is insufficient for my purposes here, there are aspects of each that are nonetheless useful and have explicative value for Gitksan legal theory – for both Gitksan and non-Gitksan readers. To do this work I adopt the reflexive approach advocated by Toquaht legal scholar, Johnny Mack – that we each have an ongoing responsibility to self-consciously examine our ethics and deliberative practices in light of the power dynamics around us.<sup>41</sup>

I draw on Hart’s primary and secondary rules<sup>42</sup> and Overstall’s third level of strict laws<sup>43</sup> to argue that decentralized Gitksan law fulfills the basic functions of Hart’s primary and secondary laws. I also draw on Fuller’s law as social interaction theory as one of the sources of Gitksan law, and I argue that there are intentional and deliberative processes that transform some implicit law into explicit law. I contend that the content and architecture of the Gitksan oral histories and other records such as the songs, crests, kinship roles, and practices also contain both implicit and explicit law. In addition, I draw on two indigenous legal scholars, Gordon Christie and John Borrows, whose work most closely relates to and supports my own. Finally, William Twining’s legal theory framework provided a very useful conceptual scaffolding for my proposed Gitksan legal theory. It is Twining’s position that within the enterprise of law, legal theory can perform a range of functions: (1) the mapping or synthesising function, (2) the conceptual or analytical function, and (3) the

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<sup>41</sup> Johnny Mack, “Understanding Academic Critique as Relational Practice” in *Thinking Through Relationship: The Ethics of Research and Reflectivity* (Collected papers presented at the Multidisciplinary Student Workshop of the Indigenous Peoples and Governance Conference, University of Montreal, 8-9 October 2008) 25 at 26 [unpublished] [Mack].

<sup>42</sup> H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) at c. 5.

<sup>43</sup> Overstall, “Encountering”, *supra* note 8 at 44.

simplifying function.<sup>44</sup> According to Twining, legal theorising should be understood as an integral part of law as a discipline in order to generate critical thinking about the “health” of law generally.<sup>45</sup> Based on Twining’s framework, I contend that Gitksan legal theory comprises a broad overview, general principles, normative principles, and general working principles. I also argue that the Gitksan legal theory can be extrapolated and, with testing, transferred and applied to other non-state, decentralized peoples such as the Dunne’za in northern British Columbia.

In the final conclusion, chapter 6, I briefly summarize and restate my findings about the internal conflict experienced by the Gitksan, and my analysis of the role of *Delgamuukw* in that conflict. I reflect on my research findings in light of an anti-reification analytical framework to explore Gitksan social change that reflects the complexities of current politics. Finally, I examine a small case study of a recent conflict in order to consider how an understanding of Gitksan conflict management, legal traditions, and legal theory matter today insofar as how Gitksan people respond to the pervasive, current, on-the-ground conflict.

## **1.5 Chapter Conclusion**

To conclude, I recognize that an ongoing question remains about how an understanding of Gitksan legal traditions and legal theory can enable Gitksan people to interact with and navigate within the larger current political context. It is my conclusion that a substantive articulation of Gitksan legal traditions and Gitksan legal theory encourages a more creative and critical way of thinking and applying Gitksan law to today’s issues and conflicts.

Basically, I contend that such an articulation will enable Gitksan people to see where there

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<sup>44</sup> William Twining, *Globalisation and Legal Theory* (New York: Cambridge University Press, 2000) at 242.

<sup>45</sup> *Ibid.*

are contradictions, where change is necessary, and perhaps how to strengthen the practice of teaching of Gitksan law to future generations.

Three underlying tenets have guided my project: First, Gitksan legal traditions are not perfect, whatever perfection might be, but they nonetheless enabled Gitksan people to effectively manage themselves through the millennia and they are applicable, with changes, today. Second, there is a need for many Gitksan legal theories – what I present here is just one legal theory proposal. Third, an articulation of Gitksan legal traditions and Gitksan legal theory must be grounded in a substantive on-the-ground treatment of Gitksan law as demonstrated in the law cases or other law-in-life examples.

It is my hope that the readers will appreciate the depth and scope of Gitksan legal traditions, and will engage in serious, informed, and substantive discussions about the continued importance of those traditions in today's world – for Gitksan governance as well as for Canadian law. As John Borrows has shown, Canada has three founding legal traditions: common law, civil law, and indigenous law. The overall political and legal health of Canada is only possible with vibrant and strong indigenous societies, be they Gitksan, Wet'suwet'en, Cree, Dunne'zaa or others. The Gitksan and other indigenous peoples are essential to Canada.

## CHAPTER 2

### Methodology

Stated very simply, Radical Indigenism assumes that scholars can take philosophies of knowledge carried by indigenous peoples seriously. They can consider those philosophies and their assumptions, values, and goals not simply as interesting objects of study (claims that some people *believe* to be true) but as intellectual orientations that map out ways of discovering things about the world (claims that, to one degree or another, *reflect* or *engage* the true). (Eva Marie Garrouette)<sup>1</sup>

#### 2.1 Introduction

As Eva Marie Garrouette advocates, it has been my intent throughout this research project to take Gitksan philosophies of knowledge seriously. My exploration, articulation, and analysis of Gitksan legal traditions are guided by a strong commitment to consider and respect Gitksan intellectual orientations and perspectives. However, as the following chapters demonstrate, this does not mean that I am not critical or that I agree with all things Gitksan. But it does mean that I am mindful of my expectations and judgments as I consider law in a society other than my own.<sup>2</sup> From a comparative law perspective, William Alford argues we cannot help bringing our own cultural values with us when we consider and evaluate other legal systems. Furthermore, Alford explains that,

[t]he obligation to be vigilant does not preclude using the language and conceptual frameworks of our own society to try to understand and explicate for others the foreign societies we may be observing....[W]e ultimately must invoke...[our own] terminology and concepts to make intelligible to ourselves and our compatriots what we have observed....Nor should our concern with being scrupulous preclude us from forming judgments about foreign societies, for the very effort to understand entails the formation of judgments, large and small.<sup>3</sup>

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<sup>1</sup> *Real Indians: Identity and Survival of Native America* (Berkeley: University of California Press, 2003) at 10 [Garrouette].

<sup>2</sup> William Alford, "On the Limits of 'Grand Theory' in Comparative Law" (1986) 61 Wash. L. Rev. 945 at 947.

<sup>3</sup> *Ibid.*

One limitation I encountered in this research project – as may many of my readers – is that I am not Gitksan. For me, this means that I do not speak Gitsanimx̓, I was not raised as a Gitksan person, nor was I trained in Gitksan politics or law. I am an adopted member of the House of Luux̓hon of the frog clan, and I am honoured to hold the small name of Gyooksgan.<sup>4</sup> I have lived in Gitksan territory for many years and I have worked with Gitksan groups for most of that time. (Most of my work may be categorized as community development in the fields of education, employment, justice and legal services, and health.) Adopting the approach advocated by Alford and also by Toquaht legal scholar Johnny Mack means that as an indigenous (i.e., Saulteaux, Cree, Dunne'zaa) researcher, I must be continually reflexive about my position in relation to the various power structures and ongoing power dynamics around me (see chapter 6).<sup>5</sup> So to the extent that my limitations have allowed, I have sought to explore and interpret the Gitksan legal traditions from an internal philosophical basis, rather than focus on external descriptions.<sup>6</sup>

Interestingly, William Twining suggests that “lawyers are more likely than anthropologists (1) to have some practical objective in mind, (2) to identify, consciously or unconsciously, with certain types of practitioners – to look at legal processes from an

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<sup>4</sup> This is an old name formerly held by matriarchs in the Luux̓hon House, but it is not considered a high name in the House.

<sup>5</sup> Johnny Mack, “Understanding Academic Critique as Relational Practice” in *Thinking Through Relationship: The Ethics of Research and Reflectivity* (Collected papers presented at the Multidisciplinary Student Workshop of the Indigenous Peoples and Governance Conference, University of Montreal, 8-9 October 2008) 25 at 26 [unpublished].

<sup>6</sup> There is an internal study of law that focuses on “how arguments are fashioned and deployed within legal practices” and an external study about law that usually focuses on “historical and sociological accounts of the very same body of law”. Jeremy Webber, “The Past and Foreign Countries” (2006) 10 *Legal Hist.* 1 at 2. My use of the term “reflexivity” is drawn from the work of Pierre Bourdieu who argues that social scientists are inherently biased, and it is only by becoming reflexively aware of their biases that social scientists may be freed of them – but there is no place of rest because reflexivity is an ongoing necessity. For Bourdieu, reflexivity is a theory of intellectual practice that is integral to any theory of society and to social science methodology. See generally, Pierre Bourdieu & Loic Wacquant, *An Invitation to Reflexive Sociology* (Chicago: University of Chicago Press, 1992).

internal point of view.”<sup>7</sup> Twining also notes that it is when working across cultures that the jurist’s tendency to develop an internal view of law is challenged by his or her conflicting ethnocentricity.<sup>8</sup> However, while a lawyer (in the very general and stereotyped classical sense) might more easily perceive the internal processes and structures of other legal systems, this is certainly not a given when lawyers move from working with Western law to working with indigenous law. Nor does the lawyer’s potential ability to perceive the interiority of law mean that he or she is able to perceive the mutually constitutive societal context around the Western law or any other law. Again, this illustrates the necessity of maintaining a reflexive approach and an awareness of our own cultural horizon (i.e., broadest interpretive horizon) as reflected in our ethics, judgments, and particular blinders (including those blinders sometimes inadvertently developed by indigenous students who study law in western law schools).

From a similar perspective on the importance of reflexivity in law, Michael Oakshott<sup>9</sup> has argued that a reflective lawyer “would observe that, in pursuing his particular project, his actions were being determined not solely by his premeditated end, but by what may be called the traditions of the activity to which his project belonged. It is because he knows how to tackle problems of this sort that he is able to tackle his particular problems.”<sup>10</sup> Nonetheless, my goal of perceiving the interiority of Gitksan law as an

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<sup>7</sup> William Twining, “Law and Anthropology: A Case Study in Inter-Disciplinary Collaboration” (1972-1973) 7 *Law & Soc’y Rev.* 561 at note 16 [Twining, “Law and Anthropology”].

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

<sup>9</sup> According to Elizabeth Campbell Corey, Michael Oakshott is extremely hard to classify, and academic commentators offer multiple characterizations of him, including “conservative, liberal, philosopher, opponent of Rationalism, postmodernist, polemicist, and sceptic”. Elizabeth Campbell Corey, *Michael Oakshott on Religion, Aesthetics, and Politics* (Columbia, Mo.: University of Missouri Press, 2006) at 2.

<sup>10</sup> Michael Oakshott, *Rationalism in Politics* (London: Routledge & Kegan Paul, 1962) at 99, quoted in Martin Krygier, “Law as Tradition” (1986) 5 *Law & Phil.* 237 at 247 [Krygier].

outsider was a difficult undertaking because, as argued by Peter Sack, law is inherently culturally bounded:

My perception of the relations between law, culture and language was based on three assumptions: firstly, that all human societies had some form of law; secondly, that all forms of law were cultural constructs; and, thirdly, that all human cultures used language as their central medium of construction. Taken together these three assumptions seemed to rule out the possibility of a culturally neutral language of law, because law appeared to be not only culture-specific but also firmly tied to a particular ‘natural’ language in which it expressed itself.<sup>11</sup>

Since there are multilingual and multicultural societies that have effectively adopted a single system of law, Sack admits that law is capable of transcending both cultural and linguistic barriers. However, Sack argues that a “culturally neutral, universal language of law” is not possible, and any such attempts “will only serve professional convenience rather than contributing to a better understanding of law”.<sup>12</sup> Despite this caution, I remain committed to working reflexively and freely admit that my articulation of Gitksan conflict management, legal traditions, and legal theory is not neutral or universal, and instead will remain circumscribed by my limitations, both acknowledged and otherwise.

There is a concern in some parts of academia and in law about ethnographic<sup>13</sup> researchers “going native” and therefore being subjective or biased in their studies.<sup>14</sup> In contrast to Garrouette’s candid political approach to research, John Creswell advises against researchers conducting research in their own backyards with people who share a vested

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<sup>11</sup> Peter Sack, “Law, Language, Culture: Verbal Acrobatics and Social Technology” (1998) 41 J. Legal Pluralism & Unofficial L. 15 at 15.

<sup>12</sup> *Ibid.*

<sup>13</sup> I do not consider my research to be an ethnographic project, but because it is a study of law in a society other than my own, there are necessarily some ethnographic elements to it. Clifford Geertz argues that an ethnology is something that social anthropologists, as practitioners do, and it is in understanding of the “doing” that creates the anthropological analysis as a form of knowledge. Clifford Geertz, *The Interpretation of Cultures* (New York: Basic Books, 1973) at 5-6 [Geertz].

<sup>14</sup> John W. Creswell, *Qualitative Inquiry and Research Design: Choosing Among Five Traditions* (Thousand Oaks, Cal.: Sage, 1998) at 61.

interest with the researcher.<sup>15</sup> According to Creswell, while there are positive aspects to carrying out backyard research (e.g., access), “[studying] such people or sites establishes expectations for data collection that may severely compromise the value of the data; individuals might withhold information, slant information toward what they want the researcher to hear, or provide ‘dangerous knowledge’ that is political and risky for an ‘inside’ investigator”.<sup>16</sup> For example, Richard Daly, anthropologist and expert witness in *Delgamuukw*, was accused of “going native” and being a “subjective advocate” by Crown lawyers. Daly responded to this allegation as follows,

As researcher, I strove to work with professional dispassion, within the limits of the “facts” and the relevant documentation, and within the discipline of my professional training; yet I was not especially assiduous in seeking to appear to be more dispassionate by desituating myself from the objects of study and the problematic of being party to one side in a court case. I did not subscribe to the obscurantist legal fiction that I was working as a transcendent subject who observes the phenomenal world from a non-phenomenal Platonic realm of forms, removed from the historical and partisan events pertaining to Aboriginal rights in Canada during the 1980s and 1990s....

Well, I did not “go Native” (which is an ethnocentrically loaded and colonialist term), and I hope I did not go non-Native.<sup>17</sup>

The views of the Crown in *Delgamuukw* and of Creswell reveal some highly questionable assumptions about the very possibility of neutrality and objectivity. On this issue, I concur with the positions taken by Linda Tuhiwai Smith, Hugo Slim and Paul Thompson, and Sally Falk Moore, who from the perspectives of their different disciplines argue that all research is fundamentally and inherently political.<sup>18</sup> However, as Clifford

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<sup>15</sup> *Ibid.* at 114.

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

<sup>17</sup> Richard Daly, *Our Box was Full: An Ethnography for the Delgamuukw Plaintiffs* (Vancouver: UBC Press, 2005) at xxiii-xxiv [Daly].

<sup>18</sup> For similar arguments, see generally, Hugo Slim & Paul Thompson, *Listening for a Change: Oral Testimony and Community Development* (Philadelphia: New Society Publishers, 1995); Sally Falk Moore, “Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949-1999” (2001) 7:1 *J. Roy. Anthropol. Inst.* 95 at 95-116 [Moore, “Certainties Undone”]; and Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (London, U.K.: Zed Books, 2001).

Geertz argues, this does not mean that intellectual rigor is somehow rendered unnecessary in our backyard research:

I have never been impressed by the argument that, as complete objectivity is impossible in these matters (as of course it is), one might as well let one's sentiments run loose... [T]hat is like saying that as a perfectly aseptic environment is impossible, one might as well conduct surgery in a sewer. Nor on the other hand, have I been impressed with claims that structural linguistics, computer engineering, or some other advanced form of thought is going to enable us to understand men without knowing them.<sup>19</sup>

A literal interpretation of Creswell's caution would mean that indigenous peoples could not conduct research in their own societies – and if they did, their findings would be deemed subjective or contaminated. Arguably, if this were the case for indigenous researchers, it should also be the case for non-indigenous researchers – a completely nonsensical and untenable situation for everyone. For instance, imagine a non-aboriginal Canadian researcher being precluded from conducting research into some aspect of Canadian society for fear of bias.<sup>20</sup> Rather, the goal for all researchers is that we must undertake the difficult task of being reflexive continually since none of us is outside the existing power structures and power dynamics that surround us.<sup>21</sup>

According to Jim Tully, the “uncontested relations of power that govern ways of acting function as the enabling and constraining conditions of possibility of the practice as

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<sup>19</sup> Geertz, *supra* note 13 at 30.

<sup>20</sup> Interestingly, on the issue of bias and judicial impartiality, the Supreme Court of Canada held that the “requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes. It has been observed that the duty to be impartial ‘does not mean that a judge does not, or cannot bring to the bench many existing sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge.’” *R v. R.D.S.*, [1997] 3 S.C.R. 484 at para. 119.

<sup>21</sup> According to Foucault, no society can exist without power relations, but such relations are not bad in themselves. Rather, problems arise when individuals try to direct and control the conduct of others. So the task is not to dissolve power relations, but to engage in those relations in a conscious and non-dominating way (or least as little as possible). Michel Foucault, *Ethics: Subjectivity and Truth*, ed. Paul Rabinow (New York: New Press, 1994) at 298.

a whole, its forms of government and contestation.”<sup>22</sup> It is difficult to free ourselves from the “problematizations and practices in which we think and act” precisely because it is our participation that renders our thinking, reflection, rule following, and rule contestation “prereflective and habitual.”<sup>23</sup> Constant political reflexivity is applicable not only to the research process, but also to the larger world that surrounds the research and to the research subject itself. Tully explains that there is no arrival insofar as political consciousness is concerned; rather, we are challenged to undertake the “permanent task of making sure that the multiplicity of practices of governance in which we act together do not become closed structures of domination under settled forms of justice, but are always open to practices of freedom by which those subject to them have a say and a hand over.”<sup>24</sup>

Also in direct contrast to Creswell, Garrouette argues that Radical Indigenism, “opens up dramatically different ways for American Indian people to interact with the academy and to accomplish goals they define for their own communities”.<sup>25</sup> Geertz offers this observation about the importance of not losing touch with community realities in favour of a bloodless aesthetic analysis:

The danger that cultural analysis, in search of all-too-deep-lying turtles, will lose touch with the hard surfaces of life – with the political, economic, stratificatory realities within which men are everywhere contained – and with the biological and physical necessities on which those surfaces rest, is an ever-present one. The only defense against it, and against, thus, turning cultural analysis into a kind of sociological aestheticism, is to train such analysis on such realities and such necessities in the first place.<sup>26</sup>

In keeping with the approach forged by Geertz and Garrouette, my methodological assumption is that it is important to write about my research in a way that is both

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<sup>22</sup> Jim Tully, “Political Philosophy as a Critical Activity” (2002) 30:4 *Political Theory* 533 at 547.

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

<sup>24</sup> *Ibid.* at 552.

<sup>25</sup> Garrouette, *supra* note 1 at 10.

<sup>26</sup> Geertz, *supra* note 13 at 30.

practically and theoretically useful to Gitksan peoples and other indigenous peoples (see chapter 6). For example, I have grounded my Gitksan legal theory in empirical research and in the substantive practice (i.e., Geertz's hard surfaces of life) of people collectively applying law in the management of their lives, communities, and society (see chapter 5). I have also endeavoured to learn from the actual application of law as exemplified in the Gitksan legal cases that were related to the Court by the Gitksan witnesses and recorded in the *Delgamuukw* trial court transcripts (see chapter 3).

My other main source of information derives from a series of interviews I conducted in 2005 and 2006 with twelve people who were actively involved and primarily responsible for *Delgamuukw*. (I will return to this later in this chapter; also see chapter 4.) It is my longer-term ambition to work with several of the people I interviewed to revise this dissertation into shorter plain language units for broader dissemination at the community level. I consider this research project to be a way of giving back to the people who invested their time with me – my way of “returning the feathers”.<sup>27</sup> As Geertz suggests, the essential aim of research is not simply about answering our own questions, “but to make available to us answers that others, guarding other sheep in other valleys, have given, and thus to include them in the consultable record of what man has said.”<sup>28</sup>

My purposes in this short chapter are threefold: (1) to place my research and theoretical orientations in the scholarship relating to indigenous legal traditions and legal theory; (2) still with the goal of placing my work in the relevant scholarship, to describe how I approached and drew from the scholarship on legal theory; and (3) to describe the

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<sup>27</sup> M. Jane Smith, *Placing Gitksan Stories in Text: Returning the Feathers. Guuxs Mak'am Mik'Aax* (Ph.D. Dissertation, UBC Faculty of Education, 2004) at ii [unpublished] [Jane Smith]. Smith uses the term “returning the feathers” to express gratitude to the people who helped her with her research.

<sup>28</sup> Geertz, *supra* note 13 at 30.

bare bones of my research process and my approach to articulating Gitksan legal traditions and the development of a Gitksan legal theory.

## 2.2 Placing My Research in the Scholarship on Indigenous Legal Traditions

Legal traditions provide substance, models, exemplars and a *language* in which to speak within and about law. Participation in such a tradition involves sharing a way of speaking about the world which, like language though more precisely and restrictively than natural language, shapes, forms and in part envelops the thought of those who speak it and think through it.<sup>29</sup>

Indigenous law (often called customary law)<sup>30</sup> has been the subject of much study for decades around the world.<sup>31</sup> The majority of this research has been in the field of legal anthropology.<sup>32</sup> Some of the early remarkable seminal work that has influenced my own thinking are: E. Adamson Hoebel and Karl Llewellyn on the Cheyenne in the United States,<sup>33</sup> Max Gluckman on the Barotse in Africa,<sup>34</sup> Laura Nader on the Zapotec in Oaxaca,

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<sup>29</sup> Krygier, *supra* note 10 at 244 [emphasis in original].

<sup>30</sup> Recent literature explores the relationship between customary law and state-centred law in Tanzania, Rwanda, South Africa, Kenya, and Uganda. See for example, Celestine Nyamu-Musembi, “Review of Experience in Engaging with ‘Non-State’ Justice Systems in East Africa” (2003), online: Institute of Development Studies <http://www.ids.ac.uk>; Leila Chirayath, Caroline Sage, & Michael Woolcock, “Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems” (2005), online: World Bank [http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Customary\\_Law\\_and\\_Policy\\_Reform.pdf](http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Customary_Law_and_Policy_Reform.pdf); Department for International Development, “Non-State Justice and Security Systems” (2004), online: Department for International Development [www.dfid.gov.uk](http://www.dfid.gov.uk); Janet Walsh, “Double Standards: Women’s Property Rights Violations in Kenya” (2003) 15:5(A) Human Rights Watch, online: Human Rights Watch <http://www.hrw.org>.

<sup>31</sup> For example, see the Law Reform Commission of Western Australia website for a series of background papers on various customary law issues relating to human rights, state recognition, women’s concerns, criminal offences, family and child welfare disputes, community governance, social services, and intellectual property, online: Law Reform Commission <http://www.lrc.justice.wa.gov.au/>. There is also the Northern Territory Law Reform Committee, which has produced a series of background papers and a final report on customary law, online: Northern Territory Government <http://www.nt.gov.au/justice/graphpages/lawmake/index.shtml>. Also see Peter Bartholomew, “Recognition Given to Aspects of Indigenous Customary Law in Queensland” (1998) 8 Research Bulletin, Queensland Parliamentary Library, online: Queensland Parliament <http://www.parliament.qld.gov.au/publications/view/publications>.

<sup>32</sup> The number of publications in this field is staggering. I have selected only a few of them for a brief survey here.

<sup>33</sup> Karl Llewellyn & E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman: University of Oklahoma Press, 1941) [Llewellyn & Hoebel].

Mexico,<sup>35</sup> Paul Bohannan on the Tiv in Africa,<sup>36</sup> and Captain R.S. Rattray on the Ashanti in West Africa.<sup>37</sup>

During this early era,<sup>38</sup> Hoebel and Llewellyn (not an anthropologist, but a jurist) developed a law-case methodology to study tribal law despite the prevalent scepticism of

<sup>34</sup> Max Gluckman, "Natural Justice in Africa" (1964) 9 *Natural Law Forum* 25-44 [Gluckman, "Natural Justice"]; Max Gluckman, "Property Rights and Status in African Traditional Law" in Max Gluckman, ed., *Ideas and Procedures in African Customary Law* (Oxford: Oxford University Press, 1969). Gluckman has been criticized for his cross-cultural legal comparisons and for applying concepts from American law (e.g., the reasonable man) to the peoples in Africa (e.g., Barotse, Lozi). Gluckman has also been criticized for describing native courts as indigenous law. For an excellent discussion, see Moore, "Certainties Undone", *supra* note 18 at 97-98. Nonetheless, I found Gluckman's work useful because he did not idealize African societies, and he explored law that was embedded in oral histories. Most helpful is Gluckman's research into Barotse land tenure laws which focused on reasoning, identification of Barotse legal cases, and rule identification. See Gluckman, "Natural Justice", *ibid*.

<sup>35</sup> Laura Nader, *Harmony Ideology: Justice and Control in a Zapotec Mountain Village* (Stanford: Stanford University Press, 1990). Nader's work challenged notions of harmony as applied to indigenous peoples. Instead, she found that the Zapotec people deliberately employed a political strategy of creating a veneer of internal harmony for the benefit of colonial outsiders. This strategy deflected intrusions of the colonizers by giving them no reason to keep the peace or enforce order. The downside of this strategy was that the harmony ideology also worked inward to suppress and maintain the internal oppressions of women – in the name of protecting the people.

<sup>36</sup> Paul Bohannan, *Justice and Judgment Among the Tiv* (London: Oxford University Press, 1957). In his research among the Tiv in Northern Nigeria, Bohannan found that two "folk systems" were operative. The first was a systemization of jural phenomena in the Tiv's own language. The second was the systemization in English of roughly the same phenomena by administrative officers. Bohannan explored the complex interaction between the two folk systems in the lives of the Tiv as they managed their lives and world despite the power imbalances created by colonization. Among Bohannan's many insightful findings was that the jural folk systems replaced the outlawed forms of indigenous methods for dealing with wrongs and disputes. In other words, the courts replaced many of the recognized non-jural means of self right-enforcement (at 208-11). In contrast to Gluckman, Bohannan argued against attempting to translate legal concepts from one society to another and contended that such translation into English terms was a distortion. See discussion in Moore, "Certainties Undone", *supra* note 18 at 99.

<sup>37</sup> Capt. R.S. Rattray, *Ashanti Law and Constitution* (1929; repr., Oxford: Clarendon Press, 1969). This is the last of a very important trilogy which includes the volumes *Ashanti* and *Religion and Art in Ashanti*. According to Rattray, the power and authority of the greater chiefs was diminished because of an unexamined adoption of Christianity doctrines, the non-observance and non-enforcement of Akan customary law relating to tenure and taxation, and the centralization of a State government over the decentralized authorities (at 408-409).

<sup>38</sup> Most of these scholars acknowledged Malinowski's earlier research which looked to the Trobriand Islanders' ordinary behaviours to "analyse all the rules conceived and acted upon as binding obligations, to find out the nature of the binding forces, and to classify the rules according to the manner in which they were made valid". Bronislaw Malinowski, *Crime and Custom in Savage Society* (London: Routledge and Kegan Paul, 1926) at 23, quoted in Sally Falk Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study" (1972-1973) 7 *Law & Soc'y Rev.* 719 at 720. Note however, that Leopold Pospisil criticized Malinowski for "dissolving law into ubiquitous social obligation or omnipotent

the time which held that indigenous peoples “did not appear to have anything that resembled law ‘properly so called,’ and that they were unable or unwilling to articulate in general terms the customary terms, if any, which guided their behaviour or which were used in settling disputes”.<sup>39</sup> The work of Hoebel and Llewellyn generated both high praise and criticism. For example, one criticism by John M. Conley and William M. O’Barr concerns the fifty-three law cases that Hoebel and Llewellyn recorded because the cases actually occurred between 1820 and 1880, some 55 to 115 years previous to their collection.<sup>40</sup> Unfortunately, much of the Conley and O’Barr criticisms are basically ethnocentric. For example, they are critical of the Cheyenne’s reliance on memory and suggest that this makes the law cases unreliable. To make this comparison, Conley and O’Barr draw on their studies of small claims courts where “people talk about their legal problems before, during, and after going to small claims courts” and where they “found no single, authoritative, pure or ‘accurate’ version of a person’s account”.<sup>41</sup> Even though Conley and O’Barr explicitly acknowledge that “law is a property of the group, not merely the idea of an individual or family”,<sup>42</sup> their comparative study of small claims court misses the collective nature and ownership of the Cheyenne stories as well as the deliberate, collective memory training employed in oral societies such as the Gitksan.<sup>43</sup> Furthermore, while common law cases can certainly be 55 to 115 years old (or older), written court reports do not ensure that the law in those cases will be interpreted in the same way today

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‘custom’”. Leopold Pospisil, “E. Adamson Hoebel and the Anthropology of Law” (1972-1973) 7 *Law and Soc’y Rev.* 537 at 538.

<sup>39</sup> Twining, “Law and Anthropology”, *supra* note 7 at 563.

<sup>40</sup> See John M. Conley & William M. O’Barr, “A Classic in Spite of Itself: *The Cheyenne Way* and the Case Method in Legal Anthropology” (2006) 29:1 *Law & Soc. Inquiry* 179 at 189 [Conley & O’Barr].

<sup>41</sup> *Ibid.* at 189.

<sup>42</sup> *Ibid.*

<sup>43</sup> I have written about this elsewhere, see Val Napoleon, “Delgamuukw: A Legal Straightjacket for Oral Histories?” (2005) 20:2 *C.J.L.S.* 123-55.

as in the past, or that the court reports are the only valid versions of the events surrounding the cases. Conley and O’Barr are also very critical of the substantive Cheyenne law that Llewellyn and Hoebel extract and analyze from the law cases,<sup>44</sup> and complain that the outcomes from case materials are “utterly unsystematic”.<sup>45</sup> They write about Llewellyn and Hoebel that their “headlong rush to an Anglo-American legal conclusion raises fundamental questions about the relation between fact and analysis throughout *The Cheyenne Way*”.<sup>46</sup> While I agree with some of Conley’s and O’Barr’s observations, I find most of their criticisms unconvincing.

The law case-method<sup>47</sup> approach to learning about law in societies is a combined study of praxis and rules described as “the tracing of the origins of a breach or disagreement backwards in time to see how it emerged, and then pursuing forwards in time the development of social relationships among the persons involved, possibly after adjudication or settlement or ritual reconciliation.”<sup>48</sup> While there are criticisms that the law-case method is an unimaginative reproduction and imposition of Western legal constructs,<sup>49</sup> what is essential in this approach is that it moves the researcher beyond the “narrow confines of [the] dispute itself” by requiring that he or she learn about the surrounding social context and social processes.<sup>50</sup> Disputes become learning opportunities because “the social drama is a limited area of transparency on the otherwise opaque surface

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<sup>44</sup> Conley & O’Barr, *supra* note 40 at 197.

<sup>45</sup> *Ibid.* at 200.

<sup>46</sup> *Ibid.* at 199.

<sup>47</sup> It is useful to recall the introduction of the case law method of teaching by the very controversial Christopher Columbus Langdell at Harvard over 100 years ago. See generally, Bruce A. Kimball, “The Langdell Problem: Historicizing the Century of Historiography, 1906-2000s” (2004) 22:2 L.H.R. paras. 1-58, online: History Cooperative <http://www.historycooperative.org/journals/lhr/22.2/kimball.html>.

<sup>48</sup> Max Gluckman, “Limitations of the Case-Method in the Study of Tribal Law” (1972-1973) 7 *Law & Soc’y Rev.* 611 at 612 [Gluckman, “Limitations”].

<sup>49</sup> Generally, the criticisms are about (1) the application of a juristic method deriving from Anglo-American law, (2) treatment of gender issues, and (3) idealism of the Cheyenne.

<sup>50</sup> Gluckman, “Limitations”, *supra* note 48 at 616.

of regular, uneventful social life”.<sup>51</sup> Gluckman however, argues that there is also much to learn about the law in societies through the “study and observance of peace” because in most societies, most of the time, “most people observe the rules, or compromise their disagreements; and this observance constitutes the matrix out of which are often born social policies, values, ideals.”<sup>52</sup>

My own approach to learning about Gitksan law most closely resembles the law case-method employed by Llewellyn and Hoebel in their influential work with the Cheyenne.<sup>53</sup> Llewellyn and Hoebel “concentrated on how rules were operated by the Cheyenne in the background of their social life, or how rules were created to meet new contingencies in that life, as exhibited in ‘trouble cases’”.<sup>54</sup> The theory of investigation they developed may be summarized as follows:

What has been said lays out three roads into exploration of the law-stuff of a culture. The one road is ideological and goes to “rules” [i.e., norms or rules] which are felt as proper for channeling and controlling behavior....[T]hey are ideal patterns, “right ways” against which real action is to be measured. The second road is descriptive; it deals with practice. It explores the patterns according to which behavior actually occurs. The third road is a search for instances of hitch, dispute, grievance, trouble; and inquiry into what the trouble was and what was done about it. Beyond this, for the third approach, there lies – if it can be discovered – the problem of motivation and the result of what was done.<sup>55</sup>

In effect, it was through the studying of actual cases that Llewellyn and Hoebel were able to, among other things, (1) discern competing norms, (2) overcome the “refusal or inability of informants to articulate norms”, (3) identify distinctions between data and interpretation (which is often missed in legal anthropology), and (4) avoid flat descriptions by bringing

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<sup>51</sup> Victor Turner, *Schism and Continuity in an African Society: A Study of Ndembu Village Life* (Manchester: Manchester University Press, 1957) at 93, quoted in Gluckman, *ibid.* at 636.

<sup>52</sup> Gluckman, *ibid.* at 619.

<sup>53</sup> Llewellyn & Hoebel, *supra* note 33.

<sup>54</sup> Gluckman, “Limitations”, *supra* note 48 at 615.

<sup>55</sup> Llewellyn & Hoebel, *supra* note 33 at 20-21.

the subject matter to life.<sup>56</sup> What becomes apparent here is that the usefulness of the law case approach is not restricted to trouble cases or conflict, but may also be useful for identifying social relationships, power dynamics, reciprocity and negotiations, and conflict avoidance practices of everyday life.

Most importantly for my project, the law case method reveals the intellectual aspects of Gitksan law – forms of legal reasoning (i.e., analogy,<sup>57</sup> metaphors,<sup>58</sup> problem solving, collectively owned outcomes,<sup>59</sup> etc.), use of precedent, interpretation, applications, and decision-making and agreements that are very often missed or ignored completely in descriptions of indigenous law.<sup>60</sup> Such simple and problematic treatments of indigenous legal traditions serve to perpetuate the stereotypical myth that indigenous peoples had little or no intellectual life, but just followed rules and stoically upheld unchanging morals.<sup>61</sup> Arguably, in such problematic and limited descriptions of indigenous law, indigenous agency and notions of morality are degraded in a way that renders them comparable to Michael Oakshott's description of the rationalist's morality.

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<sup>56</sup> William Twining, *Karl Llewellyn and the Realist Movement* (London: Weidenfeld and Nicolson, 1973) at 160-161.

<sup>57</sup> See generally Cass R. Sunstein, "Commentary on Analogical Reasoning" (1992-1993) 106 Harv. L. Rev. 741-91.

<sup>58</sup> See for example Lorie M. Graham & Stephen M. McJohn, "Cognition, Law, Stories" (2008) Suffolk University Law School, Legal Studies Research Paper Series, Research Paper 08-14, available online: Social Science Research Network, <http://ssrn.com> [Graham & McJohn].

<sup>59</sup> See generally Gerald J. Postema, "Classical Common Law Jurisprudence (Part I)" (2002) 2:2 O.U.C.L.J. 15-80 [Postema, "Part I"] and Gerald J. Postema, "Classical Common Law Jurisprudence (Part II)" (2003) 3:1 O.U.C.L.J. 1-28 [Postema, "Part II"].

<sup>60</sup> See for example Kathryn Trees, "Contemporary Issues Facing Customary Law and the General Legal System: Roebourne – A Case Study" (2004) Background Paper No. 6, Law Reform Commission of Western Australia. Also see Leopold Pospisil, *Kapauku Papuans and Their Law*, No. 54 (1958; repr., New Haven: Yale University Publications in Anthropology, 1964).

<sup>61</sup> For another problematic example see Commission on the Métis Laws of the Hunt, "Our Ancestral Rules of the Buffalo Hunt" in "The Report of the Commission on the Métis Laws of the Hunt (2003), online: Manitoba Métis Federation [www.mmf.mb.ca/publications](http://www.mmf.mb.ca/publications) at i. For an important critique of indigenous law in Canada being used as a currency of oppressive power and problematically perpetuated as unchanging, inherently unproblematic, and harmonious, see Emma LaRocque, "Re-examining Culturally Appropriate Models in Criminal Justice Applications" in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: UBC Press, 1997) 75-96.

[T]he morality of the self-conscious pursuit of moral ideals, and the appropriate form of moral education is by precept, by the presentation and explanation of moral principles. This is presented as a higher morality...than that of habit, the unself-conscious following of a tradition of moral behaviour; but in fact, it is merely morality reduced to a technique, to be acquired by training in an ideology rather than an education in behaviour.<sup>62</sup>

This however, is a false and superficial view of morality, and Oakeshott argues that moral ideas ought to be understood as sediment that has “significance only so long as they are suspended in a religious or social life”.<sup>63</sup> Instead, as Oakeshott explains, the “predicament of our time is that the Rationalists have been at work so long on their project of drawing off the liquid in which our moral ideas were suspended (and pouring it away as worthless) that we are left only with the dry and gritty residue which chokes us as we try to take it down.”<sup>64</sup> Descriptions of indigenous legal traditions, especially fundamentalist versions, become “dry and gritty” without the hard surfaces and messy stuff of life (i.e., conflicts and contradictions) and real people (i.e., not saints or naturally harmonious peoples).<sup>65</sup>

My analysis of Gitksan legal traditions begins with a series of twenty-four law cases that the Gitksan witnesses in *Delgamuukw* described to the Court. The time depths of these cases vary as they were drawn from the witnesses’ (1) oral histories (adaawk), (2) collectively owned stories (antamahlaswx), (3) personal and related memories, and (4) own direct experiences.<sup>66</sup> Many of these law cases were verified in the court transcripts because they were referred to or described by more than one witness. All the witnesses were cross-

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<sup>62</sup> Michael Oakeshott, *Rationalism in Politics and Other Essays* (London: Methuen, 1967) at 35. I would like to thank Hadley Friedland for bringing Oakeshott’s work to my attention.

<sup>63</sup> *Ibid.* at 36.

<sup>64</sup> *Ibid.*

<sup>65</sup> This is the brilliance of the wonderful film, *Atanarjuat, The Fast Runner*, 2001, videotape (Canada: Igloolik Productions/Alliance Atlantis, 2002); and the superb film, *The Ten Canoes* 2005, DVD (Australia: Fandangovertigo, 2006) online: <http://www.tencanoes.com.au> [Ten Canoes].

<sup>66</sup> Some of the adaawk and antamahlaswx are ancient; others are more recent, such as the nax nox of The Japanese Warrior described by William Beynon in Margaret Anderson & Marjorie Halpin, eds., *Potlatch at Gitsegukla: William Beynon’s 1945 Field Notbooks* (Vancouver: UBC Press, 2000) at 97-98 [Anderson & Halpin].

examined on their evidence. (A table of cases is provided in chapter 3 at page 136.) Some of the cases were also verified by the people I interviewed. Finally, some of these cases are referred to or described in other research projects and publications.<sup>67</sup> It is on the basis of my analysis of these cases, as well as the background of social life and processes described by the witnesses, that I sketched the contours of the Gitksan legal order contained in chapters 3 and 4.<sup>68</sup> Among other things, examining the Gitksan law cases enabled me to explore the legal practice of precedent and legal archive of memory, how law is implicitly and explicitly recorded in the legal practices and processes, individual and collective agency, and types of laws. All of this work served to form the basis for drafting a Gitksan legal theory (chapter 6).

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<sup>67</sup> For example, Marius Barbeau, *Totem Poles of the Gitksan, Upper Skeena River, British Columbia*, Bulletin No. 61, Anthropological Series No.12, Facsimile Ed. (1929; repr., Ottawa: National Museum of Canada & Canada Department of Mines, 1973) There are important criticisms of Barbeau's work, such as Wilson Duff's "Contributions of Marius Barbeau to West Coast Ethnology" (1964) 6:1 *Anthropologica* 63-96 [Duff]. For example, Duff argues that Barbeau's hypothesis about coastal peoples' history is open to serious question and further, that his opinion about the lack of "real antiquity" of the crest system, totem poles, exogamy, and secret societies is also highly problematic. On this latter point, Barbeau believed that many of the distinctive elements of northwest coast cultures were recent innovations deriving from Siberian nomads or European contact (Duff, *ibid.* at 64); Daly, *supra* note 17; Jane Smith, *supra* note 27; Anderson & Halpin, *ibid.*; Neil Sterritt *et al.*, *Tribal Boundaries in the Nass Watershed* (Vancouver: UBC Press, 1998) [Sterritt *et al.*]; Richard Overstall, "Encountering the Spirit in the Land: 'Property' in a Kinship-based Legal Order" in John McLaren, Andrew R. Buck & Nancy E. Wright, eds., *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2004) 22-49 [Overstall, "Encountering"]; Susan Marsden, "Defending the Mouth of the Skeena: Perspectives on Tsimshian Tlingit Relations" in Jerome S. Cybulski, ed., *Perspectives on Northern Northwest Coast Prehistory* (Hull: Canadian Museum of Civilization, 2001) 61-105 [Marsden]; Susan Marsden & Robert Galois, "The Tsimshian, the Hudson's Bay Company, and the Geopolitics of the Northwest Coast Fur Trade, 1787-1840" (1995) 39:2 *Canadian Geographer* 169-83 [Marsden & Galois]; John Cove & George MacDonald, eds., *Tsimshian Narratives I: Tricksters, Shamans and Heroes*, Mercury Series Directorate Paper No. 3 (Ottawa: Directorate, Canadian Museum of Civilization, 1987); John Cove & George MacDonald, eds., *Tsimshian Narratives II: Trade and Warfare*, Mercury Series Directorate Paper No. 3 (Ottawa: Directorate, Canadian Museum of Civilization, 1987).

<sup>68</sup> My thinking about law in everyday life was informed by Joan Ryan who learned about Dene law and legal principles from the everyday life and events in a Dene community. See Joan Ryan, *Doing Things the Right Way: Dene Traditional Justice in Lac La Martre, N.W.T.* (Calgary: University of Calgary Press / Arctic Institute of North America, 1995). Legal scholar Rod McDonald has also written about law in everyday life. See Roderick Alexander Macdonald, *Lessons of Everyday Law* (Montreal: McGill-Queen's University Press, 2002).

A major part of my analysis of the legal traditions required considering two types of Gitksan oral histories – *adaawk* and *antamahlaswx*.<sup>69</sup> Basically, I needed to develop a theoretical framework that would enable me to learn about and from the oral histories – as part of the legal archive, as information, as pedagogy, as legal reasoning, and as representing Gitksan people’s enduring connections to their land.<sup>70</sup> There is an international scholarship about oral histories that is vast and seems to cross the boundaries of most disciplines including history,<sup>71</sup> sustainable development,<sup>72</sup> literature and art,<sup>73</sup> archaeology,<sup>74</sup> anthropology,<sup>75</sup> law,<sup>76</sup> indigenous studies,<sup>77</sup> and education.<sup>78</sup> It makes perfect sense that each writer has his or her own goals and perspectives through which oral histories are interpreted, characterized, and applied. For example, historian Wendy Doniger O’Flaherty seeks to explore what meanings myths/stories carry outside their own context.

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<sup>69</sup> There are many academic articles about how Gitksan oral histories were dealt with by the courts in the *Delgamuukw* decisions. See, for example, Andie Diane Palmer, “‘Evidence Not in a Form Familiar to Common Law Courts’: Assessing Oral Histories in Land Claims Testimony After *Delgamuukw v. B.C.*” (2001) 38:4 *Alta. L. Rev.* 1040-50.

<sup>70</sup> This is what James Clifford calls the necessary power of place which grounds indigenous peoples who are both in and a part of a changing world – and prevents them from being buried in a suffocating post-modern morass. James Clifford, “Indigenous Articulations” (2001) 13:2 *Contemporary Pacific* 467 at 481 [Clifford, “Articulations”].

<sup>71</sup> See for example, Miranda Johnson, “Struggling Over the Past: Decolonization and the Problem of History in Settler Societies” (Ph.D. Dissertation, Department of History, University of Chicago, 2008) [unpublished] [Johnson]; Jennifer S. H. Brown & Robert Brightman, *The Orders of the Dreamed’ George Nelson on Cree and Northern Ojibwa Religion and Myth, 1823* (Winnipeg: University of Manitoba Press, 1988).

<sup>72</sup> Peter Ørebech *et al.*, *The Role of Customary Law in Sustainable Development* (New York: Cambridge University Press, 2005).

<sup>73</sup> Herbert T. Schwartz, *Tales from the Smokehouse* (Edmonton: Hurtig, 1974). This book was illustrated by Daphne Odjig.

<sup>74</sup> See generally George F. McDonald, *Kitwanga Fort Report* (Hull: Canadian Museum of Civilization, 1989).

<sup>75</sup> See for instance, Richard J. Preston, *Cree Narrative: Expressing the Personal Meanings of Events*, 2nd ed. (Montreal: McGill-Queen’s University Press, 2002).

<sup>76</sup> Overstall, “Encountering”, *supra* note 67. Also see John Borrows, “Listening for a Change: The Courts and Oral Tradition” (2001) 39:1 *Osgoode Hall L.J.* 1-38.

<sup>77</sup> Neal McLeod, *Cree Narrative Memory: From Treaties to Contemporary Times* (Saskatoon: Purich, 2007).

<sup>78</sup> See for example, Jane Smith, *supra* note 27. Also see generally, Ian William Sewall, *The Folkloral Voice* (Edmonton: Qual Institute Press, 1998).

Her basic argument is that myths/stories are a way to encounter other cultures and in doing so, they can reflexively shed light on the researcher's own culture.<sup>79</sup>

Other scholars, such as anthropologist Susan Marsden, apply an instrumentalist or positivist frame to the study of Tsimshian and Gitksan oral histories (adaawk) wherein a final truth is discoverable through proper telling and interpretation.<sup>80</sup> To be fair, the Gitksan and Tsimshian<sup>81</sup> also describe their adaawk, which are ancient, formal, and collectively owned, in positivist terms (see chapter 3). My intent is not to detract from the meticulous research that Marsden and others have conducted,<sup>82</sup> but for my purposes, such positivist<sup>83</sup> treatments of oral histories do not further my own project of looking to Gitksan oral histories as records of law, as comprehensive cognitive units, and as part of the foundation for a dynamic decentralized, collective legal reasoning processes.

However, it is important to note that within my approach, I understand the adaawk as the foundation for the respective political, legal, and economic systems which gives rise to enduring Tsimshian and Gitksan covenants with the land. This is the essential, grounding “power of place” that James Clifford argues “offers a sense of depth and continuity” throughout the myriad of ongoing change over time that the Gitksan and other indigenous people are both a part of and are surrounded by.<sup>84</sup> According to Clifford, recognizing this grounding of place for indigenous peoples is a way to avoid getting lost in

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<sup>79</sup> Wendy Doniger O'Flaherty, *Other Peoples' Myths: The Cave of Echoes* (New York: Macmillan, 1988).

<sup>80</sup> Marsden & Galois, *supra* note 67; Marsden, *supra* note 67.

<sup>81</sup> See generally Viola Garfield, “Tsimshian Clan and Society” (1939) 7:3 *University of Washington Publications in Anthropology* 167-340.

<sup>82</sup> See, for example, Sterritt, *et al.*, *supra* note 67.

<sup>83</sup> By positivism, I am referring to a general approach in which it is assumed that a single truth is possible provided the correct scientific methods are employed. The term originates with a “philosophical system founded by Auguste Comte, concerned with positive facts and phenomena, and excluding speculation upon ultimate causes or origins”. *Random House Unabridged Dictionary*, 2006, s.v. “positivism”, online, <http://dictionary.reference.com>.

<sup>84</sup> Clifford, “Articulations”, *supra* note 70.

the worst of post-modernism. In this way, one can balance an appreciation of change within indigenous societies, on the one hand, with an enduring continuation of indigenous peoples, on the other.<sup>85</sup>

Taking a different slant that is helpful to my research, anthropologist Julie Cruikshank asks how indigenous peoples can still find meaning in their ancient narratives in the present-day, in modern ways. According to Cruikshank, stories are a way to connect people to the world and of “unifying interrupted memories that are part of any complex life”.<sup>86</sup> She describes her work with Athapaskan narratives from the Yukon:

My additional discomfort about recording in English timeless narratives learned in Athapaskan (Dän) languages, given the inevitable losses incurred in translation, was met with their confidence in their own translation abilities and their insistence that English is just one more Native language spoken in the Yukon. Gradually I learned how narratives about complex relationships between animals and humans, between young women and stars, between young men and animal helpers could frame not just larger cosmological issues but also the social practices of women engaged with a rapidly globalizing world.<sup>87</sup>

In the scholarship, there is an expanding genre of oral histories that are written by indigenous peoples as a way to reclaim and retell their own histories.<sup>88</sup> Intended as decolonizing, these publications fulfill many objectives including language preservation, education,<sup>89</sup> and identity formation, and as political projects.<sup>90</sup> An example here is

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<sup>85</sup> For a related argument, see Tim Schouls, *Shifting Boundaries: Aboriginal Identity, Pluralist Theory, and the Politics of Self-Government* (Vancouver: UBC Press, 2003). Schouls’ main argument is that recognition of aboriginal people should not be based in difference, but in aboriginal people’s history and self-definition as peoples.

<sup>86</sup> Julie Cruikshank, *The Social Life of Stories: Narrative and Knowledge in the Yukon Territory* (Vancouver: UBC Press, 1998) at 46 [Cruikshank]. Also see, Julie Cruikshank, *Dän Dhá Ts’edeninth’ë Reading Voices: Oral and Written Interpretations of the Yukon’s Past* (Vancouver: Douglas & McIntyre, 1991).

<sup>87</sup> *Ibid.*

<sup>88</sup> See for example, Art Napoleon, ed., *Bushland Spirit, Our Elders Speak* (Moberly Lake, B.C.: Twin Sisters Publishing, 1998); Maria Campbell, ed., *Stories of The Road Allowance People* (Penticton: Theytus Books, 1995); and Will Robinson, *Men of M’deek and War of M’deek* (Red Deer, Alberta: Skytone Printing and Graphics, 2003).

<sup>89</sup> Velma Wallis, *Two Old Women: An Alaska Legend of Betrayal, Courage and Survival*, 10th anniv. ed. (Seattle: Epicenter Press, 1973; New York: HarperPerennial, 2004); Velma Wallis, *Bird Girl and the Man who Followed the Sun: An Athabaskan Indian Legend from Alaska* (New York: Harper Perennial, 1997).

Okanagan storyteller Harry Robinson, who meticulously narrated his stories to anthropologist Wendy Wickwire because they contained rich and important knowledge about the earth, spirits, creation, human beings, history, and relationships, and he wanted those stories to remain alive in the world after his death.<sup>91</sup> A final selected example of this genre is from the north coast of British Columbia where the First Nations Advisory Council produced a wonderful language series of seven educational books, the *Suwilaay'msga Na Ga'niiyatgm (Teachings of Our Grandfathers)*.<sup>92</sup> Beautifully bound and illustrated, these books include oral histories (adaawk) written in both the Tsimshian language (Sm'algyax) and English, and a range of other well-researched historical information about the Tsimshian people both pre- and post-contact times.

Turning now to selected oral history articles that focus on law,<sup>93</sup> Robert Williams Jr. argues that stories are jurigenerative devices that enable indigenous peoples to renew their connection to law and peace. Williams explains that the “reciprocal performance of these rituals generated a set of legal meanings that bound together the members of the tribal

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<sup>90</sup> See for example, Ron Ignace, “Our Oral Histories are Our Iron Posts: Secwépemc Stories and Historical Consciousness” (Ph.D. Dissertation, Department of Sociology & Anthropology, Simon Fraser University, 2008) [unpublished]. Ignace describes his goal as creating “the *sense* of history, or historical consciousness, of my people as it emerged during the last 10,000 years.... Among the important stories that my people tell are the narratives that deal with our perception of the early newcomers, and of missionaries and the new religion they were imposing on us.... Our people’s stories, as I will show, defy the colonizers’ attempts to separate us out into small portions of our land and livelihood, and bring back our sense of nationhood as a people, Secwépemc, connected to Secwépemcúlecw, our land” (at iv) [emphasis in original].

<sup>91</sup> Harry Robinson, *Nature Power: In the Spirit of an Okanagan Storyteller*, ed. Wendy Wickwire, (Vancouver: Douglas & McIntyre, 1992). Also see Cruikshank, *supra* note 86.

<sup>92</sup> First Nations Advisory Council of School District # 52, *Suwilaay'msga Na Ga'niiyatgm/Teachings of Our Grandfathers*, (*Na amwaaltga Ts'msiyeen: The Tsimshian, Trade, and the Northwest Coast Economy; Adawga Gant Wilaaytga Gyetga Suwildook: Rituals of Respect and the Sea Otter Hunt; Saaban: The Tsimshian and Europeans Meet; Fort Simpson, Fur Fort at Laxlgu'alaams; Ndeh Wuwaal Kuudeex A Spaga Laxyuubm Ts'msiyeen: When the Aleuts Were on Tsimshian Territory; Conflict at Gits'ilaasü; and Na Maalsga Walps Nislgümiik, The Story of the House of Nislgümiik*), Tsimshian Language Series (Prince Rupert, BC., 1992).

<sup>93</sup> See generally, Lucy Bell, “Kwakwaka'wakw Laws and Perspective Regarding Property” (MA Thesis, Indigenous Governance, Faculty of Human and Social Development, University of Victoria, 2005) [unpublished]; George Blondin, *Yamoria: The Lawmaker: Stories of the Dene* (Edmonton: NeWest Press, 1997).

society through mutual obligations of solidarity and trust.”<sup>94</sup> William’s explanation assisted me to develop a theoretical framework that I could apply to the Gitksan oral histories, thereby articulating them as part of a formal legal archive, as information, as pedagogy, as legal reasoning, and as representing Gitksan people’s enduring connections to their land.

I also found the interpretative approaches for ancient Jewish legal texts very useful to broadening and deepening my thinking about Gitksan oral histories (chapter 5).<sup>95</sup> As with Gitksan legal traditions, there is a constant challenge of remaining relevant – if the oral histories are not useful, they will simply cease to matter, and they will be lost. This has caused Shulamit Almog to ask, “What sustains the encounter between contemporary predicaments, the strivings of modern warfare, the upheavals of the new economy, and the Halakhah (Jewish Law) and Aggadah (Jewish legend) that were produced thousands of years ago?”<sup>96</sup> This is about the very basic and pragmatic process of change that is a part of everyday life, and which must be considered when thinking about Gitksan legal traditions.

One example that meets the challenge of relevance and current usefulness is provided by legal scholar John Borrows, who creatively employs the structure of Anishinabek oral history as an instrument or device through which to explore complex contemporary political and legal issues.<sup>97</sup> Another similar example is provided by Gitksan

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<sup>94</sup> Robert A. Williams Jr., *Linking Arms Together: American Indian Treaty Visions of Law & Peace, 1600-1800* (New York: Oxford University Press, 1997) at 95.

<sup>95</sup> Stefan H. Krieger, “The Place of Storytelling in Legal Reasoning: Abraham Joshua Heschel’s Torah Min Hashamayim” (2007) Hofstra University Legal Studies Research Paper No. 07-26, online: Social Science Research Network <http://ssrn.com/abstract=1010930> [Krieger].

<sup>96</sup> Shulamit Almog, “‘One Young and The Other Old’: Halakhah and Aggadah as Law and Story” (2003) 18:2 C.J.L.S. 27 at 27.

<sup>97</sup> See for example, John Borrows, “Practical Recolonisation?” (2005) 28:3 U.N.S.W.L.J. 614-45. Actually, what Borrows does in this article is tell an oral history inside another oral history to create a scaffold for his legal argument. This technique of telling one oral history inside a second oral history is employed in *The Ten Canoes*, *supra* note 64. In this film, the purpose of this very effective technique is to create enough distance between the observer and the difficult subject matter so that the observer can safely acknowledge and discuss the uncomfortable subject matter without fear of repercussion or shame.

education scholar Jane Smith, who has articulated the pedagogy in one of the Gitksan forms of oral history, the *antamahlaswx*.<sup>98</sup> Smith argues that Gitksan *antamahlaswx* are an effective form of pedagogy that can and should be applied to present-day political, economic, and legal issues.

What Borrows and Smith do in their work is open up opportunities for more complex analysis of both the form and content of oral histories in contemporary indigenous legal traditions. This is in keeping with the work taking place in the field of cognitive science in which narratives or stories are understood as cognitive units that enable the efficient organization, recall, and exploration (via metaphor and analogy) of information.<sup>99</sup> According to Lorie Graham and Stephen McJohn, “the cognitive aspects of stories illuminates the cognitive tasks of law, such as reasoning, remembering, learning, persuading, communicating.”<sup>100</sup> A cognitive view of stories suggests that “the mind understands every entity in terms of four causes: who or what brought it about; what it’s made of; what shape it has; and what it’s for”.<sup>101</sup> This can be applied to oral histories: Who or what brought the legal concept about? What does the legal concept comprise? What does the legal concept look like in the world? What does the legal concept do? In chapter 5, I combine and apply the approaches of Borrows, Smith, and Graham and McJohn to one form of the Gitksan oral histories, the collectively owned *antamahlaswx*.

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<sup>98</sup> Jane Smith, *supra* note 27 at 44-45.

<sup>99</sup> The term “cognitive unit” is widely used and with varying applications across the disciplines – mathematics, computer science, psychology, education, and communication. My use of the term here means the cognitive structure that enables the mind to can hold and focus on a set of information at one time – such as the structure of a narrative or story. In the educational and cognitive science literature, cognitive unit is used to describe a lesson, a concept, or a theory.

<sup>100</sup> Graham & McJohn, *supra* note 58 at 28.

<sup>101</sup> *Ibid.* at 34.

### 2.3 Drawing from Legal Theory Scholarship

Legal systems contain rules of the road, in both the literal and metaphorical sense, as one way of institutionalizing solutions to such problems and of stabilizing and focussing the relevant expectations.

Legal systems vary in the degree to which they contribute usefully, or even positively, to the solution of life's coordination problems. Much that goes on in any legal system is concerned with other problems.<sup>102</sup>

I have a very pragmatic approach to Gitksan legal traditions which is similar to Krygier's in the above quote. My basic premise is that Gitksan people's legal traditions enabled them to effectively manage themselves as a decentralized, non-state people, and it is these structures, processes, and expressions of law that I seek to theorize in chapter 5. Generally, I found that legal theory scholars have not been very concerned with theorizing the legal traditions of indigenous peoples. This dearth in the literature has led William Twining to observe that the legal theory field is ethnocentric because it is almost entirely focused on modern Western, mainly Anglo-American law.<sup>103</sup> In other words, the legal theory scholarship has paid little attention to Hindu, Islamic, or Jewish jurisprudence and there are still too few references to Chinese, Japanese, Latin American and African legal traditions.<sup>104</sup>

From a different part of the world, Gordon Woodman and Akintunade Olusegun Obilade have argued that there are resources in Western legal scholarship that might usefully be applied to developing an African legal theory or theories.<sup>105</sup> In the spirit of

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<sup>102</sup> Krygier, *supra* note 10 at 259.

<sup>103</sup> See William Twining, "Globalisation and Comparative Law" in Esin Örüçü & David Nelken, eds., *Comparative Law: A Handbook* (Portland, Or.: Hart, 2007) at 71-72 [Twining, "Globalisation & Comparative Law"].

<sup>104</sup> For an interesting article that explores examples of Islamic, Hindu, and other non-western law, see Aaron Schwabach, "Non-Western Philosophies of Law" in Aaron Schwabach & Arthur John Cockfield, eds., *Encyclopedia of Life Support Systems* (Oxford, UK: UNESCO, Eolss, 2003/Rev. 2006) online: <http://www.eolss.net>.

<sup>105</sup> Gordon R. Woodman & A.O. Obilade, eds., *African Law and Legal Theory* (New York: New York University Press, 1995) at xxv.

Woodman and Obilade, I draw on the legal theorists Herbert L.A. Hart,<sup>106</sup> Lon Fuller,<sup>107</sup> and William Twining.<sup>108</sup> Specifically, I draw on Hart's positivist legal theory of primary and secondary rules,<sup>109</sup> Fuller's law as interaction theory, and Twining's legal theory framework to inform the exploration of Gitksan legal traditions and the development of a Gitksan legal theory.

There is much continuing controversy surrounding the various works of Hart and Fuller, but nonetheless, their theoretical approaches create very practical and critical ways to explore and analyse Gitksan law in an on-the-ground, substantive fashion. This substantive treatment derives from the examination of Gitksan law and surrounding issues through the lenses created by law-cases referred to earlier in this chapter. Llewellyn and Hoebel describe the law-case method as a way to prevent romanticism and rhetoric.

There is one good hedge against self-deception, and only one: the cases must be not only gathered, but recorded, bare and in full, especially the ones with most uncomfortable corners. The shrewdest and most accurate observer's generalization or interpretation is no substitute for the cases on which it rests. Cases are of course themselves no substitute for sound theory.<sup>110</sup>

I also draw on the work of two of the most prolific indigenous legal scholars, Gordon Christie and John Borrows, to explore the questions that arise from considering and developing a Gitksan legal theory. One of Christie's concerns is that while the colonial subtext can be invisible beneath the seemingly benign legal theory constructs, it

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<sup>106</sup> H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961).

<sup>107</sup> Lon L. Fuller, "Human Interaction and the Law" in Kenneth Wilson, *The Principles of Social Order: Selected Essays of Lon Fuller* (Portland, Or.: Hart, 2001) 231-66.

<sup>108</sup> William Twining, *Globalisation and Legal Theory* (New York: Cambridge University Press, 2000).

<sup>109</sup> See Matthew L. M. Fletcher, "Rethinking Customary Law in Tribal Court Jurisprudence" (2007) 13:1 Mich. J. Race & L. At 63-65. Fletcher argues that Hart's primary and secondary rules would be helpful to tribal court judges as a framework for the recognition and inclusion of customary law by the court. Also see Overstall, "Encountering", *supra* note 67 at 44. Drawing on Hart, Overstall classifies Gitksan laws into three categories; (1) primary, (2) secondary, and (3) strict.

<sup>110</sup> Llewellyn & Hoebel, *supra* note 33 at 40. Ironically, this is one of the grounds that Llewellyn and Hoebel are criticized. See generally, Conley & O'Barr, *supra* note 40.

nonetheless remains intellectually toxic for indigenous peoples.<sup>111</sup> In his most recent treatise on indigenous law, and in keeping with Llewellyn and Hoebel, Borrows cautions against indigenous fundamentalism and romanticization of past indigenous societies.<sup>112</sup> Borrows also encourages fearless exploration into the “most uncomfortable corners”<sup>113</sup> of law which expands the idea of legal traditions to include the outer bounds of norm-contestation and conflict.

## 2.4 My Learning – Research Process

My primary sources of information for this research project were a series of qualitative interviews and the *Delgamuukw* trial level transcripts.<sup>114</sup> Over 2005 and 2006, I interviewed twelve Gitksan and non-Gitksan people who were working in some aspect of the overall *Delgamuukw* enterprise. The interviewees I selected include political leaders, legal counsel, interpreters, coordinators, and witnesses (see chapter 4). My interview design and process were guided by social psychologist Elliot Mishler, who set out four propositions for what he called an alternative approach to research interviewing: “(1) interviews are speech events; (2) the discourse of interviews is constructed jointly by

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<sup>111</sup> Gordon Christie, “Indigenous Legal Theory: Thoughts Around its Emergence” (Paper presented to the Indigenous Peoples and Governance Conference, University of Montreal, October 10 & 11, 2008) [unpublished].

<sup>112</sup> John Borrows, *Canada’s Indigenous Constitution* [forthcoming in 2009] at c. 1. But see Paul Nadasdy, “Transcending the Debate over the Ecologically Noble Indian: Indigenous Peoples and Environmentalism” (2005) 52:2 *Ethnohistory* 291 at 315. Nadasdy argues that indigenous peoples are forced to romanticize their pasts for political purposes because they must fit into the narrow political spaces created in the environmental and conservation debates. Also see Paul Nadasdy, *Hunters and Bureaucrats: Power, Knowledge, and Aboriginal-State Relations in the Southwest Yukon* (Vancouver: UBC Press, 2003) at 261: “Just to engage in the dialogue of land claims, then, Kluane people have had to learn a very different way of thinking about land and animals, a way of thinking that to this day, many Kluane people regard with disapproval. In addition, the process of negotiating a land claims agreement has helped transform the very way of life that the agreement is supposed to preserve.”

<sup>113</sup> Llewellyn & Hoebel, *supra* note 33 at 40.

<sup>114</sup> *Delgamuukw v. The Queen* (1991), 79 D.L.R. (4th) 185 (B.C.S.C.).

interviewers and respondents; (3) analysis and interpretation are based on a theory of discourse and meaning; (4) the meanings of questions and answers are contextually grounded.”<sup>115</sup> Among other things, Mishler’s propositions ensured that I paid close attention to the power dynamics in the interview process and considered how these dynamics shaped the dialogue between me as the interviewer, and the interviewee as the teller. Mishler also advocates considering the interviewees’ responses as stories or narratives, and further, that the narrative should be considered paradigmatic, “that is, as *the* way in which people transform ‘knowing into telling,’ as opposed to a view of narrative as one strategy or mode of telling.”<sup>116</sup>

For example, when I interviewed Katie Ludwig (Galsimgigyet), she described how she was raised from infancy by her grandparents. Her job as a young child was to guide her blind grandfather and to ensure that he was not injured. This intense, care-giving role meant that Ms. Ludwig regularly attended meetings, discussions, and events with her grandfather, and so she learned to be a careful listener. If I am cognizant of Mishler’s advice when I interview Ms. Ludwig, then I must appreciate how all of her childhood experiences form a knowledge that she transforms into a “telling” when I interview her; this is a paradigmatic process. It also means that I must understand that the interview context, which includes our friendship, respective views, and experiences, actually shapes both the interview process and the content. Furthermore, what Ms. Ludwig told me is a form of discourse inclusive of the context and power dynamics in our relationship.

Robert Cover continues this theme as it applies to legal traditions:

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<sup>115</sup> Elliot G. Mishler, *Research Interviewing: Context and Narrative* (Cambridge, Mass.: Harvard University Press, 1986) at ix.

<sup>116</sup> *Ibid.* at 147 [emphasis in original].

The transformation of interpretation into legal meaning begins when someone accepts the demands of interpretation and, through the personal act of commitment, affirms the position taken. Such affirmation entails a commitment to projecting the understanding of the norm at work in our reality through all possible worlds unto the teleological vision that the interpretation implies.<sup>117</sup>

Cover also argues that the creation of legal meaning “requires not only the movement of dedication and commitment, but also the objectification of that to which one is committed.”<sup>118</sup> I take Cover’s insights to apply to both implicit and explicit Gitksan law. Part of what I was looking for in the interviews was how people understood Gitksan legal traditions – implicitly (from what people did) and explicitly (how people explained the legality in what they did). This meant considering how the interviewees drew legal meaning from their oral histories and other institutions, how they created legal meaning in their past and present experiences, and how they acted on the legal meaning that they understood.

The focus of my interview guide was how *Delgamuukw* influenced or changed the social relationships between Gitksan people and the relationship between Gitksan people and the land (see Appendix B). However, the interviewees offered few comments about such broad changes, and instead talked mainly about historic and contemporary conflicts. In keeping with Mishler’s admonition to recognize the joint (interviewer and interviewee) construction of the interview discourse as well as empowering the interviewees, I decided to listen to what people were actually saying rather than insisting that they speak to my initial research question and subject interest. Given this, I shifted my research to more closely focus to conflict (which is still part of Gitksan social relationships) – to considering how people talked about conflict, conflict management, and Gitksan legal traditions, and

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<sup>117</sup> Robert M. Cover, “The Supreme Court 1982 Term Foreword: *Nomos* and Narrative” (1983) 97:1 Harv. L. Rev. 4 at 45 [footnote omitted] [Cover].

<sup>118</sup> *Ibid.*

whether some of the present-day conflict might be ascribed to *Delgamuukw*. Much of the literature about conflict in the everyday life of large groups of people focuses on its resolution as opposed to its management, and very little considers how closely conflict management is tied to law, legal norms, and obligations (see chapter 6).

This shift in research focus meant that I needed to learn whether and how the experience of *Delgamuukw*,<sup>119</sup> in its entirety, served to increase the general level of internal conflict experienced by Gitksan people by undermining their conflict management system. While not all conflict involves law, it still did not make sense to research conflict management without law, so it became part of my thesis to contextualize the Gitksan conflict management system within a substantive articulation of Gitksan legal traditions and the development of a Gitksan legal theory.

I had two concerns to do with writing about Gitksan legal traditions and developing a legal theory. First, it was of paramount importance to write about Gitksan legal traditions in a way that avoided reification and reflected the actual complex practice of Gitksan law in life, from a “law-in-the-world”<sup>120</sup> perspective. According to Robert Cover, “Law must be meaningful in the sense that it permits those who live together to express themselves with it and with respect to it. It must both ground predictable behavior and provide meaning for behavior that departs from the ordinary.”<sup>121</sup> Second, I intended to ensure that the Gitksan legal theory I developed remained grounded in the practice and experience of law. Both these concerns guided how this project evolved in the last several years.

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<sup>119</sup> As explained previously, by entirety, I am including the decades of preparation, the three levels of court, the plurality of decisions, and ongoing political aftermath.

<sup>120</sup> Twining, “Globalisation & Comparative Law” *supra* note 103.

<sup>121</sup> Cover, *supra* note 117 at 14.

Turning to the court transcripts: I reviewed only the transcripts of the Gitksan witnesses under direct examination and cross examination.<sup>122</sup> I did not review the transcripts of the Wet'suwet'en witnesses or the numerous expert witnesses who testified on behalf of the Plaintiffs or the Crown. My analysis of the transcripts was influenced by James Clifford, among others, who advocate for an appreciation for indigenous social change – what an indigenous articulation – that is capable of encompassing and reflecting the “pragmatic, entangled, contemporary forms of indigenous cultural politics.”<sup>123</sup> This starting point meant that I had to consider the historic and contemporary change factors that are a part of Gitksan people's lives and that Gitksan people are a part of. In chapter 3, I explore and discuss how these change factors (e.g., wage economy, industrial resource activities, etc.) matter to the theory and praxis of Gitksan legal traditions, and to their continuing validity and legality. This question is discussed further in chapter 6.

## 2.5 Chapter Conclusion

There are no research templates for investigating how major litigation impacts and influences the social, political, and legal affects of major litigation on an indigenous society's conflict management system and legal traditions. Literature relating to this area usually focuses on legal outcomes such as the attainment or loss of rights rather than on the various non-legal (Western) impacts or changes.<sup>124</sup> Nor are there research templates for

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<sup>122</sup> *Delgamuukw* generated some 50,000 pages of court documents at trial.

<sup>123</sup> Clifford, “Articulations”, *supra* note 70 at 472.

<sup>124</sup> But see Benjamin R. Smith & Frances Morphy, eds., *The Social Effects of Native Title: Recognition, Translation, Coexistence* (Canberra: ANU E Press, 2007), online: Australian National University E Press, [http://epress.anu.edu.au/c27\\_citation.html](http://epress.anu.edu.au/c27_citation.html). Also see E. Richard Hart, ed., *Zuni and the Courts: A Struggle for Sovereign Land Rights* (Lawrence, Kan.: University Press of Kansas, 1995); Johnson, *supra* note 70; James Clifford, *The Predicament of Culture: Twentieth-Century Ethnography, Literature, and Art* (Cambridge:

how to research and articulate indigenous legal traditions in a substantive manner – both the praxis and theory. This is not to say that there is no literature on indigenous legal traditions, but rather, analysis as to praxis and theory is not explicated. Given this, the research process described herein has been one of an ongoing discovery and invention.

There are, however, many examples of why it is critically important to treat indigenous legal traditions comprehensively and with a deep appreciation of their internal complexities and dynamics. Here is one such example from the new South Africa provided by John Comaroff and Jean Comaroff who set out to discuss the “limits of liberalism and the pragmatics of difference in the new South Africa”.<sup>125</sup> The Comaroffs describe a case where a young man, Naledzani Netshiavha, killed his neighbour, Gumani, with an axe.<sup>126</sup> In his statement, Netshiavha explained, “I plead not guilty to murder. I deny that I intentionally caused the death of Gumani. I plead guilty to culpable homicide in that I unlawfully and negligently caused [his] death. I had mistaken [him for] a bat and only later realized that I had struck a human being.”<sup>127</sup> Netshiavha was found guilty of murder at trial, but his sentence was commuted to four years and then he was actually released for time served.<sup>128</sup> While Justice Goldstone opined that Netshiavha had been “negligent in wielding an axe against a man who had not threatened him”, he nonetheless concluded that

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Harvard University Press, 1988) at c. 12; Christian W. McMillen, *Making Indian Law: The Hualapai Land Case and the Birth of Ethnohistory* (New Haven: Yale University Press, 2007).

<sup>125</sup> John L. Comaroff & Jean Comaroff, “Criminal Justice, Cultural Justice: The Limits of Liberalism and the Pragmatics of Difference in the New South Africa” (2004) 31:2 *American Ethnologist* 188-204.

<sup>126</sup> *Ibid.* at 193.

<sup>127</sup> *Ibid.* [footnotes omitted; brackets in original]. The article actually describes a number of cases with similar fact patterns.

<sup>128</sup> *Ibid.* at 195.

“a subjective belief in witchcraft may...have a material bearing upon the accused’s blameworthiness.<sup>129</sup> The Comaroffs explain the appeal:

In the appeal, a much wider range of contextual evidence was allowed to establish a meaningful frame within which the rationality of Netshiavha’s actions might be read. True, judgment stopped short of permitting Culture, as a collectively inhabited reality, to inflect the notion of the reasonable in law; being a matter of ‘subjective’ belief, it did not remove culpability. But the court’s decision suggested a new seriousness in addressing the relationship of ‘African custom,’ however ill understood, to criminal justice.<sup>130</sup>

The background here involves an understanding of the world that included witches being disguised as bats. The Comaroffs place this case and their analysis of it within a complex, but uneasy discussion about legal universalism versus cultural difference.<sup>131</sup> In South African courts, the “invocation of cultural beliefs” is dealt with unevenly, “sometimes resting on quite capricious assessments of the ‘sincerity’ of those beliefs”.<sup>132</sup>

The Comaroffs’ main focus is on the relationship between Western law and culture,

These strategies, we stress, are all contingent ways of reconciling the law of the land with the policulturalism of the postcolony, a postcolony whose liberal Constitution presumes the juridical indivisibility of the nation-state and, yet, treats cultural difference as a matter of right. However, well-intended they may be, they are notably unsystematic, sometimes incoherent.<sup>133</sup>

In Africa, the jurisprudence reflects the transformation and appropriation of foreign practices such as “democracy and other elements of modernity”.<sup>134</sup> This has led Comaroff and Comaroff to observe that historic “African customary law” is actually more similar to the common law than the “dehistoricized, timeless chimera made of it under colonialism.”<sup>135</sup> Basically, it seems that the African courts have been very practical in

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<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.* at 194.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.* at 195.

<sup>134</sup> *Ibid.* at 199.

<sup>135</sup> *Ibid.*

dealing with these cases by treating them “as arising out of a collective lifeworld” so that they do not have to assess the sincerity of beliefs of the parties, and where “[m]oral relativism, under these conditions, gives way to social contextualization”.<sup>136</sup> Hence, “‘dangerous’ practices are made more tractable to legal reason”, and “the distinction between Euromodernity and Afromodernity is renegotiated, the content of each redrawn”.<sup>137</sup>

One of the problems with the Comaroffs’ analysis and conclusion is that they do not treat what they call “African customary law” as law – as a comprehensive whole that is much more than disconnected and bizarre practices as in the case of Netshiavha (despite their acknowledgement that African customary law was undermined by colonialism).<sup>138</sup> The Comaroffs appear to assume that there was no way that African customary law could change with the times so that people could deal with today’s witchcraft killings according to current social and legal norms, and politics. One is left with the impression that African customary law is completely and hopelessly stuck in the past, and that it is so damaged that it is incapable of dealing with present-day issues.

An alternative approach would be to assume that historically,<sup>139</sup> there was an indigenous legal order that Netshiavha was a part of (1) that was large enough to avoid conflicts of interest and which ensured accountability, (2) that had collective processes to change law as necessary with changing times and changing norms, (3) that was able to deal with internal oppressions, (4) that was legitimate and the outcomes collectively owned, and

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<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*

<sup>138</sup> There is no African customary law just as there is no Indigenous customary law.

<sup>139</sup> The Comaroffs do acknowledge damage to African customary law due to colonization, but do not seem to assume other changes that might be relevant or useful. *Ibid.* at 199.

(5) that had collective legal reasoning processes.<sup>140</sup> From such an alternative perspective, it could be assumed that, despite recent history, legal traditions still exist (in contemporary forms) with legal norms and obligations, relationships, and processes that are useful for dealing with the present-day case of Netshiavha, perhaps in collaboration with the court. In this alternative analysis, perhaps Netshiavha would have been found guilty in “African customary law” for a number of actions including murder.<sup>141</sup> Who knows?<sup>142</sup>

In the chapters that follow, I make the case for more critical and deeper appreciation of Gitksan legal traditions. I also make the case that it is possible for legal traditions to transcend cultural boundaries without oversimplification or colonization – and in part, this is what this research project is an attempt to do.

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<sup>140</sup> Postema, “Part I” and Postema, “Part II”, *supra* note 59.

<sup>141</sup> In Canada, there are many similar examples such as the killing of a windigo described by Thomas Fiddler & James R. Stevens, *Killing the Shamen* (Moonbeam, Ont.: Penumbra Press, 1985). Also see, Shelagh D. Grant, *Arctic Justice: On Trial for Murder, Pond Inlet, 1923* (Montreal: McGill-Queen’s University Press, 2002); Hamar Foster, “‘The Queen’s Law is Better than Yours’: International Homicide in Early British Columbia” in Jim Phillips, Tina Loo, & Susan Lewthwaite, eds., *Essays in the History of Canadian Law: Volume: Crime and Criminal Justice* (Toronto: Osgoode Society, 1994) 41-111. One of the cases in Foster’s piece nicely examines the cultural confusion between the legal effects of an accidental death in both Gitksan and British legal cultures. A young Gitksan man, Billy Owen drowned while in the employ of a non-Gitksan, Amos Youmans. When Youmans failed to immediately report the death of Owen to his family, as was necessary according to Gitksan law, Owen’s father, Haatq, killed Youmans (at 41).

<sup>142</sup> Also see John Philip Reid, *Patterns of Vengeance: Crosscultural Homicide in the North American Fur Trade* (Pasadena: Ninth Judicial Circuit Historical Society, 1999).

## CHAPTER 3 It is in the Earrings:

### Articulating Gitksan Law in the Trial Transcripts

#### 3.1 Introduction

In May 1987, the *Delgamuukw* trial at the British Columbia Supreme Court began in Smithers, BC.<sup>1</sup> There were 374 trial days over three years, ending 30 June 1990. The Gitksan and Wet'suwet'en plaintiffs sought a declaration of ownership and jurisdiction for the purpose of maintaining their relationship with their land and resources. The legal hurdle the plaintiffs had to overcome was the legacy from *Baker Lake*, the organized society test.<sup>2</sup> This legal test required that aboriginal parties seeking to establish title had to first prove (1) that they and their ancestors were members of an organized society, (2) that this organized society occupied the specific land they claimed title to, (3) that their occupation excluded others, and (4) that they occupied the land at the time Canadian sovereignty was asserted.<sup>3</sup> In order to do this, Gitksan and Wet'suwet'en witnesses testified during the first two years of the trial. Gitksan<sup>4</sup> witnesses described their complex political, legal, social, and economic systems and presented extensive evidence about land ownership, resource management, social structure, governance, histories, economy, law (*ayook*)<sup>5</sup>, and spirituality.

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<sup>1</sup> *Delgamuukw v. The Queen* (1991), 79 D.L.R. (4th) 185 (B.C.S.C.). *Delgamuukw* was actually launched in 1984.

<sup>2</sup> *Baker Lake (Hamlet) v. Canada (Minister of Indian Affairs and Northern Development)*, [1979] F.C.J. No. 184, 107 D.L.R. (3d) 513 (F.C.T.D.) at 542.

<sup>3</sup> For an excellent analysis of this test see Catherine Bell & Michael Asch, "Challenging Assumptions" in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) 38 at 56.

<sup>4</sup> Many Wet'suwet'en witnesses also testified during this time.

<sup>5</sup> *Ayook* means law, custom, or precedent.

When I began, I had decided not to write an ethnographic description of Gitksan law.<sup>6</sup> Rather, I imagined developing enough of a working understanding of Gitksan law to be able to write about it as I would any other form of law – as Gitksan law. Furthermore, I did not want to situate Gitksan law retrospectively – as if it remained in some permanent stasis in the past and existing only in people’s memories. My goal was to explore Gitksan law as a very alive and dynamic part of Gitksan people’s past as well as part of their present and future.

My approach is informed by Jeremy Webber, who argues there are two approaches to legal scholarship. The first is an internal point of view, a study of law from the inside that focuses on “how arguments are fashioned and deployed within legal practice”.<sup>7</sup> The second is an external point view, a study about law from the outside that usually focuses on “historical and sociological accounts of the very same body of law”.<sup>8</sup> In practice, the two perspectives are often blurred in the scholarship across the disciplines,<sup>9</sup> including by legal practitioners who rely on “both kinds of explanation to understand the very same developments.”<sup>10</sup> Given this, it is my intention to write about Gitksan law from an internal

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<sup>6</sup> According to Patrick Glenn, “The anthropologists who undertook the task of discovery [of customs] seemed in no way to challenge underlying ideas of custom, though attempting the superhuman task of bringing about its recognition as law.” H. Patrick Glenn, “The Capture, Reconstruction and Marginalization of ‘Custom’” (1997) 45 Am. J. Comp. L. 613 at 619 [Glenn, “Capture”].

<sup>7</sup> Jeremy Webber, “The Past and Foreign Countries” (2006) 10 Legal History 1 at 2 [Webber, “Past & Foreign”].

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

<sup>9</sup> This blurring can also be seen in some of the law and society scholarship as well as in work by academics writing in their own discipline. See for example in sociology, Chris Andersen, *Courting Colonialism? The Juridical Construction and Political Aftermath of Métis Rights in R. v. Powley* (Dissertation, University of Alberta Department of Sociology, 2004) [unpublished].

<sup>10</sup> *Ibid.* There is some similarity between Webber’s interior and exterior approaches to law, and the terms “emic” and “etic” used in both social sciences and behavioural sciences to describe two different kinds of data. An emic account is culture-specific and describes a behaviour or belief in terms that are meaningful, either consciously or unconsciously, to the actor or participant. In contrast, an etic account is not culture-specific and describes a behaviour or belief by an observer. An etic account may be applied to other cultures and is intended to be culturally neutral. Personal correspondence from Michael Asch (15 February 2009).

point of view whenever possible through a detailing of ancient and recent Gitksan legal cases – developing a very preliminary Gitksan jurisprudence. This is an inside, hands-on way of learning about Gitksan legal traditions – from how people manage conflict (the decisions and agreements reached), from their treatment of one another (how they understand and fulfill their legal obligations), and from how they understand and deal with crimes, accidents, and failures to fulfill legal obligations. I will also need to employ a descriptive mode in order to set up and explore the internal view, and to begin identifying the contours and functions of the Gitksan legal order. All of this is necessary to laying the foundation for my development of a Gitksan legal theory in chapter 6. Also, my overarching question remains throughout this research: whether and how the experience of *Delgamuukw* affected Gitksan people's ability to manage conflict through their legal traditions. To explore this question requires at least some understanding of Gitksan law and hence this chapter.

During the trial it seemed that much of the Gitksan witnesses' evidence contained many examples of both explicit and implicit law, so I anticipated that from a study of the transcripts I would be able to discern the basic structure of the Gitksan legal order, the body of law within it, and its main legal processes. From this examination, I thought I would be able to learn, at least at an elementary level, Gitksan law's source and authority, function, processes of change, records, interpretation and reasoning, and practice and application. I have been able to achieve a measure of success toward fulfilling this goal, and I will set this out later in this chapter. However, the way that I actually had to learn about Gitksan law from the transcripts was quite different from what I imagined. As I read through the many file boxes of trial transcripts, I realized that, as rich and as wonderful as

the transcripts are, they also presented several major difficulties for my project. For example, it seemed that the Gitksan witnesses called most practices “law” without enough explanation or contextualization as to the legal reasoning about the practices, about what the legal principles were, or about how such practices might actually constitute a record of law. Basically, there was no theoretical space in the *Delgamuukw* legal proceedings to explore these larger questions from a Gitksan legal perspective. Furthermore, much of the evidence about Gitksan law appeared to be idealized and separated from the actuality of law-in-the-world, and the Gitksan were described as being also somehow insulated from the effects of recent colonial history.<sup>11</sup> The evidence provided was extremely detailed and dense, and obviously very extensive. It soon became apparent to me that I would be entirely lost if I did not develop my own framework of inquiry through which to read the transcripts. I will describe these difficulties later in the chapter.

There are three parts to this chapter: First, I explain how I learned from the trial transcripts and the initial difficulties that I encountered in doing so. Second, I provide a selected series of Gitksan cases that are examples of Gitksan legal processes and law in practice. Third, I will discuss the Gitksan legal order, selected areas of law, and emerging legal principles and obligations.

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<sup>11</sup> Legal theorist William Twining argues that one of the more useful functions of legal theory is to create a total picture of “law-in-the-world”, which I take to mean a law and society perspective. William Twining, *Globalisation & Legal Theory* (New York: Cambridge University Press, 2000) at 242 [Twining, *Globalisation*].

## 3.2 Trial Transcripts

### 3.2(a) Coherence

Legal counsel for the Plaintiffs attempted to provide the Court with a basic structure for the evidence and took pains to outline how the evidence presented by each witness would form part of the whole. For example, when introducing Olive Ryan (Gwaans), the third Gitksan witness, Peter Grant explained to the Court that “it is our intention to lay the groundwork of the Gitksan system” and that he would “put her evidence in a context to assist the Court with an understanding of its framework”.<sup>12</sup> Part of Mr. Grant’s opening statement included the following:

I intend to introduce Mrs. Ryan's evidence, as with the other two [witnesses], through her identification, through her House and through her wil'na t'ahl and her clan, and also refer to her husband's clan. Although her evidence will cover many things, I intended to lead it through the context of two pole raising Feasts... I anticipate her evidence will explain the raising of the pole for the Gitksan and how the raising of the pole for a chief is the culmination of their responsibilities as a chief.

That is why you will hear much evidence about the attendance ceremonies and Feasts that we will try to bring out for the court... [S]he makes references to the crests and to the adaawk at the appropriate places, so that you can see this type of evidence in a different context, that is, how it comes together for the Gitksan... [This] would include the evidence of her territory and her history... [W]hen I come to these other categories [I will advise] you... that I am taking the evidence out of the Feast and into these other areas.

And finally, I would like to complete her evidence with the culminating... Gwaalgwa Feast.

The reason I wanted to do this opening is... I don't want it to be frustrating and... I don't want... the Court to be lost in it, but to try to integrate many of the types of things you have heard.<sup>13</sup>

Basically, Mr. Grant explained to the Court that he would introduce Mrs. Ryan (Gwaans) through her lineage in order to explain her role and demonstrate how she fitted into Gitksan society. Mr. Grant also explained (unfortunately, rather muddily) to the Court

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<sup>12</sup> See Olive Ryan (Gwaans) 10 June 1987, B.C.S.C. trial transcript, 1003 at 1008, evidence for *Delgamuukw v. The Queen* (1991), 79 D.L.R. (4th) 185 [Olive Ryan (Gwaans) 10 June 1987].

<sup>13</sup> *Ibid.* at 108-109.

that the complex of Mrs. Ryan's evidence would be structured around two pole-raising Feasts, including one recently hosted by her House. In other words, while the Court had previously heard some evidence about the *adaawk* (formal ancient collectively owned oral history), crests (*ayuuk*), and territories from other witnesses, Mrs. Ryan (Gwaans) would be speaking about these matters primarily as they related to the pole-raising Feasts.

However, despite these efforts, the sheer machinery of such a major case became overwhelming, and no matter how hard everyone worked, there was simply not enough time to reflect or even maintain an overall case strategy. Richard Overstall, evidence coordinator during the *Delgamuukw* trial, shared this frank comment: "I think everybody got panicky and tried to put everything in just because it might be useful later on".<sup>14</sup> Of course, this is not to suggest that there was no thought or planning on the part of the Plaintiffs, since it is entirely obvious that such a tremendous project would not have been possible without dogged determination, a vast breadth of knowledge, and exceptional organizational abilities. Rather, my point is simply that *Delgamuukw* was the first time aboriginal plaintiffs had to meet the organized society test in order to make their claim for aboriginal title. No one knew what to expect. It is no surprise then, in hindsight and with my own research agenda, that the transcripts appeared to me to reveal a lack of coherence – as though everything had been included "just in case".

The trouble one has in following the lengthy complex descriptions of Gitksan legal traditions and processes caused anthropologists Margaret Anderson and Marjorie Halpin to comment that "[l]ong accounts of Northwest Coast ceremonials usually lead the reader

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<sup>14</sup> Interview of Richard Overstall (16 July 2005) Telkwa, BC, at 4 [Overstall, interview].

through such a maze of ritual and detail that she loses sight of the patterns.”<sup>15</sup> Indeed, this is exactly what does not come through the transcripts – a pattern. There is no overall scaffolding to help organize the dense and descriptive presentation of evidence into an understanding of Gitksan society or of Gitksan law.

According to Overstall, in the end, the case “just sort of carried on so that essentially evidence was being collected and paper was being moved around without too much reflection in terms of where it fitted into some overall story or legal theory.”<sup>16</sup> Given this, it was initially difficult to discern and tease out an overall structure or theory of Gitksan law from the extensive detailed evidence about Gitksan society. This was compounded by the Crown’s cross examinations, which for the most part simply replicated the density of all the Gitksan evidence by attempting to verify each aspect of Gitksan life that the witnesses presented by asking minutely detailed questions about the names of plants, creeks, and mountains, lineages and kinship relationships, and every other subject the witnesses touched upon.

Certainly, cross examination is a critical part of the judicial process. I refer to it here only to make the point that the provincial and federal Crown also lacked an overall understanding of Gitksan law (and quite likely any indigenous law), and that Crown lawyers were also struggling to find their way through the evidence. At the end of the day, the Crown’s only strategy appeared to be discounting and minimizing Gitksan evidence of their society. Consequently, cross examination in this case served no constructive purpose for anyone, and instead simply doubled the cost of the trial. After all, what was the Crown going to do with Gyoluugyat’s adaawk and her answers to their questions about whether

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<sup>15</sup> Margaret Anderson & Marjorie Halpin, eds., *Potlatch at Gitsegukla: William Beynon’s 1945 Field Notebooks* (Vancouver: UBC Press, 2000) at 4 [Anderson & Halpin].

<sup>16</sup> Overstall, interview, *supra* note 14 at 4.

Suu wii gos (a warrior) travelled to and from Gitangasx – argue that her answers were not true?<sup>17</sup> This is not so much a criticism of the Crown lawyers, who were just doing their job, as it is an observation about the seeming ludicrousness of this aspect of the trial and the limitations of the judicial forum for this case.

This short excerpt from the cross-examination of James Morrison (Txaaxwok) is an example of this minute repetitious questioning:

Mr. MacKenzie	Now, Mr. Morrison, people going to Kisgagas now drive along that road as you do, don't they, to get to Kisgagas?
Txaaxwok	They – they driving up there.
Mr. MacKenzie	And there's a lot of logging along that road now isn't there?
Txaaxwok	Yes.
Mr. MacKenzie	Yes.
The Court:	Where does the road start?
Txaaxwok	Starts at Salmon River.
Mr. MacKenzie	Could you tell His Lordship how you get to Salmon River from Hazelton?
Txaaxwok	You turn off at the sign, they call it Kispiox Road, turn to your right going down to Hazelton.
Mr. MacKenzie	It's just outside of Hazelton where you turn off the highway?
Txaaxwok	Yes. Yes, and it's about a mile and a quarter and it turns off, the sign says Salmon River.
Mr. MacKenzie	So can you agree with me it takes about what, an hour to drive up, an hour and a half to get up to Kisgagas from the turn-off at Hazelton?
Txaaxwok	It could be more than that.
Mr. MacKenzie	Depending if the road's open?
Txaaxwok	Yes.
Mr. MacKenzie	Two hours?
Txaaxwok	About two hours, two and a half hours. <sup>18</sup>

The next day, Mr. McKenzie continues,

Mr. MacKenzie	And on Chipmunk Creek you trapped Beaver there, in that territory?
Txaaxwok	Oh, yeah.
Mr. MacKenzie	And you trapped fish in that territory?
Txaaxwok	Yes.

<sup>17</sup> Mary McKenzie (Gyoluugyat) 25 May 1987, B.C.S.C. trial transcript, 506 at 526, evidence for *Delgamuukw v. British Columbia*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185.

<sup>18</sup> James Morrison (Txaaxwok) 21 April 1988, B.C.S.C. trial transcript, 5322 at 5380, evidence for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185 [James Morrison (Txaaxwok) 21 April 1988].

Mr. MacKenzie      You trapped marten in that territory?  
Txaaxwok            Yes.  
Mr. MacKenzie      You trapped mink in that territory?  
Txaaxwok            Yes.  
Mr. MacKenzie      You trapped muskrat in that territory?  
Txaaxwok            Yes.  
Mr. MacKenzie      You trapped otter in that territory?  
Txaaxwok            Yes.  
Mr. MacKenzie      You trapped skunk in that territory?  
Txaaxwok            Yes.  
Mr. MacKenzie      You trapped squirrel in that territory?  
Txaaxwok            Yes.  
Mr. MacKenzie      You trapped weasel in that territory?  
Txaaxwok            Yes. You forgot wolverine.  
Mr. MacKenzie      Wolverine, yes, thank you. Sorry, my Lord. Wolverine is  
mentioned here, that's right.<sup>19</sup>

Another similar example on a different topic is drawn from the commissioned evidence of the cross-examination of the elderly Thomas Wright (Guuhadakw).

Mr. O'Byrne            Let's clarify that a little further. Is it true, Mr. Wright, that every person who has become 'Wiiminoosikx and taken the name 'Wiiminoosikx is by Gitksan law and tradition your grandfather?  
Guuhadakw            William Dennis – yes, that's true. They're all my grandfathers. Some of them came from Stikine and one was Axtsiina. He was 'Wiiminoosikx and his name was William Dennis.  
Mr. O'Byrne            You mentioned that sometimes you would get lonely and go on the lands of your father and your grandfather. Is that land different from your land as Guuhadakw?  
Guuhadakw            Yes, it's different, quite different.  
Mr. O'Byrne            Is it in a different location than your land as Guuhadakw?  
Guuhadakw            Yes, it's that fourth cabin on the Skeena River on the left side.  
Mr. O'Byrne            Now, Mr. Wright, I want to talk about the lands that you described to us that your father, Xsimxsan took you to when you were about 12 years old.<sup>20</sup>

All of this combined to create a rather fantastical sense that Gitksan law was somehow being poured to overflowing over the whole of the trial, splashing in drops and rivulets to finally settle into pools created by the uneven surfaces and small hollows to

<sup>19</sup> James Morrison (Txaaxwok) 22 April 1988, B.C.S.C. trial transcript, 5397 at 5428, evidence for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185.

<sup>20</sup> Thomas Wright (Guuhadakw) 30 April 1986, B.C.S.C., commissioned evidence transcript, 2-73 at 2-137, for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185 [Thomas Wright (Guuhadakw) 30 April 1986].

form the body of evidence. In part, this phenomenon of seeming incoherence is created by the very nature of law, captured by this next quotation about the paradoxes of articulating implicit and explicit law in western society. Such paradoxes were magnified and multiplied many times over for the Gitksan witnesses who were explaining their law in the forum of another legal system.

It takes on something of a paradox as soon as we realise that the law does not have complete control over the code of legality and illegality which it nonetheless administers (what, then, is the source of legality?), that it has no direct access to the facts that it nonetheless controls, that its boundaries, leaky and reversible, are both internal and external, that the rules which it sets up to reduce conflict and influence behaviour are themselves the subject of permanent conflict, that the actors in the judicial drama are both partners and opponents, that knowledge of the law implies a position both inside and outside of it, and that law's legitimacy depends both on the consensus in its favour and on the possibility of dissension to which it accommodates itself.<sup>21</sup>

This seeming lack of structural coherence of Gitksan law also derives in part from the artificiality created by the court experience itself. In the courtroom, Gitksan witnesses mainly provided idealized accounts of Gitksan law that seemed somewhat disconnected from the practical examples of Gitksan people actually exercising their law on the ground. This is not surprising since, as Jeremy Webber argues, this is a “general issue inherent in the very normative aspiration of law, given that law can never quite achieve its aspiration to perfect justice (because of human frailty but also because we inevitably have different views of what that justice is).”<sup>22</sup> Given this, and because of the very real tensions between ideal aspirations and the usual messiness of law-in-life, Gitksan law as with other societies' law is always more complex than its descriptions.

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<sup>21</sup> François Ost & Michel van de Kerchove, “Constructing the Complexity of the Law: Towards a Dialectic Theory”, online: Droits de l'Homme et Dialogue Interculturel <http://www.dhdi.free.fr/recherches/theoriedroit/articles/ostvdkcomplex.pdf> at 2 [Ost & Kerchove].

<sup>22</sup> Correspondence from Jeremy Webber (21 August 2008) at 1.

While some of the Gitksan legal practices were described to the court as evidence, there was little opportunity to identify, unpack, or discuss the underlying ethics, legal principles, or obligations that are discernable in the examples of Gitksan people exercising their law. In order to meet the requirements of the organized society test, Gitksan law was presented as a way to prove that the Gitksan were an organized society. The court, through the trial, learned about Gitksan law through the witnesses' (albeit, sometime lengthy and perplexing) descriptions. The problem of learning about law entirely from description rather than from an insider jurist perspective is insightfully explained by Jeremy Webber in this example of teaching non-lawyers about law:

[T]hey think of law entirely in descriptive terms and attempt to determine, as a matter of empirical fact, what the law is. They fail to see that lawyers, in the process of making their arguments, necessarily have to make and remake law, narrowing it down to a particular “best” [exhortative] outcome.<sup>23</sup>

In this case, Chief Justice McEachern was a non-practitioner of Gitksan law, and arguably, perceived it as empirical or social fact rather than as law. Furthermore, the Gitksan witnesses were not in a position to provide the court with an internal view of their law since (1) this would have required separating their law from their other political, economic, and social institutions, and (2) no one other than the Gitksan had enough understanding of Gitksan law to enable the Court to understand that law or to describe, in Webber's words, “the reasoning...when interpreting the law, arguing cases, and making decisions”.<sup>24</sup> In other words, the position of Gitksan witnesses was such that in order to explain the internal view of their law, they also had to explain the external view of their law. By analogy, this may be likened to a common law jurist trying to explain an internal view of the common law as well as describing all the societal structures around it, the complete range of

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<sup>23</sup> Webber, “Past & Foreign”, *supra* note 7 at 7.

<sup>24</sup> *Ibid.* at 2.

dedicated roles and responsibilities, all the explicit and implicit law, and so on. The task would be enormous – just as it was for the Gitksan witnesses.

In her wonderful in-depth analysis of the *Native Title Act*<sup>25</sup> and indigenous rights jurisprudence in Australia, Kirsten Anker argues that there are three processes by which courts transform indigenous law into fact. First,

the idea of co-existence is immediately undone by the language of totality: there is only one Australian law...[T]he court resolves the apparent paradox of legal pluralism by categorically separating the common law and Indigenous law: only the former is true law, the latter is mere social fact. There may be multiple social facts, but they are resolved by the one law.<sup>26</sup>

Second, Anker explains that, in effect, the courts embody the basic precept of legal positivism in which “the rules and authority which are the necessary elements of a legal system” are separated from the “diverse phenomena of people’s behaviour, relations and discourse”.<sup>27</sup> Anker explains that once law is thus separated “from the factual realm of society, law can be applied to society”.<sup>28</sup> At a practical level, for the courts, matters of fact remain rooted in the individual disputes before it while matters of law can “transcend the decisions in which they are articulated and express universal standards for other like cases”.<sup>29</sup>

Third, Anker argues that while the courts invariably fail to apply the various western legal theories to their own law, they nonetheless employ such theories to undermine the validity of indigenous legal traditions.<sup>30</sup> Basically, while courts may acknowledge the inappropriateness of applying western legal theory to indigenous law,

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<sup>25</sup> *Native Title Act* (1993) (Cth) Australia.

<sup>26</sup> Kirsten Anker, *The Unofficial Law of Native Title: Indigenous Rights, State Recognition and Legal Pluralism in Australia* (PhD dissertation, Faculty of Law, University of Sydney, 2007) at 143 [unpublished].

<sup>27</sup> *Ibid.* at 158.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.* at 159.

<sup>30</sup> *Ibid.* at 160.

their “relativist stance towards Indigenous law is compromised by the ontological assumptions about law”.<sup>31</sup> While law can be confounded with its materials – in this case Gitksan evidence – the materials themselves are not law. Rather, Gitksan law is necessarily about how one reasons with those materials in the evidence, and it is the outcome of such reasoning that is Gitksan law. The burden of the organized society test combined with the judicial process resulted in lengthy transcripts that are dense and descriptive rather than theoretical or analytical.

An underlying question is whether it is possible for Gitksan law to escape the conceptual limitations about non-western law that are inherent in western law and which are integral to some legal theories. According to Patrick Glenn, there is a recent condescending attitude within western law about “custom” that ensures its continued marginalization in the legal discourse.<sup>32</sup> This attitude is founded, in part, on an assumption about a lack of rationality underlying custom. Glenn explains: “Custom or habit is difficult if not impossible to justify; it must be constantly held up to the rigorous standards of present rationality”.<sup>33</sup> It is useful to my project to consider whether a parallel might be found between the assumptions that Glenn finds in western law about custom and western law’s assumptions about Gitksan law as demonstrated in the trial of *Delgamuukw*. In other words, how are these assumptions about custom applied to the treatment of Gitksan law in *Delgamuukw*? Glenn sets out three questions that are helpful to my examination and which seem to exemplify the basis of the Crown’s cross-examination: “First, we judge conduct by its exterior, present manifestation. Second, in doing so, we are unable to penetrate the historical rationality of present conduct. Third, in repetitive action, we see essentially habit

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<sup>31</sup> *Ibid.* at 161.

<sup>32</sup> Glenn, “Capture”, *supra* note 6 at 613.

<sup>33</sup> *Ibid.*

and a lack of present rationality.”<sup>34</sup> The task in this chapter, then, is to look beyond the exteriority of the practices of law to find its substance and historic rationality, and to link this information to today’s Gitksan legal traditions in today’s world.

### **3.2(b) Everything is Law**

One of the concerns that I had while reading the transcripts was that some of the information, rules, conventions, and practices were called law without explanation or context. Recall Webber’s earlier assertion that law is not about the materials or data; rather, it is the reasoning about the materials or data. In this case, Gitksan law is not just about the information, practices, conventions, and rules described by the witnesses, but rather about what they reveal of the reasoning that enabled the Gitksan to live in an ordered society despite the necessary normative disagreements and underlying controversies that any society experiences.

So while it appears that sometimes the witnesses were ascribing all social conventions to law, it is the outcome of such reasoning about the conventions that is Gitksan law. For example, Mary McKenzie (Gyoluugyat) told the Court, “When I had my ears pierced, and I wear these ear-rings, it gives – in Gitksan law it means that I won’t take or hear anything that’s wrongful.”<sup>35</sup> Gyoluugyat is the head chief of the Ts’im ansgootsxaan House of the wolf (lax gibuu) clan. Mrs. McKenzie explained to the Court that earrings are intended to visibly indicate children of royalty because historically “it’s only very few women and men would be able to have their ears pierced.”<sup>36</sup> Furthermore, the crest designs

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<sup>34</sup> *Ibid.*

<sup>35</sup> Mary McKenzie (Gyoluugyat) 13 May 1987, B.C.S.C. trial transcript, 160 at 216, evidence for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 216 [Mary McKenzie (Gyoluugyat) 13 May 1987].

<sup>36</sup> *Ibid.*

on her earrings and bracelets denote her House and her Clan because “[t]hey only belong to the house of Gyoluugyat, [that] is the grizzly bear and the ram”.<sup>37</sup>

What is important about Mrs. McKenzie’s (Gyoluugyat’s) ear piercing is that, rather than literally shielding her from hearing anything “wrongful”, it identified her rank and correlative legal capacity in Gitksan society. Both Mrs. McKenzie’s parents were chiefs, so she was considered *kuuba wilxsihlxw*<sup>38</sup> (royalty) and therefore she was in line for a chiefly name. This is the important legal point that is signified by the ear piercing and is an example of Gitksan law recognizing “persons and things” and literally imbuing them with “legal existence”.<sup>39</sup> The information contained in the practice of ear piercing is actually about the expectations regarding the behaviour of the children of chiefs and of future chiefs, and is part of the training or grooming of chiefs. In this way, “[a]s it denominates, orders and ranks, the law allocates legal roles to the various actors in the life of society. To each particular status it attaches rights and duties, responsibilities and privileges”.<sup>40</sup>

The Gitksan witnesses provided extensive evidence that described the role and authority, succession, responsibilities, and training of the head chiefs to the Court. But again, this information was not explicitly situated within a larger theory or structure of the Gitksan legal order. I will return to the hierarchical organization of Gitksan society and how this is expressed in distinct legal capacities later in this chapter in the section on the Gitksan legal cases and legal order.

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<sup>37</sup> *Ibid.* at 217.

<sup>38</sup> *Kuuba wilxsihlxw* is the plural term for a member of the royalty class. See Olive Ryan (Gwaans) 10 June 1987, *supra* note 12 at 1035.

<sup>39</sup> Ost & Kerchove, *supra* note 21 at 15.

<sup>40</sup> *Ibid.*

Another example of socio-legal rules being called law is provided by Olive Ryan (Gwaans) in her explanation of the social practices relating to young women when they began to menstruate. This excerpt is from the *adaawk* of Gwaans' House, Hanamuxw.

Guxsan is the [House that] – owns that *adaawk*. It's Ska 'wo. That's came from T'am lax amit, about Ska 'wo, is a village. This Ska 'wo is a girl, young, young girl. And they ordered her to move out with her grandmother. The law in Gitksan law, they are not allowed young girl in the – in a house when they receive their period, and they move out and stay with another place. And that's what Ska 'wo did, you know, with the grandmother, was taking her out of the House and stayed in the other House; and the – while they were in – that happened to her, you know that. They don't allow the girls to eat much that time, when they receive – they call it *ha'wehbxws* in Gitksan language.<sup>41</sup>

Laws can certainly be gendered, but the main point of this example is that there is no theoretical context within which to consider how secluding and restricting the diet of a menstruating girl forms part of the larger Gitksan legal frame. Without this context, it is difficult to discern the law in this passage, so it appears to be either a simple gendered social convention or perhaps a socio-legal rule.<sup>42</sup> What matters in Gitksan society and legal order is that when women reach puberty, they are given another name and their legal status changes accordingly.<sup>43</sup> Head chief Martha Brown (*Xhliimlaxha*) explained that *ginitxw*<sup>44</sup> is

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<sup>41</sup> Olive Ryan (Gwaans) 11 June 1987, B.C.S.C. trial transcript, 1076 at 1098, evidence for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185 [Olive Ryan (Gwaans) 11 June 1987].

<sup>42</sup> I have written about indigenous feminism and gender issues elsewhere. See Val Napoleon, “Aboriginal Discourse: Gender, Identity and Community” in Shin Imai, Kent McNeil & Ben Richardson, eds., *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Hart, 2009) c. 9. My basic premise is that law is inseparable from and embedded in social life. My definition of a legal rule is one that includes a legal obligation, is enforceable in the legal order, and is reasoned with and deliberated on in the Gitksan legal processes. In contrast, a socio-legal rule is not legally enforceable nor does it engage the legal reasoning and deliberating processes in the legal order. For a useful description of the socio-legal terrain, see Brian Z. Tamanaha, “A Holistic Vision of the Socio-Legal Terrain” (2008) 71 *Law and Contemp. Probs.* 89-97.

<sup>43</sup> Mary McKenzie (Gyoluugyat) 13 May 1987, *supra* note 35 at 217. When boys and girls reach puberty, a feast is held.

<sup>44</sup> Martha Brown (*Xhliimlaxha*) 18 September 1987, B.C.S.C. trial transcript, 2 at 11, evidence for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185 [Martha Brown (*Xhliimlaxha*) 18 September 1987].

the Feast held when, “you first [became]...a woman and have to hide you away somewhere, you’re not supposed to eat fresh fish or anything.”<sup>45</sup>

Head chief Mary Johnson (Antgulilbix) elaborated further to explain that when a girl began menstruating, she was required to live apart from the people for a year during which time she was prohibited from eating fresh meat or fish. Mary explained that, “if she does eat the meat that the hunters saw, they said it will bring bad luck to the hunter. He won’t catch anything and it will cause trouble to his eyes.”<sup>46</sup> Other restrictions placed on the girl at this time in her life included (1) covering her hair lest she become grey early in life, (2) not looking at the sky or the mountains lest it damage her eyes, and (3) not eating certain berries (*t’imi’it*) lest she lose her teeth.<sup>47</sup> Interestingly, while related, these latter conventions were not explicitly referred to as laws by the witnesses. Perhaps the most important legal aspect of these restrictions and the seclusion is that the young woman is “expected to prepare mentally and materially to organize her first feast”.<sup>48</sup>

It is a little easier to see the law in the next quotation from Stanley Williams’ (Gwis Gyen’s) commissioned evidence.

After we've smoked the meat, we were leaving camp and there was some bones left and what we did is we took these bones and we burned them because it is the law for our people to do this. They are not supposed to leave any kind of animal bones around. Our ancestors looked after everything that concerns the animals. If we just leave the bones around, then those animals will see this and will never return back again. In the olden days when our ancestors killed an animal, what they do is they

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<sup>45</sup> *Ibid.* at 3.

<sup>46</sup> Mary Johnson (Antgulilbix) 27 May 1987, B.C.S.C. trial transcript, 636 at 696, evidence for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185 [Mary Johnson (Antgulilbix) 27 May 1987].

<sup>47</sup> *Ibid.* at 696.

<sup>48</sup> Richard Daly, *Our Box was Full: An Ethnography for the Delgamuukw Plaintiffs* (Vancouver: UBC Press, 2005) at 66 [Daly]. This is an area that requires much more study preferably from a gender analysis and Gitksan feminist perspective.

talk to this...animal and they praise the animal to tell them that it was right of them to give themselves to the people.<sup>49</sup>

A number of the *adaawk* contain strict prohibitions and rules concerning the proper treatment of non-human life forms such as salmon, trout, bears, and goats. The mistreatment of animals and fish or their remains would result in famine and starvation for the people. In this example, it is obvious that the larger legal principles are about maintaining the reciprocal relationships with animals so that they will continue to feed the people. This is done by visibly demonstrating respect for the animals, which translates directly into the practice of being careful with the bones and remains.<sup>50</sup>

Mr. Williams provided another example of how respect was demonstrated: “When the first spring salmon was caught, it was very very respected by our people.... When they caught this first spring salmon they would leave it and they would talk to the spring salmon and give praise to the spring salmon, talking to it”.<sup>51</sup> The salmon are then prepared in a special way and all the head chiefs in the village are invited to a first salmon ceremony to enjoy eating the salmon.<sup>52</sup> An important principle herein is about sharing the first catch of any animal or fish. Similarly, he explains,

[w]hen... a good hunter has gone hunting and he – he is successful in his hunt, then what he does is he comes home and he cooks up the – the moose, the deer, or the goat meat, he cooks it up and then he calls the – the people from the village and invites them to his house. And this is what you call *xsmayasxw*.<sup>53</sup>

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<sup>49</sup> Stanley Williams (Gwis Gyen) 11 April 1988, B.C.S.C. commissioned evidence transcript, 1 at 18, for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185 [Stanley Williams (Gwis Gyen) 11 April 1988].

<sup>50</sup> Animal bones are buried; fish bones are returned to the water.

<sup>51</sup> Stanley Williams (Gwis Gyen) 11 April 1988, *supra* note 49 at 28.

<sup>52</sup> *Ibid.* at 29.

<sup>53</sup> Stanley Williams (Gwis Gyen) 13 April 1988, B.C.S.C. commissioned evidence transcript, 78 at 99, for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185 [Stanley Williams (Gwis Gyen) 13 April 1988].

Sharing the catch is also essential to ensuring future good fortune in hunting or fishing, and in this way forms part of the reciprocal relationships among humans, and between humans and non-human life forms. Stanley Williams (Gwis Gyen) explains:

[W]e are following the laws of our ancestors and our own – our people's laws. And the reason for this is that whenever you catch anything, the first catch of any kind of animal, you give it out to the – to the other people because these other people will – will give blessing to you and the more blessing you have the more you will catch...our laws are passed on from generation to generation and still the same today.<sup>54</sup>

### 3.2(c) Law Embedded in Narrative

In the next quotation, Stanley Williams (Gwis Gyen) provides a rich and detailed account of a succession of a chief's name upon the death of the chief. Again, while much of what Mr. Williams sets out might appear to be practices, rituals, or conventions, their legal meaning is found in the context of the larger Gitksan legal order because the business conducted is the legal succession of the name and House territories according to Gitksan law. This next quotation demonstrates the importance of the detailed proceedings in his narrative:

The law is very important in the house of the simoogit [head chief, singular]. It is not only the simoogit that uses the law, it is the law of our people. All the Gitksan people use this law. We all have one common law amongst our people. If the – the simoogit of the house dies, we have – when the high chief dies what happens is a person goes around the village and has a rattle in his hand and he's walking around the village singing a mourning song and when – when the people of the village hear this mourning song, they know that the chief has died and they leave everything that they were doing...After the chief that is – that is singing the mourning song in the village returns back to where the – the chief that has died, he returns back to this and they start singing, they sit around the body and they start singing the mourning song. After the mourning song has been sung, then the spokesperson which we know as Galdim algyax –

....

He is the spokesperson of the chief that has passed away and he tells the plans of the house and who will be called to cremate the chief's body. This is when they – they have the smoke feast....

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<sup>54</sup> *Ibid.* at 98.

This is a very important part of the – of the x'miyeenasxw [smoke feast]. This is when all the plans are told to the house members and also to the people that are present what is going to happen. The former chief's spokesperson is the one that is telling these plans that are going to be put into action. After this is done...the spokesperson would talk to the house members, and they would – they would see who would – who would be responsible for the cremation of the body.

This is what happens, I'll give you an example of myself. I would go with the – with the messengers who we call as Tiits, and I would go to Kitwancool and I would enter Xamiaxyetxw's house and I would say "Simoogit, simoogit, you are going to be watching me. You are going to be seated there when the simoogit is created [sic]." He goes around to the – to the villages and he calls all the head chiefs until they're all invited and he says the same thing. After he has done this in the village of Kispiox, Kitwancool, Gitanmaax, then we – then we go to Gitsegukla. After the chiefs arrive in at the village to watch the cremation of the chief, and this is known Dii yee'm gyet, we – the people of the village put up a feast before the cremation and this feast is known as Begwinsxw. After the feast of Begwinsxw is ended, they separate the people to spend the night with a different people living in the village and the next day they will cremate the chief.

After the next day they – after they cremate the chief, they enter the chief's house, the house members, and they – they make a decision on who will be the successor, and the spokesperson is the one that – that talks because the chief is not supposed to talk. After this they – they would enter the feast house and they would have four prince guarding the feast house, one prince in the – at the door, the centre part of the door, the other prince at the centre back, and the – the two on the side of the house. And the chief – as the chief enters, the prince in front of the door will holler the name out and the other – the prince that are standing will seat this chief to his rightful seating place. And he has a cane that he hits the floor with as he seats these chiefs.

To show respect to the – to the chiefs, the prince makes himself seem small in front of these chiefs as he seats them at their houses, calling himself a servant, and I will give myself as an example. If I was putting up a feast and Gwagl'lo will be sitting on the centre of the back, this is my 'nii dil, and this is why he's sitting right at the front, the centre of the back. While this is going on, the successor of the former chief is walking back and forth singing a song which is known as Limx laanjax and he has a rattle in his hand while he's singing walking back and forth. And there is a big curtain. Behind this curtain there are some women back of this curtain doing the singing also. What happens is the successor has his blanket on, his regalia on, and he would use his – his nax nok and he would touch some of the head chiefs. As he touches these head chiefs, he is giving them power and when he touches these head chiefs there will be about two women behind him paying these head chiefs that he touches.

After this happens, then the successor puts all his regalia on and he puts his hat on and on top of his hat he has the sea lion's whiskers, and after when he puts his head wear on and then he puts the eagle down on top of his – on top of his head wear, and while this is going on the people behind the curtains are singing. And what he does is he comes out jumping, dancing, and he's doing his halayt. While he's doing this, the feathers are flying out to the head chiefs. He is – he is very happy that the people have come to the feast, Dii yee'mgyet, and to show this he is dancing and he's – he's giving feathers to show that he's – he has a peaceful mind.

After this has been done, then the younger people start serving the guests with food and then they would give out the ground hog hide known as Gwiikxw.

They mention where all the food has come from and where the ground hog hides have come from. It all comes from our territory and they say where it came from and this is through the reason why we've – we really look after our territory.<sup>55</sup>

What Stanley Williams (Gwis Gyen) has described here are the first series of legal proceedings for the succession of a chief's name at a cremation or *dii ye'm get* (funeral Feast). His account contains information about who has to be involved, what they are required to do, how they will relate to one another, the order in which the business must be conducted, and where and how the various tasks are to be completed. Another critically important aspect of this account is the reference to Mr. Williams' *'nii dil*, the House on his father's side in the opposite clan (in this case that of Simoogit Gwagl'lo, Ernest Hyzims) which bears the main responsibility and legal obligation for witnessing the succession. It will be that House's legal duty to remember all of the business conducted and to ensure that all future references to these decisions are correct.

Also significant are the references to the *gwiikxw* (groundhog hides) that came from the territory and demonstrate how a House fulfills its legal obligation to take care of and protect their territory. According to Mr. Williams, "Today they use money instead of ground hog hides. Our laws are still put into action...except for the money that is given out...it shows you are protecting your land. It's just like the tax that the government charges....What we get from our land, we give into the feast house."<sup>56</sup> Historically, the head chiefs would be paid in the more valuable marten and fisher furs.<sup>57</sup>

Also important in this example is that Stanley Williams (Gwis Gyen) took care to describe how the new chief had to demonstrate that he has a peaceful mind, which he does with the eagle down and his *halayt* (dance with regalia and eagle down). In this way, the

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<sup>55</sup> Stanley Williams (Gwis Gyen) 11 April 1988, *supra* note 49 at 35-37.

<sup>56</sup> *Ibid.* at 39.

<sup>57</sup> *Ibid.* at 38.

chief publicly affirmed that he is properly prepared and trained, mature and thoughtful, and able to fulfill his legal and political responsibilities. This eagle down demonstration is also important in that the chief acknowledges the other chiefs and the importance of their relationships to his House and in the fulfillment of his role.

Included within Stanley Williams' (Gwis Gyen's) account are also the roles of nephews and nieces, and other *am gigyet* (House members)<sup>58</sup> without whom the chief could not fulfill a chief's responsibilities to the other Houses and clans (i.e., gathering and preparing the food, serving, etc.). A chief cannot generate the wealth to host a Feast without active and knowledgeable House members who are willing to work and support the chief. Finally, the references to the songs, dances, crests on the regalia, and *naxnox* (spiritual powers) are all from the House's *adaawk* and represent the House's legal covenants with its territory.<sup>59</sup> All of these proceedings combine to ensure continuity, legitimacy of process, and accountability (i.e., witnessing and precedent) of the Gitksan legal order and legal traditions.

According to Mr. Williams, in a year or so the succession is completed with a pole-raising Feast (*bax magam gyet*) accompanied by many other legal proceedings:

After this what they do is they have a blanket, one person holding one side and the other person holding on this side, and then they would call out the name of the dead. When the new chief finally sits on the seat of the former chief, this is the law of our grandfathers, and when he sits on the – on this seat, he is putting the laws into action. It is very important for all our chiefs that all their laws are there where they're seated, the laws of our people, and when this new chief sits on this chair, all the laws of our people are moved. They're put into action.<sup>60</sup>

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<sup>58</sup> *Am gigyet* means commoners, followers, warriors, workers, and helpers. See Art Mathews (Tenimgyet) 14 March 1988, B.C.S.C. trial transcript, 4513 at 4550, evidence for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 216 [Art Mathews (Tenimgyet) 14 March 1988].

<sup>59</sup> Susan Marsden, "Adawx, Spanaxnox, and the Geopolitics of the Tsimshian" 2002) 135 BC Studies 101 at 102-103 [Marsden, "Adawx"].

<sup>60</sup> Stanley Williams (Gwis Gyen) 11 April 1988, *supra* note 49 at 38.

A useful way to think about the various proceedings – the practices, rituals, and conventions – is that in their entirety, they contain an ongoing record of Gitksan law. Patrick Glenn has argued that “Memory was thus not ‘rote’, but the process of internalizing that which was worthy of recall. Law worth having and worth keeping, was worth remembering. Instruction in law taught the process of internalizing law.”<sup>61</sup> For the Gitksan, each aspect of tradition that must be acted on is a segment of the record that Gitksan law comprises. The law setting out the legal capacities, relationships, and obligations is embedded in these practices and rituals, which is why Mr. Williams had to describe them to the Court in order to tell the Court about Gitksan law. He is actually teaching the Court about Gitksan law in the way that he was taught according to Gitksan pedagogy.<sup>62</sup>

Later in his evidence, Mr. Williams (Gwis Gyen) provided even more detail about the confirmation of the fishing sites and territories, names of the songs, ceremonies, gifts, food, seating arrangements, payment of expenses, and speeches. Again, in order to learn from traditional practices it is important to identify the information they contain, rather than to focus literally on the practices as mere actions. According to Glenn, “That which is brought from the past to the present, in a particular social context, is information... [I]t would be inappropriate to see it [as an] indefinite series of repetitions of an action.”<sup>63</sup> I will return to the laws, legal principles, and obligations in the later sections in this chapter.

William Twining reminds us that, to date, western legal theorising has either marginalized or completely ignored other legal traditions.

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<sup>61</sup> H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 2nd ed. (Oxford: Oxford University Press, 2004) at 8 [Glenn, *Legal Traditions*].

<sup>62</sup> For a brilliant scholarly description of Gitksan pedagogy, see generally M. Jane Smith, *Placing Gitksan Stories in Text: Returning the Feathers. Guuxs Mak'am Mik'Aax* (Ph.D. Dissertation, UBC Faculty of Education, 2004) [unpublished].

<sup>63</sup> Glenn, *Legal Traditions*, *supra* note 61 at 13.

If one stands back and surveys the vast heritage of Western legal theorising about law, one is reminded of two tendencies that are in tension. First, the Western heritage is vast. However, viewed from a global perspective that same heritage can be criticised for being insular, parochial, quite narrowly focussed, and even ethnocentric. Nearly all of it concentrates on the municipal law of sovereign states, mainly those in advanced industrial societies; it operates within and across only two of the world's major legal traditions, common law and civil law, with other major traditions marginalised or completely ignored. The "Country and Western Tradition" of legal theorising and comparative law is vulnerable to charges of parochialism and ethnocentrism.<sup>64</sup>

Perhaps it is in the face of the seemingly impenetrable insularity of western law as embodied in the Court that Gitksan witnesses believed that they had to somehow legitimate their evidence by calling everything law. Or, was it simply a matter of not distinguishing between the records of laws that are contained in the traditions from actual Gitksan law? In any event, what is important here is that there was no space to explore this theoretical question in the *Delgamuukw* legal action. The Plaintiffs' legal counsel did not take this up and the Crown's main strategy was to undermine the Gitksan claims to law by arguing that what the witnesses called law was actually just tradition, and therefore not real law.

### 3.2(d) Historical Duress

An important matter to consider is the extent to which historical factors changed or destabilized indigenous peoples' societies – laws, governance, economies, and social systems – when describing them today.<sup>65</sup> The society described by the Gitksan witnesses had already resisted serious onslaughts from colonial government, economy, settlers, and

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<sup>64</sup> William Twining, "Law, Justice and Rights: Some Implications of a Global Perspective" (Draft. 1/07) online: University College London [www.ucl.ac.uk/laws/academics/profiles/twining/Law\\_Justice%20Rights.pdf](http://www.ucl.ac.uk/laws/academics/profiles/twining/Law_Justice%20Rights.pdf) at 2.

<sup>65</sup> The early Boasian literature trapped indigenous peoples in an imagined or golden age past, while at the same time, denying them a place in the nineteenth-century story of British Columbia. See for example, Randy Bouchard & Dorothy Kennedy, eds., *Indian Myths & Legends from the North Pacific Coast of America: A Translation of Franz Boas' 1895 Edition of Indianische Sagen von der Nord-Pacifischen Küste Amerikas*, trans. by Dietrich Bertz (Vancouver: Talonbooks, 2002).

churches. Despite this recent history, how Gitksan society survived, adapted, and changed was not explicitly included in the testimony of Gitksan witnesses. Rather, Gitksan society was presented in the evidence as though it was still completely intact as in pre-contact times.

For the Gitksan, this strategy was developed in response to the hurdle of the organized society test and from a resulting belief that any sign of weakness or indication of damage in Gitksan society had to be concealed. This is no surprise given that the Crown argued that all inconsistencies, changes, and adaptations in Gitksan traditions and practices were indicative of either a failure by the Gitksan to meet the burden of the organized society test or an implied acceptance of Crown sovereignty. Various examples of Crown cross-examination questions ranged from the registration of traplines under provincial legislation,<sup>66</sup> application for hunting licences from the province, commercial sale of Gitksan art including crest designs, band council authority versus Gitksan kinship authority, use of utilities such as electric power and running water, employment positions, transportation routes and resource (i.e., water, timber, and mining) extraction activities on Gitksan territories, settlers on Gitksan territories, the use of wills (i.e., DIA records that contradicted Gitksan matrilineal inheritance), provincial education (e.g., attendance at grade school and post-secondary) off-reserve, and finally to the change from extended families living in longhouses to nuclear families living in individual houses.<sup>67</sup>

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<sup>66</sup> With the goal of controlling the fur industry and managing harvesting in British Columbia, the provincial government introduced legislation to register traplines in 1926. See Carl R. Eklund, "Fur Resource Management in British Columbia" (1946) 10:1 *The Journal of Wildlife Management* 29-33.

<sup>67</sup> Questions of this sort were asked of most of the witnesses. See for example, the cross examination of Mary Johnson by the federal and provincial counsel: Mary Johnson (*Antgulilbix*) 9 June 1987, B.C.S.C. trial transcript, 924 at 943ff. evidence for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185.

Given how extremely complex it is for anyone to identify and discuss the normative order or implicit law in any society including their own, at the best of times, it would have been just as difficult for the Gitksan witnesses to assess and articulate how their legal traditions had changed since contact. When asked directly about significant events in recent history, the witnesses spoke openly about them, but there was little or no follow-up discussion of their larger implications for Gitksan law or society. For example, Olive Ryan (Gwaans) described a “religious fight” that caused major divisions in the village (*kaltsap*) of Gitsegukla during the early 1900s.<sup>68</sup> During this time, most of the people left Gitsegukla and some families followed the Salvation Army Church to establish a small mission village across the Skeena River at Andimaul (Taxh’loaulitxw’). Most of this group moved back to the present village of Gitsegukla during the mid- to late-1920s. Another group followed the Methodist Church to establish a small mission village to the east at Carnaby (Siits’ee’t’ixs), and these families also gradually returned to Gitsegukla during the later 1920s.<sup>69</sup> Olive Ryan (Gwaans) returned to Gitsegukla in 1929 and moved again in 1930 to Gitwangak when she married.<sup>70</sup> Following her husband’s death, she moved back to Gitsegukla during the late 1950s.

What is important about Olive Ryan (Gwaans) returning to Gitsegukla is that she did so deliberately to protect the name, authority, and territories of Hanamuxw. The former Hanamuxw, the late Jeffery Johnson, had moved from Gitsegukla to Gitanmaax in the late 1950s. Upon his death, Joan Ryan, Olive Ryan’s (Gwaans’) eldest daughter, became

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<sup>68</sup> Olive Ryan (Gwaans) 16 June 1987, B.C.S.C. trial transcript, 1278 at 1320, evidence for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185 [Olive Ryan (Gwaans) 16 June 1987].

<sup>69</sup> Charlotte Sampare *et al.*, “Adawxhl Gitksegukla” (1979) Gitsegukla History and Development Project, [unpublished, archived by author] at 4 [Gitsegukla].

<sup>70</sup> Olive Ryan (Gwaans) 16 June 1987, *supra* note 68 at 1328.

Hanamuxw.<sup>71</sup> Later in 1970, without consulting Gwaans or Hanamuxw, the Gitsegukla band council authorized moving the Hanamuxw pole to another location in Gitsegukla.<sup>72</sup> The consequences of having the pole moved without consultation caused serious political difficulties for Gwaans. “Well...” she explained, “the ones that moved the pole there broken the law...the Council never asked...our permission to move the pole and tear the House down and give the land to the school.”<sup>73</sup> Olive Ryan (Gwaans) explained that the unauthorized moving of the pole caused disrespect to be shown to the names Gwaans and Hanamuxw and what they represent – they were ignored, and “they [were] making fun of Hanamuxw”.<sup>74</sup> At issue for Gwaans and Hanamuxw was the loss of face and correlatively, a diminishing of *daxgyet* (chief’s power and authority) for the House of Hanamuxw, the most serious loss any House can experience.

Gwaans and Hanamuxw arranged for the old pole to be repaired, and they restored it near Olive Ryan’s (Gwaans’) house. They also hosted a pole-raising Feast in 1987 that was videoed as part of her evidence at trial.<sup>75</sup> Each of these major events required numerous steps involving witnessed ceremonies for the taking down of the old pole, moving it, repairing it, and raising it. Similarly for the new pole, the series of ceremonies began in the forest with the selection of the tree, and continued through the selection of the carvers and the carving (father’s side) to the final pole-raising Feast. The combined cost for both poles and associated Feasts was a serious financial undertaking, which according to

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<sup>71</sup> Joan Ryan (Hanamuxw) 22 March 1988, B.C.S.C. trial transcript, 4975 at 4976, evidence for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185.

<sup>72</sup> Because it was the band council that was breaking Gitksan law, Gwaans complained to the Indian agent, who told her to take the pole to Gitwangak where Gwaans was living, and to “put the pole under [her] bed”. Olive Ryan (Gwaans) 10 June 1987, *supra* note 12 at 1056.

<sup>73</sup> *Ibid.* at 1060.

<sup>74</sup> *Ibid.*

<sup>75</sup> Olive Ryan (Gwaans) 10 June 1987, *supra* note 12 at 1009.

the current Hanamuxw, Don Ryan, was well over \$100,000.<sup>76</sup> Olive Ryan (Gwaans) outlined each of these processes, including the selection of the witnesses as part of her evidence, because “that’s the Gitksan law. The pole holds everything in that house....a totem pole is like the white man’s map”.<sup>77</sup> Gwaans and Hanamuxw restored the daxgyet of their House by carefully following all the legal proceedings and having them properly witnessed, and by ensuring that they fulfilled their obligations to their House and their House’s obligations to the wider Gitksan network. According to Gwaans, these legal processes were in accordance with Gitksan law<sup>78</sup> and served to overcome the earlier insults relating to the unauthorized moving of the pole.

While Olive Ryan (Gwaans) described these events as a religious fight, such a characterization obscures a larger and more complex issue concerning the deliberate, and partially successful, undermining of Gitksan law by missionaries and the Canadian government. This is exemplified by a “law and order” decree issued by the local Indian agent for Andimaul in 1908 which directed the villagers to organize a committee for the purpose of keeping order in the village. Among other things, the “rules and regulations” set out who was authorized to meet: “No person other than a councillor, Indian Agent, Missionary, Chairman or Interpreter, shall speak at council meetings, unless permitted to do so by the chairman. None but a councillor shall vote”.<sup>79</sup> The other rules pertained to drunkenness, fornication (a somewhat mystifying prohibition), public nudity, gambling, public fighting, curfew and school attendance requirements for children, and the

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<sup>76</sup> Interview of Don Ryan (Hanamuxw) 15 April 2008, by telephone.

<sup>77</sup> Olive Ryan (Gwaans) 10 June 1987, *supra* note 12 at 1067.

<sup>78</sup> *Ibid.* at 1070.

<sup>79</sup> Gitsegukla, *supra* note 69 at 7.

appointment of community “watchmen”.<sup>80</sup> Anyone found to be in violation of this decree was required to pay a fine of thirty dollars into the village coffers.<sup>81</sup>

Certainly all of the witnesses had been connected to and were a part of the early colonial economy in some way – directly or indirectly. For example, many Gitksan fished commercially and worked seasonally in the many canneries on the coast. Others worked in the forest industry, as trappers, or as labourers. Finally, many Gitksan people earned a living by providing food and supplies to workers in various projects (e.g., railway building, etc.).<sup>82</sup>

Change was simply a part of life and the Gitksan were able to practically incorporate a lot of these changes into their kinship systems and institutions.<sup>83</sup> Recall Stanley Williams (Gwis Gyen) referring to cash payments at Feasts instead of furs, which he did not view negatively because people were still upholding Gitksan law and fulfilling their legal obligations.<sup>84</sup> According to Richard Overstall, the Gitksan kinship networks and institutions were flexible and effectively participated in the fur trade until they became

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<sup>80</sup> *Ibid.* at 7-9.

<sup>81</sup> In describing part of this upheaval, the writers of the Gitsegukla History and Development Project noted that, “In this village [Andimaul], their lifestyle was difficult at first, but they gradually learned how to cope with the life of a Christian.” When these families moved back to Gitksegukla, they also moved the Salvation Army Church building and took it with them. This was no small feat given that there was no large equipment available to them. “They began moving the Salvation Army Church to the present village in 1925. It was taken apart, board by board, carried to the river bank by hand and loaded into a boat. It was hauled across the [Skeena] river, loaded on a horsewagon and hauled to its present site. The site was cleared in 1925 and the church was put together and opened by 1936” (*Ibid.* at 5).

<sup>82</sup> See generally, Charles R. Menzies & Caroline F. Butler, “Working in the Woods: Tsimshian Resource Workers and the Forest Industry of British Columbia” (2001) 25:3 *Am. Indian Q.* 409-30. Also see, Rolf Knight, *Indians at Work: An Informal History of Native Indian Labour in British Columbia 1858-1930*, 2d ed. (1978; Vancouver: New Star Books, 1996). On how government policy reflected the need for aboriginal labour dispersed throughout British Columbia, see Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (Vancouver: UBC Press, 2002).

<sup>83</sup> For a wonderful description of how the Tsimshian were actively and successfully involved with the fur trade, see Susan Marsden & Robert Galois, “The Tsimshian, the Hudson’s Bay Company, and the Geopolitics of the Northwest Coast Fur Trade, 1787-1840” (1995) 39:2 *The Canadian Geographer* 169.

<sup>84</sup> Stanley Williams (Gwis Gyen) 11 April 1988, *supra* note 49 at 39.

overwhelmed by the sheer numbers of settlers, the speed and scale of settlement, and the demands of capitalism.<sup>85</sup>

During the years of early contact, there were also disagreements between generations (as in any society) about maintaining political institutions and continuing major political practices. One such controversy arose in 1945 when as a result of a major flood many of the poles in Gitsegukla were washed away.<sup>86</sup> As people discussed restoring and replacing the poles, there was a split between some younger community members and what was called “older thought” as to what should be done and how to go about it.<sup>87</sup> (This is a significant issue and I will return to it in chapter 6.) The “older thought” members insisted on fulfilling the required formal and detailed protocols for all their usual legal, social, and political transactions. The younger members argued for a more modern approach with shorter and less expensive proceedings. These included written invitations rather than the official village-to-village (*t’its*)<sup>88</sup> invitation proceedings, and more contemporary dances instead of the usual more conventional dancing.<sup>89</sup> For example, one young Gitksan man expressed the view that the money should be spent on modern economic development to create employment instead of on the Feasts.<sup>90</sup>

The evidence yielded several small glimpses of the “old thought” versus “new thought” dynamic, which served to demonstrate how alive all of these issues continue to be. For example, during a commissioned evidence session between Mr. Goldie, legal

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<sup>85</sup> Interview of Richard Overstall (3 April 2008).

<sup>86</sup> Anderson & Halpin, *supra* note 15 at 3.

<sup>87</sup> *Ibid.* at 4.

<sup>88</sup> *T’its* means “chief’s ambassadors – a group that is sent out by a chief to invite other chiefs to a feast. Sim’algax Working Group & Aboriginal Education Branch, British Columbia Ministry of Education/Gitksan Wet’suwet’en Education Society/School District #88, *Ha’niimagoansxwhum Algaxhl Gitksen-Gitksan: Gitsenimx-Gitksanimax to English Dictionary – Learner’s Edition, Volume 1* (1996) at tab 9 [unpublished] [Gitksan dictionary].

<sup>89</sup> Anderson & Halpin, *supra* note 15 at 4.

<sup>90</sup> *Ibid.* at 192.

counsel for the province, and Martha Brown (Xhliimlaxha), the following exchange seemed to reveal her concern and possible frustration about some of the changes in the

Feast hall:

Mr. Goldie	Now, Mrs. Brown said in the course of her earlier evidence that in the olden days a territory was talked about at a feast; would you [interpreter] ask her if that's correct?
<u>Xhliimlaxha</u>	The answer is yes, they always talked about territories in a feast and whenever one of the members is going to go up to the territory often he will invite other members, whoever can come, in consideration due to the contribution to the feast.
Mr. Goldie	I understood her to say that at feasts today territory is not talked about, is that correct?
<u>Xhliimlaxha</u>	We don't talk about territories today.
Mr. Goldie	Why is that?
<u>Xhliimlaxha</u>	We're forgetting, we're white people now.
Mr. Goldie	Is it because the people no longer use the territories that they are not talked about at feasts?
<u>Xhliimlaxha</u>	Yes. <sup>91</sup>

However, under re-examination by Mr. Grant, legal counsel for the Plaintiffs, Martha Brown (Xhliimlaxha) clarified her earlier statement, "Today, most of our young people are all working, not years ago. It's [territory] used yearly."<sup>92</sup> While this clarification addresses the change in use of the territories, it does not address Mrs. Brown's reference to younger Gitksan people as white people – unless she just meant that working full-time was to be "like white people". However, a year later, during the trial, Mrs. Brown told the Court, "In the old days they used to talk about it. Nowadays is feast doesn't talk anything about territory, and *anjok* [fishing site] too."<sup>93</sup> This suggests that her real concern was about maintaining a strong, direct, and tangible connection between the territories and the Feasts.

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<sup>91</sup> Martha Brown (Xhliimlaxha) 22 January 1986, B.C.S.C. commissioned evidence transcript, 65 at 96, for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185.

<sup>92</sup> *Ibid.* at 113.

<sup>93</sup> Martha Brown (Xhliimlaxha) 18 September 1987, *supra* note 44 at 32.

In this next example, Mary McKenzie (Gyoluugyat) describes former Gitksan marriage law and some of the present-day changes to these practices. Mrs. McKenzie begins with, “In Gitksan law we strictly can't marry into our own clan.”<sup>94</sup> Historically, marriages were arranged: “That's how it has been quite a number of years ago, that a young woman or a young man, he can't marry – he may have been wanting to marry somebody but that isn't so in the Gitksan. The House of that woman has to chose for her husband, and that's very much so in the Gitksan, that your House have to decide.”<sup>95</sup> Potential spouses were selected after years of careful observations to determine whether, in the case of a male, he was “capable of looking after a family, their family, when they are in need of it, and if that person be a good provider, like doing their trapping and hunting. These are the things that the people of a House would look into.”<sup>96</sup> The families of the young men also watched the young women to determine whether she “would respect the family.”<sup>97</sup> Once a preliminary spouse selection is completed, the two families will meet to discuss the marriage possibility, and then “the man's side, the family, the House of this man has to take up goods, like clothing and little bit of money with it, then they take it to this lady's House”.<sup>98</sup> If the woman's House agrees to the marriage, then “they will accept those gifts and leave it there and are used”.<sup>99</sup> However, if the House does not agree, “all these goods are given back to the givers, as I say, there is no marriage there.”<sup>100</sup>

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<sup>94</sup> Mary McKenzie (Gyoluugyat) 19 May 1987, B.C.S.C. trial transcript, 338 at 379, evidence for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 216 [Mary McKenzie (Gyoluugyat) 19 May 1987].

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.* at 380.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

In recent times, Mrs. McKenzie (Gyoluugat) explains, there were changes to the practice of arranging marriages and the strict rules of not marrying into your own clan were no longer adhered to. Mrs. McKenzie attributes the cause of this behaviour, on the part of the younger Gitksan people, to their general ignorance of Gitksan laws and the *adaawk* which she sees as a modern life circumstance.

Well, today – this is the problem – we have at times in our young people, because the young people today [are] sort of negligent going to Feastings and listen to these *adaawks* and what the laws of the Gitksan hold. And today again I see my way, that when these young people go away after going through high school, then they want more education, they go away and take up schooling somewhere, and in that time these two people meet, they fall in love, they get married, never thinking that they are both in the same clan because they don't know; and there is quite a few today that have this problem. This is why I say that the Feasting House is where you get your experience. You have to listen to what our laws are, are given out in the Feasting, but when these people are away from the villages and not knowing what their clan is a lot of times and what clan your spouse will be, these are the disadvantages of the young people today; but when this happens, we, as the older people, have to let these young people know that they are doing something against the Gitksan law. We have to repeat it to them.<sup>101</sup>

Mrs. McKenzie (Gyoluugat) is careful to explain that upon proper explanation, “A lot of them see it our way after awhile....It's still very few people that are married into their own clan today.”<sup>102</sup> Mrs. McKenzie provides this very recent example when a young woman moved back to the Hazeltons from Vancouver. In this case, the grandmothers of the couple were sisters and the young man and woman were not only in the same clan, they were also in the same House.<sup>103</sup>

Now, the family talked to both of them and they wanted more people to talk to these two people, so again I was involved in that one. A head chief was called to a meeting that we had to talk to these young people about it because they had intentions of getting married and they were very close in the House, same House; and being grandmother's, being sisters, so it's quite an embarrassing thing for the chiefs to have the young people. So I was involved – I was asked to this meeting.

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<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.* at 381.

So we talked to these young people and we explained to them how it was and how it will be after awhile if they got married, and luckily they seen it our way.<sup>104</sup>

Despite the efforts of the chiefs, there are still some people who will go against the law in order to marry someone in their own clan.<sup>105</sup> Mrs. McKenzie (Gyoluugat) was quite uncomfortable talking about this on the stand: “Do you want me to say names? I am getting leery about this.”<sup>106</sup> In the event that a same-clan couple goes ahead and marries against the direction of their families, adoption is used to rectify the kinship relationships, as she explains:

Well, when this happens, like the Lax Gibuu – I’m still talking about myself – my clan, if there is two Lax Gibuu that are married in, you know, within the clan, and it doesn’t look right to us and we more embarrassed than anything, so we have to talk about these people, so one side, maybe the mother or the father, have to adopt one side, so as to give them – that one would be maybe a Frog and a Wolf or a Fireweed and a Wolf, so that things are straight to the eyes of the chiefs of the Houses.<sup>107</sup>

The concerns about same-clan marriages are economic, political, and legal – although these are not explicitly articulated as such and rather, such marriages are usually described as “embarrassing”, “against the law”, or even as “incest”.<sup>108</sup> In effect, the Gitksan kinship system of clan exogamy creates a legal, political, and economic duality around each Gitksan person. There are different reciprocal relationships between an individual and his or her mother’s House, and between an individual and his or her father’s House. In the case of injury, for example, a person’s father’s side is responsible and would have to sort out the relevant compensation issues. Furthermore, through each parent there are distinct and separate responsibilities for and privileges to land and resources. Finally,

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<sup>104</sup> *Ibid.*

<sup>105</sup> Such intra-clan marriages are disparagingly called *xaats*.

<sup>106</sup> Mary McKenzie (Gyoluugyat) 19 May 1987, *supra* note 94 at 381. There is still a strong Gitksan ethic to only talk about one’s own experiences or about one’s own House rather than to talk about what other people do or have done. In this case, Mrs. McKenzie dealt with this by using her own House as the example.

<sup>107</sup> *Ibid.*

<sup>108</sup> Interview of Katie Ludwig (Galsimgiget) (May 2005) at South Hazelton, BC.

each spouse has a separate role to fulfill in the Feast hall, and there would be confusion about where the children of a same-clan marriage should sit. Given these various confusions and embarrassments, the families will arrange adoptions through the father's side or maternal grandfather's side.<sup>109</sup> While this extension of adoption laws is an example of Gitksan people adapting to present-day changes, a residue of shame still lingers around same-clan marriages, and at the Feasts one will usually hear quiet but judgmental comments about such marriages.

My purpose in discussing the Gitksan laws relating to marriage and adoption is twofold. First, this brief examination of these laws illustrates how they are integrally connected to the overall economic, social, and political institutions, dynamic, and everyday life of Gitksan people today. Second, future questions regarding Gitksan self-determination and how Gitksan legal traditions might relate to Canada require considering how those traditions have changed and what practical consequences have resulted from these changes.

Obviously, resource extraction increased exponentially over the Gitksan territories since the 1950s as it did on the rest of the planet. Provincial and federal legislative and regulatory regimes were layered over Gitksan jurisdiction throughout the territories.

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<sup>109</sup> This adoption practice is also followed when a Gitksan man marries a non-Gitksan woman. Unless she is adopted, their children will be considered non-Gitksan and there will be no place for them in the feast hall. Such clanless Gitksan would be shamed to have to sit at the "missionaries' table" with the other non-Gitksan attendees. This table was established at the feasts initially for the missionaries, but has evolved to include any other non-Gitksan feast goers such as anthropologists, teachers, priests, social workers, bureaucrats, etc. During the trial of *Delgamuukw*, several of the Crown lawyers attended at least one feast in Gitanyow, and they were seated at the missionary table. I have written elsewhere about the need for aboriginal groups (such as the Tsimshian and the Gitksan) with growing populations of clanless members (created by marrying out or the establishment of exclusionary band membership policies) to politically and legally reconcile these clanless people according to their own laws. See for example, Val Napoleon, "Who Gets to Say What Happened? Reconciliation Issues for the Gitksan" in Catherine Bell & David Kahane, eds., *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) 176-95; Val Napoleon, "Raven's Garden: A Discussion about Aboriginal Sexual Orientation and Transgender Issues" (2002) 17:2 C.J.L.S. 149-71.

Stanley Williams (Gwis Gyen) is critical of the colonial governments and “white people” breaking Gitksan laws:

The laws that our ancestors that has been there for thousands of years have always been there and they still there today. And it's been a little over a hundred years since the white man and the government came here, and they are trying to tell us that – they are saying – they are breaking our laws and they can't do this because our laws have been here for thousands of years.<sup>110</sup>

As mentioned previously, Gitksan people participated fully in all aspects of the economy including working in the forestry industry and the commercial fishery on the north coast. Provincial and federal laws created an on-the-ground conflict of laws for many Gitksan on the territories, which for the most part was unexamined, denied, and obscured in the formal relationship between the Crown and Gitksan people (hence *Delgamuukw*). The Gitksan people employed in these industries were also members of the Gitksan Houses that owned the territories, and this put them in the distressing position of having to break Gitksan law in order to survive economically. For example, Solomon Marsden (Xamiaxyetxw; frog/ganeda), cut cedar poles for a company called Hanson's from 1951 to 1961.<sup>111</sup> Mr. Marsden told the Court that he cut cedar poles on Xamiaxyetxw's (his House's) *lax yip* (territory).<sup>112</sup> While in one way this may have made his work easier, he was still cutting for a non-Gitksan company for wages while the resource – the poles – left the territory under provincial jurisdiction, not Xamiaxyetxw's jurisdiction, and lastly, it was the company that garnered any profit.

James Morrison (Txaaxwok; wolf/lax gibuu) had found himself in a similar situation. When he was cross-examined about his work as a logger and independent

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<sup>110</sup> Stanley Williams (Gwis Gyen) April 19, 1988, B.C.S.C. commissioned evidence transcript, 160 at 181, for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185 [Stanley Williams (Gwis Gyen) 19 April 1988].

<sup>111</sup> Solomon Marsden (Xamiaxyetxw) May 5, 1988, B.C.S.C. trial transcript, 5820 at 5874, evidence for *Delgamuukw v. The Queen* [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185.

<sup>112</sup> *Ibid.*

subcontractor for Hazelton Forest Products, he explained that he was cutting cedar poles on House of Anda'ap (fireweed/gisgaast) clan territory:

Mr. Macaulay	You were a logger at one time, weren't you?
Txaaxwok	Yes, I am.
Mr. Macaulay	Are you still logging?
Txaaxwok	No.
Mr. Macaulay	When did you stop logging?
Txaaxwok	Oh, about five years ago.
Mr. Macaulay	Did you have your own operation?
Txaaxwok	I have once.
Mr. Macaulay	You did have once?
Txaaxwok	Yes.
...	
Mr. Macaulay	... did you cut poles, is that what you were doing?
Txaaxwok	Yeah, that's what we were doing, cutting poles.
Mr. Macaulay	Okay. And when you were cutting poles, did you have employees?
Txaaxwok	Yes.
...	
Mr. Macaulay	And where did you cut poles when you were cutting poles?
Txaaxwok	Oh, we cut them north of Hazelton.
Mr. Macaulay	On whose territory?
...	
Txaaxwok	Well the – it could be – could be Anda'ap's territory. <sup>113</sup>

According to Mr. Morrison (Txaaxwok), cutting cedar poles was a very different practice from clear-cut logging, which he viewed as being much more detrimental:

The – only [cutting] Hazelton Forest Products allowed was to take poles, which you only taking poles that you should be taking, not all of them. But after that, the logging, Hazelton Sawmill and some other loggers were coming in and they clear-cut logging. The change – whether the law change, I don't know, but that's what they do. They cut the whole – right from Hazelton right up to Kisgagas. Now you can see there is nothing left there. That's ... the policy of these people that been cutting off those logs, and they been taking, even now, right up to Sustut River it's going to be clear-cut logging there.<sup>114</sup>

While this exchange demonstrates that Mr. Morrison (Txaaxwok) considered his practice of cedar-pole logging to be less environmentally intrusive than clear-cut logging,

<sup>113</sup> James Morrison (Txaaxwok) April 26, 1988, B.C.S.C. trial transcript, 5545 at 5584, evidence for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185.

<sup>114</sup> *Ibid.* at 5585.

there are certainly many Gitksan who have, and still are, engaged in clear-cut logging.<sup>115</sup> But the Crown's interest in the logging activities of Txaaxwok and Xamiaxyetxw (Solomon Marsden) was to demonstrate that Gitksan people either gave up practicing their land tenure laws at contact or never had real laws to begin with. On the other hand, while the Plaintiffs appeared to be completely open about these types of activities on the land, they never directly addressed the complexity or the contradictions they created for Gitksan law.<sup>116</sup> This is evident in this quotation from Solomon Marsden when he is talking about changes to Gitksan trespassing law: "The chief could use this law. It's still there, but the government laws have greatly interfered with our laws, the Gitksan law. And this is... why it is not used today."<sup>117</sup>

By all the Gitksan witnesses' accounts, *lax yip* (territories) are absolutely central to the Gitksan people, and their relationship with the land is recreated and performed through the *adaawk* at every pole-raising Feast. When asked if he could allow the clear-cutting of his territories on behalf of his House under Gitksan law, Art Mathews (Tenimgyet) responded, "No, I wouldn't because I would be the dumbest chief ever alive if I did this on my own. I have to consult my House first. Like I said, I can't do it alone."<sup>118</sup> Yet there is a profound silence in the Feast hall and beyond about the questions raised by activities such

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<sup>115</sup> I have heard the derisive term "Simoogit Logging Truck" applied to several Gitksan loggers by other Gitksan. For interviews with two Gitksan loggers, Art Loring and Chris Skulsh, see Nettie Wild's documentary film, *Blockade: It's About the Land and Who Controls It*, co-produced by Canada Wild Productions and Canada Broadcasting Corporation (1994).

<sup>116</sup> Pete Muldoe (Gitludahl) 16 May 1988, B.C.S.C. trial transcript, 6084 at 6147-53 evidence for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185. [Pete Muldoe (Gitludahl) 16 May 1988]. For example, in his testimony, Mr. Muldoe recounted that he had a small logging company for cordwood and pole logging, and he also had a small sawmill until the mid-1960s.

<sup>117</sup> Solomon Marsden (Xamiaxyetxw) 9 May 1988, B.C.S.C. trial transcript, 5932 at 5938, evidence for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185 [Solomon Marsden (Xamiaxyetxw) 9 May 1988].

<sup>118</sup> Art Mathews (Tenimgyet) 18 March 1988, B.C.S.C. trial transcript, 4759 at 4779, evidence for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 216 [Art Mathews (Tenimgyet) 18 March 1988].

as those described by Solomon Marsden (Xamiaxyetxw) and James Morrison (Txaaxwok). All the while, the *adaawk* are still recounted for the House territories even though they may be clear-cut and despite the fact that those responsible for the clear-cutting are from other Gitksan Houses.<sup>119</sup> Despite all of these seeming contradictions, the Gitksan proceeded with *Delgamuukw* for the purpose of protecting their relationship with their lands.

Thus, a form of political cognitive dissonance has been created because there has been no candid legal or political discussion about how any of this can be reconciled according to Gitksan law. Certainly people still live and manage their lives, and attend to their many responsibilities as Gitksan. Perhaps it is simply a matter of recognizing the colonial power differential and being overwhelmed by capitalism that enabled people to practically separate the logger James Morrison's (and others') means of survival from those of *Simoogit* (chief) Txaaxwok. This unacknowledged contradiction must cause a fundamental stress in Gitksan people.

In another example of Gitksan societal duress, while being cross-examined by Mr. Macaulay, Olive Ryan (Gwaans) also expressed some frustration about young Gitksan people trying to be "white".<sup>120</sup> At this point Mrs. Ryan had already spent over four days providing evidence in chief and two days under cross-examination by Mr. Plant, and her interaction under cross-examination was generally very testy.<sup>121</sup> Her earlier testimony under direct examination focused on explaining the extensive pole-raising ceremonies and Feasts for her House. Mr. Macaulay asked Mrs. Ryan whether she had authorized the use

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<sup>119</sup> More recent House protection and harvesting activities are described in chapter 4.

<sup>120</sup> Olive Ryan (Gwaans) 18 June 1987, B.C.S.C. trial transcript, 1438 at 1440, evidence for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185 [Olive Ryan (Gwaans) 18 June 1987].

<sup>121</sup> In fact, Mrs. Ryan had been reprimanded several times by Chief Justice McEachern for being difficult under cross-examination. See for example, Olive Ryan (Gwaans) 17 June 1987, B.C.S.C. trial transcript, 1358 at 1401, evidence for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185.

of the Hanamuxw crest on the carved doors at the University of British Columbia and on a carved pole that was raised in Kansas City. Basically, Mr. Macaulay questioned Mrs. Ryan about whether these commercial works of art were against Gitksan law, whether Gitksan law had any force and effect, and whether such laws were in fact “new” Gitksan laws. In this exchange, Gwaans is put in the position of trying to explain some of the contradictions arising from the unauthorized sale of commercial Gitksan art by Gitksan artists.

Mr. Macaulay	But didn't you tell us that that was against Gitksan law?
Gwaans	Well, that's what they said before, you know, but nowadays different. We trying to stop those young people, but they were – you know, I can't –
Mr. Macaulay	They don't pay attention?
Gwaans	They don't pay any attention to the elders.
Mr. Macaulay	You don't approve of works of art like those doors... you don't approve of that being sent down to Vancouver?
...	
Mr. Macaulay	But was that against Gitksan law to take Gitksan poles to Kansas City?
Gwaans	Well, against the law, but they don't listen, you know. They don't follow the law, some of the carvers.
...	
Mr. Macaulay	Now, museums and botanical gardens didn't exist in the old times, did they? Before the white man there were no museums or –
Gwaans	No.
Mr. Macaulay	– that kind of thing?
Gwaans	No.
Mr. Macaulay	And so there was no Gitksan law about moving poles around because they didn't – it didn't come up?
Gwaans	That was the Gitksan law. They are not supposed to be there, you know, but they decided to do that, you know, the carvers –
...	
Mr. Macaulay	But before the white man came –
Gwaans	No, no.
Mr. Macaulay	There wasn't that problem?
Gwaans	No.
Mr. Macaulay	Well, how – so this Gitksan law you are talking about is a law which meets a new circumstance in the last hundred years because the problem in the old times – there was no problem of that kind?
Gwaans	Well, the young people listen to the Chiefs, you know, not supposed to do that. But today, you know, they was trying to be a white man, that's the reason why they carving the pole and put it in the cities. Do you understand what I am saying?

...  
 Mr. Macaulay      And Gitksan law applies to all the Houses, not just Hanamuxw?  
 Gwaans             Yes, when they talk it over – when they – they call it – the white people calls it a meeting....  
 Mr. Macaulay      Yes.  
 Gwaans             That's what Gitksan do.  
 Mr. Macaulay      And you meet with the other – with other Chiefs, do you and talk it over?  
 Gwaans             Yeah, I talk to them. I talk to Gwis gyen and I talk to Herbert Wesley before we decided to build the new pole.  
 Mr. Macaulay      And the law – the Gitksan laws develops from these meetings and discussions of the Chiefs?  
 Gwaans:            Yes, yes.<sup>122</sup>

This exceedingly frustrating passage also reflects one of the Crown's main strategies – to attempt to discredit Gitksan law because it has not been practically reconciled with the demands of today's world, be it the wage economy, capitalism, or state law. Arguably, the Crown's destructive strategies were effective and contributed to the overall sense of Gitksan law not being real law, but rather something simpler and frailer, and ultimately more primitive. Another way the Crown's strategy was effective was that it perpetuated the notion that Gitksan law must remain locked in the past if it is to be authentic, and if Gitksan law persists into the present, it is inauthentic because it has been damaged by change and what passes for progress in the colonial world. I will pick up this discussion again in chapter 6.

The Crown put similar disparaging questions to the witnesses about the failure to apply Gitksan law to marital property, housing, and real property on reserves. Along the same vein, the witnesses were questioned about whether and how the settlers, various roads, sawmills, and other activities were in violation of Gitksan law. For example, in this exchange Gwaans (Olive Ryan) tells the Court that the “white people” do not recognize her

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<sup>122</sup> Olive Ryan (Gwaans) 18 June 1987, *supra* note 120 at 1339-41.

or the authority of the House of Hanamuxw.<sup>123</sup> Nonetheless, she argues that Gwaans still owns the territories that the settlers are living on. Representing the Crown, Mr. Plant is careful to shift the focus from the lack of recognition by the settlers to the inability of Gwaans to act on the ownership rights of Hanamuxw under Gitksan law.

Mr. Plant	Talking about the white people that are living on your territory like the Cummings and the Watsons and so on. Does the land that they live on belong to Gwaans or to them?
Gwaans	Yes. Well, don't have Gwaans.
Mr. Plant	I didn't understand your answer?
Interpreter	They don't consider Gwaans, the white people.
Mr. Plant	I wasn't asking you about them. I am asking you about you as Gwaans. Does that land, the land that Mr. Cummings lives on and Mr. Watson owns, does that land belong to you?
Gwaans	Yes.
Mr. Plant	It doesn't belong to the Cummings or the Watsons?
Gwaans	No. <sup>124</sup>

Again, all of this was intended to undermine the evidence about Gitksan law by showing how irrelevant it was in the practical everyday lives of Gitksan and non-Gitksan people. This was especially true in regard to younger Gitksan, as this exchange under cross-examination illustrates.

Mr. Macaulay	So it is only you and maybe your brother who is actually alive who have actually walked in the territory; is that right?
Txaaxwok	Well, there are some people that walking through that area, like people still alive today.
Mr. Macaulay	Okay. Very few people and they're older people now, aren't they?
Txaaxwok	Yes, there are some older people that walk through that area.
Mr. Macaulay	Yes, and your brother is about 68 years old, isn't he?
Txaaxwok	Well, somewhere around there.
Mr. Macaulay	But there are no younger people who know that territory or walked through it, are there?
Txaaxwok	Well, there is David Blackwater.
Mr. Macaulay	And young people don't go on the territory up there at Chipmunk Creek today, do they?

<sup>123</sup> Olive Ryan (Gwaans) 17 June 1987, *supra* note 121 at 1409.

<sup>124</sup> *Ibid.*

Txaaxwok	Well, I don't know if they did or not.
Mr. Macaulay	No. They are involved in other employment. They are involved in the logging industry, aren't they?
Txaaxwok	Yes, right for some areas, not the area that you are talking about. There are a lot of areas that have been destroyed, that is the reason why they went to work on that. <sup>125</sup>

### 3.2(e) Gitksan Society as Dynamic

Obviously the trial was not the time or place to consider the larger ongoing questions relating to how Gitksan law changes over time, the source of Gitksan law, the relationship between Canadian law and Gitksan law, the extent of damage to Gitksan institutions, difficult internal contradictions, or how resources from Gitksan legal traditions might be drawn upon to help deal with some of the contemporary issues and conflicts that were evident in the trial. (I will explore these questions in more detail in chapters 5 and 6.)

If Gitksan legal traditions are determined to be incapable of change or are pinioned in the past, their theoretical and intellectual resources will no longer be available to Gitksan people today. John Borrows makes a similar argument:

Tradition can be the dead faith of living people, or the living faith of dead people. If Indigenous traditions are not regarded as useful in tackling contemporary concerns and recognized as applying in current circumstances, then they are nothing but the dead faith of living people. On the other hand, if our people, institutions, and ideologies have relevance beyond our boundaries, this marks the living faith of our ancestors – the living traditions of dead people. Aboriginal people can resist assimilation by applying their traditions to answer the questions they encounter in the multifaceted, pluralistic world they now inhabit.<sup>126</sup>

One of the most important aspects of indigenous legal traditions is that they enable societies to manage themselves and to express normative collective resolutions. However, such collective agreements are only ever partial, because “[t]he underlying controversies

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<sup>125</sup> James Morrison (Txaaxwok) 25 April 1988, B.C.S.C. trial transcript, 5471 at 5525, evidence for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185.

<sup>126</sup> John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 147.

remain, and the positions that lost out on this occasion may in the future carry the day. The collective resolutions are, then, both provisional and peremptory.”<sup>127</sup> In other words, change is just as relentless in legal traditions as in every other aspect of life – and change is just that – nothing more. Patrick Glenn offers a practical and useful way to think about Gitksan legal traditions and change: “Tradition provides advice or models which may be used in living our lives. Most of the tradition which has been captured and retained is aimed at the good or well-being of entire communities. . . . All of these great traditions generate opposition within themselves, aimed at improvement or transformation of the tradition.”<sup>128</sup>

My point here is that Gitksan society has never been in stasis and Gitksan people were and are active agents in their world rather than passive recipients of colonialism.<sup>129</sup> My questions are whether and to what extent the demands of the *Delgamuukw* trial pushed the Gitksan witnesses to idealize and reify aspects of Gitksan law in retrospect. And if this was the case, has this reification of Gitksan law become the truth at the local level for those Gitksan today who lack the extensive practical knowledge about Gitksan law of the witnesses who testified? This connects to my main research questions about whether and how *Delgamuukw* has inadvertently generated the conflict that is still reverberating within Gitksan communities, and whether and how Gitksan people’s conflict management system has been affected. Of course the people are still Gitksan and the current conflict indicates that they still care very deeply about these issues.

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<sup>127</sup> Webber, “Past & Foreign”, *supra* note 7 at 6.

<sup>128</sup> Glenn, *Legal Traditions*, *supra* note 61 at 26.

<sup>129</sup> The social sciences have created an unhelpful and false dichotomy “between the person as active agent and the person as culturally determined”. Joseph P. Gone, Peggy J. Miller, & Julian Rappaport, “Conceptual Self as Normatively Oriented: The Suitability of Past Personal Narrative for the Study of Cultural Identity” (1999) 5:4 *Culture & Psychology* 371 at 395.

### 3.3 Selected Gitksan Cases

The purpose of this section is to demonstrate the tremendous complexity of the Gitksan legal order and to better contextualize the consideration of Gitksan law as law. Earlier I wrote that one of the difficulties in the transcripts is that the Gitksan witnesses described Gitksan law as the ideal, not Gitksan law as it is practiced. The witnesses did provide the Court with many examples of ancient and recent case law that forms the basis for Gitksan jurisprudence, but these were not unpacked to reveal the legal norms, obligations, deliberation and reasoning that, arguably, makes Gitksan law, law. In other words, the content of the law and legal processes was not discussed, only whether certain practices were conducted in the name of law – law as fact (as explained earlier). In this section, I aim to unpack the legal cases that the witnesses told the Court about in order to deepen my thinking about Gitksan legal traditions. This unpacking will also serve as the basis for my later development of a Gitksan legal theory in chapter 5.

Richard Overstall has ordered Gitksan laws into three types which create a helpful framework for locating the essential contours and dynamics of the Gitksan legal order, and the functions<sup>130</sup> of the laws within it:<sup>131</sup>

[P]rimary laws – the rules that have to be followed to carry out one’s reciprocal obligations to others. Examples include asking permission of an animal or plant before taking it, never taking more from the land than one needs, and always giving something in return.

[S]econdary laws – rules that enable people to interpret the primary laws. These are the rules governing the feast hall, where the Houses, through their chiefs, validate and recreate the original relationships of the host House group, the succession of

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<sup>130</sup> I am not using this term anthropologically (i.e., static functionalist approach to culture) or from the legal theory school (i.e., legal functionalist approach). Rather, my use of function here is in a dynamic rather than a static sense; law changes over time, but still enables large groups of people to manage themselves in the present.

<sup>131</sup> Overstall’s model draws on H.L.A. Hart, *The Concept of Law* (London: Oxford University Press, 1975). I will return to this classification method later in this chapter. In chapter 5, I will discuss Overstall’s rules model in relation to Hart’s primary and secondary rules.

individuals within the host House to chiefly names, and the allocation of use rights to lands and resources.

“[S]trict” laws [that] are constitutional in nature, being concerned with establishing and maintaining the legal framework of the society and its ability to maintain its obligations to the land. Examples ... include the law against marrying within one’s own clan, the inalienability of territory, and a lineage’s absolute liability for human actions on its territory.<sup>132</sup>

In this section, I will set out a number of ancient and recent legal cases by theme, and will discuss some of the legal norms, obligations, capacities, and processes contained within them. Two forms of verification stand behind these cases. First, quite a few of the cases were described by more than one witness, and this cross-referencing served to verify them in the courtroom. Second, the witnesses were speaking publicly, so they would have been exceedingly careful about what they told the Court because of direct political ramifications for themselves, their Houses, and other kin. In other words, in their public role, they were directly accountable to their House and their kinship network, and indirectly to more distantly related Gitksan.

The following quotation by William Twining is helpful to understanding my approach to articulating Gitksan jurisprudence:

One way of looking at jurisprudence is as the theoretical part of law as a discipline. A theoretical question is one posed at a relatively high level of generality. In this view, jurisprudence is that part of the institutionalised study of law that is concerned with more or less general questions. As such, it is one part of the enterprise of understanding law. Theory and practice is a false dichotomy: for there is no necessary correlation between generality and practical utility. Some general ideas are extremely useful, even in the short term; others have no discernable applications.<sup>133</sup>

In line with Twining’s view of the integral link between theory and the practice of law, my treatment of the following Gitksan cases includes an effort to begin theorizing

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<sup>132</sup> Richard Overstall, “Encountering the Spirit in the Land: ‘Property’ in a Kinship-Based Legal Order” in John McLaren, Andrew R. Buck & Nancy E. Wright, eds., *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005) 22 at 44 [Overstall, “Encountering”].

<sup>133</sup> Twining, *Globalisation*, *supra* note 11 at 11 [footnote omitted].

Gitksan legal traditions (see chapter 6). Furthermore, one of my overall premises is that indigenous law, including Gitksan law, must be approached just as critically and rigorously as western law or any other law. Furthermore, legal scholarship about indigenous legal traditions must be substantive – grounded in the actuality of law-in-the-world. This treatment requires a practical and in-depth exploration of how legal decisions are made, how reasoning and deliberation are conducted, how disputes are managed, and how law is recorded, taught, and changed. That is the goal of this section.

There are twenty cases divided into six themes concerning (1) legitimacy of the authority held by the chief and House, (2) compensation relating to intentional and accidental death, (3) compensation relating to debt, (4) corrections in the Feast hall, (5) disputes about names, and (6) different types of adoptions. For ease of reference, a case chart summary is provided at the end of the section. It goes without saying (but I will say it anyway if for no other reason than to remind myself), that the whole of Gitksan legal traditions is infinitely more extensive than anything I am able to capture here. The sample cases are but a small slice of the evidence that the Gitksan witnesses presented in court, and a mere glimpse at the legal traditions by which Gitksan people managed themselves since the beginning of remembered time.

At the risk of overburdening the reader with detail, I am providing short descriptions of each case which I hope will enable me create a hands-on learning opportunity about Gitksan legal traditions including legitimacy, conflict management, legal decisions and agreements, establishment and use of precedent, relationships and conduct, identification and fulfillment of legal obligations, and perceptions of various crimes, accidents, and failures to fulfill legal obligations.

### 3.3(a) Legitimacy of Authority

The cases in this section are important in beginning to articulate the norms in the Gitksan legal traditions that make possible a decentralized legal order and enable it to function without a designated bureaucracy. I think the witnesses emphasised these cases in order to show the importance of their legal traditions and *daxgyet* to the Court. Each of these cases concerns the legitimacy of their names, political structure, and authority, and serves to demonstrate that Gitksan people have fiercely defended this legitimacy in the past as well as in the present.

The witnesses provided a number of examples that focused on the importance of keeping the head chief's name<sup>134</sup> clean in order for the chief to maintain his or her authority in the Gitksan system. Failure to uphold the name properly and failure to fulfill one's chiefly legal obligations can cause the chief and House to lose face, and the name to be considered tarnished. If a chief died without cleansing the name, usually with a type of shame Feast, the burden of doing so would fall on the next person to be held by that name<sup>135</sup> and the House's *daxgyet* would be diminished until the cleansing was completed. Mary McKenzie (Gyoluugyat) explained that while these are called "shame Feasts" in English, "there are different types of Feast when a Chief is hurt or shamed, embarrassed".<sup>136</sup> These cases vary as to location, specific issues, circumstances, remedies, and time frame.

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<sup>134</sup> All the names are considered part of the intellectual property of the House, but the names of the head chief and wing chiefs are directly connected to the *adaawk* and therefore to the House's territories, history, songs, crests, and *nax nox*.

<sup>135</sup> In *Gitsanimx̄* (the Gitksan language), the way this is expressed is that the name takes the person, not the other way around.

<sup>136</sup> Mary McKenzie (Gyoluugyat) 13 May 1987, *supra* note 35 at 247.

In all of these next examples, the chief accepts full responsibility for the event and takes measures to publicly “wipe” the name clean so that the name will not lose its authority and the House and its members will not lose face. The chief’s name is central to the institution of the House which is connected to the territories, *adaawk*, and the broader network of Gitksan relationships. The names form part of the House’s intellectual property along with the *adaawk*, crests, *naxnox*, and songs. Pete Muldoe (Gitludahl) explains to the Court the seriousness of keeping the name clean:

Mr. Grant	What happens if you don't keep it clean?
Gitludahl	Well, you can't put up a feast.
Mr. Grant	...what would be the situations where you would have to put up a feast?
Gitludahl	Well, after...the blanket is given to you and to wear that blanket, and you are supposed to keep it clean. And if you get into a fight or anything like that, and blood over your body, or anything like that, or you fall into a river or into the ocean, and that's why you have to keep it clean, is to put up a feast. If you get into a fight, and they have to put up so much money again in order to get yourself into position to have that blanket clean. And what they call that is <i>Guuxs ghagal gimxs</i> .
	And if you fall into the water that's called <i>Guuxs tso'oxsxw</i> , that's the same thing. But you have to keep – that's a tradition of a chief. <sup>137</sup>

Given the potential liability that a chief’s conduct may cause a House, strict standards and expectations are placed on a chief’s public behaviour. Glen Williams (Malii) explained that as a chief, he is required to fulfill other ongoing expectations:

I have to do my – my own planning. I have to make sure that I always have money just in case I have to contribute to feasts. It's not just a few dollars, it's usually a thousand dollars depending on the rank of the chief that passes on to my house. And if there's other feasts that happen with the wolves I can't just contribute \$20, it's got to be a little bit more than \$20 to show my rank.<sup>138</sup>

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<sup>137</sup> Pete Muldoe (Gitludahl) 16 May 1988, *supra* note 116 at 6108.

<sup>138</sup> Glen Williams (Ax gwin desxw) 30 May 1988, B.C.S.C. trial transcript, 6620 at 6680, evidence for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185 [Glen Williams (Ax gwin desxw) 30 May 1988].

Other standards of public behaviour include, “I have to be careful how I appear in the community. I cannot be seen as drinking and be drunk on the street, or partying all the time. I have to be a bit more careful. I have to try and attend as many feasts as I can.”<sup>139</sup> In the Feast hall, Glen Williams (Malii) said, he must be conscious of how he is seated and he is “responsible for making sure that a lot of planning takes place if – if we’re [going to] have a feast for our particular house.”<sup>140</sup> Mr. Williams explains that the chief’s responsibilities in the Feast hall extend to his other House members and to the territories, and he must

[e]nsure that things are well thought out and well planned and be responsible for...my nephews and my nieces and my brothers and my cousins in our house, make sure that they have names. And we also have to think about the land itself, the land that we have seeing who's – who's using it, who's logging on there, planning out some things that we want to do on the land. Those are some of the responsibilities that I have inherited.<sup>141</sup>

Again, it is crucial to appreciate that this complex of reciprocal legal obligations is how the decentralized Gitksan legal order functions without a central bureaucracy. The chiefs’ names, kinship networks, and corresponding obligations are part of an overall political, economic, and legal system that connects the past with the present, the people with the land, and the people with each other. When a chief or a House acts to protect its names, these actions are about protecting the legitimacy of the system, the authority of the House, and its ownership of its territories. According to Mary McKenzie (Gyoluugyat), the chief’s authority and responsibility also extends horizontally through the *wil’naat’ehl* (relations on the mother’s side) in times of crisis or need. When asked specifically what her

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<sup>139</sup> *Ibid.*

<sup>140</sup> *Ibid.* at 6680.

<sup>141</sup> *Ibid.* at 6680-81.

obligations were for her wil'naat'ehl insofar as making sure that Feasts were held, Mrs.

McKenzie gave this example from 1983:

Mrs. Amelia Wilson died and she's from Wii elaast's House, and it was during the summer months so Wii elaast wasn't around so I have the authority so I put on a Feasting for her burial and this is how our wil'nat'ahls get together and work when there's one chief there and without me asking him because he's my wil'nat'ahl. I don't have to ask because I'm the head chief too of a House so we had the Burial Feast for this lady.<sup>142</sup>

### 3.3(a)(i) Stanley Williams, Gwis Gyen

Stanley Williams (Gwis Gyen) described his hosting of a *guxws haldim guutxws* (shame or cleansing Feast) and his reasons for doing so. About forty years earlier when Mr. Williams was still drinking alcohol, he was with a number of other Gitksan men in the “Hazelton beer parlour”.<sup>143</sup> (Hazelton is a small, primarily non-Gitksan village located in the eastern Gitksan territories.) Mr. Williams had been buying the rounds until he learned that one of his fellow drinkers, a large young man named Barney Morgan, was underage. When Mr. Williams refused to continue to buy beer for Mr. Morgan, a fight ensued. Mr. Morgan (from the House of Luuxhon) was injured and Mr. Williams was arrested, charged, found guilty, and sent to Oakalla Penitentiary to serve a nine-month sentence. According to Mr. Williams, his expertise in range of practical skills and his industriousness quickly brought him to the attention of the warden.<sup>144</sup> Before Mr. Williams' first month of incarceration was over, the warden intervened and paid for his bus ticket home.

When Mr. Williams (Gwis Gyen) returned home, he went commercial fishing on the north coast (in Tsimshian territories). Upon his return, he talked with his mother and

<sup>142</sup> Mary McKenzie (Gyoluugyat) 19 May 1987, *supra* note 94 at 365.

<sup>143</sup> Stanley Williams (Gwis Gyen) 13 April 1988, *supra* note 53 at 108.

<sup>144</sup> *Ibid.* at 109-10. During his incarceration, Mr. Williams was recognized by the warden for his skills in animal husbandry and as a carpenter, farrier, and mechanic.

they met with his uncles about his wish “to use our own law about cleansing myself”.<sup>145</sup>

Mr. Williams paid for all the expenses and his House hosted a Feast in Gitsejukla to which he invited the Houses from the other villages. Mr. Williams’ uncle Arthur MacDames (Haxbagwootxw) stood up and

announced why we were having this – this cleansing feast. He announced that – that I was cleaning myself...I'm one of the head chiefs in the village of Gitsejukla and this is why – why I did this so there won't be any talk, any rumours that – of disrespect towards myself and towards my uncles....[T]his is our law....If I did not go through this cleansing feast, I wouldn't be counted as a chief.

Ever since this cleansing feast I haven't touched a drop of liquor. I stopped taking this liquor and I never ever call anybody down in public or quarrel with anybody in public.<sup>146</sup>

Mr. Williams put \$3,000 into the Feast collection and his uncles each contributed \$100 or \$200 so that the total sum or Feast pot was considered substantial for the day. Mr. Williams’ uncles distributed the money to the guests and chiefs, some receiving \$50 and others \$100 which, “we call Guxws yoo'ixs. It's very serious for me because...I'm a chief.”<sup>147</sup> Luuxhon, Barney Morgan’s head chief, accepted payment at the Feast and thereby recognized that Mr. Williams accepted responsibility and cleansed himself of the behaviour that caused injury to Mr. Morgan. Mr. Williams explained that, “I want to be like I was before this fight ever happened.”<sup>148</sup> In effect, the intent of this Feast was to ensure that the fight and the incarceration were wiped out and forgotten.<sup>149</sup>

The significance of this Feast is that the shame incurred by Mr. Williams’ (Gwis Gyens’) actions was not wiped out by the criminal trial, guilty verdict, sentencing, or

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<sup>145</sup> *Ibid.* at 110.

<sup>146</sup> *Ibid.* at 110-111.

<sup>147</sup> *Ibid.* at 111.

<sup>148</sup> *Ibid.* at 112.

<sup>149</sup> *Ibid.* at 111-12. Stanley Williams was killed in a motor vehicle accident in 1991. His estate successfully claimed compensation which included the cost of hosting a headstone feast. The Court allowed this claim “on the basis that it was an obligation imposed by customary law and not an expression of sentiment”. *Williams v. Mould*, [1991] 3 C.N.L.R. 186 (B.C.S.C.).

incarceration. In fact according to Gitksan legal traditions, these Canadian legal proceedings actually compounded the shame of his original actions. Furthermore, the shame of Mr. Williams' actions was not limited to him personally, but also shamed his chief's name (Gwis Gyen), relatives, and House. Had he not hosted the cleansing Feast, he would have lost his authority in the Feast hall and in the Gitksan system. While the Feast "wiped out" his shame, his future behaviour was seriously altered – no alcohol and no public arguments.

### **3.3(a)(ii) Pete Muldoe, Gitluudahlxw**

Mrs. McKenzie (Gyoluugyat) recounted three recent examples of shame Feasts held to cleanse the name of the chief. In this first example, Pete Muldoe (Gitluudahlxw) fell into the ocean while commercial fishing on the north coast of B.C. (outside of Gitksan territories), and "when he returned to Kispiox he put a Feast on, and we called it Gil k'al gimks, to wipe off the ocean from him".<sup>150</sup> Mr. Muldoe explained that he hosted this Feast in order to symbolically cleanse himself and his blanket, and to educate the younger generation:<sup>151</sup>

Well, I fell in the ocean at Skidegate while still in commercial fishing, the reason I have to put up this feast, this feast has never been put up before, they do it in the early days but I wanted to show the younger generation how it's done. So I have to put up that feast and just to show everybody and everybody is glad I put up that feast, because that brought something back for the new generation to see it.<sup>152</sup>

Despite the fact that Mr. Muldoe's (Gitluudahlxw's) accident occurred outside Gitksan territories, he was still bound to host a Feast in which the ocean was symbolically

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<sup>150</sup> Mary McKenzie (Gyoluugyat) 13 May 1987, *supra* note 35 at 247. In Mrs. McKenzie's testimony, Pete Muldoe's name is spelled Gitluudahlxw. In Pete Muldoe's own testimony, it is spelled Gitludahl.

<sup>151</sup> Pete Muldoe, (Gitludahl) 16 May 1988, *supra* note 116 at 6109.

<sup>152</sup> *Ibid.*

wiped from him. A chief has the responsibility to uphold the chief's name on behalf of the House, and failure to do so will result in diminished authority in the Gitksan system for both the chief and the House. In Mr. Muldoe's case, he was also concerned that there were fewer cleansing Feasts and one of his stated goals was to educate the younger Gitksan. His broader interest included protecting and maintaining the legitimacy and authority of the Gitksan legal traditions.

### **3.3(a)(iii) Edith Gawa, Yahl**

In this more recent example, Edith Gawa (Yahl) was hit by a vehicle in the Gitksan village of Kispiox. She was seriously injured, suffering permanent brain damage. Mrs. McKenzie (Gyoluugyat) explained: "This lady Chief was knocked down by a vehicle, and she was injured very very much. She had to be in Vancouver hospital about a year. She lost her speech."<sup>153</sup> When she recovered, "she put on a Feasting. It took her two or three years before she recovered from that injury. She put on a Feast just last winter to wipe her blood off the street. It's called Sa gimk ihlee'e."<sup>154</sup>

The importance of this case was that it involved an injury that temporarily disabled Mrs. Gawa (Yahl), thereby interfering with her ability to fulfill the obligations of her name. Furthermore, Mrs. Gawa argued for the cost of her shame Feast as part of her injury in a Canadian court, and while she was not successful in obtaining a settlement for that cost, the Court took her loss of status as a chief into account when awarding her damages.

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<sup>153</sup> Mary McKenzie (Gyoluugyat) 13 May 1987, *supra* note 35 at 247.

<sup>154</sup> *Ibid.* In this case, Mrs. Gawa also went to the British Columbia Supreme Court where she argued that she "suffered shame, first by being knocked down in public and, second, by becoming forgetful and an object of pity". The Court found that awarding her an additional \$15,000 for the cost of the shame feast would have been double-counting. *Gawa v. Horton*, [1982] B.C.J. No. 1620 (B.C.S.C.).

### 3.3(a)(iv) Mabel Forsythe, Wet'suwet'en

In another recent example which took place in a nearby non-aboriginal town of Smithers, B.C., Wet'suwet'en House chief Mabel Forsythe was wrongly accused of shoplifting, and she and her daughter were publicly searched on the sidewalk of the main street.<sup>155</sup> Mrs.

McKenzie (Gyoluugyat) explains:

Another example is when a person is embarrassed by another group, like last summer in the City of Smithers a lady Chief again was embarrassed. Her case came up as theft at that time, so after the court was finished she put on a Feasting to wipe off that embarrassment, and that word theft, that she steals something, that's no longer to be remembered towards her when she put this Feast on.<sup>156</sup>

In this case, the police officer further detained Mrs. Forsythe and her daughter by driving them to the Forsythe's residence where he questioned Mrs. Forsythe's other daughter. No charges were laid and Mrs. Forsythe filed a legal action for damages in which she successfully claimed the cost of hosting a shame Feast. The Court "found that Mrs. Forsythe and her daughter were wrongfully imprisoned and as a result suffered embarrassment and shame".<sup>157</sup> When assessing damages, the Court took into account Mrs. Forsythe's greater rank in the community and awarded her \$2,000 toward the cost of a shame Feast.<sup>158</sup>

The significance of this case was that it took place in a non-Wet'suwet'en community, involved non-Wet'suwet'en parties, and Mrs. Forsythe argued her injuries in a non-Wet'suwet'en court. In other words, the shame was caused by non-Wet'suwet'en (although on Wet'suwet'en land) people in front of other non-Wet'suwet'en people (except for Mrs. Forsythe's daughter) – but the shame still had to be dealt with according to

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<sup>155</sup> Smithers is located in Wet'suwet'en territories but has a mainly non-Wet'suwet'en population.

<sup>156</sup> Mary McKenzie (Gyoluugyat) 13 May 1987, *supra* note 35 at 248.

<sup>157</sup> *Forsythe v. Collingwood Sales Ltd.*, [1988] B.C.J. No. 683 [B.C.C.A.].

<sup>158</sup> *Ibid.*

Wet'suwet'en legal traditions. In this case, Mrs. Forsythe successfully argued the application of Wet'suwet'en law.

In rare circumstances, a chief could actually lose his or her name. Mrs. Olive Ryan (Gwaans) gave this example of one such event “if the chief was making trouble or mislead the clan, then they'll put them out. That's the law. That's Gitksan's law”.<sup>159</sup> Mrs. Ryan continues:

Well, they doing wrong. That's the reason why they...chose another one to take their place, because the other one was making wrong. Something's going on in the house and they put them out. That's the law.

...

Well, they – if you going to be a chief, you have to learn the law. So you can't – you know, it's hard to do that, you know, but they take – take chance to put the other one in after they put the other one out, because he's doing wrong. It's not right. That's the reason why they put them out. That's the Gitksan's law.<sup>160</sup>

These last examples in this section demonstrate how the chiefs understand their obligations and the potential consequences in the event of their failure to fulfill them.

### 3.3(a)(v) **Roddy Good, Ax gwin desxw**

Glen Williams (Ax gwin desxw)<sup>161</sup> from the lax gibuu (wolf) House of Malii in Gitanyow provided another example of a chief losing his name in 1986.<sup>162</sup> In this case, Mr. William's name (at the time of the trial) was Ax gwin desxw, a wing chief name previously held by Roddy Good.<sup>163</sup>

[Roddy Good] had this name that I have now. That was a high ranking name. And we had feasts since he took the name that – and then he never – he would never show up for our feasts, or when he did he contributed very little money for that particular name. And the other chiefs from Kitwancool were disappointed that –

<sup>159</sup> Olive Ryan (Gwaans) 10 June 1987, *supra* note 12 at 1040.

<sup>160</sup> *Ibid.*

<sup>161</sup> Glen Williams now holds the head chief's name for the House, Malii. Interview of Glen Williams (13 July 2005) at his home in Gitwangak, B.C.

<sup>162</sup> Glen Williams (Ax gwin desxw) 30 May 1988, *supra* note 138 at 6678.

<sup>163</sup> Roddy Good had the name Ax gwin desxw since Rufus Good passed away, *ibid.* at 6677.

that the name was being abused. It wasn't being heard. When it was heard it was very little money that was associated to it. And they had a number of discussions with – with my – the chief of our house and other members of our house, and also the frogs from Kitwancool were disappointed as well. They expressed their views to Malii. And ... we had a meeting.<sup>164</sup>

The meeting that Mr. Williams (Malii) refers to here included members of his House and the chiefs from the other wolf Houses from Gitanyow, and from the frog Houses from Gitanyow. Mr. Williams recalled that some of the chiefs at the meeting included Gwashlam (Abel Campbell, wolf/lax gibuu), Gallii (Ronnie Johnson, wolf/lax gibuu), Gordon Robinson (House of Wilitsxw), Xamiaxyetxw (Solomon Marsden, frog/ganeda), Gunuu (Godfrey Good, frog/ganeda), and Sindihl (Bob Good, Luuxhon, frog/ganeda).<sup>165</sup> According to Glen Williams, the discussion and concern about Roddy Good (Ax gwin desxw) was caused by his general absence at the Feasts. This absence was understood as “abuse that was happening to the name” and it caused embarrassment “not just to our house, but to the wolves and to the frogs of Kitwancool [because]...such a high ranking name...wasn't visible enough and he didn't participate in it”. In the end, Mr. Williams explains, “this name that I have was discussed extensively at this meeting and I was asked to take it. And I was reluctant to accept it at first, but I was – I was convinced that I should take it. And I did accept it.”<sup>166</sup> The word that describes this action on the part of the House of Malii is *suuwiiis'wen* and it means “blowing them out of the Feast hall”.<sup>167</sup> At the Feast the results of the meeting and *suuwiiis'wen* were explained:

[Suuwiiis'wen] was...properly explained to everybody at that particular feast what was happening. And I took the name. They christened me. And after that feast the first order of chiefs to respond was the – was the Kitwancool frogs and they fully

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<sup>164</sup> Glen Williams (Ax gwin desxw) 30 May 1988, *supra* note 138 at 6678.

<sup>165</sup> *Ibid.* at 6679.

<sup>166</sup> *Ibid.*

<sup>167</sup> *Ibid.*

agreed with it. And the other chiefs agreed – agreed with it as well from the other villages.<sup>168</sup>

### 3.3(a)(vi) General – Feast Attendance

According to Mary McKenzie (Gyoluugyat), sometimes a chief will refuse to attend Feasts as a result of “differences in their own house, in their own family wil'nat'ahl, and this chief, any chief, doesn't agree with what is done or what is said by the different House chiefs and he doesn't want to make a thing about it so he just stays home.”<sup>169</sup> These are cases where a chief chooses not to exacerbate a difference in a public Feast, so he or she “and the family just sits back”.<sup>170</sup> Deliberately not attending a Feast is also a way for a chief to give a public signal about a serious disagreement or, alternatively, in some situations, to allow the chief to save face when they know their position will not be supported by the other chiefs.<sup>171</sup>

However, if the chief stays away from the Feast for too long, “in Gitksan way we say that moss is beginning to come cover the seat of a chief. The dust is settling in a chief's seat. So the family has to do something about that. They have to talk to the chief to make sure that they attend and they're embarrassed of their chief not attending, and the moss is getting thicker”.<sup>172</sup> Mary McKenzie (Gyoluugyat) explains that the other chiefs will intervene and will talk to the tardy chief and will encourage his or her attendance. A chief

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<sup>168</sup> *Ibid.*

<sup>169</sup> Mary McKenzie (Gyoluugyat) 19 May 1987, *supra* note 94 at 365.

<sup>170</sup> *Ibid.*

<sup>171</sup> For example, in 1945 there was a serious dispute involving a crest between Hlengwax, a small and highly ranked Ganeda House from Gitwangak, and Gaxsgabaxs, a larger and growing Ganeda House from Gitsegukla. See Anderson and Halpern, *supra* note 15 at 129-30.

<sup>172</sup> Mary McKenzie (Gyoluugyat) 19 May 1987, *supra* note 94 at 365.

can recover from being absent from the Feasts by hosting a Feast for the purpose of taking “away the dust and the moss of his seat” thereby enabling re-entry into the Feast hall.<sup>173</sup>

A chief who still refuses to attend the Feasts and continues to “abuse the name” may be called a “paper bag chief”. This means that at a Feast, a paper bag is placed on the chair of the chief into which Feast goods and gifts (*am gosinxw*)<sup>174</sup> are placed by the hosting House. This bag is then taken home by the chief’s attending House members. The presence of a “paper bag chief” is nominal or non-existent at the Feast, and an inadequate fulfillment of responsibilities to the chief’s own House or to the other Houses.

In such a situation the wing chiefs of the House have the authority to take measures to “blow the chief out of the Feast hall” and take the name back. However, *suuwiis'wen* is rare and undertaken only when there is no alternative and after serious consideration by a House and extensive consultation with other chiefs. The name can be immediately reassigned, as in the case of Glen Williams, or it can be “put away” until the House is ready to assign it, as in the case of Luutkudjiiwas.<sup>175</sup> Such actions taken by a House to protect its names are about protecting the legitimacy and therefore the authority of the House and its territories. These are all major political decisions that will have serious repercussions for the House through the kinship network, so they are not taken lightly.

### **3.3(b) *Xsiisxw* (Compensation/Cleansing)**

This section deals with a selected number of ancient and recent cases involving compensation, usually in the form of land. As with the other cases, the importance of

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<sup>173</sup> *Ibid.* at 365.

<sup>174</sup> Gitksan dictionary, *supra* note 88 at tab 9.

<sup>175</sup> Daly, *supra* note 48 at 294. In October of 2002, at an acrimonious mortuary feast in honour of the late Art Risdale (Luutkudjiiwas), the two opposing camps within the House, being unable to agree on a successor, agreed instead to “hang up the name” for a year.

examining these compensation cases is to gain insight into the on-the-ground practice of Gitksan law. How do people understand and work with injury, liability, and compensation?

In order to convey a sense of how the laws relating to compensation have been maintained and adapted through time, I have chosen some ancient cases and some that are more recent. Additionally, in order to understand the territoriality aspect of Gitksan law, I have chosen some events (i.e., offences and accidents) that occurred on Gitksan territories and others that occurred in the territories belonging to other peoples. Finally, as with the other cases, the challenge of varying degrees of involvement by Canadian law or State authorities serves to demonstrate the resilience of the Gitksan legal traditions in more recent times.

The law governing compensation is called *xsiišxw*, and it is applied in the most serious of situations involving loss of life or major debt. *Xsiišxw* (compensation/cleansing) may be applied when a life is taken either accidentally or with intent, in which case the offending House usually transfers land to the wronged House. The principle behind compensation/cleansing is that land does not wear out and the compensation has to last at least a lifetime. When the land is to be returned to the original owner, the head chief of the House that received the land as compensation will announce its return at one of the biggest Feasts, usually a funeral Feast. Solomon Marsden explains:

This is when a person's life is taken, and it's a serious matter to...give compensation to the...family. And a life has been taken here, and that's what they look at. This is why they have to – to give a lifetime thing, like the land, another person they would give, because the – the life of a person has been taken.<sup>176</sup>

According to the *adaawks*, land is the ultimate compensation payment. In order for land to be paid as compensation for varying periods of time – sometimes generations – a

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<sup>176</sup> Solomon Marsden (Xamiaxyeltxw) 9 May 1988, *supra* note 117 at 5957.

well organized system was required that allowed those with recognized legal authority for land to transfer it to another House. These compensation payments in land would have to be communicated widely, again over generations, so that everyone affected would be informed of the ownership changes (i.e., original transfer of land and the possible return of that land). These transfers are not restricted to the distant past, but are recalled and dealt with in today's Feasts.<sup>177</sup>

According to Richard Daly, failing to pay attention to the affairs of the House or to one's obligations in the Feasting complex is very serious and will lead to loneliness within the Gitksan kinship network.<sup>178</sup> Furthermore,

[i]f one does not honour one's feast obligations, then one is considered to live like a slave, or like all who have become immigrants in Canada, who are seen as strays, without pedigree, "people of uncertain origin." Such people show up at feasts. They receive gifts, but they never generate wealth. They live without honour, on the kindnesses of others.<sup>179</sup>

Daly asked one Gitksan chief, Pearl Trombley (Gwamoon), about *sitx'asxw* (to pay back debt) and she said, "Your name is mud if you don't *sitx'asxw*, if you don't settle your accounts. *Sitx'asxw* is paying back. If you don't *sitx'asxw* nobody looks at you the second time round."<sup>180</sup>

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<sup>177</sup> A question for future consideration is how the loss of control over territories and the various states of degradation due to logging and other activities factor in to the transfer and return of territories.

<sup>178</sup> Daly, *supra* note 48 at 66.

<sup>179</sup> *Ibid.*

<sup>180</sup> *Ibid.*

### 3.3(b)(i) **Accidental Death by Motor Vehicle**

In this first example, Stanley Williams (Gwis Gyen) described a recent *xsiisxw* Feast held in 1988 as a result of a motor vehicle accident that killed a young girl. In this case, the *xsiixw* Feast was not held immediately, but took place some years later because the driver was unable to forget the accident.

What happened was this young man hit this girl with – young girl with a car. He didn't do it on purpose. He didn't see the...girl on the way and this is why he went forward with his car. This young man could never forget what – what had happened. He suffered all through these years of what had happened and why he took the life of a young girl by accident, so what they did at this feast was his mother and his family put almost \$2,000 together and they gave it to the mother of the – of the young girl, and this is what you call a *xsiisxw*. This – after this happens, this accident should never be mentioned and the – the parents of the child would feel that it was an accident.<sup>181</sup>

While the driver maintained that the death of the girl was an accident, he nonetheless accepted responsibility for his actions. The Feast and the driver's payment to the dead girl's parents acknowledged their loss and his responsibility for their daughter's death even though his actions had already been dealt with according to Canadian law. No explanation was provided for the delay in hosting the Feast, but it is likely that the continued lack of resolution according to Gitksan law generated a sense of unease and perhaps bad feelings that the driver and his family and House found hard to endure.

### 3.3(b)(ii) **Olive Ryan, Hanamuxw**

In this next example, Olive Ryan (Gwaans) describes how the House of Hanamuxw acquired a fishing site called An si bilaa from the House of Luutkudziiwas, (frog, lax seel). According to Mrs. Ryan, Ha'atxw from the House of Luutkudziiwas wanted to marry the sister of 'Niitsxw who was in the House of Hanamuxw. 'Niitsxw refused to let Ha'atxw

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<sup>181</sup> Stanley Williams (Gwis Gyen) 13 April 1988, *supra* note 53 at 112.

marry his sister, and consequently, Ha'atxw killed 'Niitsxw. A peace settlement (*gawa gyanii*) Feast was held and the fishing site An si bilaa was given to Hanamuxw as compensation for the death of 'Niitsxw.<sup>182</sup> Mrs. Ryan explains further in her evidence in chief:

Mr. Grant	[Does] Hanamuxw still holds An si bilaa?
Gwaans	Yes.
Mr. Grant	Will that site go back to Luutkudziiwas at any time?
Gwaans	Sometimes when the time coming up and return it to them.
Mr. Grant	Why will you return it to them?
Gwaans	Well, that's settled. All the family will settle down and they not mad and not angry anymore.
Mr. Grant	So this settlement of giving this fishing site was temporary?
Gwaans	Yes.
Mr. Grant	Now, you said sometime in the future we will give this back. Has Hanamuxw and you decided when that will happen?
Gwaans	Yes.
Mr. Grant	When will that be?
Gwaans	When the pole raising. <sup>183</sup>

According to Don Ryan, the current Hanamuxw, the transfer of An si bilaa back to Luutkudziiwas has not yet taken place. The transfer was initially planned to take place in 2008 when the Feast was held for Joan Ryan, bearer of the name Hanamuxw prior to Don Ryan, but it has been postponed.<sup>184</sup>

### 3.3(b)(iii) David Wells, Sakum Higookw

Mrs. Ryan (Gwaans) recounted another xsiisxw Feast between Guksan's (frog/ganeda) House and one of the eagle/lax skiik Houses that took place in 1957.<sup>185</sup> Gwaans was involved with this xsiisxw Feast as part of Guksan's wil'na t'ahl. Very briefly, in this case, Amaayam (Walter Wesley), a member of Guksan's House, was killed by a member of the

<sup>182</sup> Olive Ryan (Gwaans) 15 June 1987, B.C.S.C. trial transcript, 1217 at 1249-50, evidence for *Delgamuukw v. The Queen* [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185 [Olive Ryan (Gwaans) 15 June 1987].

<sup>183</sup> *Ibid.* at 1251.

<sup>184</sup> Conversation with Don Ryan (Hanamuxw) 22 April 2008. The Hanamuxw feast was held 24 May 2008.

<sup>185</sup> Olive Ryan (Gwaans) 15 June 1987, *supra* note 182 at 1252.

lax skiik clan.<sup>186</sup> At this Feast, David Wells (a former holder of the chief's name Sakum Higookw, lax skiik) announced a *gawa gyanii* (settlement), in this case a hunting ground called *Xsi k'alii gajit*, to be transferred to Guxsan's House.<sup>187</sup>

### 3.3(b)(iv) Yagosip

In this next example, Thomas Wright (Guuhadakw)<sup>188</sup> from the House of 'Wiik'aax (wolf/lax gibuu), described an accidental death that occurred in Kisgagas "a long time ago" for which no compensation was paid.<sup>189</sup> In this case, while the families were eating, the nephew of Yagosip died when he accidentally fell onto Yagosip's knife. Because Yagosip and the nephew were both members of the House of 'Wiik'aax there was no need for a *xsiisxw* (compensation/cleansing Feast). According to Mr. Wright, "It was resolved. There was peace. Nobody mentioned it."<sup>190</sup> Mr. Wright explained that a *xsiisxw* would have been held if Yagosip and the nephew were from two different Houses: "[T]here will be *Xsiisxw* if that person was from a different house [and different clan]; there will be an exchange of blood."<sup>191</sup>

The case of Yagosip reveals a division between those matters that are dealt with publicly and those that are dealt with privately. According to Don Ryan (Hanamuxw), if one House member intentionally harmed another member from the same House, this matter would be considered an internal matter which should involve the father's side of the person that was

<sup>186</sup> Gwaans' explanation did not include the circumstances or specifics of this killing.

<sup>187</sup> Olive Ryan (Gwaans) 15 June 1987, *supra* note 182 at 1252. Gwaans said that Ant tk'al bakxw and Xsi kalii gajit were given to Guxsan's House as the *gawa gyanii* settlement, but she did not explain what Ant tk'al bakxw was. Xsi k'alii gajit is the name for an area of a mountain near Ritchie, BC.

<sup>188</sup> Thomas Wright (Guuhadakw) 19 February 1986, B.C.S.C. commissioned evidence transcript, 1 at 1, for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185 [Thomas Wright (Guuhadakw) 19 February 1986]. Guuhadakw means "stingy".

<sup>189</sup> *Ibid.* at 14-15.

<sup>190</sup> *Ibid.*

<sup>191</sup> *Ibid.* at 15.

harmed. Mr. Ryan explains: “The injury would have to be dealt with, and the father’s side would try to be involved, but it would be dealt with internally, not publicly.”<sup>192</sup> Because of this, the witnesses did not provide the Court with any examples of internal (i.e., private) House legal processes for such injuries.

### 3.3(b)(v) Dim Xsaan

What is fascinating about this next example is that it involved Nisga’a, Wet’suwet’en, and Gitksan peoples, all of whom recognized the exercise of Gitksan law in a case involving a Wet’suwet’en person while on Nisga’a lands.<sup>193</sup> Stanley Williams (Gwis Gyen) told the Court that it was determined that no compensation would be paid because the wrongdoer broke the law (*a hla gansxw*).<sup>194</sup> According to Mr. Williams, this event occurred thousands of years ago when Dim Xsaan raised a pole with a stone *hlgimadaa sook* crest on the top:

Dim Xsaan really wanted to protect this pole and his crest, and when the...Hagwilget people, Kispiox, Gitan'maaxs, Gitwingax, they travelled down to...make some oolichan grease. And the people of Kitwancool – and when they started travelling, there was a man from – a young man from Hagwilget...they started travelling towards the Nass. This would be about March because this is when the oolichans run at the Nass. As they got closer to the boundary line where the pole and the stone figure was, known as Hlgimadaa sook, the young man from Hagwilget looked up and he laughed at this crest, the stone figure on top of this pole, and he...took a stick and he pushed it down, and...the stone fell. Dim Xsaan found out who made fun of his crest and the pole, and as they arrived to the village of the Nass, Dim Xsaan took his spear and he knew this young person from Hagwilget was...in this certain house, and he went in and...he stabbed him on the chest with the spear. There was no hard feelings between the people of Hagwilget and the people of the Nishga, because this young man had broken the law. He should have never done that. And what happened is...some of the people from

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<sup>192</sup> Telephone conversation with Don Ryan (Hanamuxw), 16 May 2008.

<sup>193</sup> While the Gitksan and Nisga’a peoples are both in the Tsimshian linguistic group (along with the Tsimshian peoples), the Wet’suwet’en peoples are part of the Athabaskan linguistic group.

<sup>194</sup> Stanley Williams (Gwis Gyen), 19 April 1988, *supra* note 110 at 167. According to Fred Johnson, (Lelt) *a hla gansxw* means breaking the law. Fred Johnson (Lelt) 2 September 1986, B.C.S.C. commissioned evidence transcript, 1-39, for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185 [Fred Johnson (Lelt) 2 September 1986].

Hagwilget came and they picked the body up and they left without confronting the Nishga people.<sup>195</sup>

Since all the parties agreed that the young man was in the wrong and “had broken the law”, there was no compensation or retaliation as a result of his capital punishment. In this case, and in some of the other older cases, the punishment was extreme, but the chief has the authority to vary or even to waive the punishment altogether. Regarding the law of trespass, for instance, Solomon Marsden (Xamiaxyetxw) told the Court that if “the person that trespasses, if he apologizes to the chief then the chief would forgive this person”.<sup>196</sup> One must keep in mind the extensive arrangements of privilege to lands and resources though the kinship system, so the first order of business in any trespass situation would be to determine whether a person had access or resource privileges through their complex of relationships – mother’s side, father’s side, grandparents, spouse, or some other use or access arrangement.

### **3.3(b)(vi) Art Mathews, Tenimgyet**

This is another case involving the Nisga’a and the Gitksan as told by Stanley Williams (Gwis Gyen). At issue in this case was the trespass by a member from the Gitksan House of Tenimgyet onto Nisga’a lands. It was decided that a *xsiisxw* was not necessary because it was acknowledged and accepted by both parties that the trespasser was in the wrong.

According to Mr. Williams,

[t]his happened – this incident again happened in – near Tenimgyet's boundary, between Tenimgyet's boundary and the Nishga boundary, and this is known as Luuts'uutsxw – Git axsol, and – and the white people call it Sand Lake. There was a trespasser that went onto Nishga territory, and this trespasser was killed and put

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<sup>195</sup> Stanley Williams (Gwis Gyen) 19 April 1988, *supra* note 110 at 167.

<sup>196</sup> Solomon Marsden (Xamiaxyetxw) 9 May 1988, *supra* note 117 at 5938.

back into the – into the lake, and the people of Tenimgyet's took the body and never said anything because they know that he was trespassing.<sup>197</sup>

Art Mathews (Tenimgyet) told the Court that the Nisga'a killing of their House member was quite recent, because "Reverend Thompson and another person tried to exhume the body to inspect how he had died, but it was too badly decomposed to get anything out of it."<sup>198</sup> According to Mr. Mathews, the fact that the Nisga'a put the body onto Tenimgyet's side of the boundary was an intended signal by the Nisga'a recognizing that boundary. As with the Crosby case,<sup>199</sup> (see section below) had the settlers found evidence of murder, they would have interfered with the case after it had already been settled insofar as Tenimgyet was concerned.

### 3.3(b)(vii) Samuel Brown, House of 'Niikyap

In this example, Thomas Wright (Guuhadakw) describes a situation involving a murder in 1918 in Kisgagas for which a xsiisxw was not necessary.<sup>200</sup> According to Mr. Wright, Samuel Brown<sup>201</sup> from the House of 'Niikyap killed his wife, Madeline Brown (Woosim mediik) who was from the House of Melulek.<sup>202</sup> In retaliation, Charles Crosby killed Samuel Brown at Bear Lake.

Mr. Grant	Under Gitksan law did the chiefs recognise that Mr. Crosby has a right to kill Samuel Brown for killing his sister?
Guuhadakw	The people agreed with Charles Crosby and there was peace amongst them. He never got picked up or anything.
Mr. Grant	So there was no dispute afterwards between Samuel Brown's

<sup>197</sup> Stanley Williams (Gwis Gyen) 19 April 1988, *supra*, note 110 at 167-68.

<sup>198</sup> Art Mathews (Tenimgyet) 16 March 1988, B.C.S.C. trial transcript, 4661 at 4688, evidence for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 216 [Art Mathews (Tenimgyet) 16 March 1988].

<sup>199</sup> Thomas Wright (Guuhadakw) 19 February 1986, *supra* note 188 at 47.

<sup>200</sup> *Ibid.* at 46-47.

<sup>201</sup> Samuel Brown's Gitksan name is not provided.

<sup>202</sup> There are several different spellings of this name in the transcripts. For example, it is also spelled Miluulak.

Guuhadakw house and Madeline Brown or Charles Crosby's house?  
 No. There was peace amongst them. I was always there so there was no trouble amongst the houses.

Mr. Grant These two houses would be the House of Melulek where Madeline and Charles Crosby came from?

Guuhadakw They're both from Melulek's house.

Mr. Grant And the House of 'Niikyap where Samuel Brown came from?

Guuhadakw Yes. It was just recently that 'Niikyap had a house. He is from Gitangasx

Mr. Grant Did the police come to Kisgegas to investigate the killing of Samuel Brown or Madeline Brown?

Guuhadakw Yes, two police officers came and they dug Samuel Brown's grave and looked at the body. They didn't know whether he killed himself or not so they didn't arrest anybody and there was peace.<sup>203</sup>

In this example, while the “people” in this account agreed with Charlie Crosby’s killing of Samuel Brown, he would likely have been found guilty under Canadian law had the police found evidence against him.

### 3.3(b)(viii) House of 'Wiilitsxw

In this example, xsiisxw for loss of life is paid with land to the House of 'Wiilitsxw (Gitanyow) by the Ts’ets’aut (Stikine) people because they killed Txawok and Ligigalwil (belonging to the House of 'Wiilitsxw). 'Wiilitsxw was a young man when these events happened, before his son Fred Johnson (Lelt) was born. This excerpt is part of House of 'Wiilitsxw adaawk and is recounted here by Fred Johnson:<sup>204</sup>

It wasn't too far from the falls at Meziadan. As they were returning home they camped at the big tree, that's where the Kitwancool<sup>205</sup> camped.

...

The Stikine people killed Txawok and they shot Ligigalwil and they both died. 'Wiilitsxw was following behind Ligigalwil, and 'Wiilitsxw took off towards the Nass River. He ran.

<sup>203</sup> Thomas Wright (Guuhadakw) 19 February 1986, *supra* note 188 at 47.

<sup>204</sup> Fred Johnson (Lelt) 2 September 1986, *supra* note 194 at 1-58-61. In his commissioned evidence, Fred Johnson (Lelt) also sang three songs that are part of this adaawk.

<sup>205</sup> Kitwancool was the English version of Gitwinhlguu'l. According to Solomon Marsden, "'Guu'l' means small in our language." Solomon Marsden (Xamiaxyetxw) 6 May 1988, B.C.S.C. trial transcript, 5891 at 5902, evidence for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185.

...he was hiding, and the Stikine people were still looking for him on the bank. The shots were fired by a gun and he got hit, and he got shot on the chin and his chin split, and they hit him, the bullet hit him on the breast as well....

He left the canyon around and he went along the river bank of the Nass.... The people were living at a village called Xskiigyeenit. He didn't want to take the trail or else he would see any Stikine people around, so he went around the trail.

...

This fishing hole, lots of people lived at Xskiigyeenit. He told the story there. Other people went to Kitwancool and they went to Gitsegukla. They went to see for themselves because they wanted to see the bodies of the high chiefs that were killed.

...

They went to examine where the bodies were and find out the truth. They started off and they wanted to revenge and there was going to be a war. They were just going to burn the bodies of Ligigalwil and Txawok, that's what the old people did. They burned it properly. That's what they've seen, they inspected it properly.<sup>206</sup>

Seeking revenge, warriors from Gitsegukla, Gitwangak, and Gitanyow travelled to Meziadan. The warriors took spears and knives rather than guns, and they attacked the Ts'ets'aut early in the morning when they were still sleeping. Many Ts'ets'aut were killed. As a result, a peace meeting was organized and held near Meziadan Falls.<sup>207</sup> 'Wiilitsxw called the Ts'ets'aut over and "They came, the Stikine people. The Stikine people had a house and they seated the people properly. They took the guns and they placed them quite a ways from where they were meeting, and the same with the Stikine people, they placed their guns and weapons quite a way from where they were gathering."<sup>208</sup> The Ts'ets'aut people sang a peace song, they smoked, and the "Stikine person would be blowing the eagle down indicating peace".<sup>209</sup> The two Ts'ets'aut chiefs were Atxwmseex and Gela.<sup>210</sup> According to Mr. Johnson, one of the Ts'ets'aut chiefs took a goose wing and "waved it, there will be peace. This will be your land, this was the big chief talking. We will not return -- we will return to

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<sup>206</sup> Fred Johnson (Lelt) 2 February 1986, *supra* note 194 at 1-59/60.

<sup>207</sup> *Ibid.* at 1-62.

<sup>208</sup> *Ibid.* at 1-58.

<sup>209</sup> *Ibid.*

<sup>210</sup> *Ibid.* at 1-59.

our own village, there will be no more wars, Xsiisxw. They compensated for the killing of Txawok and Ligigalwil.”<sup>211</sup>

According to Stanley Williams (Gwis Gyen), several other Houses have adaawk that contain much earlier accounts of the Ts’ets’aut wars which were fought by the famous Gitksan warriors 'Naa gel gaa (House of Sakxum Higookx), 'Neekt (House of Haalus), 'Yagaa deets (House of Gwis Gyen), and Xsuu (House of Guksan).<sup>212</sup>

In the 'Wiilitsxw case, the xsiisxw enabled the Ts’ets’aut and Gitksan peoples to establish an enduring peace thereby averting ongoing war and continued bloodshed. This account forms part of the 'Wiilitsxw adaawk and as such is performed and recreated at the pole-raising Feasts through the songs, crests, naxnox, and narrative that form part of the intellectual property for House of 'Wiilitsxw. The law of xsiisxw was recognized and acted on by both the Ts’ets’aut and Gitksan peoples.

### **3.3(b)(ix) Art Mathews, Tenimgyet**

What is unusual about this final example of compensation is that it involved payment in the form of a crest, and it was a settlement was between Houses of the same clan – wolf/lax gibuu. Art Mathews (Tenimgyet) told the Court how his House was paid a crest, the ensnared bear, when two female House members were killed sometime in the 1700s. Mr. Mathews explained that at the time there was a mild famine and some of the wolves/lax gibuu travelled from Kisgagas to trade grease.<sup>213</sup> Mr. Mathews continues:

And they were trading for grease and they traded and they took this grease and packed it away, when I say "away", they left. And a short time later they came back

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<sup>211</sup> *Ibid.* at 58-59.

<sup>212</sup> Stanley Williams (Gwis Gyen), 18 April 1988, B.C.S.C. commissioned evidence transcript, 140 at 148-54, for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185.

<sup>213</sup> Art Mathews (Tenimgyet) 18 March 1988, *supra* note 118 at 4764.

again and they said they had changed their mind, they didn't want to trade anymore. And they wanted the payment back which they did, they gave back the payment. But later after these men left, these ladies found out that they were being cheated...[T]he men...actually...poured off some stuff, the grease, and filled it up with rock so it looked like it was full again. And this is how the ladies found out that they were being cheated. And these men came back again and said that they would trade again and these ladies started laughing and taunting them, so that's how these men ended up killing these two women. And as a result of that the – I don't know the name of the chief from Kisgagas came and gave the crest of the ensnared bear and that's why we have it in our house.<sup>214</sup>

The two women that were killed were from the House of Tenimgyet. Mr. Mathews explained that since this case occurred in fairly recent history it did not have an accompanying song, but it was a part of the Tenimgyet *adaawk*.<sup>215</sup> As part of the *adaawk*, this event is performed at all Tenimgyet's pole-raising Feasts – and through the generations, such performances recreate the House's history, *daxgyet*, and ownership of land and intellectual property.

### **3.3(b)(x)      Bilaatx**

A number of the examples provided by the witnesses to the Court involved compensating a burial Feast debt with land.<sup>216</sup> In essence, these cases are about reconfirming the relationships and obligations in the kinship web. This next recent example reveals the layers of relationships and obligations surrounding the death of Bilaatx. Understanding the debt paid by Stanley Williams (Gwis Gyen) requires a description of both the historic and relational contexts. To operate effectively and successfully as Mr. Williams did is precisely about intimately knowing and upholding one's role and responsibilities.

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<sup>214</sup> *Ibid.*

<sup>215</sup> *Ibid.* at 4465.

<sup>216</sup> For example, see Olive Ryan (Gwaans) 15 June 1987, *supra* note 182 at 1274. Also see Solomon Marsden (Xamiauxetxw) 9 May 1988, *supra* note 117 at 5950-51.

Stanley Williams (Gwis Gyen) described the return of a territory from his House to the original owner. Briefly, Mr. Williams' grandmother married Wixa (wolf/lax gibuu) from Gitsegukla and her youngest daughter was Mary Williams, the mother of Stanley Williams. Mr. Williams explained, that "Sakxum higookx and his wife didn't have any children, so they came up to Kitwancool<sup>217</sup> to ask my grandmother to adopt my mother. ... and so they ... did adopt my mother and they took her back to Gitwingax."<sup>218</sup> Mr. Williams' mother was adopted into the Sakxum Higookx's wife's House of Wixa (Mary William's father). This type of adoption is called *sihlguuhlxsxw diit*.<sup>219</sup> A big Feast was held for the adoption, and later Mr. Williams' mother received the chief name of Bilaatx. When Wixa died, Bilaatx paid all of the funeral expenses and "because of the expenses she had spent, they announced in the Feast hall that they would give her a piece of a territory which was known as Txaas 'wii lax habaasxw".<sup>220</sup> When Bilaatx passed on, Mr. Williams explained that he spent a lot of money at the Feast, and

during this feast, after the expenses were paid, I stood up in the feast hall and I announced that my mother's work with Wixa, her living with Wixa and looking after them, I – I told the people that her work was done with Wixa and that the territory that was given to her because of Wixa, would be returned now back to the rightful owners. And to this day, I still got the blood of Wixa in me, and I still got the blood of Wii'mugulsxw [father's name] in me, and this is – this is why the people recognize me and they – they know me and this is why they let – I sometimes go on the different territories up at Kitwancool. But I always ask permission from the head chief if I – if I'm going to go on the territory.<sup>221</sup>

It is the adoption of Mr. Williams' mother into the House of Wixa, her father's House, which makes this arrangement for her use of the Wixa's territory and its return a more formal process than if Mr. Williams had access to it via the law of *amnigwootxw*

<sup>217</sup> Kitwancool is now more commonly known as Gitanyow.

<sup>218</sup> Stanley Williams (Gwis Gyen) 19 April 1988, *supra* note 110 at 166.

<sup>219</sup> Stanley Williams (Gwis Gyen), 20 April 1988, B.C.S.C. commissioned evidence transcript, 186 at 210, for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185.

<sup>220</sup> Stanley Williams (Gwis Gyen) 19 April 1988, *supra* note 110 at 166.

<sup>221</sup> *Ibid.*

(privilege to use territories belonging to the father's House).<sup>222</sup> The significance of this case is that it illustrates how adoption was integral to maintaining the Gitksan kinship network and one of forms of access to territories. (I will return to the subject of adoption later in this section.)

### 3.3(b)(xi) Gubihl gan

In order to provide a deeper sense of temporality and of the extreme importance of memory in Gitksan legal traditions, this next example concerns a debt compensation case that dates back “thousands of years”.<sup>223</sup> This case provides a sense of how people treated and supported one another. According to Stanley Williams (Gwis Gyen), one spring, Gubihl gan and his wife were trapping near Galdii Ess (Little Oliver) when Gubihl gan got sick and died. His wife did not know what to do so she just sat with the body for a long time. Close friends of Gubihl gan, Luulak and Dax Juxw, came to visit Gubihl gan and his wife and as they approached the camp they first saw smoke coming from the cabin. As they got closer, “they seen this lady sitting...beside her husband and her husband was already dead and she did not know what to do. The...body of Gubihl gan was already getting spoiled, and they talked to his wife and they said they were going to – they built a fire and they were going to burn this body.”<sup>224</sup> Mr. Williams continues,

After they burnt the body of Gubihl gan, after they finished burning there, just his heart was left in the embers of the fire. In those days the – in the olden days they always say that the heart never burns. They took the heart and they buried it near the waters. They took the wife back to Gitwingax and they held a feast and they told of what happened to Gubihl gan.

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<sup>222</sup> Stanley Williams (Gwis Gyen) 11 April 1988, *supra* note 49 at 5.

<sup>223</sup> Stanley Williams (Gwis Gyen), 12 April 1988, B.C.S.C. commissioned evidence transcript, 41 at 72, evidence for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185.

<sup>224</sup> *Ibid.*

After they held a feast, the next day they took the wife of Gubihl gan and they took her back to her own village, which is known as Gitsilaasxw. When they arrived in the Gitsilaasxw village they talked to the wife of Gubihl gan and she explained what had happened, and what they did is they sat Luulak and Dax Juxw and they held a feast. After they've finished eating at this feast, the...family of Gubihl gan made a plan and they told what...they are going to do to Luulak and Dax Juxw. This is when they gave the territory of Xsi Galdii Ess to Luulak and Dax Juxw.<sup>225</sup>

Mr Williams said that this agreement dates back thousands of years and “if the family of Gubihl gan want this territory back, they will have to make payments to the family of Luulak before they take this territory back”.<sup>226</sup> Such a debt is very expensive because “every time you hold a feast is that you have spent so much at these feasts because of the territory that is involved, and this is the reason why Luulak still has this territory today.”<sup>227</sup>

Confirming the law in the Gubihl gan case, Solomon Marsden (Xamiaxyetxw), told the Court that should a House’s numbers and wealth dwindle to the point that it could not afford to bury their head chief, a different House of the same clan and the same village could step in, with the permission of the new chief (i.e., the deceased chief’s replacement), to complete the burial.<sup>228</sup> In this case, the assisting House would be paid compensation in the form of land. Mr. Marsden explains: “Yes. This could happen. If the house was weak, dwindling, and there is no one there to bury the dead, to help out, so what happens is they call a chief from the same clan and they would pay the expenses of the dead and in turn they would give the land.”<sup>229</sup> Mr. Marsden qualifies this form of transaction: “The head chiefs, the Simgigyet, could do this amongst themselves in one village. Like in the

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<sup>225</sup> *Ibid.* at 73.

<sup>226</sup> *Ibid.*

<sup>227</sup> *Ibid.*

<sup>228</sup> Solomon Marsden (Xamiaxyetxw) 9 May 1988, *supra* note 117 at 5951.

<sup>229</sup> *Ibid.*

Kitwancool village, they could pass the land, but they can't do it out of different villages.”<sup>230</sup>

The recounting of these ancient cases by Mr. Williams and Mr. Marsden reveals the importance of memory in understanding land ownership and access today. Furthermore, as stated earlier, such a system requires excellent communication among all Gitksan to prevent future misunderstandings and conflicts. These are among the factors that the Gitksan must consider today as they sort out how to draw from their own legal traditions to deal with contemporary situations. For example, any land registry system would have to be just as knowledgeable, reliable, legitimate, and accessible as Mr. Williams and Mr. Marsden were in their day.<sup>231</sup>

### 3.3(b)(xii) Yal and Guksan

As another ancient example of *n'id an luut t'ip magit* (giving of territory for compensation), Solomon Marsden (Xamiaxyetxw) told the Court about the case of Yal and Guksan which took place long before Mr. Marsden was born.

Mr. Grant	But can you explain what happened regarding Yal and someone assisting in the burial of Yal?
Xamiaxyetxw	It...happened when...there was just Yal and his sister alive, and they lived at a place called Gisa Hooxsit.
...	
Xamiaxyetxw	They lived at this place, and Yal took sick and died, and there was no one there to...bury Yal, so she remembered back to her village, Gitsegukla, and she remembered Guksan.
...	
Xamiaxyetxw	And she went to see Guksan in the Village of Gitsegukla. After she arrived in Gitsegukla, she went to see Guksan and explain to him that there was nobody there to bury the body of Yal. Because Guksan was close...to this house, he buried Yal. After the – burial of Yal, Guksan held a Funeral Feast.

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<sup>230</sup> *Ibid.*

<sup>231</sup> Unfortunately, both Mr. Marsden and Mr. Williams are deceased.

- During this feast Yal's sister was trying to give him the – rattle, the regalia, but Guksan refused, and so she tries... to give him the...the seat in the Feast House and the name, and Guksan refused. When she finally mentioned a territory, then Guksan took this territory. And this territory is still there today, and there is a mountain that they call Guksan's mountain, Skanist Guksan Mountain.
- Mr. Grant            Were Guksan and Yal or are Guksan and Yal in the same Wil' na t'ahl or different Wil' na t'ahl?
- Xamiaxyetxw        It's a different Wil' na t'ahl, but they were from the same clan.
- Mr. Grant            And is there – do you know – is there another name for this territory that was given, or for this mountain?
- Xamiaxyetxw        The name of the territory is Ant ga'l bakw.<sup>232</sup>

This case confirms the preference for land as compensation over other forms of payment. Compensation is another important feature of Gitksan legal traditions that must be contemplated and reconciled with contemporary relationships with land, third-party interests, and degraded or changed landscapes.

### 3.3(c) Disputes

Just as Gitksan law regarding various forms of compensation are integral to the Gitksan legal traditions, so too is the law governing dispute management. This area of law is particularly important to my broader research question about conflict management. Like the other cases, these demonstrate (1) the extensive consultation that Gitksan conflict management requires, (2) the careful deliberation of the problem at issue, (3) the legal reasoning involved in its resolution, and (4) the importance of memory and communications.

Just one recent example is provided here, but it is complex and gives good insight into the consultative processes in Gitksan legal traditions and decision making. This is not

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<sup>232</sup> Solomon Marsden (Xamiaxyetxw) 9 May 1988, *supra* note 117 at 5953-54.

a decision from the mists of time, but rather is very recent. As such, it demonstrates how alive Gitksan legal traditions are in the everyday lives of Gitksan people.

Mary McKenzie (Gyoluugyat) recounted how a recent dispute<sup>233</sup> about a chief's name was settled.<sup>234</sup> The dispute arose with the death of Miriam Russell who held the chief's name Miluulak, one of the Houses in the frog/lax seel clan. The succession of the name Miluulak was aggressively contested by Robert Jackson Sr. and Alice Jefferies, each of whom claimed the right to the name and, of course, was actively lobbying to garner political support from their families and lineages. Mrs. McKenzie explains how "at the funeral day it wasn't settled yet amongst the Miluulak's House.... The House of Miluulak couldn't have it settled because half was pulling for the other person and half for the other".<sup>235</sup>

A number of chiefs were called to a meeting at Freddy Starr's home including Mrs. McKenzie, her husband Ben McKenzie (the former Luutkudziiwas), Eli Turner (killerwhale/gisgaast),<sup>236</sup> and several other chiefs from the frog/ganeda and fireweed/gisgaast Houses.<sup>237</sup> Both sides of the debate told the group of chiefs their concerns. Eli Turner was able to recall a precedent from the early 1900s concerning a similar dispute in which it was decided to divide the name's prerogatives.<sup>238</sup> The chiefs were able to consider the precedent and after a lengthy discussion among themselves, decided that Alice Jefferies would take the name Miluulak, and would sit in the Miluulak

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<sup>233</sup> This case is recounted in chapter 4 from a different perspective provided by Peter Grant when, as a new lawyer working with the Gitksan, he was invited to attend this series of chiefs' meetings. Mr. Grant later became one of the lead legal counsel for *Delgamuukw* at all three levels of court.

<sup>234</sup> Mary McKenzie (Gyoluugyat) 19 May 1987, *supra* note 94 at 366.

<sup>235</sup> *Ibid.*

<sup>236</sup> Many Gitksan people from the western fireweed clan, Gisgaast, identify with the Tsimshian killerwhale (Gispwudwada) clan. The killerwhale is also one of Eli Turner's House crests.

<sup>237</sup> Mary McKenzie (Gyoluugyat) 19 May 1987, *supra* note 94 at 366.

<sup>238</sup> Interview of Peter Grant (9 July 2006) in Gibsons, B.C. at 6-8.

seat in the Feast hall.<sup>239</sup> However, the chiefs also decided that Robert Jackson Sr. would assume the authority for looking after the territory. Mrs. McKenzie continues, “So that's how it was settled because he was able to go do hunting and trapping on the territory, so without – instead of just leaving one out altogether it's all in the house so they – we had to settle that they both have authority.”<sup>240</sup>

According to Mrs. McKenzie, the next order of business was to explain everything at the Miluulak Feast so the decision would be properly witnessed and recorded. This explanation included the disagreement, the deliberation of the chiefs, and the agreed settlement among the Miluulak family, wil'nat'ahl, and chief from the other clans.

Yes. All this was – had to be told in a Feasting of how the family disagreed and how it couldn't be settled so they called on the chiefs of the different clans to settle it for them and they – that they had agreed, the family of Miluulak's, and the wil'nat'ahl had to agree with that. This was all settled at the Feasting House.<sup>241</sup>

According to Art Mathews (Tenimgyet), the splitting of the name's prerogatives is not that uncommon. In the case of Mr. Mathews' own House, the head chief's seat is also split, with Mr. Mathews being in charge of the territories and Henry Tait (Ax tii hiikw) in charge of the Feast.<sup>242</sup>

Mrs. McKenzie (Gyoluugyat) also describes how she would deal with an internal dispute involving her own House. The extensive consultative process involving the other chiefs is similar to that described in the Miluulak example.

I'd have to go to the Lax Gibuu, different houses. Like I'd have to go to Kliiyem lax haa because he's the head chief of Kispiox, and I have to go when Wii elaast is

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<sup>239</sup> Mary McKenzie (Gyoluugyat) 19 May 1987, *supra* note 94 at 366-67. The seating arrangements in the feast hall are complex and change depending on who is hosting the feast and which village it is held in. The seating is determined according to rank, relationships, or special directives from various House adaawk. Gwaans (Mrs. Olive Ryan) for example, always sat near the door not with the other Hanamuxw House members as per the Hanamuxw adaawk.

<sup>240</sup> *Ibid.* at 367.

<sup>241</sup> *Ibid.*

<sup>242</sup> Art Mathews (Tenimgyet) 18 March 1988, *supra* note 118 at 4820.

there with the Kliiyem lax haa, I have to go to the chief of Gitaanmax that Spookw because they the head chiefs of the villages and I have to explain to them the disagreement of my house and see what they can come up with to settle this for me and if we don't have the settlement, we have to rely on the head chiefs of the Lax See'l and the Giskaast and they're the ones that would have it settled for us and we have to agree with whatever it is. Now, in a Feasting House too if it's brought into a Feasting House and the other chiefs, one may disagree and that chief has to say what he disagrees on with the other chiefs, so this is settled again in a Feasting House if there's a dispute between two chiefs, one agrees, the other doesn't. So this is how it involves all the chiefs that they have to say how they want it and why they want it that way. These are the things that come out into a Feasting sometimes when the dispute in the family.<sup>243</sup>

What becomes clear from Mrs. McKenzie's description is how the responsibility for the dispute is shared through the levels of kinship structure. An agreement reached at any of these levels would be taken to the Feast hall to be witnessed and become binding, but where there is continued disagreement the dispute is taken to the next level. The first level, obviously, is within the House, but if, as in the case of Miluulak, the House is divided, the second level of closely related Houses within the same clan (wil'nat'ahl) is consulted. If the wil'nat'ahl is unable to resolve the dispute, it goes to the third level at which the chiefs from other clans are invited to help the House settle the dispute. If the dispute is still unresolved, it can go to the Feast hall where the disputant may state his or her disagreement. The Feast is the final level of decision making, though historically it was rare for an unresolved dispute to be taken to the Feast since this is generally thought to reveal a weakness of the House.<sup>244</sup> Even then, according to Mrs. McKenzie, an agreement may be reached in the Feast to table the disputed matter for a specific period of time. There are precedents for a House to divide and this can sometimes happen at a Feast especially if the dispute involves the chiefs' names of a House that was historically amalgamated.<sup>245</sup>

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<sup>243</sup> Mary McKenzie (Gyoluugyat) 19 May 1987, *supra* note 94 at 367.

<sup>244</sup> As is explained in chapter 4, there are recent examples of serious disputes being taken into the feast hall.

<sup>245</sup> This was the case with a recent dispute about the chief's name, Luutkudziiwas (see chapter 4).

There are important principles here regarding how a dispute is approached, who is involved and consulted, not rushing the process, paying attention to the substance of the matter in dispute, careful explanations and communication, and witnessing and recording. When a dispute such as the Miluulak one is not handled properly according to Gitksan legal traditions, the whole legal order is destabilized because it becomes fraught with unresolved conflict. When this happens, Gitksan law is undermined and this raises questions as to its relevance in today's world.<sup>246</sup> However, Richard Daly cautions against such doomsday perspectives, arguing that the disputes themselves demonstrate a "considerable strength, vibrancy, and elasticity. This is still a community where social relations are profoundly based on kinship rooted in territory".<sup>247</sup>

### **3.3(d) Corrections in the Feast Hall**

Turning now to another area of law that also concerns the protection of the legitimacy of the Gitksan legal order: This section provides a case in which a correction was made in the Feast hall. Such an action requires an adherence to a strict diplomatic protocol in order to maintain and protect kinship relationships. With some thought, the lessons from this case are applicable to other political, legal, economic, and social relationships within Gitksan society and other indigenous and non-indigenous parties.<sup>248</sup> According to Stanley Williams

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<sup>246</sup> Arguably this is the situation with the current Luutkudjiiwas-Xsimits'lin dispute described by Richard Daly, *supra* note 48 at 290-94. This is expanded in chapter 4.

<sup>247</sup> Daly, *ibid.* at 294.

<sup>248</sup> I have written about this protocol elsewhere. See Val Napoleon, "Living Together: Gitksan Legal Reasoning as a Foundation for Consent" in *Challenging Consent: Consent and the Foundations of Political Community*, Jeremy Webber & Colin McLeod, eds. (Vancouver: UBC Press, forthcoming in 2009).

(Gwis Gyen), correcting the telling of an *adaawk* in the Feast hall is called “[T]he law of the *Aluugiyet*”.<sup>249</sup> Mr. Williams continues:

[W]hen *Wii Hlengwax* has a big feast...then he describes his territory. And if there is a mistake being made, then...one of the chief will tell *Wii Hlengwax* that he is wrong in saying that, that he has made a mistake in saying that. This is the law of the *Aluugiyet*.

...

If a mistake has been made, one of the head chiefs would stand up and say that the mistake has been made. They are not mad at each others, they are just saying that a mistake has been made.

...

In the ancient times, it was not for a chief to speak out. He has a spokesperson beside him and this is the person that speaks for the chief. And each time there would be a successor for *Wii Hlengwax* then these boundaries are described. And they stand by these spokesperson.<sup>250</sup>

In this example provided by Mr. Williams, it becomes clear that there is actually a legal duty to correct a mistake heard in the Feast hall, and it is the ‘*nii dil* (opposite clan) that has the first responsibility for doing this since they are the official witnesses for a Feast’s business. This case shows that, potentially, what is at stake are the territorial boundaries, names, crests, and other symbolic intellectual property. When Magnus Turner died and Miles Gogag (*Jook*,<sup>251</sup> fireweed/*gisgaast*) from the House of *Wiigyet* spoke, Mr. Williams said, “I stood up and I told *Jook* that he was wrong about the *adaawk*...and he said this happens a lot of times if a mistake has been made by a chief about the boundaries, then the other chief that noticed this mistake will stand up and tell them.”<sup>252</sup> He explains this further:

If there is a mistake being made about territories, then you have your ‘*Nii Dil* which will speak first, who is at the front, sitting at the back front centre...If he has listened to the chief that has spoken and he agrees with the chief, he will say that it is right, and the rest of the other chiefs on the sides of the house and on the centre

<sup>249</sup> Stanley Williams (Gwis Gyen) 26 April 1988, B.C.S.C. commissioned evidence transcript, 291 at 312, for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185 [Stanley Williams (Gwis Gyen) 26 April 1988].

<sup>250</sup> *Ibid.*

<sup>251</sup> This is spelled “*Jok*” and “*Jook*” in the transcripts.

<sup>252</sup> Stanley Williams (Gwis Gyen) 26 April 1988, *supra* note 249 at 314.

will all agree and say that it is right. I use this in the feast house when...there was a mistake being made...And when – if there is a mistake being made then it is corrected right there and then in the feast house. This is how we go about it.<sup>253</sup>

Later, under cross-examination, Mr. Williams described his correction at the Wiigyet feast more fully:

This adaawk starts at T'am Lax amit and the ladies used to go too, which is known now as Seeley Lake, this lake belongs to Spookw. This is where there was maple trees and this is where the ladies used to go to get the maple barks. There has been a lot of women that went there and never returned and at one time these two women from Gwis gyen's house went and they didn't return. So Ts'uu eek and Dii aa wilp went to investigate. They waited around the area where the women disappeared and all of a sudden they seen this white bear – they seen the Mediigam ts'uu'wiiaks and ... these two men shot them with arrows on the sides. They killed this Mediigam ts'uu'wiiaks and they took this Mediigam ts'uu'wiiaks towards the village of Temlaham and this was the creature that was killing all the women off. They cleaned the bear and they took the hide off and Gwis gyen took the hide and used it, he took it as his crest and it was called Gwiis luu sinxsw. Gwis gyen used this hide as a blanket when he is invited to a Feast House. And their crest is the body of the Mediigam ts'uu'wiiaks. Wiigyet did not have a crest so Gwis gyen gave the body to Wiigyet to use as a crest. And they still use this today. And this is where Jook made a mistake, when he said that the women were sitting at the back of this Mediigam ts'uu'wiiaks and the women told this Mediigam ts'uu'wiiaks, told them don't kill the Mediigam ts'uu'wiiaks, because he will take us home. This is the part that was not right. This, he made a mistake here. So what I did is I stood up and I explained that this was our adaawk and that a mistake was made and I explained to them that my grandfather gave the body of the Mediigam ts'uu'wiiaks to Wiigyet because he didn't have any crest.<sup>254</sup>

Fulfillment of this correction role is seen as “helping out” at the Feast. When the chiefs take turns standing up and affirm the correction, they are publicly agreeing to the truth of the intervention.<sup>255</sup> Art Mathews (Tenimgyet) also spoke to the responsibility one has to ensure that the boundaries are described correctly in the Feast hall. According to Mr. Mathews, an alternative approach is that the person who did the correcting could hold a Feast at which he or she would give the correct boundaries.<sup>256</sup>

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<sup>253</sup> Stanley Williams (Gwis Gyen) 19 April 1988, *supra* note 110 at 184-85.

<sup>254</sup> Stanley Williams (Gwis Gyen) 26 April 1988, *supra* note 249 at 314-15.

<sup>255</sup> *Ibid.* at 315.

<sup>256</sup> Art Mathews (Tenimgyet) 21 March 1988, B.C.S.C. trial transcript, 4836 at 4902, evidence for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 216.

### 3.3(e) Ts'imil Guut

Citizenship, adoption, and related laws are the last area of Gitksan law examined here. To understand a people's law includes attempting to understand how a people understand themselves – individually and collectively. Citizenship and adoption provide useful insights into these internal perceptions of self, kin, and other. The fostering of such perceptions is central to unpacking the intellectual processes and reasoning behind Gitksan legal traditions. There are many important questions: How does the law make sense to Gitksan people? How might it be explained to non-Gitksan people? What is the contextual understanding required in order to figure out how Gitksan law might apply today?

To begin, Mrs. McKenzie (Gyoluugyat) explained that while some of her grandchildren were born and reside outside the territory, they are still considered to be Gitksan, “because our roots are in our territory.”<sup>257</sup> This next excerpt is from the Crown's cross-examination of Mrs. McKenzie:

Mr. Macaulay	And they very seldom come to the territory some of them?
Gyoluugyat	Some of them. Yes.
Mr. Macaulay	And the – your grandchildren, do many of them speak the Gitksan language?
Gyoluugyat	Yes.
...	
Mr. Macaulay	People who are now in their 20's, 23 or 24, perhaps older, who don't speak any Gitksan?
...	
Mr. Macaulay	But they are still Gitksan whether they speak it or not?
Gyoluugyat	Yes. They were born as Gitksan so they are Gitksan.
Mr. Macaulay	And in the case of the marriage between a Gitksan and a white, the children, they're Gitksan are they?
Gyoluugyat	Yes. Even if the mother is married to a white person, we still see her as Gitksan.
Mr. Macaulay	And her children are –
Gyoluugyat	And her children. <sup>258</sup>

<sup>257</sup> Mary McKenzie (Gyoluugyat) 26 May 1987, B.C.S.C. trial transcript, 560 at 589, evidence for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 216 [Mary McKenzie (Gyoluugyat) 26 May 1987].

<sup>258</sup> *Ibid.* at 589-90.

In this example, it appears that the Crown is mistaking Gitksan citizenship laws for band membership codes as per the *Indian Act*.<sup>259</sup> Mr. Macaulay valiantly struggles on with his line of questioning: “Now, is there a point at which a person is no longer Gitksan in this sense: If a...somebody who’s half Gitksan marries a white, then their children would be a quarter Gitksan?”<sup>260</sup> Later, in apparent desperation, Mr. Macaulay switches gears and asks, “And a person’s occupation doesn’t make any difference, does it? If a Gitksan person becomes a chemical engineer and goes to New York he’s still a Gitksan?”<sup>261</sup>

What Mrs. McKenzie is explaining to Mr. Macaulay is that the Gitksan have laws for determining who is Gitksan and the sole criteria is birth to a Gitksan mother or adoption according to Gitksan law – not residence, blood quantum, birthplace, language, occupation, or marriage. As mentioned earlier, if the mother is not Gitksan, the mother’s father’s House will usually adopt the mother to ensure that the children are Gitksan. This form of adoption is not without contestation as some of the later discussion in chapter 4 attests, especially when political disagreements fall along the fault line of these adoptions.

According to Neil J. Sterritt (Mediig'm Gyamk), Gitksan descent is not exclusively matrilineal because there are legal processes for many situations including (1) marriage to non-Gitksan persons (*ts'ilimdoogam nidiit*),<sup>262</sup> (2) male children<sup>263</sup> or childless marriages,

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<sup>259</sup> *Indian Act*, R.S.C. 1985, c. I-5.

<sup>260</sup> Mary McKenzie (Gyoluugyat) 26 May 1987, *supra* note 257 at 591.

<sup>261</sup> *Ibid.* at 595.

<sup>262</sup> Art Mathews (Tenimgyet) 18 March 1988, *supra* note 118 at 4808. An individual adoption is called a *ts'ilimdoogam nidiit*.

<sup>263</sup> When a House has too many male children its numbers will dwindle since House membership follows the mother. Mary McKenzie (Gyoluugyat) provided an example of Able and Lizzie Tait who only had sons so they arranged to adopt Lottie Muldoe. Lizzie Tait was in Delgamuukw's House, *lax see'l*, and later, Lottie's son Albert Tait held the name Delgamuukw at the start of the *Delgamuukw* trial. Mary McKenzie (Gyoluugyat) 19 May 1987, *supra* note 94 at 375-76.

(3) same-clan marriages, and (4) the “taking in” of larger groups.<sup>264</sup> These adoption processes are called *ts'imil guut* which means “bringing in one’s own”.<sup>265</sup>

The taking in of groups of people is best demonstrated by the incorporation of the now extinct Ts’ets’aut<sup>266</sup> (Stikine) into Gitksan society over the generations. Today, the lineage of many Gitksan Houses from Kuldo, Kisgaga’as, and Gitanyow is traceable to their origin to the Ts’ets’aut of Gitangus, Awijii, and Blackwater (e.g., House of Luuxhon, Gwinitixw, etc.). According to Mr. Sterritt, “most if not all of the Tsetsaut of Gitangus, Blackwater and Awiiigii became Gitksan through marriage and Ts’imil Guut”.<sup>267</sup>

There is another more recent adoption development which includes the deliberate taking in of outsiders for a range of reasons including increasing the number of wage earners for House income,<sup>268</sup> creating a form of political currency created by having prestigious House members,<sup>269</sup> and providing recognition for work done or of a particular friendship. In one such example, Mr. Stewart Forsythe was a very close friend of Moses Wilson for many years, and “when Moses died his heart is really broken”.<sup>270</sup> Mr. Forsythe contributed money and a substantial amount of meat (k’i’yhl daa luxw, merchandise from another clan) which was considered very valuable to the funeral feast of Moses Wilson.

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<sup>264</sup> Neil J. Sterritt, “Ts’imil Guut, To Bring in One’s Own” (2004) [unpublished, on file with the author] at 2 [Sterritt].

<sup>265</sup> According to Neil J. Sterritt, personal correspondence (1 May 2008). “‘Ts’im’ means inside (something – a house, car, whatever); ‘Guut’ means to take (something – e.g., to take candy away from someone.)” So while *ts'imil guut* is commonly used for adoption, it would be clearer to say, *ts'imil guudin ts'im wilp* which can mean, to take a person into a Gitksan House. And, if one said, *ts'imil guudin candy ts'im wilp*, it would simply mean, to take candy into an ordinary house [Sterritt, 1 May 2008].

<sup>266</sup> Also spelled Tsetsaut.

<sup>267</sup> Sterritt, *supra* note 264 at 9.

<sup>268</sup> All adoptees are expected to contribute to the feast, but only according to their stature. One should not contribute more than the people of higher rank in the House, for example.

<sup>269</sup> For example, Pierre Elliott Trudeau was adopted during the 1970s by one of the Gitsegukla Houses, and given the name Wadii Tee. Interview of Neil J. Sterritt (17 May 2008) by telephone.

<sup>270</sup> Mary Johnson (Antgulilbix) told the Court about the adoption of Stewart Forsythe, a white settler in the Hazelton area. Mary Johnson (Antgulilbix) 27 May 1987, *supra* note 46 at 652-53.

Mrs. Johnson explained that Stewart Forsythe was given a name because “I really appreciate what he had done because he did exactly the same thing the Indians did in the ancient time.”<sup>271</sup> Of course some outsiders do not maintain their connections or uphold their obligations to their adopting House. The names given to the outsiders may be ancient, of wing chief stature, or newly created to reflect a particular person.<sup>272</sup> When these people die, their names automatically return to the adopting House’s store of intellectual property to be held until such time as it is given out again. This form of adoption is understood as being by the “family crest”. Mary Johnson (Antgulilbix) explains more fully through this example: “[I]t’s by the family crest because they’re all stood together in the Feast House and they – they shook hands with Stewart Forsythe to welcome him into the crest and they call him brother and sister or uncles.”<sup>273</sup>

The example provided by Mrs. Johnson concerned an individual adoption that may be added to the regular business conducted at a funeral Feast or a stone-raising Feast (usually held one year after the funeral Feast) as was the case with the death of Moses Wilson and the adoption of Stewart Forsythe. The privileges and responsibilities of the adoptee in this type of adoption are not those of a full House member. The privileges accorded to the various adoptees (i.e., male spouses, political adoptees, etc.) are usually

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<sup>271</sup> *Ibid.*

<sup>272</sup> For example, the name that I hold in the House of Luuxhon, Gyooksgan, is a small, but ancient name formerly belonging to a line of matriarchs in the Russell family. In an example of a new name, the name given to Karen Erickson is Bahasxw. It is a new name which means “wind” or “breeze”, and is in recognition of Ms. Erickson’s physical quickness and speedy walking pace. On the question of ongoing contributions, Bahasxw and I (see also *infra* notes 272 and 273) regularly send money to one of the Luuxhon House members so that she can make contributions on our behalf at the Luuxhon feasts. When our sister House member adds our financial contributions to the pot of money at the feast, our respective names are called out and in this manner they are publicly upheld and kept clean.

<sup>273</sup> Mary Johnson (Antgulilbix) 27 May 1987, *supra* note 46 at 652-53. Stewart Forsythe is a white settler and local sawmill owner near Hazelton, B.C.

determined at the time of the adoption or may be clarified as additional questions are raised.

There is a second type of adoption that requires a separate adoption Feast (*dim k'aphl wilp*).<sup>274</sup> This is when a person and all their children are adopted (i.e., when the purpose of the adoption is to increase the House size). In this case, the amalgamated House survives independently or the House survives as part of another House (*sto 'wilp*).<sup>275</sup> In this second type of adoption, the adoptees may assume all the rights and privileges of a full House member, but these have to be granted. Art Mathews (Tenimgyet) clarifies this practice:

- |           |   |
|-----------|---|
| Tenimgyet | Each adoption – each one requires permission. Even if your full right adoption is there, you have to approach the chief of the house or anyone of the four chiefs of that house and you would get permission to get all of these rights, yes. |
| Mr. Plant | So even though you've been adopted in this legal adoption that you have described, your rights are somewhat different from the other members of the house?  |
| Tenimgyet | Yes. The one I talked about individual and the one that is a legal adoption has the right to obtain seats if the house starts to deplete or taper off in numbers. <sup>276</sup>  |

According to Mr. Mathews, “it is not polite for us to have a feast with somebody with no name”.<sup>277</sup> This is one of the ethics that seems to generally guide adoptions of Gitksan and non-Gitksan people, as well as the way that both internal and external relationships are understood and fostered. The significance of this brief look at citizenship is that it demonstrates how Gitksan law determines who is a Gitksan citizen, and how issues of citizenship are inclusively managed (as opposed to exclusively managed as is the case with most, if not all, *Indian Act* membership codes). How Gitksan people understand

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<sup>274</sup> Art Mathews (Tenimgyet) 18 March 1988, *supra* note 118 at 4813.

<sup>275</sup> The chief of the *sto'wilp* chooses his or her own successor. Solomon Marsden (Xamiaxyetxw) 9 May 1988, *supra* note 117 at 5965.

<sup>276</sup> Art Mathews (Tenimgyet) 18 March 1988, *supra* note 118 at 4814.

<sup>277</sup> *Ibid.* at 4810.

who is a Gitksan person, what it means to be a Gitksan person, how they become a Gitksan person, and where they fit in the kinship network is part of the foundation for the Gitksan legal order, and informs how Gitksan law is understood, interpreted, and applied.

### 3.3(f) Summary – Law Case Table

For ease of reference, the following summary chart highlights the key elements of the selected Gitksan cases.

#### Theme: Legitimacy

Case	What Happened?	What is Involved?	Result
Stanley Williams, Gwis Gyen [13 April 1988 at 108]	<ul style="list-style-type: none"> <li>40 years previous, Stanley Williams got into a fight</li> <li>Stanley Williams injured Barney Morgan from the House of Luuxhon</li> <li>Stanley Williams was incarcerated</li> </ul>	<ul style="list-style-type: none"> <li>guxws haldim guutxws</li> <li>shamed by own actions</li> <li>met with mother, uncles</li> <li>hosted a Feast, Stanley Williams put in \$3,000</li> <li>uncles put \$100 to \$200 each into the Feast pot</li> </ul>	<ul style="list-style-type: none"> <li>paid \$ to House of Luuxhon, Barney Morgan's House</li> <li>"to be like I was before this fight ever happened"</li> <li>removed shame</li> </ul>
Pete Muldoe, Gitluudahlxw [16 May 1988 at 6109]	<ul style="list-style-type: none"> <li>while commercial fishing off the north coast, Pete Muldoe fell into ocean</li> </ul>	<ul style="list-style-type: none"> <li>Gil k'al gimks – means to wipe the ocean off him</li> <li>accident – embarrassment</li> <li>hosted Feast</li> </ul>	<ul style="list-style-type: none"> <li>blanket cleansed</li> <li>removed shame</li> </ul>
Edith Gawa, Yahl, related by Mary McKenzie, Gyoluugyat [13 May 1987 at 247]	<ul style="list-style-type: none"> <li>Edith Gawa was seriously injured in a car accident</li> <li>speech affected and time in hospital</li> <li>fulfillment of chief's duties impaired</li> </ul>	<ul style="list-style-type: none"> <li>Sa gimk ihlee'e – means to wipe her blood off the street</li> <li>shame – injured, accident</li> <li>hosted Feast</li> </ul>	<ul style="list-style-type: none"> <li>awarded damages for the cost of a shame Feast by the B.C.S.C.</li> <li>cleansed name, removed shame</li> </ul>
Mabel Forsythe (Wet'suwet'en chief) related by Mary McKenzie, Gyoluugyat [13 May 1987 at 248]	<ul style="list-style-type: none"> <li>Mabel Forsythe and her daughter were publicly embarrassed and shamed in non-aboriginal town of Smithers, B.C.</li> <li>Mabel Forsythe and her daughter were falsely accused of shoplifting</li> </ul>	<ul style="list-style-type: none"> <li>embarrassed by others (store owners)</li> <li>successfully claimed damages from store owner and received compensation through court</li> <li>hosted Feast</li> </ul>	<ul style="list-style-type: none"> <li>awarded damages toward the cost of a shame Feast by the B.C.C.A.</li> <li>cleansed name, removed shame</li> </ul>
Glen Williams, Ax gwin desxw [30 May 1988 at 6678]	<ul style="list-style-type: none"> <li>Roddy Good not attending the Feast or fulfilling duties</li> <li>House of Malii decided that Roddy Good was abusing the name and causing embarrassment</li> </ul>	<ul style="list-style-type: none"> <li>meetings involving wolf and frog chiefs</li> <li>review of Roddy Good's attendance and abuse of the name</li> <li>agreement among chiefs to blow Roddy Good out of the Feast hall (suuwis'wen) and to reassign the name to Glen Williams</li> </ul>	<ul style="list-style-type: none"> <li>the name, Ax gwin desxw was publicly taken from Roddy Good and reassigned to Glen Williams</li> <li>could have put name away for an agreed period of time</li> <li>problem, reasons for decision, and action explained to everyone at the Feast</li> </ul>

**Theme: Legitimacy (continued)**

Case	What Happened?	What is Involved?	Result
Mary McKenzie, Gyoluugyat [19 May 1987 at 365]	<ul style="list-style-type: none"> <li>Mrs. Amelia Wilson, a House member for Wii elaast died when Wii elaast was away</li> </ul>	<ul style="list-style-type: none"> <li>responsibility for wil'nat'ahl in times of crisis</li> <li>Gyoluugyat assumed responsibility for hosting a burial Feast when one of the chiefs from a House in her wil'nat'ahl was away</li> </ul>	<ul style="list-style-type: none"> <li>Wii elaast would likely compensate Gyoluugyat and this would be announced at the next wolf/lax gibuu Feast</li> </ul>

**Legitimacy Comments:**

By:	Hypothetical	What Would be Involved?
Mary McKenzie, Gyoluugyat [19 May 1987 at 365]	<ul style="list-style-type: none"> <li>if a chief does not attend the Feast</li> </ul>	<ul style="list-style-type: none"> <li>moss is growing over the chief's chair</li> <li>dust is settling on the chief's seat</li> <li>family of the chief will first try to deal with issue</li> <li>family explains their embarrassment about the "moss getting thicker" to the chief</li> <li>chief must host Feast to wipe way the moss and dust</li> <li>chief can recover and re-enter the Feast</li> <li>"paper-bag chief" – if chronic and situation is not dealt with</li> <li>House loses credibility</li> </ul>
Olive Ryan, Gwaans [10 June 1987 at 1040]	<ul style="list-style-type: none"> <li>if a chief misleads the House or makes trouble for the House</li> </ul>	<ul style="list-style-type: none"> <li>remove chief and replace him/her</li> </ul>
Glen Williams, former Ax gwin desxw, current Malii [30 May 1988 at 6680]	<ul style="list-style-type: none"> <li>a chief's public conduct must be proper</li> <li>a chief must work &amp; save money</li> </ul>	<ul style="list-style-type: none"> <li>must be organized and able to pay as needed</li> <li>must think of other House members – lineage, behaviours, names, and recognition</li> </ul>

**Theme: Compensation/Death**

<b>Case</b>	<b>What Happened?</b>	<b>What is Involved?</b>	<b>Result</b>
Related by Stanley Williams, Gwis Gyen [13 April 1988 at 112]	<ul style="list-style-type: none"> <li>driver accidentally killed a young girl in a car accident</li> </ul>	<ul style="list-style-type: none"> <li>accidental death</li> <li>xsiisxw Feast</li> <li>driver and family put together money</li> <li>\$2,000 paid to girl's mother at the Feast</li> </ul>	<ul style="list-style-type: none"> <li>girl's family know that her death was an accident</li> <li>the accident is never to be mentioned again</li> </ul>
Ha'atxw, related by Olive Ryan, Gwaans, [15 June 1987 at 1250]	<ul style="list-style-type: none"> <li>Ha'atxw killed 'Niitsxw because 'Niitsxw refused to let his sister marry Ha'atxw</li> </ul>	<ul style="list-style-type: none"> <li>intentional death/murder</li> <li>gawa gyanii Feast</li> <li>fishing site given as compensation (an si bilaa)</li> </ul>	<ul style="list-style-type: none"> <li>An si bilaa is held by the House of Hanamuxw until they are ready to return it to the House of Luutkudziiwas</li> </ul>
Amaayam (Walter Wesley), related by Olive Ryan, Gwaans, [15 June 1987 at 1251-52]	<ul style="list-style-type: none"> <li>a member of the lax skiik clan killed Amaayam, a member of the House of Guksan (frog)</li> </ul>	<ul style="list-style-type: none"> <li>intentional death (less detail)</li> <li>gawa gyanii Feast</li> <li>transfer of hunting ground, xsi k'alii gajit, to Guksan</li> </ul>	<ul style="list-style-type: none"> <li>compensation paid, issue closed</li> </ul>
Yagosip, related by Thomas Wright, Guuhadakw [19 February 1986 at 14-15]	<ul style="list-style-type: none"> <li>nephew of Yagosip accidentally killed</li> <li>both were from the House of 'Wiik'aax</li> </ul>	<ul style="list-style-type: none"> <li>accidental death</li> <li>no compensation paid</li> </ul>	<ul style="list-style-type: none"> <li>matter dealt with internally (i.e., privately) within the House so no xsiisxw</li> </ul>
Dim Xsaan, related by Stanley Williams, Gwis Gyen [19 April 1988 at 168]	<ul style="list-style-type: none"> <li>Wet'suwet'en man knocked Dim Xsaan's crest down and made fun of it</li> </ul>	<ul style="list-style-type: none"> <li>Alaganxsw means to break Gitksan law</li> <li>ridiculing a crest – insult</li> <li>Dim Xsaan found out who knocked the crest down</li> <li>Dim Xsaan located the young man on Nisga'a territories</li> <li>Dim Xsaan killed the Wet'suwet'en man</li> </ul>	<ul style="list-style-type: none"> <li>the Wet'suwet'en people from Hagwilget travelled to Nisga'a lands and collected the body</li> <li>no need for compensation because the Wet'suwet'en man broke Gitksan law</li> </ul>

**Theme: Compensation/Death (Continued)**

<b>Case</b>	<b>What Happened?</b>	<b>What is Involved?</b>	<b>Result</b>
Tenimgyet, related by Stanley Williams, Gwis Gyen [19 April 1988, at 168]	<ul style="list-style-type: none"> <li>a member of Tenimgyet trespassed onto Nisga'a lands and was killed by Nisga'a</li> </ul>	<ul style="list-style-type: none"> <li>trespass</li> <li>the Nisga'a put the body back on Tenimgyet's territory</li> <li>Tenimgyet collected body</li> </ul>	<ul style="list-style-type: none"> <li>no retaliation, trespasser was in the wrong</li> <li>no xsiisxw</li> <li>according to Tenimgyet, Art Mathews [March 16, 1988 at 4688], the Nisga'a put the body back on the Tenimgyet side of the boundary and this was an affirmation of the Nisga'a recognizing the boundary</li> </ul>
'Niikyap, related by Thomas Wright, Guuhadakw [19 February 1986 at 46]	<ul style="list-style-type: none"> <li>Samuel Brown from the House of 'Niikyap killed his wife, Madeline Brown</li> <li>Madeline Brown was from the House of Melulek</li> </ul>	<ul style="list-style-type: none"> <li>murder</li> <li>Charles Crosby, Madeline's brother, killed Samuel Brown</li> </ul>	<ul style="list-style-type: none"> <li>peace between the Houses of Melulek and 'Niikyap</li> <li>Charles Crosby had a right to kill Samuel Brown</li> <li>no need for xsiisxw</li> </ul>
'Wiilitxsw, related by Fred Johnson, Lelt [2 September 1986, at 58-61]	<ul style="list-style-type: none"> <li>Ts'ets'aut killed two members from the House of 'Wiilitxsw</li> <li>Gitksan sought revenge and killed many Ts'ets'aut</li> </ul>	<ul style="list-style-type: none"> <li>war</li> <li>killing</li> <li>Ts'ets'aut hosted a peace settlement Feast, gawa gyanii</li> <li>Ts'ets'aut transferred land at Mezziadan to the House of 'Wiilitxsw</li> </ul>	<ul style="list-style-type: none"> <li>no more bloodshed</li> <li>end of war</li> </ul>
Yagaa ni yooksxw wilp, related by Art Mathews, Tenimgyet [18 March 1988, at 4764-65.]	<ul style="list-style-type: none"> <li>wolf/lax gibuu from Gisgagas cheated when they traded for grease with women from Tenimgyet's House (Yagaa ni yooksxw wilp, wolf/lax gibuu clan)</li> <li>when the same men returned for more trading, the Tenimgyet women ridiculed them</li> <li>in retaliation, the men killed two women from the Tenimgyet's House</li> </ul>	<ul style="list-style-type: none"> <li>all the people involved were from Houses from the wolf/lax gibuu clan</li> <li>in settlement for the women's deaths, the chief of the responsible wolf/lax gibuu House from Gisgagas gave the crest of the ensnared bear to Tenimgyet</li> <li>no Feast was necessary because all the Houses were from the wolf/lax gibuu clan</li> </ul>	<ul style="list-style-type: none"> <li>Tenimgyet still owns the crest of the ensnared bear</li> <li>the narrative is part of the Tenimgyet adaawk</li> <li>peace was established</li> </ul>

**Compensation/Death Comment**

<b>By:e</b>	<b>Hypothetical Situation</b>	<b>What Would Be Involved?</b>
Solomon Marsden, Xamiaxyetxw [9 May 1988 at 5938]	<ul style="list-style-type: none"> <li>trespass onto another House territory</li> </ul>	<ul style="list-style-type: none"> <li>trespass and apology</li> <li>the trespasser can apologize to the House chief who owns the land</li> <li>the House chief may forgive the trespasser</li> <li>if the trespasser is forgiven, there is no punishment</li> <li>mixed versions of what happens if there is no apology or forgiveness</li> </ul>

**Theme: Compensation/Debt**

<b>Case</b>	<b>What Happened?</b>	<b>What is Involved?</b>	<b>Result</b>
Gubihl gan, related by Stanley Williams, Gwis Gyen [12 April 1988 at 72]	<ul style="list-style-type: none"> <li>Gubihl gan died</li> <li>wife sat with his body, but did not cremate it</li> <li>Luulak and Dax Juxw cremated the body</li> <li>Luulak and Dax Juxw held a Feast for Gubihl gan</li> </ul>	<ul style="list-style-type: none"> <li>debt for funeral Feast</li> <li>Gubihl gan's family gave a territory to Luulak and Dax Juxw</li> </ul>	<ul style="list-style-type: none"> <li>debt paid by Gubihl gan's family</li> <li>House of Luulak and Dax Juxw still own this territory</li> </ul>
Bilaatx, related by Stanley Williams, Gwis Gyen [19 April 1988, at 166; 20 April at 72-74]	<ul style="list-style-type: none"> <li>childless couple asked to be given a child</li> <li>Mary Williams from Gwis Gyen's house adopted into House of Wixa (her father's House)</li> <li>When Wixa (Mary's father) died, Mary paid for all the funeral expenses</li> </ul>	<ul style="list-style-type: none"> <li>adoption for childless couple</li> <li>adoptee paying for adopted House's burial Feast</li> <li>debt for funeral Feast</li> <li>The House of Wixa announced that they were transferring part of a territory to her in gratitude</li> <li>when Mary died, her son, Stanley Williams, paid for her burial Feast and announced the giving back of the territory to the House of Wixa</li> </ul>	<ul style="list-style-type: none"> <li>childless couple able to raise a child</li> <li>Bilaatx returned to House of birth upon her death, and territory formally returned</li> </ul>
Yal & Guksan, related by Solomon Marsden, Xamiaxyetxw [9 May 1988 at 5953-54]	<ul style="list-style-type: none"> <li>Yal and his sister lived at a place called Gisa Hooxsit</li> <li>Yal died and the sister was alone</li> </ul>	<ul style="list-style-type: none"> <li>Yal's sister asked Guksan to help bury Yal</li> <li>Yal and Guksan were in different wil'na t'ahl but in the same clan</li> <li>Guksan and Yal were from the same village, Gitsegukla</li> </ul>	<ul style="list-style-type: none"> <li>Guksan would not accept any other form of payment except land</li> <li>Yal's sister compensated Guksan with the territory called Ant ga'l bakw or Guksan's Mountain</li> </ul>

### Compensation/Debt Comment

By:e	Hypothetical Situation	What Would Be Involved?
Solomon Marsden, Xamiaxyetxw [9 May 1988 at 5950-51	<ul style="list-style-type: none"> <li>a House's numbers and wealth dwindle to the point that it cannot afford to bury their head chief (<i>miin simoogit</i>)</li> </ul>	<ul style="list-style-type: none"> <li>different House of the same clan and the same village could step in, with the permission of the new chief (i.e., the deceased chief's replacement), to complete the burial</li> <li>House system is maintained by wealthier House; incurred debt to be repaid later</li> <li>this is called <i>n'id an luut t'ip magit</i></li> </ul>

### Theme: Corrections in the Feast Hall

Case	What Happened?	What is Involved?	Result
A luu giget, related by Stanley Williams, Gwis Gyen [26 April 1988 at 313]	<ul style="list-style-type: none"> <li>at the Wii Hlengwax Feast, Jook made a mistake in the telling of an adaawk</li> <li>Stanley Williams corrected the adaawk by telling the proper version</li> </ul>	<ul style="list-style-type: none"> <li>law of a luu giget – correcting a mistake in the telling of an adaawk or House boundary</li> <li>your 'nii dil will speak first to an error about your adaawk or territories</li> <li>other chiefs speak to the correction</li> </ul>	<ul style="list-style-type: none"> <li>adaawk corrected</li> <li>confirmed that Jook did not have a separate territory from Gwis Gyen</li> </ul>

### Theme: Disputes

Case	What Happened?	What is Involved?	Result
Miluulak, related by Mary McKenzie, Gyoluugyat [19 May 1987 at 366-67]	<ul style="list-style-type: none"> <li>Miriam Russell, chief Miluulak (<i>frog/ganeda</i>) died</li> <li>two people wanted the name</li> </ul>	<ul style="list-style-type: none"> <li>dispute over a chief's name</li> <li>series of meetings with frog chiefs</li> <li>inviting other chiefs from the other clans to settle dispute</li> <li>agreement reached (precedent)</li> <li>dispute and agreement explained in the Feast hall</li> </ul>	<ul style="list-style-type: none"> <li>one person got the name Miluulak</li> <li>one person got control and authority for the Miluulak House territory</li> <li>(current status uncertain since Robert Jackson's death)</li> </ul>

### Disputes Comments

By:	Hypothetical Situation	What Would Be Involved?
Mary McKenzie, Gyoluugyat [19 May 1987 at 367]	<ul style="list-style-type: none"> <li>• internal house dispute</li> </ul>	<ul style="list-style-type: none"> <li>• Gyoluugyat would have to consult with the other wolf Houses at Kispiox</li> <li>• also with Kliiyem Lax, Wii elaast, Spookw</li> <li>• would have to go to the frog chiefs</li> <li>• Gyoluugyat would have to explain the dispute</li> <li>• the dispute would be discussed among the chiefs</li> <li>• a settlement proposal would be developed</li> <li>• if the settlement proposal was accepted, both the dispute and the settlement would be explained at the Feast</li> <li>• if the settlement proposal was not accepted, the disagreement could be taken into the Feast and publicly explained</li> <li>• at the Feast, a decision could be reached to set aside the dispute for a period of time</li> <li>• the House could divide</li> </ul>
Art Mathews, Tenimgyet [18 March 1988 at 4820]	<ul style="list-style-type: none"> <li>• Amicable division of chief's name prerogatives (no dispute was reported by Mr. Mathews when he provided this information to the Court under cross-examination)</li> </ul>	<ul style="list-style-type: none"> <li>• the splitting of the name's prerogatives is not that uncommon.</li> <li>• in the House of Tenimgyet, the head chief's seat is split with Mr. Mathews being in charge of the territories and Henry Tait (Ax tii hiikw) is in charge of the Feast</li> </ul>

### Theme: Adoption

By	Hypothetical Situation	What Would Be Involved?	Result
Mary McKenzie, Gyoluugyat [26 May 1987 at 590-95]	<ul style="list-style-type: none"> <li>if a Gitksan man marries a non-Gitksan woman<sup>278</sup></li> </ul>	<ul style="list-style-type: none"> <li>marriage to a non-Gitksan woman</li> <li>the man's father's side will adopt the woman and their children</li> </ul>	<ul style="list-style-type: none"> <li>the children will be members of the father's father's House</li> <li>the mother will be a member of her husband's father's House</li> <li>the adoptee will have a place to sit in the Feast hall and will not have to stand by the door</li> </ul>
Mary McKenzie, Gyoluugyat [26 May 1987 at 590]	<ul style="list-style-type: none"> <li>if a Gitksan woman marries a non-Gitksan man</li> </ul>	<ul style="list-style-type: none"> <li>marriage to a non-Gitksan man</li> <li>the woman's father's House can adopt the man</li> </ul>	<ul style="list-style-type: none"> <li>the mother's father's House will determine the access privileges of the adoptee</li> <li>the adoptee will have a place to sit in the Feast hall and will not have to stand by the door</li> </ul>
Neil John Sterritt, Mediig'm Gyamk ["Ts'imil guut"] <sup>279</sup>	<ul style="list-style-type: none"> <li>if a childless couple wants a child</li> </ul>	<ul style="list-style-type: none"> <li>childless couple</li> <li>the childless couple can approach other Gitksan people about adopting a child</li> <li>if the child is from an outside clan (to the childless mother), then an adoption Feast is held</li> <li>if the child is from within the childless mother's House or clan, there is no need for a Feast<sup>280</sup></li> </ul>	<ul style="list-style-type: none"> <li>child will be considered a member of the adopted House</li> <li>as an adult, the adopted member or their children can return to their original House (e.g., Art Loring, lax skiik/eagle House)</li> </ul>

<sup>278</sup> Whatever the purpose, an individual adoption is called a *ts'ilimdoogam nidiit*. Art Mathews (Tenimgyet) 18 March 1988, *supra* note 118 at 4808. See also Sterritt, *supra* note 264; Sterritt, 1 May 2008, *supra* note 265.

<sup>279</sup> Sterritt, *supra* note 264.

<sup>280</sup> Viola Garfield, "Tsimshian Clan and Society" (1939) 7:3 University of Washington Publications in Anthropology at 167 at 227 [Garfield].

**Adoption (continued)**

<b>By</b>	<b>Hypothetical Situation</b>	<b>What Would Be Involved?</b>	<b>Result</b>
Neil John Sterritt, Mediig'm Gyamk ["Ts'imil Guut"]	<ul style="list-style-type: none"> <li>the number of House members shrinks</li> </ul>	<ul style="list-style-type: none"> <li>adopting other people, male or female</li> <li>the House can arrange to adopt people from other Houses into their House to increase its numbers</li> <li>or House can amalgamate with another</li> </ul>	<ul style="list-style-type: none"> <li>House survives independently</li> <li>Or the House survives as part of another House (<i>sto'wilp</i>)</li> </ul>
Neil John Sterritt, Mediig'm Gyamk <sup>281</sup> ["Ts'imil Guut"]	<ul style="list-style-type: none"> <li>shrinking number of House members</li> <li>House members only have sons</li> <li>need for daughters/female House members</li> </ul>	<ul style="list-style-type: none"> <li>can arrange to adopt girls</li> <li>can arrange to bring in nieces and nephews</li> <li>the House can amalgamate with another – a very closely related House</li> </ul>	<ul style="list-style-type: none"> <li>House survives independently or as part of another House until its numbers increase and members choose to split from amalgamated House</li> </ul>
Neil John Sterritt, Mediig'm Gyamk ["Ts'imil Guut"]	<ul style="list-style-type: none"> <li>same-clan marriage</li> </ul>	<ul style="list-style-type: none"> <li>Xaats (a disgraced couple)</li> <li>the father's House of one of the couple, will adopt one of them</li> </ul>	<ul style="list-style-type: none"> <li>face is saved</li> <li>children have place in Feasts</li> <li>ongoing covert derision intended to act as a deterrent</li> </ul>
Neil John Sterritt, Mediig'm Gyamk ["Ts'imil Guut"]	<ul style="list-style-type: none"> <li>taking in of Ts'ets'aut</li> </ul>	<ul style="list-style-type: none"> <li>groups of other people</li> <li>over time through marriage and adoption</li> </ul>	<ul style="list-style-type: none"> <li>the Ts'ets'aut no longer exist</li> <li>a number of Gitksan Houses can trace their ancestry to Ts'ets'aut</li> </ul>

<sup>281</sup> An example of this form of adoption was provided by Mary McKenzie (Gyoluugyat) 19 May 1987, *supra* note 94 at 375-76.

### 3.4 Glimmers of Structure: Gitksan Legal Order<sup>282</sup>

Laws are like maps because each presents ordered distortions of reality, the physical world for geographic maps, social relations for law. In both cases there is a tension between representation (image maps) and orientation (instrumental maps). Laws not only represent reality, but also create it – “the different forms of law create different legal objects upon the same social objects”.<sup>283</sup>

The question to be picked up in this section is what might we learn about the structure of the Gitksan legal order from the case examples? What contours and patterns emerge from the complicated and sometimes seemingly impenetrable detail that was the Gitksan witnesses’ evidence? Such an inquiry generates many more questions such as: What are the legal principles, obligations, and ethics that derive from the cases and how might they animate our understanding of how the Gitksan legal order operated and changed over time? How do Gitksan cosmology, concepts of self, and concepts of other human and non-human life forms influence the structure and function of Gitksan legal traditions? And finally, given that the Gitksan are a decentralized, non-state society, what is the source of Gitksan law and its legitimacy, and how is it recorded for the purposes of precedent and legal reasoning? As mentioned earlier, consideration of these questions will help to identify an overall coherent picture of Gitksan legal traditions, general concepts, general normative principles, general working theories, and principles – integral to a Gitksan legal theory as discussed in chapter 6.

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<sup>282</sup> For me as a non-Gitksan to attempt this chapter is admittedly a presumptuous undertaking, but done in a spirit of understanding and sympathy, and scholarly inquiry.

<sup>283</sup> Twining, *Globalisation*, *supra* note 11 at 238, paraphrasing Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York: Routledge, 1995) at 463-73.

### **3.4(a) Embedded and Implicit Law**

While the case examples I have selected generally relate to laws of governance, families, succession, murder, accidental death, lands and resources, intellectual property, legal capacity, remedies and compensation, and dispute resolution, it is difficult if not impossible to pull them apart into discrete areas of law to resemble Canadian law. For example, the crests on the poles at once (1) represent the formative relationship between a House and a specific territory, (2) form part of the intellectual property of a House, (3) are part of the formal, collectively owned *adaawk* that creates the political and legal identity of a House, (4) may represent a *naxnox* or spirit power that lives in the land and which is performed and recreated at the Feasts, and (5) may be shared with other Houses that formerly joined as one House in an earlier period of the *adaawk*. In other words, these crest laws are simultaneously about land tenure and ownership, governance, intellectual property, kinship, and citizenship.

Similarly, there are different types of adoptions for enabling (1) childless couples to adopt children, (2) a House to increase its numbers, (3) the incorporation of non-Gitksan peoples, (4) the increase of a House's political prestige and income, and (5) the building of relationships. While the legal purposes for adoptions vary and do sometimes overlap, they relate to different areas of law concerning families, remedies, and governance (e.g., building relationships and supporting a House's ability to meet its legal and political obligations).

The first lesson, then, to be drawn from these cases is that Gitksan law cannot be neatly categorized into discrete areas of law, but instead is woven throughout the social, economic, and political institutions in Gitksan society. There is no dedicated, centralized

bureaucracy that is responsible for Gitksan law – its promulgation, interpretation, or application. Nor do the Gitksan have a separate group of people charged with the discrete responsibility of adjudicating legal disputes. Instead, it is the Gitksan chiefs that are primarily responsible for the interpretation, memory of legal precedents, decision-making processes, and application and enforcement within the Gitksan legal order. As described herein, the chiefs also have other roles and responsibilities according to their rank and relationships. House members are variously involved at different stages of these legal processes since obviously the chiefs could not possibly do all of the organizing and on-the-ground enforcement necessary for maintaining the Gitksan legal order.

### 3.4(b) Internal Tensions

These case examples demonstrate a second important lesson that may be learned about Gitksan legal traditions – basically, that decentralized Gitksan society, without a centralized governing or enforcement bureaucracy, ensured compliance within its normative order through layers of implicit and explicit authority and accountability that operated through reciprocal relationships in the kinship system. As the evidence from a number of the witnesses attests, Gitksan society was organized into *simgigyet* (sg. *simoogit*, high chiefs), *lax gigyet* (young chiefs) or *wam gyat*<sup>284</sup> (male or female wing chiefs that are in line for a high chief's name), *hla ga kaaxhl simoogit*<sup>285</sup> (wing chiefs), *am gigyet*<sup>286</sup> (commoners, followers, warriors, workers, and helpers), and *hlihlingit*<sup>287</sup> (slaves).

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<sup>284</sup> Mary Johnson (Antgulilbix) 27 May 1987, *supra* note 46 at 660.

<sup>285</sup> Mary Johnson (Antgulilbix) 26 May 1987, B.C.S.C. trial transcript, 616 at 629, evidence for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185 [Mary Johnson (Antgulilbix) 26 May 1987].

<sup>286</sup> Art Mathews (Tenimgyet) 14 March 1988, *supra* note 58 at 4550.

<sup>287</sup> Daly, *supra* note 48 at 207. According to Daly, the Gitksan never maintained slavery as a regular or ongoing part of the Gitksan economy. The Tsimshian on the coast had the “means to sustain slavetaking for a

Marriages were arranged, and the preferred marriage for a *kuuba wilxsihlxw*<sup>288</sup> (child of two chiefs) was with another *kuuba wilxsihlxw*.<sup>289</sup>

Richard Daly cautions against uncritically applying an understanding of class that derives from “European” history and culture to the Gitksan.<sup>290</sup> Instead, he argues that while Gitksan families talk of royalty, it is only the talk that is widespread, not the actual grounded or historical reality. In fact, Daly quotes Don Ryan (current Hanamuxw) as saying “anybody who keeps her nose clean and lives long enough can be as royal as hell. It is a question of age.”<sup>291</sup>

Nonetheless, each of the classes in Gitksan society has a corresponding legal capacity.<sup>292</sup> A *lax gigyat* or *wam gyat* who becomes a *simoogit* then embodies the kinship group that is the property-owning entity in Gitksan society. Similarly, it is only a *lax gigyat* or *wam gyat* that has the legal capacity to assume the role of *simoogit*. The *am gigyat* have the individual capacity to access their own House’s territories, and they are able to access the territories of other Houses depending on the various privileges they have been accorded. Any *hlihlingit* who appear from time to time in Gitksan society would not have the legal capacity to own property.

As the cases demonstrate, the kinship system possesses a fluidity which is vital to the operation of the entire Gitksan society. For instance a person who is a *lax gigyat* or a *wam gyat* may lose the opportunity to take a *simoogit* name for failing to live up to the

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while, now and then in history, but not even there constantly, and certainly not inland”. Letter from Richard Daly, (7 May 2008) [Daly, correspondence].

<sup>288</sup> Mary McKenzie (Gyoluugyat) 13 May 1987, *supra* note 35 at 215.

<sup>289</sup> Telephone interview of Don Ryan (Hanamuxw) 17 November 2008. The singular for *kuuba wilxsihlxw* is *wilimsxw*.

<sup>290</sup> Daly, correspondence, *supra* note 287 at 1.

<sup>291</sup> *Ibid.*

<sup>292</sup> Richard Overstall, “Gitksan/Nisga’a Terms for Person’s Legal Capacity” (May 5, 2008) [unpublished, archived with the author].

standards required for the names. A simoogit who is embarrassed or shamed may have to take serious and costly measures to cleanse the name or risk losing it by being “blown out of the Feast hall” as was the case with the former Ax gwin desxw.<sup>293</sup> Richard Daly provides another example of Gitksan society’s fluidity: “Matrilineal kinship and succession militate against the formation and entrenchment of social hierarchy and groups of kinspeople capable of consolidating wealth and power generation after generation.”<sup>294</sup> (I will return to this point later in this chapter.)

The first layer of reciprocal accountability is internal within the House and is between classes of individuals – among the chief and wing chiefs, among the am gigyet, and between the am gyet and the chiefs. Each group has responsibilities to one another, and it is only within the House that the individual as agent matters and is necessary to ensure the effective overall functioning of the House. According to Daly, within the House “[p]olitical power accruing to any particular chief is scrutinized and challenged constantly by the other members of the House group.”<sup>295</sup> Art Mathews (Tenimgyet) explained to the Court that, as the head chief, he is required to consult with his ‘nii dil, *wilxsi leks* (paternal side), wing chiefs, and members of his House for any decisions about Tenimgyet’s territories and resources. In fact, Mr. Mathews explained that such consultation within and outside the House in order to obtain “guidance, advice and wisdom” was a requirement under Gitksan law.<sup>296</sup>

In practice, House membership functions as a point of reference for a Gitksan person in order to locate a person in the kinship network (unlike western-style corporate

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<sup>293</sup> Glen Williams (Ax gwin desxw), 30 May 1988, *supra* note 138 at 6678.

<sup>294</sup> Daly, *supra* note 48 at 209.

<sup>295</sup> *Ibid.*

<sup>296</sup> Art Mathews (Tenimgyet) 18 March 1988, *supra* note 118 at 4784.

memberships). However, it is the work and contributions of individual House members that enable a House chief and wing chiefs to host Feasts. Historically, House members would have harvested wealth from the House territories; today, members earn money in the cash economy. In turn, it is by the House fulfilling its responsibilities through the Feasts that the credibility and political power of the House is maintained through the larger Gitksan political collectivity. This is explained by Glen Williams:

[T]he host at that feast is demonstrating publicly to the people in that – in that feast hall that you do own land, that you own territory, that you own fishing holes, that you own names in those houses, and this is who we are. And that also interprets your wealth and the stature you have in the community, in the feast hall, and that stature represents the power and the authority that you have.<sup>297</sup>

The second layer of reciprocal accountability is between House groups through the various relationships of *wil'naat'ehl*<sup>298</sup> (kinship relations through the matrilineal House with closely aligned House groups in the same clan), *wilksi'witxw* (paternal relatives through the father's House and clan), and other House groups in the village.<sup>299</sup> In this broader network, it is collective relationships that matter between House groups. At this level, an individual's action that impacts another House is considered to be the collective action of that individual's entire House. In the earlier example provided by Gwis Gyen, who as head chief had to put up the majority of the cost for his House's hosting of his *guxws haldim guutxws*, his wing chiefs and House members were also obligated to contribute either with cash (*hawaal*),<sup>300</sup> goods for gifts, or Feast food.<sup>301</sup> The shameful incarceration experienced by Stanley Williams (Gwis Gyen) was the collective

<sup>297</sup> Glen Williams (Ax gwin desxw) 30 May 1988, *supra* note 138 at 6682.

<sup>298</sup> There are several different spellings for this throughout the transcripts (e.g. *wil'nat'ahl*).

<sup>299</sup> Gitksan dictionary, *supra* note 88 at tab 4.

<sup>300</sup> *Ibid.* at tab 9. *Hawaal* is defined as a contribution to your own clan's feast, a voluntary land tax levy.

<sup>301</sup> Stanley Williams (Gwis Gyen) 13 April 1988, *supra* note 53 at 110-11.

responsibility of his House to deal with. An important aspect of this case is that while the actions are individual, the responsibility and liability for the action is borne collectively.

The third layer of reciprocal accountability is along clan lines and alliances between peoples such as the Tsimshian<sup>302</sup> or Nisga'a for example. At this level, each Gitksan House member has a series of other responsibilities and relationships with other House groups through their spouse's maternal and paternal Houses. These latter relationships require that each spouse contribute financially or materially to the Feasts hosted by their spouse's House (*ent'im nak*).<sup>303</sup>

Overall, it is this weave (*sgano*) of reciprocal relationships forming the entire fabric of Gitksan society that serves to maintain the legitimacy and therefore the authority of the House. This is eloquently explained by Art Mathews (Tenimgyet):

Tenimgyet	Like I indicated and tried to show here that we have interests, quite highly interest in our own territories Xsi gwini ixst'aat and Tsihl Gwellii, but our interest far reaches out to other territories through silksi witxw, both your mother and your father's side and like relatives from other villages. This [is] what we call the helping of each other, a phrase that we have in our language naa hlimoot' is to help each other. And what is so unique about that is we have a phrase that my grandparents, when I say "grandparents", I have repeated their names over and over: Geoffrey, Wallace and Jack and my grandfather Charley Smith said that the phrase about our Gitksan and Wet'suwet'en relations, interconnections of marriage we are like a <i>sgano</i> , a woven fabric, solid. That is the way we look at ourselves as a woven fabric together.
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<sup>302</sup> For example, the western Gitksan frog clan, Ganeda is related to the Tsimshian raven clan called *ganhada*. According to Solomon Marsden (Xamiaxyetxw), in Gitanyow, the *ganeda* clan is the raven/frog clan. Solomon Marsden (Xamiaxyetxw) 9 May 1988, *supra* note 117 at 5965. Also see discussion, *supra* note 236, about the connection between the western Gitksan *gisgaast* (fireweed) clan and the Tsimshian *gispuwudwada* (killerwhale) clan.

<sup>303</sup> *Ent'im nak* means "A voluntary land tax levy and a Goods and Services tax. Money or merchandise given by spouses of hosting Clan. This is to show that you fully support your husband or wife. May or may not be accompanied by being fully dressed up in a costume and dancing up to the collection pot. It's a Gitksan protocol that one has to pay every time your spouse's Clan and House feast is called". Gitksan dictionary, *supra* note 88 at tab 9.

- Mr. Grant            Now, you said your grandfathers would talk about this  
sgano – .
- Tenimgyet            Yes.
- Mr. Grant            – woven together like a fabric. When they referred to that,  
who were they referring to?
- Tenimgyet            The whole area, the whole Skeena, the whole – all the  
houses, all the territories woven together as one. But each  
house has a special interest in their own territory.
- Mr. Grant            And when you say all the Skeena and all the houses, are you  
referring to all the Gitksan houses?
- Tenimgyet            All the Gitksan houses. And I have indicated we have  
relatives into the Hagwilet, Wet'suwet'en area too.<sup>304</sup>

Within this *sgano*, the role of the individual as a dynamic and independent agent (e.g., as stable wage earner, upstanding and active citizen, or politically and socially astute leader with strong diplomatic and interpersonal skills) is critical to creating and maintaining the overall strength of the House. Within the larger weave between the Houses and beyond, the many relationships and alliances between dynamic, organized collectivities ensures the overall strength of the Gitksan people. The responsibility for consultations and building relationships is ongoing, as Glen Williams illustrates: “I've also been appointed the spokesman for our house that – that I speak for them and after consulting with members in my house and my chief and other chiefs in our house to make sure that I'm saying the right thing.”<sup>305</sup>

The dynamisms at each level of interaction are, at least in part, created by the competitive nature of Gitksan society, which fosters competitive and independent citizens who are also capable of managing effective collaborations. The importance of saving face and the formal, public witnessing to wipe away shame and embarrassments occurs because there is an element of competition both between the Houses and within each House. In other words, in this competitive network, the public face of a House and its resulting

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<sup>304</sup> Art Mathews (Tenimgyet) 18 March 1988, *supra* note 118 at 4777-78.

<sup>305</sup> Glen Williams (Ax gwin desxw) 30 May 1988, *supra* note 138 at 6681.

legitimacy matters precisely because public opinion determines the credibility of the House. This was Gwaans' concern when she said that the other Houses were "making fun of Hanamuxw".<sup>306</sup>

Similarly, within the House, there is an ongoing competition for names and associated privileges because arguably, all are potentially heirs to the highest seat in the House. While usually out of the public eye, "[f]ierce internal competition attests to the continuing vitality of the Feasts and the social relations and cultures in which they are embedded."<sup>307</sup> While the Gitksan system is often referred to as hereditary, as mentioned previously, improper conduct by someone who is in line for a name will likely mean the loss of the opportunity to obtain that name.<sup>308</sup>

This competition plays out among House members as individual agents and between lineages within the House. Each lineage within the House seeks to secure the chief names which will enable that lineage to maintain its "royalty" status. In a healthy and dynamic House with active and competitive members, the names will alternate between the lineages with each generation. However, should a lineage fail to secure chief names for three or so generations, that lineage will lose its royalty status and they will become commoners (although as commoners, they can still compete for names).

According to John Adams, this tension between royalty and commoners is a theme that ran through all his interviews:

It seems to sum up the tension between the requirements that a small lineage group remain fixed to their traditional resources in perpetuity though in constant jeopardy of dying out due to the variability of birth and death rates, while faced with a

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<sup>306</sup> Olive Ryan (Gwaans), *supra* note 12 at 1060.

<sup>307</sup> Daly, *supra* note 48 at 58.

<sup>308</sup> This applies to all names in the House including the chief's names. From my observations, the mothers in a House will all work to advance their own children to be considered for the House names, often in direct, but unstated, competition with one another.

continuous necessity to take in mobile “outsiders” to fill the lineage statuses as well as to help accumulate resources.<sup>309</sup>

Adams observed that the chiefs work to “ensure a more orderly succession to chiefships and to minimize tensions within the House.”<sup>310</sup> Without the House members, the chiefs could not fulfill their obligations within the kinship network and would subsequently lose face and *daxgyet*. So while the head chief of a House is reliant on the House members, the House members are so not reliant on the chief. If House members are unsatisfied in the House or with the chief, they can align themselves with another House through their other relationships. While their House membership does not change, they can determine where they devote their contributions and resources, and how they participate in the Feast system. Stability in the system is created, in part, by the tension between the chief’s dependence on the House members, and the ability of the House members to realign their participation and contributions.

However, within this dynamic network, unless the House members realign themselves (as above) they must also constantly and actively collaborate within their House, and alliances of Houses are maintained through an ongoing practice of horizontal consultations and collaboration between Houses. Again, stability is created by this tension between, on the one hand, the necessary individual and collective collaboration at all levels of the kinship system, and on the other hand, the necessary individual and collective competition both inside each House and between all the Houses.

Two other factors contribute to the competition/collaboration dynamic that characterizes Gitksan society and which has enabled Gitksan peoples to manage

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<sup>309</sup> John Adams, *The Gitksan Potlatch: Population Flux, Resource Ownership and Reciprocity* (Toronto: Holt, Rinehart and Winston of Canada, 1973) at 36.

<sup>310</sup> *Ibid.* at 37.

themselves through a stable decentralized governing system and legal order. The first is that political hierarchy and centralization is resisted because historically “authority was diffused through reciprocal gifting between the clans and their respective Houses, between villages, and even sometimes between neighbouring peoples”.<sup>311</sup> Secondly, the interlocking kinship network and “‘feasting,’ with its complexity of giving and receiving, paying and paying back, discharging and creating indebtedness, allows for the achievement of status within a framework of ascribed rights and responsibilities”.<sup>312</sup> Within this vigorous network, the accretion of power is limited by “the common practice of patrilocal residence combined with matrilineal inheritance. This breaks up potential blocs of male kin who otherwise would acquire enduring power and authority held by men and their sons.”<sup>313</sup>

### **3.4(c) Focus on Compensation versus a Focus on Guilt**

Another contour that begins to appear through the selected case examples is the emphasis on remedies, including various types of compensation, over a focus on the determination of guilt. Practically, what this means is that there are no separate “trial-like” processes to settle disputes, determine crimes, or assign punishment. It is not my intent to compare Gitksan law with Canadian law, but at this point it is difficult to avoid acknowledging that this is one of the fundamental differences between the two legal orders. This must change the very nature of the many interactions involving a dispute or injury. At the very least, there would be many more people involved with all aspects of a dispute in Gitksan society as compared to the few delegated groups of professionals (e.g., police, lawyers, judges, etc.) that would be involved in a state system.

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<sup>311</sup> Daly, *supra* note 48 at 31.

<sup>312</sup> *Ibid.* at 36.

<sup>313</sup> *Ibid.*

Given this, in some of the cases involving death for instance, it does not seem to matter whether the death was intended or accidental – as long as the death was properly acknowledged and reported; in either case, the remedy was compensation in the form of land or money. This is confirmed by Mary Johnson (Antgulilbix) in this example:

After the breath song, then he spoke to the chiefs that the man that was shot belongs to. He told them he will...be giving a compensation of hunting ground to them, not all of the hunting ground because they got a lot of territory, and they could give just – just little bit of the territory. So everything is settled. The reason I want to tell it is just for an example even if it's an accident among the Indians they still give what we call xsiisxw.<sup>314</sup>

There is a big difference, though, when one party has committed a wrong, either accidentally or intentionally, but has failed to acknowledge the wrong or offer amends. In such cases involving death, severe retaliation is an acceptable response. Such was the case of the Ts'ets'ut wars, for example. The Ts'ets'ut chiefs compensated the House of 'Wiilitsxw with land for the killing of Txawok and Ligigalwil. A xsiisxw Feast was held in order that “there will be no more wars”.<sup>315</sup> Basically, the deaths of Txawok and Ligigalwil were deliberately caused, responsibility for them was accepted, compensation was paid, the xsiisxw was properly conducted and witnessed and, in this case, recorded for future generations in the 'Wiilitsxw adaawk.

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<sup>314</sup> Mary Johnson (Antgulilbix) 28 May 1987, B.C.S.C. trial transcript, 703 at 750, evidence for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185. Hamar Foster describes a case where an employer failed to properly acknowledge and report the accidental death of a young Gitksan man during his employment, the young man's father killed the employer in retaliation. This was explained in a letter to the Provincial Secretary by Geddum-cal-doe, “It is expected that the survivors shall immediately, or as soon as possible, make known to the friends of the...deceased, what has taken place. If this is not done, it is taken as evidence that there has been foul play...The general custom...is that if anyone calls another to hunt with him, to go canoing, &c., and death occurs, the survivor always makes a present corresponding with his ability, to show his sympathy and good will to the friends of the deceased, and to show that there was no ill-feeling in the matter.” Hamar Foster, “‘The Queen’s Law is Better than Yours’: International Homicide in Early British Columbia” in Jim Phillips, Tina Loo, & Susan Lewthwaite, eds., *Essays in the History of Canadian Law: Volume: Crime and Criminal Justice* (Toronto: Osgoode Society, 1994) 41 at 42.

<sup>315</sup> Fred Johnson (Lelt) 2 September 1986, *supra* note 194 at 59.

It is important to note that before the xsiisxw, in retaliation for the deaths of Txawok and Ligigalwil, the Gitksan killed many Ts'ets'aut in their attack, but there was no xsiiswx for these deaths of Ts'ets'aut. This is because it was agreed that the Gitksan had been wronged by the killing of Txawok and Ligigalwil, and therefore they were entitled to attack the Ts'ets'aut. This case was also international in nature in that it involved another distinct people, and further lessons may be drawn from this about how relationships are built and maintained between peoples.

Revisiting the accidental killing of the young girl in a car accident at Kispiox, we will note that it did not matter to this case whether the driver was actually at fault or whether he was found not guilty according to Canadian law. It is likely that in this situation, the driver, his family, and House experienced the wrath of the girl's family and House – because he did not acknowledge his wrong in the Feast hall. However, once a xsiixw Feast was held, albeit some years later, and compensation was paid in dollars (\$2,000) to the mother of the girl,<sup>316</sup> then for the purposes of Gitksan law, it was understood that he accepted his responsibility for the death, accidental or otherwise, and properly fulfilled his responsibility.

Once it is determined who is responsible for an action, it becomes a matter of liability and the law for that particular action is applied – in the form of punishment or compensation. In other words, if the Ts'ets'aut had no valid reason for killing Txawok and Ligigalwil (and their bodies were inspected to find the truth of their murders), and the Ts'ets'aut did not acknowledge their responsibility, then the Gitksan had a mutually recognized legal justification to retaliate until the xsiisxw was properly hosted by the

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<sup>316</sup> Stanley Williams (Gwis Gyen) 13 April 1988, *supra* note 53 at 112.

Ts'ets'aut. The Ts'ets'aut were in the wrong at the onset and so it was understood by both peoples that it was their responsibility to avert continued bloodshed.

The case of Charles Crosby (House of Miluulak) and Samuel Brown (House of 'Niikyap) is the same in that Samuel Brown was guilty of killing Charles Crosby's sister, Madeline Brown. It did not matter why he killed her; Samuel Brown was responsible for her death, and accordingly, Charles Crosby had a legal right to kill him – an exchange of blood. In the end, the House of 'Niikyap had no legal recourse against Charles Crosby because it was agreed that Samuel Brown was responsible for and therefore in the wrong for killing Madeline Brown, a member of the House of Miluulak.

This same legal ethic is seen in the case involving the trespass of the member from Tenimgyet. It was agreed that the trespasser was in the wrong when he went onto Nisga'a lands, and when he was killed, the only thing that the House of Tenimgyet could do was to collect his body. Because it was a member of the House of Tenimgyet that was in the wrong, there were no legal grounds to demand that the Nisga'a compensate Tenimgyet for the death. Had Tenimgyet retaliated, his House would have been in the wrong according to both Gitksan and Nisga'a law, and such retaliation would have triggered more bloodshed.

When a person, and therefore their House, has been found liable for a death or debt, land is the preferred compensation because it lasts a lifetime. According to Solomon Marsden, the "life of a person has been wiped out, and for...that person to be compensated for this life that was taken then it is for a lifetime. If they – if they would give that land away, it will be for a lifetime."<sup>317</sup> Once the "heart is satisfied" or the "heart is full",<sup>318</sup> and

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<sup>317</sup> Solomon Marsden (Xamiaxyetxw) 9 May 1988, *supra* note 117 at 5957.

<sup>318</sup> Mary Johnson (Antgulilbix) 29 May 1987, B.C.S.C. trial transcript, 784 at 803, evidence for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185 [Mary Johnson (Antgulilbix) 29 May 1987].

the anger has dissipated, the land may be returned as was the case with Hanamuxw's plans to return the fishing site, An si bilaa, to Luukudziwas.

There is also an element of strict liability within Gitksan law for some injuries. For example, if a guest is injured during a Feast, the host is liable for the injury no matter whether the injury was the fault of the guest or not. Similarly, if someone who is legitimately on another House's territory is accidentally injured, that House is liable for the injury suffered. This ethic creates a different set of expectations and behaviours regarding accidents, responsibility, and liability.<sup>319</sup>

Finally, it is important to note that the determination of compensation payments reflects the consideration of the different classes of legal capacities. The injury or death of a chief, for instance, requires greater compensation than if the victim were a commoner.<sup>320</sup> This is mirrored in the Feast historically with more valuable furs paid to the chiefs, and today, with larger sums of cash and more gifts being given to the chiefs.

#### **3.4(d) Public Witnessing and Accountability**

In his discussion about trespassing, Solomon Marsden (Xamiaxyetxw) said, "the person who knows the law is the person that will compensate – the trespasser will compensate the chief at this time when he apologizes in the Feast house".<sup>321</sup> When Mr. Grant asked, "Why is it done in the Feast hall?" Mr. Marsden explained: "It is not for the Gitksan people to do this by themselves, because no one would know about it. And in order for people to recognize what has been done and what's going on, they announce it in the Feast and this is

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<sup>319</sup> For example, when serving at the Luuxhon feasts, I was always terrified of spilling soup or dropping food. I understood that such actions would shame the entire House, and the liability of the House corresponded with the seriousness of my carelessness.

<sup>320</sup> Garfield, *supra* note 280 at 257-58.

<sup>321</sup> Solomon Marsden (Xamiaxyetxw) 9 May 1988, *supra* note 117 at 5938.

– this is a correction that’s made before the people.”<sup>322</sup> While Mr. Marsden is specifically referring to people who have trespassed, the legal principles behind public explanations and witnessing are transferable to other areas of law. In the Gitksan legal order, people have to know what is going on and how issues are being dealt with – and it is this very public process that gives the deliberations and application of law legitimacy. A significant exception here is any matter considered internal to the House such as one member causing harm or death to another member of the same House (e.g., Yagosip and his nephew).<sup>323</sup> Should a House fail to manage its internal matters, it will lose its effectiveness as a collectivity and this will subsequently cause a loss of public credibility.<sup>324</sup>

Despite this exception for internal matters, this ethic of public witnessing appears to guide the operation of the Gitksan legal order and the relationships through which people governed themselves. For example, according to Olive Ryan (Gwaans), the public witnessing ethic is closely tied to ensuring respect in relationships. Mrs. Ryan explains: “That’s the law in Gitksan. If you don’t respect the other people, they wouldn’t get nice to you. That’s what grandmother said. Because the law of Gitksan is strong. You can’t do a lot of things behind the other people. They don’t recognize you if you do that.”<sup>325</sup> Mrs. Ryan worked to teach this ethic to her children, “[a]s long as...I had kids, so I just trying to explain them, what to do, you know, to respect the people.”<sup>326</sup> For Mrs. Ryan, public witnessing and transparency translated into respect and accountability, and this was one of

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<sup>322</sup> *Ibid.* at 5938-39.

<sup>323</sup> Thomas Wright (Guuhadakw) 19 February 1986, *supra* note 188 at 14-15.

<sup>324</sup> There is also Tenimgyet’s case where the crest of the ensnared bear was paid to Tenimgyet for the killing of two female House members by members from another wolf/lax gibuu House from Gisgagas. Art Mathews (Tenimgyet) 18 March 1988, *supra* note 118 at 4764.

<sup>325</sup> Olive Ryan (Gwaans) 10 June 1987, *supra* note 12 at 1033.

<sup>326</sup> *Ibid.*

the essential understandings that she had to pass on to her children in order to ensure their success.

Without the formal witnessing of the *'nii dil* (opposite clan) in the Feast hall, the Feast is meaningless. Art Mathews (Tenimgyet) explains the public verification role of the *'nii dil* to the Court:

- |           |  |
|-----------|--|
| Tenimgyet | 'Nii dil in our language ... would be the one sitting at the head table, guests. When you put up a feast, they are at the head table. They sit directly in front facing us. ... If you have the table and we are serving, 'Nii dil means that. 'Nii dil in our law, the feast law, if there was no 'Nii dil, feasts was meaningless. When I say feast or 'Nii dil, are the very people that stamps approval of your feast. |
| ...       |  |
| Mr. Grant | You said that your 'Nii dil, I think you used the term, gives the stamp of approval, or your 'Nii dil must be present for the witnessing.  |
| ...       |  |
| Tenimgyet | That ... 'Nii dil is the first speaker of a feast. And when you tell your adaawk, and ... I went through that already, adaawk, and your territorial boundaries, if they are complete and true, he will then address it as true. That's what I mean by stamping and saying this is true. There is no lie to what you're saying. <sup>327</sup>  |

The role of the *'nii dil* involves much more than sitting at the head table and carrying the main burden of witnessing. When the House of Tenimgyet is in the role of the *'nii dil*, he must also be available to help in times of need or with disputes. For example, he said, “[when]...Wii hlengxax came to us regarding the logging that was taking place on the Seven Sisters [a mountain range] to discuss what had happened and to ask us to witness that he was the owner...of that place...and we had to, as that's our 'Nii Dil, verify what he was saying was true.”<sup>328</sup> The witnessing role and responsibilities of the *'nii dil* extend beyond Feast hall to public meetings, with decisions and intervention as necessary in

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<sup>327</sup> Art Mathews (Tenimgyet) 16 March 1988, supra note 198 at 4671-72.

<sup>328</sup> Art Mathews (Tenimgyet) 17 March 1988, B.C.S.C. trial transcript, 4691 at 4753, evidence for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 216.

disputes.<sup>329</sup> Mr. Mathews provided an example of such an intervention at a ganeda Feast by his grandfather, Geoffrey Morgan, the former Ax tii hiikw (wolf/lax gibuu). In this case, “the Ganeda was trying to put on a chief’s name on a non-Indian.... and then Lelt said to the people that this name cannot go here, but it's up to our 'Nii Dil to do something about this, and then my grandfather Geoffrey, Ax tii hiikw, stood up and he says ‘No, it cannot be held by this person.’, and it was then stopped.”<sup>330</sup>

While all the Houses attending a Feast have a responsibility to witness and remember the business of the host House, it is the ‘nii dil that has the greatest responsibility as well as the most authority in any interventions. Every House in every village has a reciprocal ‘nii dil from that village. So in the example of Ax tii hiikw’s intervention, he was fulfilling his ‘nii dil responsibility to the ganeda. In turn, when a ganeda House is hosting a Feast, the lax gibuu will fulfill the role of ‘nii dil. The business conducted at the Feasts as well as these examples of problem solving and decision making, all serve to form the body of precedent that future Houses may recall to resolve future problems and manage conflict. This participatory problem-solving approach, public transparency, and horizontal accountability are all essential elements of the Gitksan legal order. It is this system of checks and balances that are dispersed throughout the Gitksan legal order that help to stabilize it.

It is important to keep in mind that none of these legal processes are conducted separately from the rest of daily life or on some rarefied intellectual plane – rather these are practical matters that are about effective management of territories, conflict management,

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<sup>329</sup> *Ibid.* at 4755-57.

<sup>330</sup> *Ibid.* at 4755.

problem solving, and other necessary business. Art Mathews (Tenimgyet) makes this point clearly:

Yes. [The territorial place names] were announced in various ways. They were announced as an adaawk and they were announced when you bring your soup, your tea, your bread, whatever, they are announced and said this so and so, this meat comes from, and they specify each mountain or its territory where it comes from. Each creek is mentioned. So in our rule and laws we say that if you eat and digest the words, it's within your very soul. That's why they do these things.<sup>331</sup>

### **3.4(e) Cosmology and Concept of Self: Beneath Gitksan Law**

One of my tenets is that a society's legal order and laws will reflect how its members understand themselves and their world, their place in the universe, and others, including non-human life forms.<sup>332</sup> It is our cosmologies and ontologies that determine the kind of legal traditions we create, because fundamentally our laws will reflect what we think of ourselves and others. In this subsection, I select only three closely intertwined aspects of Gitksan cosmology for discussion since obviously a full exploration of a people's cosmology is far beyond the scope of my research project. The three aspects are reincarnation, understanding of territories, and relationships with non-human life forms. Each of these contains important concepts about the self and about the law that is necessary to manage Gitksan society.

To begin, Solomon Marsden (Xamiaxyetxw) offers this perspective: "The Gitksan people have had their laws since the beginning of time. And this is... where the laws come from. It is clear to us that we were the first people here because of the histories of what has been told in the adaawk of the flood. And it is quite clear to us that the Creator, Lax ha, has

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<sup>331</sup> Art Mathews (Tenimgyet) 15 March 1988, B.C.S.C. trial transcript, 4586 at 4607, evidence for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 216.

<sup>332</sup> See generally, Lawrence Rosen, *Law as Culture: An Invitation* (Princeton: Princeton University Press, 2006) and Mary Clark, *In Search of Human Nature* (London: Routledge, 2002) 8-16 [Clark].

given us the land.”<sup>333</sup> In other words, the history of the Gitksan, their territories, and their laws fuse together in the distant past. The history of the Gitksan people is not separated from the history of the Gitksan world as Benedict Anderson argues has been the case in Europe.<sup>334</sup> This has a direct bearing on how Gitksan people understand themselves in the world, how they comprehend the world and all it encompasses, and how they relate to the world and other life forms.

### **3.4(e)(i) Reincarnation**

In the Gitksan universe that one can catch glimpses of in the trial transcripts, the laws come from the beginning of time and continue through to the present. The earliest accounts in the *adaawk* describe great migrations of peoples to unoccupied lands that were “treeless and unstable”, and where people experienced “flooding, earthquakes, and volcanoes”.<sup>335</sup> Over time, the people found stable lands and established villages, and settled across the regions of northwest British Columbia.

From Solomon Marsden’s (Xamiaxyetxw) perspective, Gitksan laws emerged from the earliest experiences of Gitksan peoples connecting to their lands.<sup>336</sup> The world view of the Gitksan also encompasses reincarnation, so being Gitksan not only extends into the future, it extends back through time to when the earth was still unstable and smoking, and

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<sup>333</sup> Solomon Marsden (Xamiaxyetxw) 9 May 1988, *supra* note 117 at 5934.

<sup>334</sup> According to Benedict Anderson, cosmology and the origin of the world were once indistinguishable and formed one of the ancient certainties of life in Europe. Capitalism, rapid communications, and social and scientific changes “drove a harsh wedge between cosmology and history” and enabled “people to think about themselves, and to relate themselves to others, in profoundly new ways”. Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London, UK: Verso, 1983) at 36.

<sup>335</sup> Neil Sterritt *et al.*, *Tribal Boundaries in the Nass Watershed* (Vancouver: UBC Press, 1998) at 15 [Sterritt *et al.*].

<sup>336</sup> Solomon Marsden, Xamiaxyetxw, 9 May 1988, *supra* note 117 at 5935.

through the generations of lifetimes recounted through the *adaawk*.<sup>337</sup> According to Joan Ryan, (former Hanamuxw), when Gitksan people die, they have to decide whether they will return to this life again, and if they choose to do so, they are born into the next generations.<sup>338</sup>

Reincarnation of humans is a separate ongoing cycle of life from that of the Gitksan names, although the two may overlap. Richard Daly writes: “Deceased holders of high names are said to reincarnate, their spirits usually returning to the babies of their own line of succession, to help out their descendants and maintain the House’s human prosperity”.<sup>339</sup> However, Don Ryan (Hanamuxw), has also heard of commoners and sometimes even slaves being reincarnated, although such individuals usually have some special gift that is noticed by the chiefs.<sup>340</sup> According to Antonia Mills, for the Gitksan, most reported reincarnations are within clan and are said to happen soon after death.<sup>341</sup> In other words, the names live on independently from people, and the individual humans that inhabit and fulfill the names may continue through their rebirth or change with succeeding generations (*anskiiyee*).<sup>342</sup>

How a people understand life, death, and their place in the universe will determine the kind of legal institutions they will build to manage their society.<sup>343</sup> In the case of reincarnation, there is an “expectation that people will be recycled on the same territory

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<sup>337</sup> See generally, Antonia Mills, “A Preliminary Investigation of Cases of Reincarnation Among the Beaver and Gitksan Indians” (1988) 30:1 *Anthropologica* 23-59 [Mills, “Investigation”]; and Antonia C. Mills, “A Comparison of Wet’suwet’en Cases of the Reincarnation Type with Gitksan and Beaver” (1988) 44:4 *Journal of Anthropological Research* 385-415 [Mills, “Comparison”].

<sup>338</sup> Interview of Joan Ryan (former Hanamuxw) (1992) in Gitwangak, B.C.

<sup>339</sup> Daly, *supra* note 48 at 67-68, with reference to the work of Antonia Mills, *supra* note 337.

<sup>340</sup> Don Ryan (8 May 2008) personal correspondence.

<sup>341</sup> Mills, “Investigation”, *supra* note 337 at 42.

<sup>342</sup> According to Fred Johnson, *anskiiyee* means generations and family. Fred Johnson (Lelt) 2 September 1986, *supra* note 194 at 1-41.

<sup>343</sup> Clark, *supra* note 332 at 8-16.

and within the same families [which] intensifies the bonds between kin”.<sup>344</sup> For the Gitksan, this means that the complex network of social, political, and legal relationships not only exists in the present, but also extends back in time and has been informed and strengthened by countless lifetimes.<sup>345</sup> Basically, a Gitksan world view founded on reincarnation creates a greater capacity for tolerance of shortcomings, as Mills explains:

One Gitksan chief explained that she accepted her daughter’s congenital lameness because she was told by her mother that the baby she was carrying was the reincarnation of her late mother-in-law, who was lame. The Gitksan...are highly tolerant of a person’s shortcomings because they see the limitations, peculiarities, aversions, and preferences as being brought back from former lives. Thus a baby that is jealous and teasing has these tendencies gently and lovingly corrected.<sup>346</sup>

Arguably, such an understanding of relationships and a general potential for tolerance would likely influence all aspects of a peoples’ lives, including the interpretation and application of law.<sup>347</sup> In this universe, the present self is also a reincarnated being formed by millennia of experience in kinship relationships in past lives. Not only does the self extend back in time, but it also projects forward into ongoing millennia of future generations and kinship relationships:

A group of mature siblings direct House affairs, while simultaneously engaging in the daily affairs of their affines. Brothers take wives to their home villages and raise their children there, yet for these brothers, it is the children of their sisters – who generally have married out and live in other villages – who are the inheritors of these brothers’ social legitimacy – his family history, regalia, stories, songs and names. His own children, whom he had nurtured and raised, inherit from their

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<sup>344</sup> Mills, “Comparison”, *supra* note 337 at 406.

<sup>345</sup> I do not take up the question of whether the Gitksan understand their laws are also reincarnated with each generation. Presumably they would imagine that their ancestors managed themselves according to the same legal traditions that the present generation is familiar with. At any rate, it is my opinion that what we imagine in the spirit world will reflect what we imagine and organize in the present.

<sup>346</sup> Mills, “Comparison”, *supra* note 337 at 406.

<sup>347</sup> While this is the extent to which I am willing and able to speculate on this question here, I do think further conversations about punishment, ethics, and agency would reveal much deeper insights that would be beneficial to figuring out present-day justice concerns and questions.

spatially distant mother's brother. Thus every family is composed of people with a plethora of crosscutting ties, stresses and interests.<sup>348</sup>

It is this Gitksan self that is at once an independent competitive agent and collaborative kinship group member, that is able to manage himself or herself in decentralized Gitksan society where there is no centralized bureaucracy for enforcement.<sup>349</sup> The understanding of the Gitksan self is as individual agent surrounded by countless, never-ending kinship relationships, and who is also a part of the ongoing kinship relationships around every other Gitksan. Such a way of being demands self-management and maintenance of the social, legal, economic, and political roles and responsibilities around each individual. This is less an altruistic ideal than a practical need for strong, independent members who are skilled at and capable of working collectively.

### 3.4(e)(ii) Relationship to Territories

You always see it, and your face is going by the spiritual things what's on the territory, and you always see the creeks are going down. You always see the mountains and the wildlife was on the mountain at that time when you're singing this song [limx oo'y]. This is what I'm talking about, the spiritual things, connection to the land. And you can see those things in your vision. You can't help but seeing it while you're singing that song.<sup>350</sup>

It becomes evident from all the testimonies that the territories are absolutely central to being Gitksan. The connection between the House and its territories extends back to when the lands were still “treeless and unstable”, and where people experienced “flooding,

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<sup>348</sup> Richard Daly, “Pure Gifts and Impure Thoughts” (Paper presented at the Ninth International Conference on Hunting and Gathering Societies, Heriot-Watt University, Edinburgh, 2002), online: University of Aberdeen <http://www.abdn.ac.uk/chags9/1daly.htm> at 7.

<sup>349</sup> Marie Wilson, “The Right to Be Responsible for...” n.d. at 4 [unpublished].

<sup>350</sup> James Morrison (Txaaxwok) 20 April 1988, B.C.S.C. trial transcript, 5247 at 5280, evidence for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185 [James Morrison (Txaaxwok) 20 April 1988].

earthquakes, and volcanoes”.<sup>351</sup> Over time, the people found stable lands and established villages, and settled across the regions of northwest British Columbia and these early experiences of land are recorded in the *adaawk* of each House. The territories are closely intertwined with the institutions comprising Gitksan society including law, economy, and governance. The Gitksan understand that their laws emerged from their earliest experiences of connecting to their lands.<sup>352</sup>

It is the head chief who has the *daxgyet* (power) and the legal capacity to hold the territory on behalf of the House.<sup>353</sup> According to Solomon Marsden (Xamiaxyetxw), “[t]he most important law of the Gitksan people are the laws concerning the territories. This is the most important law.”<sup>354</sup> The territories are represented on the poles, and the House recreates its connections to the territories at each pole-raising Feast through the recounting of its *adaawk* and *nax nox*, and by singing the *limx oo’y* (memorial song). This intertwining of people, history, and land is what creates Gitksan jurisdiction according to Solomon Marsden (Xamiaxyetxw):

When the chief is planning to raise the pole, it is very important because he thinks back of his territory where he would put all – on this pole he would put all the power and authority that he has and he’ll put all the crests in his *adaawk* on this pole. And even around this area we see totem poles and it’s – the Indians know how important it is to our people, because it shows where our power and authority and jurisdiction is. This is what these poles show where it lies. And this totem pole is called *Xwtsaan*.<sup>355</sup>

James Morrison (Txaaxwok) describes the spiritual power (*amet hexw*)<sup>356</sup> involved with singing the *limx oo’y* and how this connects the people to the land and the past to the

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<sup>351</sup> Sterritt *et al.*, *supra* note 335 at 15.

<sup>352</sup> Solomon Marsden (Xamiaxyetxw) 9 May 1988, *supra* note 117 at 5935.

<sup>353</sup> *Ibid.* at 5940.

<sup>354</sup> *Ibid.* at 5934.

<sup>355</sup> *Ibid.* at 5963.

<sup>356</sup> *Amet hexw* means that “life is the [good] spirit”. “*Hexw* is spirit and *Amet* is good.” James Morrison (Txaaxwok) 20 April 1988, *supra* note 350 at 5281.

present. Mr. Morrison told the Court: “This is what we remember at that time, because you can feel it when you sing that song and spirits connection is what is given to us in those days. And the – the spirits, you can feel it. You don't see those things, but you also see the vision sometimes, what's on the territory, while they're singing that song.”<sup>357</sup>

Mr. Morrison also explains how Gitksan people's formative experiences in the distant past were a source of Gitksan law and how the *limx oo'y* is a way of maintaining this connection with the basis of law.

Well when, while they ever singing that song, that's memorial, that's today, when they are singing it and rattle, when they are singing it in a quiet way, while they are singing that song, I can feel it today that you can feel something in your life, it memories back to the past what's happened in the territory. This is why this song, this memorial song. While the chief is sitting there I can still feel it today while I am sitting here, I can hear the brook, I can hear the river runs. This is what the song is all about. You can feel the air of the mountain. This is what the memorial song is. To bring your memory back into that territory. This is why the song is sung, the song. And it goes on for many thousands of years ago. And that's why we are still doing it today. I can feel it. That's how they know the law of Indian people, as this goes on for many years and I know this is how they have been handled in the feast, the first one has to be the one that sung the song.<sup>358</sup>

The witnesses explained to the Court that ownership of their territories (*xalyax lax yip*) meant having “jurisdiction of a land and the authority of that land”.<sup>359</sup> Many Gitksan people referred to their territories as their banquet table (*an t'ookxw*),<sup>360</sup> their table (*ha'nii tookw*),<sup>361</sup> or simply, their storage area (*an luu to'os't*).<sup>362</sup> While the Gitksan have laws of trespass, they also have a much more inclusive approach to determining access to territories. This inclusivity is expressed by Art Mathews (Tenimgyet): “[An

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<sup>357</sup> *Ibid.*

<sup>358</sup> *Ibid.* at 5269-70.

<sup>359</sup> James Morrison (Txaaxwok) 18 April 1988, B.C.S.C. trial transcript, 5081 at 5132, evidence for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185 [James Morrison (Txaaxwok) 18 April 1988].

<sup>360</sup> Art Mathews (Tenimgyet) 18 March 1988, *supra* note 118 at 4777.

<sup>361</sup> James Morrison (Txaaxwok) 18 April 1988, *supra* note 359 at 5090.

<sup>362</sup> Also spelled *An luutuus*. Solomon Marsden (Xamiaxyetxw) 9 May 1988, *supra* note 117 at 5947.

t'ookxw]...simply means a banquet table that you have to welcome people and grant permission to them to come and use it, use your territory. That is a law that's been handed down that we do even today.”<sup>363</sup> James Morrison (Txaaxwok) expresses a similar view:

Well, that's where you got your food and everything on the territory. That's where...you got your food. All the animals was on the territory and that seems to be right on the table. That's where we have on your table, or you have it on the bark of the trees, you spread it on the ground. That's where you been feeding with your family. That's what it means. That's where your food from that territory, hunting ground.<sup>364</sup>

Territory boundaries and corner-posts (*an leetiks*) generally use stable natural land features such as streams (that never run dry) or mountains as reference points.<sup>365</sup> Houses also blaze trails to mark and protect their territories. Other territorial markers include painted,<sup>366</sup> carved (*gyetim gan*, *gan* means wood),<sup>367</sup> and blazed trees (*an leetiks*).<sup>368</sup> Michael Blackstock cautions against assuming that all the various markers on the territories are simply territorial symbols because there are many intended meanings. For example, some marked trees represent an exchange in territory when land is paid as compensation,<sup>369</sup> some may be a part of animal traps,<sup>370</sup> and others are simply intended to be art forms.<sup>371</sup>

As previously explained, the hosting chief of a pole-raising Feast will recount and name the boundaries, and refer to the various markers in order to confirm them and to ensure that they are correctly remembered by the guests. Mr. Morrison explains: “It’s in the

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<sup>363</sup> Art Mathews, Tenimgyet, 18 March 1988, *supra* note 118 at 4777.

<sup>364</sup> James Morrison (Txaaxwok) 18 April 1988, *supra* note 359 at 5090.

<sup>365</sup> *Ibid.* at 5133.

<sup>366</sup> Michael D. Blackstock, *Faces in the Forest: First Nations Art Created on Living Trees* (Montreal: McGill-Queen’s University Press, 2001) at 90 [Blackstock].

<sup>367</sup> *Ibid.* at 96.

<sup>368</sup> *Ibid.* at 108.

<sup>369</sup> Mary Johnson (Antgulilbix) 29 May 1987, *supra* note 318 at 801.

<sup>370</sup> Blackstock, *supra* note 366 at 100.

<sup>371</sup> *Ibid.* at 109.

Feast, and anyone that is sitting in the Feast listen to you what you said in the Feast, *Ann lii diiks*. That's where the law has been passed onto another chief."<sup>372</sup>

It also becomes obvious from the compensation case examples described above that land is central to both the Gitksan legal order and economy as a form of payment. However, the relationship to land and the dividing of land is very different from that of private property. It is held by the House chief on behalf of the House and there are no concepts in Gitksan law that are equivalent to selling land or subdividing land. For instance, Solomon Marsden (Xamiaxyetxw) told the Court that there were no Gitksan laws that allowed a chief to change the boundaries of his or her territories.<sup>373</sup> This exchange during commissioned evidence between Thomas Wright (Guuhadakxw) and one of the Crown lawyers reveals the distance between the Gitksan and Canadian constructs of property. Mr. Wright simply does not understand the land as a commodity or a capital asset – although I am not suggesting that this is a static or homogenous understanding among Gitksan people today.

Mr. O'Byrne	After you became Guuhadakxw, did you try to increase the amount of lands you had?
Guuhadakxw	It's not up to me. I never created this world that I should make it bigger. The size of our land remains the same. We can't make it bigger.
Mr. O'Byrne	Why can't you make it bigger?
Guuhadakxw	I can't do it. But maybe some of my other people could do it from Kisgagas. There is a lot of us. Kisgagas owns a lot of land, even around this area.
Mr. O'Byrne	If the people from Kisgagas wanted to make the land bigger, what would they do?
Guuhadakxw	I guess the white people know how to increase their own lands, but Indians don't do that. Once they have a parcel of land, they keep it as that same size. It was 'Wiik'aax, Xsimxsan and 'Wiiminoosikx that surveyed this area.
Mr. O'Byrne	Could you get more land, for example, by taking some from

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<sup>372</sup> James Morrison (Txaaxwok) 18 April 1988, *supra* note 359 at 5133. As with many of the other Gitksan terms, there are a number of spelling variations throughout the transcripts and other documents.

<sup>373</sup> Solomon Marsden (Xamiaxyetxw) 9 May 1988, *supra* note 117 at 5935.

- another tribe?  
 Mr. Grant Do you mean another, a non-Gitksan?  
 Mr. O'Byrne I'll break it down into two questions and rephrase it. Could you get more land by taking it from people other than Gitksan people?  
 Guuhadakxw The Indians are finished now with that. And now that they have it, nobody has the right to take it away.  
 Mr. O'Byrne In the past, in the time of your grandfathers, did the Gitksan people take lands from non-Gitksan people?  
 Mr. Grant To your knowledge.  
 Guuhadakxw No, they can't do that. It's already finished and nobody can take this land away. It's finished already.<sup>374</sup>

While Thomas Wright was still under cross-examination during the commissioned evidence, the distance between the more trust-like, collective Gitksan ownership and the private ownership of property was further illustrated:

- Mr. O'Byrne Now, Mr. Wright, I apologize and I ask you to be very patient with me, but I don't understand what you mean by owning the land.  
 Guuhadakxw Because I'm an Indian and we come from our mothers, I come from my mother and if she has another baby then that person, that baby will own land too.  
 Mr. O'Byrne Could you tell me what you mean by ownership of land?  
 Guuhadakxw The Indians owned a lot of land. It's not only me. There is a lot of Indians on this earth and they own a lot of land, but we own Kisgagas.  
 Mr. O'Byrne Well, for example, Mr. Wright, could you go and build a house on the land where you hunt and fish and trap?  
 Guuhadakxw My brothers have houses on these lands. They burnt down when there was a forest fire caused by lightning.<sup>375</sup>

However, there are many ways in Gitksan law that enable Houses to control, arrange access to, and manage use of their territories and resources.<sup>376</sup> With these laws, the Houses are able to allocate various privileges to people within the Gitksan kinship system. For example, the law of *yuugwilatxw* is one way that a House may grant access privileges

<sup>374</sup> Thomas Wright (Guuhadakw) 30 April 1986, *supra* note 20 at 2-136.

<sup>375</sup> *Ibid.* at 2-141.

<sup>376</sup> Some of these laws are also referred to in the next chapter containing the 2005 interviews.

to a husband upon his marriage to one of its women members.<sup>377</sup> The husband will only have the privilege as long as he remains alive and married to the House member.

Several other laws governing territorial access include *amnigwootxw* which is when the son travels with his father on his father's territory.<sup>378</sup> When the father dies, the son must seek the permission of the head chief of his father's House if he wants to continue being on his father's territory rather than returning to his own House territory. There is an accompanying protocol that one has to contribute financially to his or her father's House's Feasts. This payment is called *aye'* and it is considered a form of "goods and services tax" for use of the paternal territory.<sup>379</sup> When the son does seek permission from the chief of his deceased father's House, "He would not be refused, because when his father dies all the deceased person's children are taken by the Wil'na t'ahl as their own children and this is why they don't refuse them to go on to the territory".<sup>380</sup>

Solomon Marsden (Xamiaxyetxw) also provided information about the law, *nii yuuwit*, that governs the crossing of someone else's territory. Under this law, a Gitksan person has the right to cross another person's territory and he could hunt, "if the animal was right on that trail. They could shoot that animal on the trail, but they can't go in and hunt on that territory".<sup>381</sup>

One of the lessons that can be learned from the Gitksan legal cases is that to effectively manage conflict on the territories, each Gitksan person should have a detailed knowledge of Gitksan laws, current and past kinship relationships, and the various

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<sup>377</sup> Solomon Marsden (Xamiaxyetxw) 9 May 1988, *supra* note 117 at 5940.

<sup>378</sup> *Ibid.* at 5948.

<sup>379</sup> Gitksan dictionary, *supra* note 88 at tab 9.

<sup>380</sup> Solomon Marsden (Xamiaxyetxw) 9 May 1988, *supra* note 117 at 5948.

<sup>381</sup> *Ibid.* at 5957.

arrangements and time frames that govern the awarded privileges.<sup>382</sup> Kinship, land, and history are so closely intertwined that it appears impossible to unravel any one of them. At the end of the day, the Gitksan legal order and laws are built on an understanding of Gitksan people, their past, and their territories at any point in time. As with other law, the witnesses' evidence shows that Gitksan law has changed and is capable of further change over time to reflect new circumstances. What understanding of "Gitksan" will inform new Gitksan law today and in the future? I will return to this question in chapter 6.

### **3.4(e)(iii) Relationships with Non-Human Life Forms**

Throughout their evidence, Gitksan witnesses provided examples of their extensive relationships with non-human life forms. The principles that guide these relationships form the underpinning for the Gitksan laws with which Gitksan people govern their use of land and resources. Solomon Marsden (Xamiaxyetxw) provides a very practical example of the relationship between humans and animals: "It is clear to our people, the Aluugigyet, that when this animal told of the way he should be handled when it is killed and this is one – this is where our laws have come from."<sup>383</sup>

As with the territories, the *limx oo'y* is a very powerful spiritual way for the Gitksan to relate to non-human life forms as well as to the Creator.

Mr. Rush  
Txaaxwok

Can you just tell us what it was that the song brought back? See, this is what comes back into your memory at the time when the song that was sung in the past many thousands of years ago, and this is why you have to be set as steady in order to receive it. You receive it. If you don't understand it, you're not going to receive it. This is what the spiritual things, and that's why it's moving. You can see it just like a film in your eye, because you know it was on the territory, what was on that. All the animals that you're going to be

<sup>382</sup> In the next chapter, some of the interviewees talk about the consequences of the younger generation not having the same level of knowledge about Gitksan laws and kinship.

<sup>383</sup> Solomon Marsden (Xamiaxyetxw) 9 May 1988, *supra* note 117 at 5935.

hunting, you can see that in your spirit. Today you can still see those things. When you mention today, I feel it, and that many people – that today this is where they've been out to the territory and sometimes the song in the feast. That's where it originally started from, in the feast, and you can see those things, or it comes to your mind. You've got to listen, be careful as today, and then the spirit will talk to you. And you always talking to him in the same time, which is the creator this time. That's why it's the beginning in those days. That the creator has direct to the Indian people in that time. They're talking to them.

Mr. Rush  
Txaaxwok

Is there a ... Gitksan word for the creator?  
Simoogit Laxhagii. Laxhagii is higher than those chiefs.  
That's why I explain that.<sup>384</sup>

According to James Morrison (Txaaxwok), owning the territories meant that Gitksan people actually had to be on the territories. In this regard, the role of the chief was as hands-on manager of the lands and resources.<sup>385</sup> Mr. Morrison explained that the chiefs

[w]ould have to be out there, and this 10 or 15 or 20 of them, sub-chiefs, was out there, and also the chief, like myself, managing that territory, they have to know where they been trapping and where they been hunting, what animals has been taken out of there. They have to know that. And if there is – was other people was out there and they report to each other. They have to know what animals was taken out to its different group, in order to know what was taken out every year, just like the management of – unit management they call it in white people. Ourselves, we call it Wil na tihl taahl. Wil na tihl taahl, it's group and it's a company or whatever you call it.<sup>386</sup>

As many of the witnesses explained to the Court, the reciprocal relationship between the Gitksan and non-human life forms (i.e., fish, birds, animals, spirits,<sup>387</sup> etc.) was one of demonstrated respect in exchange for the lives of the animals and fish to feed the Gitksan.<sup>388</sup> One of the practices was to never leave the remains of animals, birds, or fish on the ground as this was understood as a sign of serious disrespect. Such actions might have repercussions for the Gitksan since the animals, birds, or fish could refuse to continue

<sup>384</sup> James Morrison (Txaaxwok) 20 April 1988, *supra* note 350 at 5281.

<sup>385</sup> Some of the related contemporary issues are dealt with in the next chapter.

<sup>386</sup> James Morrison (Txaaxwok) 18 April 1988, *supra* note 359 at 5143.

<sup>387</sup> I do not explore the relationship between the nax nox and the Gitksan. For an excellent article, see Marsden, Adawx, *supra* note 59.

<sup>388</sup> See for example, Stanley Williams (Gwis Gyen) 11 April 1988, *supra* note 49 at 18.

to feed the Gitksan or they could cause some other catastrophe that would cause severe suffering for the Gitksan. The *adaawk* contain many examples of human foolishness, and these serve as ongoing guidelines for human behaviour.<sup>389</sup> James Morrison (Txaaxwok) described one of the practices to the Court:

- |          |  |
|----------|--|
| Mr. Rush | When you said the bark of the tree, was the bark of the tree used as a table in some form or as a mat?   |
| Txaaxwok | Yes, they use it with any other type of thing. You can use it for skinning, in order to get a clean skin in, or the table, so you – all those parts of the animals won't go through between the boughs and things like that, because you have to get it together and throw them in the fire. That's why they using those things.   |
| Mr. Rush | What's thrown into the fire?   |
| Txaaxwok | All the part of the animals. Like the fish bones and all those other things that you can get together and make sure there is nothing missing and put it together and throw it in the fire, because that's the Indian laws, that you can't miss out those bones. You have to put it back in the fire. That's why they are using those – call it just like the table cloth. <sup>390</sup> |

Gitksan law reflects this underlying ethic of reciprocal relationships with non-human life forms. The intellectual processes of law – legal reasoning, interpretation, and application – are actually founded on Gitksan people's understanding of themselves in relationship with non-human life forms.

### 3.5 Chapter Conclusion

When I began this chapter, I chose not to write an ethnographic description of Gitksan law that was pinned in the imaginary past, but rather I intended to develop a working understanding of Gitksan law and to write about it as a form of law, as Gitksan law. My premise is that Gitksan law is a very alive and dynamic part of Gitksan people's past as well as part of their present and future. Given this, I have provided perspectives about

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<sup>389</sup> See for example, Olive Ryan (Gwaans) 11 June 1987, *supra* note 41 at 1111-17.

<sup>390</sup> James Morrison (Txaaxwok) 18 April 1988, *supra* note 359 at 5090.

Gitksan law from both internal and external perspectives. That is, what does the law look like from the inside insofar as its functions and reasoning, and what does it look like from the outside in terms of its forms and players?

Returning to Richard Overstall's classification system of Gitksan law: The case studies amply demonstrate the practical exercise and application of what he calls primary laws that "have to be followed in order to carry out one's reciprocal obligations to others. Examples include asking permission of an animal or plant before taking it, never taking more from the land than one needs, and always giving something in return".<sup>391</sup> These primary laws are founded on deeply held ethics that derive from Gitksan people's understanding of history, land, non-human life forms, and kinship, and understanding of the self as an independent, collaborative agent.

Overstall's secondary laws are those of interpretation that have been demonstrated in the discussions, legal reasoning, and applications (i.e., settlements, compensation, agreements, etc.) without which there would not have been any legal case examples. These secondary laws are continually reinforced at each Feast and through the extensive traditions and practices that actually contain part of the record of Gitksan law. The laws regarding adoption, access and privileges to territories, and succession are all examples of secondary laws.<sup>392</sup>

Lastly: the strict laws that Overstall describes as constitutional in nature and that govern the legal framework of Gitksan society and maintain the "obligations to the land" (e.g., clan exogamy, inalienability of territory, and absolute liability for human actions on

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<sup>391</sup> Overstall, "Encountering", *supra* note 132 at 44.

<sup>392</sup> *Ibid.*

the territory).<sup>393</sup> The public witnessing and accountability processes, the various levels of consultations (i.e., House membership, clan, wilnadaahl, niidihl, *niid'nt* (guests), marriage, and village), and the fulfillment of the roles and responsibilities of Gitksan people throughout the society, are all evidence of Overstall's strict laws.

The Gitksan legal order and laws are not perfect, but they certainly enabled Gitksan people to effectively manage their society, and they offer many rich and wise resources for tackling present-day problems, concerns, and conflicts. Did *Delgamuukw* undermine Gitksan legal traditions and therefore Gitksan people's ability to manage conflict? Yes, because it continued the undermining of Gitksan legal traditions that was and is a part of colonialism, and it set up a Gitksan truth that became disconnected from everyday living. Gitksan legal traditions are founded on being Gitksan – whatever that is at any given time – and to work effectively, conflicts and problems must be dealt with in Gitksan institutions including the public accountability and witnessing processes. As I argued earlier in this chapter, Gitksan institutions were impacted by recent history pre-*Delgamuukw* and while change in and of itself is not a problem, unexamined change can generate confusion, resentment, and conflict.

This chapter lays the groundwork for the development of a Gitksan legal theory – including an articulation of an overall coherent picture of Gitksan legal traditions, general concepts, general normative principles, and general working theories principles. These concepts are drawn from the law-in-the-world case examples provided here – from inside human interactions in which people sorted out a range of legal issues and conflicts. These cases reveal many insights about human relationships and behaviours, responsibilities and obligations, life and death, and history – all of which shape the form and function of

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<sup>393</sup> *Ibid.*

Gitksan legal traditions. Finally, my primary question throughout this project is whether and how the experience of *Delgamuukw* affected Gitksan people's ability to manage conflict through their legal traditions. The only way that I can begin to answer this question is by developing a greater understanding of Gitksan legal traditions – hence this chapter. I will pick up this research question again in chapter 6.

## CHAPTER 4

### Learning from the Interviews

[A]s many [Gitksan] elders told me, “We know our laws, we know we own the land, we know our rights on the land. We don’t need the court to tell us that. . . . [Y]ou have to have the court tell the government what those rights are so that the government would deal with it.” (Peter Grant)<sup>1</sup>

#### 4.1 Introduction

With the title of his book, Stuart Hampshire established his basic argument in three words: *Justice is Conflict*. “Within any nation,” he wrote, “there will always be contests arising not only from conflicting interests, particularly economic interests, but also from competing moral outlooks and entrenched beliefs.”<sup>2</sup> In other words, there is no perfect state that a people can achieve wherein there is no conflict; but rather, conflict is an integral part of people living together. In the spirit of Hampshire’s approach, the overall purposes of this chapter are to explore historic and present-day conflict<sup>3</sup> among the Gitksan as discussed by the interviewees, to explore the extent and nature of conflict that might have been generated by the *Delgamuukw* title action, and to begin identifying possible resources for conflict management in Gitksan legal traditions.<sup>4</sup>

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<sup>1</sup> Interview (9 July 2006), Gibsons, BC, at 4 [Grant, 9 July 2006].

<sup>2</sup> Stuart Hampshire, *Justice is Conflict* (Princeton: Princeton University Press, 2000) at 79.

<sup>3</sup> In order to simplify my treatment of such an enormously complex matter, my use of the term “conflict” is inclusive of the original conflict and the responses to conflict that are often separately described as “the dispute”. Also, since conflicts such as the one described here appear to feed themselves by continually generating more conflict, such technical differentiation may not always be useful.

<sup>4</sup> “A legal tradition... is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught.” J. H. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, 2nd ed.

Peter Grant, legal counsel for the Gitksan<sup>5</sup> and Wet'suwet'en<sup>6</sup> plaintiffs in *Delgamuukw*, observed that like any society, the Gitksan had ongoing internal conflict. The crucial question Grant asks is whether today's Gitksan people will be able to draw on the resources of their own legal traditions to manage and resolve this conflict. According to Mr. Grant,

[t]he [Gitksan] system has to have conflicts to survive. I was told that over and over again during the *Delgamuukw* case. I don't say that when those chiefs were directing us in *Delgamuukw*, and when those old chiefs were alive, that it was all bliss and a golden age. I think those are myths that we sometimes put on the past, but in reality, no, there was conflict then too. There were bitter disputes between people who were in their 80s. And very hard lines of issues. So the risk for the Gitksan is not the fact that they are disputing and conflicting with each other, it is will they be able to recognize that there is a way in their own system to deal with that dispute. Will they be able to do that?<sup>7</sup>

Grant's perspective is important in that he does not view conflict as a failing of Gitksan society; rather, he recognizes that conflict is a normal condition of large groups of people living together. Similarly, Don Ryan (Hanamuxw) argues that today's conflict must be seen as a demonstration of just how alive the Gitksan system is – even if people are finding it a struggle to manage it.<sup>8</sup> If Gitksan people did not care deeply about being Gitksan in today's world, there would be no disputes about names, territories, intellectual property, kinship, Feasts, governance, or any other aspect of being Gitksan.

The purpose of this chapter is to explore the issues raised in my conversations with the interviewees. What becomes clear is that many of these issues are reflected in and linked with the more extensive discussions in chapters 3 and 5. This chapter illustrates how

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(Stanford, Cal.: Stanford University Press, 1985) at 1, quoted in John Borrows, *Indigenous Legal Traditions in Canada* (forthcoming, 2009) at 8.

<sup>5</sup> Peter Grant was legal counsel for the Gitksan at all three levels of Court – British Columbia Supreme Court, British Columbia Court of Appeal, and the Supreme Court of Canada.

<sup>6</sup> Peter Grant was not legal counsel for the Wet'suwet'en at the Supreme Court of Canada.

<sup>7</sup> Grant, 9 July 2006, *supra* note 1 at 12.

<sup>8</sup> Interview of Don Ryan (9 July 2005), Kamloops, BC [Ryan, 9 July 2005].

the interviewees' perspectives and concerns directly connect to the *Delgamuukw* trial transcripts in chapter 3 and the theorizing of Gitksan legal traditions in chapter 5.

There are four main sections to this chapter. I first explain how and why, as a result of the interviews I undertook in 2005 and 2006, my research focus shifted to an exploration of conflict management. Initially, I expected that those conversations would yield insight into analytical reflections about *Delgamuukw* and perspectives on some of the possible resultant changes to Gitksan people's relationships with one another and their relationship to the land. So while I asked questions based on my assumptions, what the interviewees actually talked about was what was more important to them – conflict. This caused me to refocus my research framework to an examination of Gitksan conflict management as a part of Gitksan social relationships and law, and whether and how this system of conflict management was impacted by the overall, collective experience of *Delgamuukw*. Issues relating to social relationships and connection to land did emerge, but almost always within the context of conflict.

Second, I introduce the interviews and provide a small on-the-ground backdrop to the *Delgamuukw* trial and litigation. *Delgamuukw* emerged as a part of an overall political strategy for the Gitksan that was aimed at fulfilling their responsibilities as Gitksan people to protect their territories. This larger political strategy was directly connected to legal and political developments across Canada both in the jurisprudence and with the repatriation of the *Canadian Constitution, 1982*.<sup>9</sup>

Third, I provide a discussion of historic and recent conflict among Gitksan people, and I identify conflict management processes in Gitksan legal traditions. The interviewees provided many substantive examples of actual disputes in order to discuss their perceptions

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<sup>9</sup> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

of conflict as well as practical accounts of their roles and responsibilities in its resolution and management. From this discussion, I have begun to sketch out the coherence of the Gitksan legal order, which I expand further and begin to theorize in chapter 5.

Finally, I analyse the nature of and extent to which the case of *Delgamuukw* has contributed to increased conflict among the Gitksan people. In part, what this section reveals is a general undermining of Gitksan conflict management that is linked to colonial history and to the contemporary political situation of the Gitksan and other indigenous peoples in Canada. I explore a number of critical questions about the experiences of Gitksan people during and after *Delgamuukw*. While these insights are important to appreciating how major aboriginal rights litigation can impact a people, I conclude that the experiences of the Gitksan cannot be entirely attributed to *Delgamuukw*, but rather must be appreciated within a deeper and broader understanding of the complex of power relationships between Gitksan people and Canada, and between Gitksan law and Canadian law. This discussion will be picked up again in chapter 6.

## **4.2 The Interviews**

This chapter draws directly on the interviews I conducted in 2005 and 2006 with twelve key participants in the *Delgamuukw* court action.<sup>10</sup> The interviewees included the former litigation co-ordinator, the evidence co-ordinator, political leaders, expert witness, the communications manager, a researcher, the hereditary chief plaintiff, a service provider, legal counsel, the library technician, and a court interpreter. A number of the interviewees were directly involved politically in the groundwork leading up to the decision to launch

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<sup>10</sup> A copy of the information handout is attached as Appendix "A".

*Delgamuukw*.<sup>11</sup> At the time of the interviews, all but two people interviewed were on the outside of the current central Gitksan political bureaucracy, the Gitksan Treaty Office (also called the Gitksan Hereditary Chiefs' Office).<sup>12</sup>

There were two parts to the general discussion guide I used for the interviews.<sup>13</sup> The first section contained questions about the interviewee's role and responsibilities, their hopes and goals for the *Delgamuukw* legal action, experiences and highlights, surprises, and lessons learned. The second part contained post-*Delgamuukw* questions about changes to internal social relationships and to Gitksan people's relationship to land. The conversation topics in the interviews included past and present conflicts, past and present dispute resolution processes, Gitksan and western law, adoption, local political dynamics, Feasts, and spirituality.

People were very generous with their time, and the interview times varied from one to three hours although most were about ninety minutes in duration. For some of the interviewees, the interview was a painful process that summoned up emotions from loss to anger. For example, of the 120 elders Neil J. Sterritt (Mediig'm Gyamk) worked with in the several decades leading up to the launch of *Delgamuukw*, only five were still alive at the time of my interview with him.<sup>14</sup> Another interviewee experienced a deep sense of personal failure because of post-*Delgamuukw* political events.<sup>15</sup> Only one of the twelve interviewees

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<sup>11</sup> Eleven interviews were completed in either the homes or offices of the interviewees located in the B.C. communities of Kamloops, New Hazelton, Hazelton, Gitwangak, Glenvowell, Gitanyow, Gibsons, and Telkwa. The twelfth interview took place in a rural area outside Hazelton in the home of Neil John Sterritt.

<sup>12</sup> The one person who remained publicly involved with the central Gitksan legal and political machinery post-*Delgamuukw* was the late Joan Ryan who held the hereditary chief's name of Hanamuxw. The other person who remains directly involved, but not in a public role is Don Ryan, who has held the name Hanamuxw since Joan Ryan's death in 2007. Most of the other interviewees continue to work in Gitksan territories, but not with the current centralized Gitksan political bureaucracy.

<sup>13</sup> A copy of the interview guide is attached here as Appendix "B".

<sup>14</sup> Interview of Neil J. Sterritt (11 July 2005), Hazelton, BC, at 9 [Sterritt, 11 July 2005].

<sup>15</sup> Interview of Anonymous (9 July 2005) at 4 [Anonymous, 9 July 2005].

requested anonymity. Most of the interviewees asked that the recorder be turned off once or twice when discussing experiences or observations that they did not want to become public. In respect for the interviewees' wishes, I have not included any of these more sensitive narratives in this dissertation.

I recorded the interviews on a digital recorder and transcribed them verbatim into Microsoft Word files. I also took hand-written notes during the interviews. A copy of the interview transcript was provided to interviewees who requested them. All of the interviewees signed consent forms in compliance with the University of Victoria ethics policy and my ethics approval certification.<sup>16</sup> I paid interviewees that were unemployed a small honorarium in recognition of their time and expertise.

### 4.3 Backdrop

Several of the interviewees provided a small backdrop leading up to the Gitksan's<sup>17</sup> decision to undertake an aboriginal title legal action. In the late 1960s, the Nisga'a (formerly spelled Nishga) initiated the *Calder* legal action which was heard by the British Columbia Supreme Court in 1969 and later decided by the Supreme Court of Canada in 1973.<sup>18</sup> In the mid to late 1970s, the Gitksan and Wet'suwet'en were attempting to negotiate a land claims settlement through a tribal council structure based on the band council system<sup>19</sup> of eight bands (six Gitksan and two Wet'suwet'en). Three of the interviewees – Don Ryan (Hanamuxw), Neil J. Sterritt (Mediig'm Gyamk), and Gary Patsey (Galli Skalan) – were involved in these very early days of organizing. At that time,

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<sup>16</sup> A copy of the consent form is attached as Appendix "C".

<sup>17</sup> Obviously, the Wet'suwet'en (formerly called Carrier) people also made this decision since they were the other plaintiff group, but I am focusing only on the Gitksan in this research project.

<sup>18</sup> *Calder v. British Columbia* (Attorney General), [1973] S.C.J. No. 56, 34 D.L.R. (3d) 145 [*Calder*].

<sup>19</sup> In accordance with the *Indian Act*, R.S.C. 1985, c. I-5.

the federal policy in place was to negotiate with only six aboriginal groups at any one time across Canada. In B.C., the Nisga'a were negotiating with the federal government, and it did not appear as though there would be an opportunity for the Gitksan and Wet'suwet'en to begin their land claims negotiations.

In 1977, the Gitksan-Carrier Declaration was delivered to then minister of Indian and northern affairs, the Honourable Hugh Faulkner, in Kispiox, B.C. This political declaration set out Gitksan and Wet'suwet'en ownership and jurisdiction over 25,000 square miles of Gitksan and Wet'suwet'en territory.<sup>20</sup> By this time, at least for the purposes of advancing this legal action, there was a deliberate shift in local political authority from the band council system back to the Gitksan House groups and hereditary chiefs as legal holders of the House territories according to Gitksan law.<sup>21</sup> For example, it was the Gitksan and Wet'suwet'en House groups, not the bands, that were the plaintiffs in *Delgamuukw*. This tension continues today with the hereditary system being internally recognized in the Feast hall while the bands receive external recognition as per the *Indian Act* and funds from the State. One of the interviewees, Victoria Russell (Amsisay'txw), who was in high school at the time, recalls how all the students from the villages were bussed to Kispiox for the presentation of the Gitksan-Carrier Declaration. Russell described the dignity of the chiefs and the sense of power she felt in seeing, “[a]ll of the chiefs...in Kispiox Hall in their

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<sup>20</sup> Interview of Gary Patsey (9 July 2005) Glenvowell Band Office, Glenvowell, BC. The Gitksan-Carrier Declaration was written by Neil J. Sterritt, Don Ryan, Gary Patsey, and Ardythe Wilson. At this time, the Gitanyow (formerly, Kitwancool) were a part of the Gitksan-Carrier Tribal Council.

<sup>21</sup> For further explorations on various aspects of this question, see generally Richard Daly, *Our Box was Full: An Ethnography for the Delgamuukw Plaintiffs* (Vancouver: UBC Press, 2005) [Daly]; P. Dawn Mills *For Future Generations: Reconciling Gitksan and Canadian Law* (Saskatoon: Purich Publishing, 2008) [Mills]; Albert Peeling, “Traditional Governance and Constitution Making Among the Gitanyow” (2004), online: National Centre for First Nations Governance <http://www.fngovernance.org/pdf/Gitanyow.pdf>.; and Natalie Oman, “Paths to Intercultural Understanding: Feasting, Shared Horizons, and Unforced Consensus” in Catherine Bell & David Kahane, eds., *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) 70-93.

regalia....there was Weget, Delgamuukw, Gwis Gyen, Guksan, Gitsegukla Weget, all of the hereditary chiefs of the Gitksan were there in their regalia.”<sup>22</sup>

By 1976, the Gitksan-Wet’suwet’en had established a land claims office and in cooperation with Carlton University,<sup>23</sup> had implemented a specially designed research training program for Gitksan and Wet’suwet’en researchers.<sup>24</sup> At this time the focus was on fishing cases, hunting rights cases developing in central Canada, and the serious overlap implications created by the *Calder* case.<sup>25</sup> *Delgamuukw* arose from the combined events of the *Calder* and *Bear Island*<sup>26</sup> decisions, and the repatriation of the *Canadian Constitution, 1982*. According to Neil J. Sterritt (Mediig’m Gyamk), a number of discussions were held from 1981 to 1983 with key aboriginal leaders<sup>27</sup> from across Canada about a possible major court action that would, “make or break us, and turn this logjam at this constitutional conference, this process around”.<sup>28</sup> Three criteria were developed for deciding where such a court action would be launched: financial resources, political will, and people with life experience on the land. In Sterritt’s and Ryan’s discussions with key political leaders, it was agreed that the Gitksan and Wet’suwet’en could best meet these criteria.

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<sup>22</sup> Interview of Victoria Russell (12 July 2005) Gitanyow, BC, at 3 [Russell, 12 July 2005].

<sup>23</sup> Interview of Don Ryan (9 November 2008). According to Don Ryan, a number of people at Carlton University were instrumental in helping to organize this initiative. Two of the main organizers were historian Scott Clark and anthropologist John Cove.

<sup>24</sup> There were many educational and training initiatives designed to enable local people to be involved with all aspects of the on-the-ground *Delgamuukw* preparation and trial. These included library technician training, genealogy research methodologies, fishery technician training, territorial management training, forestry technician training, teacher training, etc.

<sup>25</sup> For an in depth discussion and history of the Nisga’a-Gitksan overlap dispute, see Neil J. Sterritt *et al.*, *Tribal Boundaries in the Nass Watershed* (Vancouver: UBC Press, 1998).

<sup>26</sup> *Baker Lake (Hamlet) v. Canada (Minister of Indian Affairs and Northern Development)*, [1979] F.C.J. No. 184, 107 D.L.R. (3d) 513 (F.C.T.D.) [*Baker Lake*].

<sup>27</sup> Some of these leaders included Gary Potts, Herb Norwegian, Ed John, Georges Erasmus, and Billy Diamond. Sterritt, 11 July 2005, *supra* note 14 at 3-5.

<sup>28</sup> *Ibid.* at 5.

These national discussions corresponded closely to local level discussions about asserting aboriginal title. Don Ryan (Hanamuxw) explains:

I think the, a lot of it started to get formulated much earlier than most people think. If you take a look at what we were doing in the 70s, in the early 70s, there was a decision made by people in the community to do something about the claim...you could already see that we weren't going to get anywhere with the discussion with the Crown.<sup>29</sup>

According to him, the Crown's position was clear in *Calder* and in the various fishing cases where aboriginal peoples were continually forced to defend themselves: "I saw that the position taken by the Crown was not going to be any different than what our ancestors dealt with at contact".<sup>30</sup> Both Ryan and Sterritt and a number of other Gitksan leaders attended the national constitutional talks in 1981.

During the time before the filing of *Delgamuukw*, there was very intense community involvement in discussions about political and legal options.<sup>31</sup> *Delgamuukw* was filed in 1984 and the trial began on May 12, 1987. In recalling the start of *Delgamuukw*, Neil Sterritt (Mediig'm Gyamk) commented, "That was 1984. We thought we would be finished in 1985 – pretty straightforward stuff".<sup>32</sup>

Ardythe Wilson (Skanu'u), former litigation co-ordinator, imagined what might be achieved by *Delgamuukw*: "For the world to know that we still were intact. That we still knew the boundaries of our land, that we still worked the land, used the land. And now there is a conflict because people were coming in and saying, 'No, that is not your land

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<sup>29</sup> Ryan, 9 July 2005, *supra* note 8 at 1.

<sup>30</sup> *Ibid.*

<sup>31</sup> Conversation with Peter Grant (11 April 2008) in Gibsons, BC [Grant, 11 April 2008].

<sup>32</sup> Sterritt, 11 July 2005, *supra* note 14 at 5. The *Calder* trial lasted five days because the Attorney General accepted that the Nisga'a were a people. There is a discussion between Frank Calder and Tom Berger about the concession of this point by the Attorney General of British Columbia in Hamar Foster, Heather Raven & Jeremy Webber, eds., *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2008). This was prior to the infamous organized society test developed by the court in *Baker Lake*, *supra* note 26 at 542. In *Delgamuukw*, the Attorney General did not accept that the Gitksan were a people or that they were an organized society, so *Delgamuukw* lasted 374 days.

anymore.”<sup>33</sup> To become equal partners, she continued, “[we need] a fundamental shift in the type of relationship, to build an equal relationship with the rest of Canada. I’m talking about our equality, not their equality...I come to you as who I am, as a Gitksan, fluent in my system and fluent in yours.”<sup>34</sup> Ardythe Wilson’s (Skanu’u’s) hopes for *Delgamuukw* were closely echoed by most of the other interviewees. People imagined equality, recognition of Gitksan governance, affirmation of Gitksan ownership of their territories, and a way to end poverty. Victoria Russell hoped for the government “[t]o recognize us for who we are and how we are related to our land, how important it is to us. That we maintain that relationship to the land.”<sup>35</sup>

On the various expectations for *Delgamuukw*, Richard Overstall observed that

[s]ubsequent history is that when it got to the S.C.C., *Delgamuukw* was considered a win. But it only established criteria for aboriginal title; it didn’t actually make an award to the Gitksan and Wet’suwet’en. From a practical point of view, the people didn’t get anything out of it. It was probably not what their expectations were. Their expectations of course were quite diverse.<sup>36</sup>

#### 4.4 My Expectations

[I]f you do an all or nothing court case, at the end of it, that is what you get, all or nothing.<sup>37</sup>

When I drafted the interview guide and began the interviews, I expected to hear more critical and insightful reflections about the *Delgamuukw* experiences and subsequent court decisions. I also expected that these reflections might reveal changes to the social relationships among Gitksan people and to Gitksan people’s relationship to land. Finally, it was my expectation that the interviews would illustrate how these internal changes might

<sup>33</sup> Interview of Ardythe Wilson (14 July 2005) Hazelton, BC, at 3 [Wilson, 14 July 2005].

<sup>34</sup> *Ibid.* at 3-4.

<sup>35</sup> Russell, 12 July 2005, *supra* note 22 at 2.

<sup>36</sup> Interview of Richard Overstall (16 July 2005) Telkwa, BC, at 4 [Overstall, 16 July 2005].

<sup>37</sup> *Ibid.*

be consequences of *Delgamuukw*. While the responses to my interview questions were mixed, the majority of interviewees provided descriptive accounts rather than analytical or critically reflective observations. Specifically, despite my questions, most interviewees offered few comments about changes to internal Gitksan relationships or Gitksan relationships to land. However, most people talked about conflict, providing both historic and contemporary accounts of various types of conflicts. It struck me that I could learn much more by paying attention to what people did talk about since this was obviously more important to them than my initial research interests. Given this, I shifted my research focus to considering how people talked about conflict, conflict management, and Gitksan law, and whether some of the present-day conflict might be ascribed to *Delgamuukw*.

The following discussion sets out some of the possible reasons why I received more descriptive rather than the analytical or more critically reflective accounts than I had expected. These possibilities necessarily overlap and are drawn solely from my observations and my own experiences with the interviews. It makes sense that a number of these factors are likely to have contributed to the pervasive internal conflict among the post-*Delgamuukw* Gitksan that all the interviewees spoke of. I will return to this later in this chapter.

The first possible reason is simply logistical and practical – the trial opened in Smithers, B.C., so many people from the local communities could easily attend the daily court proceedings.<sup>38</sup> When the trial was ordered to Vancouver in September 1987, there were fewer opportunities for local people (i.e., non-staff) to attend the daily court

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<sup>38</sup> The *Delgamuukw* trial was in Smithers for the months of May and June. There was no summer sitting of the Court.

proceedings.<sup>39</sup> (Although when the Gitksan plaintiffs were on the stand, the court was often attended by many relatives, House members, and friends who had travelled to Vancouver to provide support.)

At the British Columbia Supreme Court trial level, in both Smithers and Vancouver, many Gitksan court interpreters, case co-ordinators, office support staff, fund raisers, communications staff, and volunteers were involved. Once the trial concluded, the Gitksan and Wet'suwet'en infrastructure in Vancouver was largely dismantled. The Gitksan and Wet'suwet'en plaintiffs immediately appealed Chief Justice McEachern's 1991 trial decision to the British Columbia Court of Appeal, and later to the Supreme Court of Canada. While many people were involved in making the decision to appeal, there were obviously fewer opportunities for direct continued involvement of Gitksan staff and community people.<sup>40</sup> Quite simply, once the *Delgamuukw* trial was concluded and the decision released, people just went on with their lives and *Delgamuukw* shifted from being an immediate experience and part of local consciousness to becoming a memory. Life did not stop for most Gitksan people when the higher courts deliberated or when the Supreme Court of Canada finally handed down its *Delgamuukw* decision in 1997.<sup>41</sup>

The second possible reason is closely related to the first, and this is the time span of the combined court proceedings. This time span began when the *Delgamuukw* legal action was filed in 1984, included the B.C.S.C. trial commencement in 1987 and the B.C.C.A.'s 1993 decision, and culminated with the S.C.C. releasing its decision in 1997. Even in the

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<sup>39</sup> The apartment building that the Gitksan and Wet'suwet'en plaintiffs rented in Vancouver for the duration of the trial was dubbed the "GitWet Towers".

<sup>40</sup> Grant, 11 April 2008, *supra* note 31. According to Peter Grant, 250–300 people participated in the decision to appeal the B.C.S.C. decision in 1993. At the Supreme Court of Canada level, there was a smaller group of Gitksan advisors who vetted the Gitksan arguments.

<sup>41</sup> *Ibid.* From Peter Grant's perspective, the local Gitksan involvement with the case continued to be energetic and did not wane until 1995 when treaty negotiations began with the B.C. Treaty Commission.

best of circumstances, almost fourteen years is a very long time for a relatively small population to sustain an all-consuming and very expensive legal action. Gitksan people had to make a living, and there were many other legal, political, and social issues that demanded attention and resources at the local level. For example, during this same time period, there were a number of logging blockades,<sup>42</sup> an aboriginal fishing rights case,<sup>43</sup> treaty negotiations,<sup>44</sup> self-government talks, child welfare agreements,<sup>45</sup> and many other activities taking place on the territories.

The third possible reason is that the preparation leading up to the trial allowed time for the plaintiffs, staff, and House members to consider political and legal strategies, options, and questions, but once the trial began, taking time for such reflection was no longer possible. For example, Richard Overstall, who co-ordinated the evidence and expert witnesses, talked about the importance of breaking “things down into small steps. The reason I say that is so you have time. Everyone has time to think about what is going on and what everybody is learning”.<sup>46</sup> He describes how the case became an avalanche overtaking everyone in its path:

Essentially in *Delgamuukw*, there was a period of time beforehand, where there were leaders and advisors beforehand discussing the best approach. Then it was all or nothing, a big title case. Very soon the whole mechanics of the case, the size of it got so big that there was not time for thinking or reflection on the learning. It just sort of carried on so that essentially evidence was being collected and paper was

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<sup>42</sup> For example, see Nettie Wild, *Blockade*, (Canada Wild Productions, Canadian Broadcasters, & National Film Board, 1993), documentary film.

<sup>43</sup> *R. v. Nikal*, [1996] S.C.J. No. 47, 1 S.C.R. 1013.

<sup>44</sup> The Gitksan signed a political accord with the provincial government in 1993 following the release of the B.C.C.A. decision. The accord enabled the first round of treaty talks to begin. The talks broke off soon after when out of frustration, the Gitksan continued their direct political action in the form of logging blockades.

<sup>45</sup> These child welfare agreements were part of a devolution trend whereby the administration of centralized social services was transferred to local communities. The administration of education, health, and social services was also transferred to local community governance structures. These transfers have not gone smoothly and there has been much local conflict surrounding the control of the administration and governance of these services.

<sup>46</sup> Overstall, 16 July 2005, *supra* at note 36 at 3.

being moved around without too much reflection in terms of where it fitted into some overall story or legal theory.<sup>47</sup>

In other words, the lack of time to critically discuss aspects of the case or to reflect on learning simply was not possible during the trial period. And, perhaps once the trial was over and the case moved off to the appeal courts, there was little opportunity or incentive for people to return to the earlier reflective processes. No forum was created by the leaders and advisors of the day to facilitate critically reflective conversations. Given this, why would people engage in a critical reflection of a legal action that had become so far removed? As Richard Overstall points out, *Delgamuukw* is fast becoming “more and more theoretical. It is attaining a more mythological existence.”<sup>48</sup> Peter Grant, legal counsel for the Gitksan and Wet’suwet’en plaintiff, offered a different but related observation:

So you see the disputes occur within the Gitksan system, but if you look at the people engaged in the dispute, about aboriginal title or rights to the land, it seems that it is much more of a theoretical debate than those elders that talked to us. They knew exactly what they were fighting for – the land base, the rights to use the land, managing the land. They knew that.<sup>49</sup>

This disconnect happened despite the best of intentions of the leaders. For example, Don Ryan (Hanamuxw) explained the decision to have people involved throughout all levels of the trial

just to bring people through the whole process so everybody could understand exactly what we were trying to do, and to have people participate in it. That was why it was such a big case, right? I looked at all the other cases that went to the courts... There was very little participation of the people inside that. And once you make that decision to have people participate, the whole case changes. The whole dynamic of what you are trying to do changes. And I think that making that decision was in the best interests of the Gitksan and Wet’suwet’en.<sup>50</sup>

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<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.* at 11.

<sup>49</sup> Grant, 11 April 2008, *supra* note 31 at 4.

<sup>50</sup> Ryan, 9 July 2005, *supra* note 8 at 3.

The fourth possible reason is an increasing sense for many local Gitksan people that *Delgamuukw* did not change anything at the local level. That is, people still have to deal with the logging companies and all the other same old on-the-ground pressures and demands from governments and third parties, as Richard Overstall has observed:

The hard fact is that on the ground, nothing has changed. Certainly nothing that *Delgamuukw* promised in terms of people having greater control over their lives and resources. What changes there have been have largely been drawing people into existing westernized bureaucracy. Replacing white bureaucrats with brown bureaucrats. You certainly see that in the area of social services. And I think you are seeing it more recently in various types of forest licences being given out.<sup>51</sup>

The fifth possible reason is that very few local people were part of the ongoing national and international kaffuffle about *Delgamuukw*. For years, *Delgamuukw* was centrally featured at aboriginal law conferences and other public and academic venues. These critical conversations were not taking place locally, but rather in distant universities and city conference centres. It was not unusual to attend a *Delgamuukw*-focused conference and see few or no Gitksan or Wet'suwet'en people in attendance.

The final reason is that because *Delgamuukw* seemed to take on a life of its own far from Gitksan territories, it may have fostered a form of political passivity for some Gitksan people who had begun to wait for each succeeding court decision with the expectation that each would herald major political changes on the land. Don Ryan (Hanamuxw) shared this observation:

And the Gitksan never really looked at the options properly after the *Delgamuukw* case. Throughout the *Delgamuukw* case what I was trying to impress on everyone is that you don't need the court to affirm what you have. You don't need to go to the treaty table to affirm what you have. You just have to assert it and carry it out. I said that over and over and over.... And for me, that is the problem we've got. Because people make assumptions that these different forums that we've got are going to do something for us. They are not. People didn't like that.<sup>52</sup>

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<sup>51</sup> Overstall, 16 July 2005, *supra* note 36 at 11.

<sup>52</sup> Ryan, 9 July 2005, *supra* note 8 at 7.

It makes sense that the combination of these factors served to limit the critical reflections about *Delgamuukw* by some of the people I interviewed. All of this meant that I had to seriously rethink the focus of this dissertation. Based on the interview results, I decided to examine some historic and present-day conflicts, explore whether and how the *Delgamuukw* experience impacted Gitksan conflict management, and situate Gitksan conflict management within the Gitksan legal order.

Don Ryan (Hanamuxw) described the excitement he experienced in the preparation and trial of *Delgamuukw* and this helped to refocus my research:

I think that all of this whole thing of the law, ancient law, and the whole way our system works – that was the most exciting thing for me. Because even in the context of being Gitksan and coming from a House, all of us who participated – we were right inside the whole process and whole project; we got to see everything and hear everything....People who were steeped in the system – they were the ones that were able to talk to us about what was going on on the land, what was happening inside the different institutions that each tribe has. So those people that were really active participants inside the system – they were the ones that gave us the best information.<sup>53</sup>

#### **4.5 Conflict – Past and Present**

While talking about conflict resolution and management, interviewees also referred to Gitksan law and to various roles and responsibilities within the Gitksan kinship system. This is consistent with one of my arguments that the resolution and management of disputes must be contextualized within an understanding of Gitksan law. This section provides excerpts and comments about the way the interviewees talked about past and present conflicts, and conflict management processes. In the next section, I provide more of the interviewees' discussions about Gitksan legal traditions and the nature of Gitksan law.

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<sup>53</sup> *Ibid.* at 4.

Katie Ludwig (Galsimgigyet), who is currently a Gitksan language teacher, was one of the court interpreters in the *Delgamuukw* trial. She discussed how disputes were resolved historically:

I think now when the people are having conflict, they are not resolving it in the original way that our people resolved it....If I was going to claim that a certain song is mine, I would have to prove it....[If] the people that are in conflict...were absolutely certain [about the history they were claiming], they would do what the old people did years ago. They would gather the chiefs and they would say, “This is what I know and this is why”. And the chiefs would approve it in this meeting. And then when they leave, they would say, “This subject will never be brought up again. And that is how it is done. And then that is it. It is done. There is no further discussion.”<sup>54</sup>

In the hypothetical example Ludwig provides, the dispute is over the ownership of a song that is considered part of the intellectual property of a *wilp* or House group. The process requires that the related chiefs and elders be invited to a meeting at which the disputants each provide their “proof” in the form of a history of the disputed property. This could include describing the origin of the song, where it fit into the *adaawk*, who owned it, when and where it was sung, who witnessed the singing and declaration of ownership, and the lineage of the disputant (name, House, and clan). Basically, each disputant would have to describe how they came to know that the song is theirs by personally relating their direct experience (when, where, and how) and knowledge (what and why). In turn, each of the chiefs and elders would recount their knowledge and direct experience with the disputed song in Feasts and pole raisings. They might also consider precedents of other disputes and how they were decided and by whom. They would consider past relationships and future relationships of the disputants and their kinship networks. Based on these considerations, they would make a decision about the song’s ownership. There is no appeal process and the dispute would not be raised again.

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<sup>54</sup> Interview of Katie Ludwig (Galsimgiget) (8 July 2005) Kamloops, BC, at 5 [Ludwig, 8 July 2005].

If the dispute was major insofar as potential political repercussions, chiefs from a neutral House group (i.e., with no interest in the dispute), or from a neutral village would be invited to meet and settle the dispute.<sup>55</sup> While these neutral parties would not have a direct interest in the dispute, they would nonetheless be interested in maintaining the validity of the Gitksan legal traditions and authorities. Ms. Ludwig describes this process:

[Everybody has to talk from their] own experience and knowledge of that [dispute], and then after everyone has stated what they know, then the people not directly connected [to the dispute] can say, ‘I’ve heard Katie speak, I’ve heard from Val, I’ve heard from Darlene, and I think what they say sounds like something that I heard about years ago. You know, when the old people were there. And then another person will go up and they will say the same thing, and then another person will come and say the same thing. And pretty soon everybody is saying the same thing, so then okay.’<sup>56</sup>

What is required of all the participants is (1) the ability to closely listen to all the other speakers, (2) the ability to recall precedents that might offer guidance, (3) to have some knowledge of who all the parties are including the disputants, and (4) an understanding of the protocols for speaking in the differing venues (small meetings, larger meetings, Feasts, etc.). In addition to having a basic respect for the process, Ludwig suggests that there must be a basic respect for all the parties. Katie Ludwig (Galsimgiyet) states: “And at that time, people respected one another. ‘I know that Val is not a liar. Why would I stand up and say you are a liar?’ I wouldn’t say something just to be heard, and that is the way the people were.”<sup>57</sup>

When these elements of conflict management are disrupted, the dispute resolution process can break down. Ms. Ludwig provides an example of such a breakdown when as a

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<sup>55</sup> An example of this legal strategy is provided in Margaret Anderson & Marjorie Halpin, eds., *Potlatch at Gitsegukla: William Beynon’s 1945 Field Notebooks* (Vancouver: UBC Press, 2000) [Anderson & Halpin]. I have written about this dispute and the legal strategies employed in Val Napoleon, “Living Together: Gitksan Legal Reasoning as a Foundation for Consent” in Jeremy Webber & Colin McLeod, eds., (Vancouver: UBC Press, forthcoming in 2009).

<sup>56</sup> Ludwig, 8 July 2005, *supra* note 54 at 15.

<sup>57</sup> *Ibid.* at 15.

young girl she attended a chiefs' meeting to resolve a dispute involving an owl pole.<sup>58</sup> The crest on this pole belonged to her *ye'* or grandfather who was in Guxsan's House.

And Guxsan was talking about their owl pole. They were having a disagreement...I remember Anna [pseudonym; also in Guxsan's House] and there was another party....And they [the chiefs] were talking about the ownership of this owl pole. And I remember leaving there because they didn't settle it....All that Anna had in her hand was the Barbeau book on the totems of the Upper Skeena. And that was what she was using as her claim. And they [chiefs] said, "An Umsuwah [white person] wrote that. How can you use that as evidence?"...And I was a child then so I don't even know how it ended. But I remember being in the meeting and I remember all the chiefs and I remember them all talking, not hollering or screaming – they just took turns talking. And I remember Anna holding Barbeau's red book with the totem pole information and there were lots of chiefs in there.<sup>59</sup>

In this case, the dispute was not resolved through these discussions. One of the main disputants did not properly provide a history of her connection to the owl pole, and instead she relied on the publication of anthropologist Marius Barbeau.<sup>60</sup> Because this was not a proper personal or direct account of her own experience with the owl pole, her evidence was not considered valid by the chiefs in the meeting. Both the disputants were in Guxsen's House so this was an internal House issue. After the meeting, Ms. Ludwig remembers her mother being very upset because someone had cut down her father's (Katie's grandfather) two poles that stood beside his house in Gitsegukla. As far as she is aware, the owl pole has not been raised nor has the dispute been sorted out.

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<sup>58</sup> This meeting would have taken place at least fifty or so years ago.

<sup>59</sup> Ludwig, 8 July 2005, *supra* note 54 at 7.

<sup>60</sup> Marius Barbeau, *Totem Poles of the Gitksan, Upper Skeena River, British Columbia*, Bulletin No. 61, Anthropological Series No.12, Facsimile Ed. (1929; repr., Ottawa: National Museum of Canada & Canada Department of Mines, 1973). In Chapter 2, I explained that Wilson Duff expressed serious concern about some of Barbeau's opinions. See Wilson Duff, "Contributions of Marius Barbeau to West Coast Ethnology" (1964) 6:1 *Anthropologica* 63-96.

Peter Grant shared this account of a conflict in 1978 which clearly demonstrates the careful consultations and deliberations of the chiefs in order to manage and resolve a serious dispute over a name of a House in the frog clan:<sup>61</sup>

There was a dispute in the House as to the successorship of the chiefly name. You take on the name, you sit at the head of the table in the feast hall and there are certain prerogatives that you have. That includes that you, together with the wing chiefs, will decide the management and resources, who will have access and those things. A woman was in line for the name. Because of her life experience, [she] had not been as much on the land. There was a man in the House; both of them were, I recall, wing chiefs at the time – a very, very difficult dispute in the House about who would take the name. It was not taken lightly, it was taken extremely seriously.

They called in the other frog clan chiefs from their village first. Those frog clan chiefs called in the frog clan chiefs from other villages and they talked. This was not in the feast. This was in the homes of some of the elders and chiefs....

The frog chiefs decided that this was so serious that they had to bring in the chiefs of the other Houses. So they had a select – one or two frog clan chiefs who approached the chiefs of the wolf clan and fireweed.

This House group was originally from Gisgagas, but...had moved down to Kispiox. So they invited the chiefs from Gisgagas first, then the chiefs from the other villages.

They brought together select wolf chiefs and fireweed chiefs, and it was discussed further....

[One of the participants recalled that he had] seen this happen in his lifetime before in the early 1900s. The result of it was, the woman was given the name and a seat in the feast hall, and would always be recognized as that chief.

The management of the land and rights of the land were given to the man who knew the land. This was a dividing of the head chief prerogatives, which was very unusual at that time....[T]his was not done easily; this was a serious, serious

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<sup>61</sup> The knowledge gained by the non-Gitksan such as Peter Grant, Richard Overstall, Richard Daly, Stuart Rush, Louise Mandel, myself, and many others about Gitksan society and Gitksan law reflects another, largely unexamined, aspect of *Delgamuukw*: it provided an opportunity for people to learn about law across cultures. I do not explore this dynamic in this dissertation, but believe it raises very rich and important issues for Canada that should be considered. In his most recent book, John Ralston Saul explores how Canada is fundamentally shaped by the relationship between indigenous peoples and the settlers. Saul writes: “What we are today has been inspired as much by four centuries of life with the indigenous civilizations as by four centuries of immigration. Perhaps more. Today we are the outcome of that experience. As have Métis people, Canadians in general have been heavily influenced and shaped by the First Nations. We still are. We increasingly are. This influencing, this shaping is deep within us.” John Ralston Saul, *A Fair Country: Telling Truths About Canada* (Toronto: Viking Canada, 2008) at 3.

dispute. People were very unhappy and there was a risk of splitting the House and a risk of a battle in the feast hall. By the time it came to the feast, everybody accepted the decision and that is what happened in that case.

...

What it required in subsequent feasts is that these two people had to work together and the resources of the land and the chief who held the rights to the land had to maintain those obligations to the House, to fulfill the obligations of the House....

They would sit beside each other at the feast hall. The head chief at the head, the wing chief at the side, but they were recognized by all of the chiefs of the other clans as having this divided role. So they were each gifted at the feast where they sat.

So that difficulty that they had, it forced these two persons who were disputing to work together.<sup>62</sup>

In this case, Mary McKenzie (Gyoluugyat) recalled a precedent from the early 1900s that the chiefs were able to consider in deciding how to deal with the disputed name. Also very significant is that the settlement of the dispute took place through a series of at least four meetings with the chiefs of Houses in the frog clan as well as with the chiefs from Houses in the fireweed and wolf clans. The dispute was settled prior to the Feast where the chief's name was to be formally and publicly passed on. At the Feast, the decision to split the prerogatives of the chief's name was accepted and witnessed by the other chiefs. The witnessing of the decisions ensures that this process and decision forms part of the body of precedent for future chiefs to deliberate on when faced with similar disputes. This is an important feature in Gitksan conflict management strategies that was more examined closely in chapter 3 and will be picked up again and theorized in chapter 5.

Another example of a successful resolution to a disputed name is provided by anthropologist Richard Daly, one of the expert witnesses in *Delgamuukw*. At the turn of the century, there was a Feast at which the House members had been unable decide on the

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<sup>62</sup> Grant, 9 July 2006, *supra* note 1 at 6-8.

succession of a name beforehand.<sup>63</sup> In this case, the two candidates for the name stood at the front of the Feast hall, each with their respective piles of gifts, and their spokespersons explained each of their claims to the name, but in the end the Feast could not proceed and the guests left.<sup>64</sup> However, according to Richard Daly, “Later the collective chiefs of Gitanmaax, Hagwilget, and Gitsegukla gathered to sort out the succession. Both men were told to share the name, with it remaining on the shoulders of the one who lived the longer.”<sup>65</sup>

Turning to present-day conflict, Glen Williams (Mali) offers this tongue-in-cheek rendition of how Gitksan people settle internal disputes today: “We gossip about somebody. We spread bad words. We glare at them in a meeting or community function. It gets worse and worse, and then later on it fades away.”<sup>66</sup> More seriously, Williams observes that “[t]here is not much of an internal dispute resolution process. There is the father’s side, but it is not really functioning as it used to be. There are disputes that get thrown onto the band council or their staff, or chiefs’ office staff. Or it gets thrown into the western [court] system. That is the internal.”<sup>67</sup>

The late Joan Ryan (Hanamuxw) attributed much of the very serious post-*Delgamuukw* conflict to the treaty process that the Gitksan entered into in accordance with the British Columbia Treaty Process (treaty process):

We’ve had a lot of conflict since *Delgamuukw*. For me the treaty process was the wrong process to use to work on *Delgamuukw*. From day one, I have said this. I have not supported the treaty process. It is not the way to follow up on what we were able to gain from the *Delgamuukw* court case.

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<sup>63</sup> Daly, *supra* note 21 at 294.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> Interview of Glen Williams (13 July 2005) Gitwangak, BC, at 5 [Williams, 13 July 2005].

<sup>67</sup> *Ibid.*

[The treaty process] has created more conflict amongst the Gitksan. The kinds of conflicts that we have had, for me it is really sad that it has created so much hatred amongst our people. It has divided families, it has divided our Houses and our clans. It is very difficult to get together and make decisions now. The conflict interferes with the process of getting ahead. From my perspective right now, we are not getting anywhere.<sup>68</sup>

For Joan Ryan (former Hanamuxw), the present-day conflict is having very grave political consequences for Gitksan peoples in that it is tearing apart the political and social fabric. Until her recent death, she remained involved with the local political scene, serving on a number of local and provincial boards and committees as well as being active in her capacity as Hanamuxw. However, it seems that the frame in which to understand the conflict is much larger than the treaty process, although it also seems that, in particular, the treaty process exacerbated the internal conflicts and hardened some of the divisiveness at the local level.

Katie Ludwig (Galsimgiyet) attributes the local conflict to Gitksan people acting as individuals in their negotiations with State governments, rather than consulting with and representing the House groups and larger collectivities. (The choice of laws scenario that is implied by Ms. Ludwig's comment is explored later in this chapter.) According to her, such individualism and conflict is now undermining the Feast:

And I think it is bringing a lot of internal problems. There's internal fighting. It is internal disputes between the families and it affects what happens in the feast hall. Some will not come to participate because they are so angry at so [and so]. And some won't come [to the feast] because they didn't get the name that they wanted. And it seems so fractured now. It seems that the people are too focussed on the value of money rather than the value of our culture, just to get away from being poor.<sup>69</sup>

The interviews established that conflict is currently a widespread and deeply entrenched phenomenon in Gitksan communities. Thus far in my account, three themes

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<sup>68</sup> Interview of Joan Ryan (15 July 2005) Gitwangak, BC, at 5. [Joan Ryan, 15 July 2005]. See *infra* note 86.

<sup>69</sup> Ludwig, 8 July 2005, *supra* note 54 at 3.

have taken shape: (1) There are established practical conflict management processes that were and are (albeit less often) employed to effectively resolve disputes, and such strategies may also be recognized as forming a part of Gitksan legal traditions. (2) The agreements and decisions reached as a result of the conflict management processes are formally and publicly witnessed and recorded as precedent in the collective memory that forms the Gitksan legal archive. (3) There has been a breakdown in the knowledge and practice of the Gitksan conflict management processes, and of Gitksan law, which has contributed to the present-day climate of deeply sedimented conflict in Gitksan politics and in the daily lives of Gitksan people. This last point was raised many times by the interviewees and it provokes many serious and practical governance questions about how to educate and include those Gitksan who do not have a detailed knowledge of the legal traditions and language.<sup>70</sup> I will return to this question in the conclusion, chapter 6.

But they are not the only sources to which the current atmosphere of conflict has been ascribed. Another interviewee attributes the pervasive local conflict to younger peoples' lack of understanding about the hereditary chief's role, behaviour and protocols, and proper way of conducting business and decision making.<sup>71</sup> In the 1978 dispute about the frog House chief's name, many chiefs from other villages and clans were invited to participate in the deliberations before coming to an agreement that was finally taken into the Feast hall. In order to have facilitated such extensive consultations, the participants would have had to be very knowledgeable of who all the chiefs and elders are, the complex

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<sup>70</sup> I have written about the need for an internal reconciliation process for the Gitksan to deal with this and related citizenry questions. See Val Napoleon, "Who Gets to Say What Happened?" in Catherine Bell & David Kahane, eds., *Intercultural Dispute Resolution in Aboriginal Societies* (Vancouver: UBC Press, 2004).

<sup>71</sup> Anonymous, *supra* note 15 at 8-9.

web of relationships surrounding all the various players, the roles and responsibilities of all the participants, and the protocols of each of the villages. According to this interviewee,

[a] lot of younger people grew up to be familiar with the band councils and *Robert's Rules of Order* as opposed to the hereditary system about who has a right to speak... In meetings in villages other than my village, I have to wait for the instructions of the chiefs in that village. I can't go there and say that I'm a hereditary chief and speak whenever I want to. I have to wait for them to finish and wait to hear what they have to say.<sup>72</sup>

Arguably, a general lack of understanding about the laws governing access and ownership of land and resources on the part of the younger Gitksan, combined with an uncertainty about the authority and applicability of the Gitksan legal order in the present day, contributes to some of the recent conflict. (The intergenerational tensions revealed here are explored in chapter 3.) The late Martha Brown (Xhliimlaxha) provided such an example relating to a fishing site:

Why not ask if you can use it? I said to them. They said, but their grandmother used it. Yes, I said, lots of people have used it, but we own it. If you just ask me, you can use it. I will even tell you where you can set your net.

By marrying into our House they had the right to use it in the past. But those marriage ties died out long ago, and they were told, right in the feast, that they could not use it any more.<sup>73</sup>

For example, there is the Gitksan law of *yuugwilatxw* which governs the access of non-House members to a House's territory. Solomon Marsden (Xamlaxyetxw)<sup>74</sup> explained the privilege of *yuugwilatxw* in his *Delgamuukw* commissioned evidence:

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<sup>72</sup> *Ibid.* at 3.

<sup>73</sup> Martha Brown (Xhliimlaxha), quoted in Daly, *supra* note 21 at 242.

<sup>74</sup> Solomon Marsden (Xamlaxyetxw), 5 May 1988 trial transcript of the B.C.S.C. hearing commissioned evidence of Solomon Marsden (Xamlaxyetxw) 5 May 1988, B.C.S.C. trial transcript, 5820 at 5873, evidence for *Delgamuukw v. The Queen* (1991), 79 D.L.R. (4th) 185 at 5872-73. The name held by the late Solomon Marsden was Xamlaxyetxw, a head chief of the House of Ts'im an luu sgeex, of the ganeda (frog) clan from Gitanyow. Xamlaxyetxw is a naxnox name and means "going back and forth". The House name, Ts'im an luu sgeex, comes from the House's adaawk and means "When the water runs through the house and the people would be wading in the water".

The Gitanyow chiefs supported the Gitksan and Wet'suwet'en even though they were not formerly part of the Gitksan plaintiff group for *Delgamuukw*. A number of the Gitksan witnesses were actually from Gitanyow.

When a young man marries within the – within the house of the young woman and they are both Gitksan people, what usually happens is the head chief of that woman's house gives a part of the land to this young man and he tells this young man to use this land to bring the children up, his children up on this land. And also he would give him a fishing site

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If they happen to separate, then he has no rights to that territory. But if they go on living together until his death, then he'll use that until his death. And then it goes back to his children [who are members of their mother's House].<sup>75</sup>

There is also the similar Gitksan law of *amnigwootxw*, which is when the son travels with his father on his father's territory.<sup>76</sup> When the father dies, the son must seek the permission of the head chief of his father's House if he wants to continue being on his father's territory rather than return to his own House territory. There is an accompanying protocol that he has to contribute financially to his father's House's Feasts. This payment is called *aye'* and it is considered a form of "goods and services tax" for use of the paternal territory.<sup>77</sup> When the son does go to the chief of his deceased father's House, "[h]e would not be refused, because when his father dies all the deceased person's children are taken by the Wil'na t'ahl as their own children and this is why they don't refuse them to go on to the territory".<sup>78</sup>

Solomon Marsden (Xamiaxyetxw) also provided information about the law, *nii yuuwit*, which governs the crossing of someone else's territory. Under this law, a Gitksan person has the right to cross another person's territory and could hunt "if the animal was right on that trail. They could shoot that animal on the trail, but they can't go in and hunt

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<sup>75</sup> Solomon Marsden (Xamlaxyetxw) 9 May 1988, B.C.S.C. trial transcript, 5932 at 5940, evidence for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185 [Solomon Marsden (Xamlaxyetxw) 9 May 1988].

<sup>76</sup> *Ibid.* at 5948.

<sup>77</sup> Sim'algax Working Group & Aboriginal Education Branch, British Columbia Ministry of Education/Gitksan Wet'suwet'en Education Society/School District #88, *Ha'niimagooansxwhum Algaxhl Gitksen-Gitksan: Gitsenimx-Gitxsanimax to English Dictionary – Learner's Edition, Volume 1* (1996) at tab 9 [unpublished] [Gitksan dictionary].

<sup>78</sup> Solomon Marsden (Xamlaxyetxw) 9 May 1988, *supra* note 75 at 5948.

on that territory”.<sup>79</sup> Mr. Marsden’s comment suggests a fair degree of tolerance as well as a requirement for knowledge about the law.

From these examples, it again becomes apparent that Gitksan conflict-management strategies require not only a detailed knowledge of Gitksan laws, but also memory of current and past kinship relationships, and the various arrangements governing privileges are also critical. In other words, a working knowledge of the genealogy of each Gitksan person is part of what was required historically and what is required today in order to reduce or sort out conflicts relating to lands and territories.

Both Neil J. Sterritt (Mediig’m Gyamk)<sup>80</sup> and Glen Williams (Malii)<sup>81</sup> recounted a very complex conflict in 2002 about the successor for the name Luutkudjiiwas at a mortuary Feast in Gitanmaax. One of the main disputants, according to Mr. Williams, was not very familiar with the Gitksan laws, territories or language, and this general lack of knowledge fuelled the conflict.<sup>82</sup> “And normally you try and resolve those [disputes] in the House, and that should have been resolved ahead of time to set aside the name or whatever, but...it [the dispute] clashed in the Feast fall.”<sup>83</sup> Richard Daly attended this very controversial Feast and described the conflict in some detail. The former holder of the name Luutkudjiiwas was Art Ridsdale who belonged to the House Luutkudjiiwas-Xsimits’lin of the frog/raven (lax se’el) clan.

This is a very large House with two *simgiget* [chiefs’] names and two territories. (Some Houses, of course, have three or four territories)...In terms of size and

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<sup>79</sup> *Ibid.* at 5957.

<sup>80</sup> Sterritt, 11 July 2005, *supra* note 14 at 21.

<sup>81</sup> Williams, 13 July 2005, *supra* note 66 at 8.

<sup>82</sup> This is not to suggest that Gitksan laws cannot be changed or that new Gitksan laws cannot be created, although ideally, such changes or the introduction of new law would be in accordance with accepted Gitksan laws of recognition (see chapter 5). My main concern in this chapter is with how people understand and describe conflict. I am cognizant that such a characterization of a main disputant may be intended to undermine the validity of that disputant’s position.

<sup>83</sup> Williams, 13 July 2005, *supra* note 66 at 8.

internal contradictions, this *wilp* [House] seems due for fissioning into two *huwilp* [Houses], each with its own *simoogit* [chief] and territory,... This House is unusual in that it has a braided *sto'owilp* structure as, in a dispute over the chiefship early in the twentieth century, the chiefs of the local Frog/Raven Clan decided to award the two chief names to the opposite “sides” of the House. Accordingly, Luutkudjiiwas went to the Xsimits’iin side and vice versa. This was a practice designed to slow down the tempo of internal disputes, but the subsequent problem has been that the families on each side of the House feel called upon to control both the names and both the territories.<sup>84</sup>

Richard Daly explains that it was a former practice for the chiefs to meet when the conflict disrupted everyday life, and they could decide to split the House.<sup>85</sup> This was generally a practice when a House grew too large to be practically managed as a single House. The braiding of Houses, as in the case of Luutkudjiiwas-Xsimits’iin, was a strategy often employed when Houses became too small to be economically and politically sustainable or when it was necessary to build strong political alliances between Houses. Apparently this was also a strategy often employed with Houses that had territories bordering those of other peoples in conjunction with arranged marriages.<sup>86</sup>

In this case, Luutkudjiiwas apparently had indicated that the name should go to the opposite side of the House, but then left contrary written instructions that the name should go to the son of another segment of the House. The actual dispute over the name is not remarkable, but having the conflict acted out in the Feast hall to the extent that it was, does not occur often. Historically, disputes could be taken to the Feast hall (as described in

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<sup>84</sup> Daly, *supra* note 21 at 290. According to Mary McKenzie, (Gyoluugyat), *sto'owilp* means “the wing of the head chief”, also known as wing chief. Mary McKenzie (Gyoluugyat) 13 May 1987, B.C.S.C. trial transcript, 160 at 198, evidence for for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185 at 198.

<sup>85</sup> Daly, *supra* note 21 at 290.

<sup>86</sup> Interview of Don Ryan (10 May 2005). Failure to understand these historic inter-group arrangements may have contributed to some of the so-called overlap disputes between aboriginal groups. Since the establishment of the British Columbia Treaty Commission (BCTC), the number of overlap disputes has increased. According to Peter Grant, *supra* note 31, these disputes are actually caused by the BCTC. Basically, aboriginal groups (often bands, but sometimes larger political collectivities) know that they will only receive approval for a small portion of the land they claim, so they enlarge their claim area. There is no political accountability to the claimant’s aboriginal neighbours for these claim areas and no requirement to prove their claim boundaries. Where the disputes occur is at the ratification stage if the proposed treaty lands include lands that are also claimed by another aboriginal group.

chapter 3), but this was usually in the form of registering disagreement with a decision. Behavioural protocols were strictly adhered to in order not to generate further conflict. This is not to suggest that there should not be any changes to the forum or process of conflict management, but rather that such changes be examined by an engaged Gitksan citizenry. In the Luutkudjiiwas-Xsimits'lin Feast, the careful problem solving and dispute resolution processes were not facilitated prior to the Feast, and historic precedent was not drawn on as a resource. In the end, it was agreed by both factions that the name Luutkudjiiwas be “hung up” or retired for at least a year<sup>87</sup> (and I do not know its current status).

Glen Williams (Malii) comments on the importance of talking things out and of proper grooming for chiefs:

That is why it is so important to learn Gitksan at an early age. And ever so more important to know the language. And to always attend and know the head chief's authority, and to talk things out before it goes in the public. You can't just assume a high name, you have to work towards it. How you conduct yourself in public, not always cracking jokes and laughing at somebody. You are actually groomed and training to assume those. And know the territory and know the law. Sometimes today people have more money and they are the ones to acquire the names. They don't have the real qualifications.<sup>88</sup>

Another view of Mr. Williams' statement is that he may be simply hardening the various conflicts since he is clearly not acknowledging the many Gitksan people who do not speak their language, nor is he considering how non-speakers might learn about their laws and society. Not speaking Gitksanimax<sup>89</sup> is not a matter of personal failure, but rather is the result of political conditions beyond individual control. In fact, the danger of such thinking also privileges those Gitksan people who were fortunate enough to be hidden from

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<sup>87</sup> Daly, *supra* note 21 at 293, quoting Neil J. Sterrit (Mediig'm Gyamk) at the Feast. Interestingly, the key disputants on both sides have Canadian law degrees.

<sup>88</sup> Williams, 13 July 2005, *supra* note 66 at 8.

<sup>89</sup> The term for the Gitksan language, which is also called *simalgyex*. There are various spellings, including Gitksanimx or Gitsanimx.

the residential schools and who had knowledgeable family members who were fluent in the Gitksan language.

Joan Ryan (Hanamuxw) offered a similar opinion about the importance of training for younger chiefs:

In years past, we've always made sure that the chiefs are trained and my family did their best to show me the different aspects of leadership that are important...that is the law that we have in our nation as to how you transfer names to the next generation...looking after the territories, the berry patches, the fishing sites, the names of every member of the House, the Wilp, and the resources on the territories. Making sure that no damage is done to them.<sup>90</sup>

The Luutkudjiiwas dispute permeated much of the local politics for several years, and there were several major conflicts involving the Gitksan Treaty Office including slanders, threats of violence, picket lines, and litigation.<sup>91</sup> Richard Daly cautions against concluding that the Gitksan system is somehow weakening, and suggests instead that

[t]he feast system and its underlying spirit of the gift is not dying, but it is facing new and challenging times....Today people have at least a toehold in the mainstream culture and society. They resort to the police and litigation to redress what they perceive to be injustices within the local community. At the same time, however, the territories...remain central elements of proprietorship, of political, economic, and symbolic capital. The force of community (such as the chiefs' implied readiness to intervene and enforce a division in Wilps Luutkudjiiwus-Xsimits'iin, and the threatened exodus from the feast hall when there was no unanimity or possibility of witnessing a proper chiefly installation) appears to have considerable strength, vibrancy, and elasticity. This is still a community where social relations are profoundly based on kinship rooted in territory.<sup>92</sup>

The types of disputes discussed by the interviewees were mainly those relating to the ownership of intellectual property (e.g., crests) and the succession of chiefly names. Historically, the Gitksan, as with all other peoples, also had to deal with more serious accidents or conflicts that led to injury or death. However, jurisdiction for bodily harm and death has been assumed by the State so there are fewer recent examples of how Gitksan

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<sup>90</sup> Joan Ryan, 15 July 2005, *supra* note 68 at 1.

<sup>91</sup> Daly, *supra* note 21 at 294.

<sup>92</sup> *Ibid.*

peoples are dealing with these occurrences in their legal order.<sup>93</sup> An important point here is that the Gitksan legal order included a form of absolute liability so that an accidental death or injury would be treated in the same way as an intentional death or injury.<sup>94</sup> The House-owned oral histories (*adaawk*) have many accounts of such violent incidents and how they were dealt with according to Gitksan law.<sup>95</sup> For example, *xiisxw* is the law governing compensation when a life is taken. Solomon Marsden explains:

This is when a person's life is taken, and it's a serious matter to...give compensation to the...family. And a life has been taken here, and that's what they have to look at. This is why they have to – to give a lifetime thing, like the land, another person they would give, because the – the life of a person has been taken.<sup>96</sup>

The principle behind this most serious form of compensation is that land does not wear out and the compensation has to last at least a lifetime. According to Solomon Marsden, the “life of the person has been wiped out, and for...that person to be compensated for this life that was taken then it is for a lifetime. [I]f they would give that land away, it will be for a lifetime.” When the land is to be returned, the head chief of the House that received the land in form of compensation would announce this at one of the biggest Feasts, usually a funeral Feast.

Solomon Marsden recalled the *xiisxw* being acted on thirty years previously (about 1958) when there was an accidental death. A child from the House of Simadiiks (eagle

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<sup>93</sup> In 1989, an initiative called Unlocking Aboriginal Justice was established in order to involve and support House groups in dealing with their House members who were harmed or caused harm. This program is still operating in Hazelton, but the jurisdiction remains with the Canadian State.

<sup>94</sup> For example, if someone was accidentally injured on a territory, the chiefs and House group that owned that territory would be liable and therefore responsible for compensation. Similarly, if someone was accidentally injured in a Feast hall, the hosting House group and chiefs' Feast would be liable and would be required to pay some form of compensation.

<sup>95</sup> See examples of conflict of laws in Mills, *supra* note 21 at 34-38. There are many examples of how Gitksan laws pertaining to injury and death were misunderstood by settlers, and vice versa.

<sup>96</sup> Solomon Marsden (Yamiaxyeltxw) 9 May 1988, *supra* note 75 at 5957.

clan/lax skiik) accidentally shot and killed another child from the House of Guksen.<sup>97</sup> As a result, David Wells, the head chief (Sakum Higookw, eagle clan/lax skiik) gave part of the lax skiik territory to Matthias Wesley who held the name Guksen. The House of Guksen still holds it today.

In another example that demonstrates a modern variation of xsiisxw, Solomon Marsden recounted the death of his granddaughter [in the House of Guksen] who was killed in a car accident by a driver who was from the House of Luutkudziiwus.

I don't exactly remember what date it was last month when Joshua Campbell passed on. This was when a feast was held, and they invited our family to this feast. Before the expenses were paid, they announced what happened, that the...life of a young girl was taken from Guksen's House and that...a payment would...be made to that family, and they did give them a small amount of money. This kind of Xsiisxw that gives money is...not according to our law because the money is spent fast, but the thing that really counts here is that the family were satisfied because these people [Guksen's House] will never forget this law that they are trying to put into action.<sup>98</sup>

The main principle here is still that of a lifetime, but instead of land, the family of the child that was killed was satisfied with money only because they were assured that the House of Guksen would not forget the law of xsiisxw nor their liability for the little girl's death.

The law of xsiisxw also governs the relations with other peoples. Solomon Marsden recounted that the people to the north, called the Ts'ets'aut,<sup>99</sup> gave land (Meziadin Lake and surrounding area) to the Gitanyow (northern Gitksan village) peoples "for compensation of the blood that was spilt there."<sup>100</sup> The Feast between the Ts'ets'aut and the Gitksan for this purpose was called *gawaagyaanii*.<sup>101</sup>

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<sup>97</sup> Guksen still holds this land.

<sup>98</sup> Solomon Marsden (Yamiaxyeltxw) 9 May 1988, *supra* note 75 at 5960.

<sup>99</sup> Also spelled Ts'its'aawit, these people are sometimes referred to as the Stikine people.

<sup>100</sup> Solomon Marsden (Yamiaxyeltxw) 9 May 1988, *supra* note 75 at 5959.

<sup>101</sup> *Ibid.*

#### **4.6 The Nature of the Gitksan Legal Order**

Chapter 1 provided a basic introduction to the structure of Gitksan society. Chapter 3 provided accounts of historical and recent conflicts among Gitksan peoples. Chapters 3 and 5 explore in more detail how a decentralized legal order functions. It becomes clear that while there are effective processes of conflict resolution and management within Gitksan legal traditions, people are experiencing some difficulty in employing those processes today. Many contributing factors have combined to paralyze the conflict management processes, including a complex breakdown of the intergenerational transmission of language, history, and knowledge of legal traditions. However, such a conclusion is not only already well established, it is useless and perhaps even destructive if there is no effort to practically deal with this intergenerational breakdown. This is because the danger of such conclusions is the conscious and unconscious privileging of those who still speak the language and know the legal traditions over those Gitksan people who, for whatever reason, no longer have this knowledge or experience. Finally, it is worth restating that conflict such as that experienced by the Gitksan is not an indication of some sort of political failure, but rather is an indicator of how alive and important the issues in dispute are for the Gitksan communities.

This section includes some of the interviewees' discussions about the nature of Gitksan law and some of my observations on how it operates as a decentralized legal order. Two major closely related themes emerge from the interviewees' comments: The first is about how the self is constructed and understood in Gitksan society and how this conception is not only necessary to the maintenance of an overall relational, stable, and decentralized Gitksan legal order, but is an integral part of it. The Gitksan self is an

independent agent only within and against his or her network of immediate relationships at the House level. Beyond these internal House-level relationships, the actions of the individual are understood to collectively represent his or her House. In other words, at this next level, the relationships that matter are between House groups rather than between individuals. For larger scale relationships, between neighbouring peoples, it is the clan relationships that are of utmost importance.

The second is about how much of the law, in terms of legal obligations, is contained within the relationships and kinship networks. The examples of the laws of *amnigwootxw* and *yuugwilatxw* demonstrate how conflict management depends on locating a person within the complex of kinship networks – through marriage, the mother’s House and *wilksi’witxw*, the father’s house and *wilna’tahl*, and through knowing about the various types of privilege agreements and their terms (e.g., duration, etc.). Once you know the relationships between people and their related Houses, you can figure out what privileges and responsibilities they have within Gitksan society. These are not an easy set of relationships to illustrate by diagram because they are essentially fluid (see below), and they often operate more as a series of reference points than as set, formal structures.

This relational ethic is also operational between the Gitksan and other indigenous peoples including the Nisga’a, Wet’suwet’en, and Tsimshian. Richard Overstall explains that the social fabric of the Gitksan, “does not stop at any formal ‘national’ boundaries but, because of the necessary face-to-face relations, does require extraordinary effort and resources to maintain over long distances”.<sup>102</sup>

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<sup>102</sup> Richard Overstall, “Encountering the Spirit in the Land: ‘Property’ in a Kinship-based Legal Order” in John McLaren, Andrew R. Buck & Nancy E. Wright, eds., *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005) at 36.

An examination of the laws of *amniigwootxw* and *yuugwilatxw* reveals another conflict management strategy, and this has to do with the fluidity mentioned by Richard Daly and several of the interviewees. The House is not a static unit of people, but rather serves as a point of reference for each person's genealogy that enables each person to move through their immediate and extended kinship networks in the event of a conflict. So, a person who for some reason did not get along with others in his or her House group could spend time with a number of other House groups – a spouse's House group, father's House group, grandparents' respective Houses, and so on. In this way persons with conflicted relationships can easily move throughout Gitksan society while maintaining their place through their genealogy. Arguably, this is one of the reasons reifying the House groups has generated conflict – they were never meant to act as closed, immobile groups that locked in participants. Rather, there were many ways that each Gitksan person could participate in Gitksan society.

What also becomes clear from the interviews is how important Gitksan law is in everyday life – far outside the Feast hall – enabling Gitksan people to manage themselves as a people. According to Glen Williams (Malii), “We know it [Gitksan law] exists today. The *ayook* [law] exists, it is practiced today.”<sup>103</sup> Williams explains that, at least in Gitanyow, people do practice Gitksan law every day in terms of payment for fish or wildlife on the territory, “We practice it all the time. It is alive”.<sup>104</sup> Gitksan law and legal obligations are still guiding some people's behaviour and decisions. Insofar as Feasts are concerned, Williams explains that,

we have inheritance [law], accepting names, when somebody dies, a House member. The law is that you have to have a pre-feast [smoke feast]. That is

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<sup>103</sup> Williams, 13 July 2005, *supra* note 66 at 7.

<sup>104</sup> *Ibid.*

required under Gitksan law. Following, who would be responsible for the deceased person, that is following the law. Doing our own traditional farewell or funeral. Before the funeral, the way people sing songs, there is a lot that we respect for the deceased and the House, and then the feast itself. Basically, you are following the law again. Going out and inviting people. All of that is the law for us. And the whole conduct at the feast. All of it is open and transparent.<sup>105</sup>

Don Ryan (Hanamuxw) argues that much more consistent effort is required by Gitksan people today in order to maintain Gitksan law in everyday life. Don Ryan says that, since Gitksan law “is oral, then you really have to put the energy to making it remain oral. Okay. If that is the case, then there has to be lots of discussion among the chiefs with respect to the law”:<sup>106</sup>

It is not enough to just talk about it at a feast when somebody dies. That is not sufficient. You have to take it out of that institution [feast] and take it back into social relationships and community interactions. What happens to your House territory in terms of the Crown coming to take your resources away from you?<sup>107</sup>

Don Ryan describes the Gitksan legal framework as providing a spectrum of tolerance and so he has moved away from describing Gitksan law solely as a system of rules that are simply followed rather than critically thought about, interpreted, and reasoned through. Most importantly, he provides a very useful description for thinking about how Gitksan law and the oral histories work as reference points for Gitksan legal reasoning and interpretation (this is expanded on in chapter 5):<sup>108</sup>

I...characterize the [Gitksan] rules as constitutional law. As sort of a framework of things and it permits you to do all the discretionary type of things inside of it. And that was what I heard from...the oral histories. Because the oral history is instructive as well, because it gives you snapshots of what was going on in the history of the people. How the *ayooks* [laws] work in the end is that it gives you all kinds of discretion. You could act this way inside of this. And...it is a spectrum of tolerance as well.<sup>109</sup>

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<sup>105</sup> *Ibid.*

<sup>106</sup> Don Ryan, 9 July 2005, *supra* note 8 at 5.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.* at 6.

<sup>109</sup> *Ibid.*

Speaking specifically about the disputes over names, Don Ryan explains the extensive negotiations that are required in order to manage and resolve these disputes within House groups and between House groups. Such negotiations can only happen when people know their responsibilities, can act on their responsibilities, and are actively engaged in the practical management of all aspects of the world around them. In other words, the legal obligations that Gitksan people have are those that require them to be exceptionally active citizens because, quite simply, in this decentralized society, there is no central authority to enforce a set of rules. Instead, as Richard Overstall suggests, “essentially, you have got to have a way for people to acknowledge a certain set of behaviours without them actually being enforced.”<sup>110</sup> Because there is no central authority to appeal to, people must recognize others as having “approximately equal status and equal value in the community.” Furthermore, they must have “an inherent, implicit respect for the existence of those groups...[which] include other human beings, the animals, and the land itself.”<sup>111</sup> This recognition is based on the articulation, maintenance, and protection of the legitimacy of the Gitksan legal order and the varying legal capacities and legal obligations of the people in the kinship system (see chapter 3). He explains further that

[t]he process by how it works is a fairly consistent reciprocal relationship with exchanges of goods and acknowledgement of ownership of certain rights, territories, crests, and so on and so forth. And people recognize that if one group rose above another, then that group would not work.<sup>112</sup>

Richard Daly argues that the lack of centralized administrative institutions for the Gitksan has meant an increased “reliance upon historical narrative elaboration, moral suasion, diplomacy, and an overarching body of laws and beliefs lubricated by gift-

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<sup>110</sup> Overstall, 16 July 2005, *supra* note 36 at 10.

<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*

giving”.<sup>113</sup> Thus, the relationships between Gitksan people must be such that they actually allow for the very time-consuming processes of reciprocity, narrative, moral suasion, and diplomacy.

Such diplomacy is described by the late James Morrison (Ṯxawoḵ), a witness in *Delgamuukw*, as an aspect of self-control that is fundamental to the operation of the decentralized Gitksan legal order: “I cannot go over to my neighbour’s territory and tell him what to do. I can only stand on my side of the boundary, look into his eyes, and tell him my history”.<sup>114</sup> This is reminiscent of one of the interviewees quoted earlier who described how “[i]n meetings in villages other than my village, I have to wait for the instructions of the chiefs in that village. I can’t go there and say that I’m a hereditary chief and speak whenever I want to. I have to wait for them to finish and wait to hear what they have to say.”<sup>115</sup> Ardythe Wilson described a fundamental respect and recognition of the independence of others outside your House and related Houses, and a deeply held ethic of non-interference: “We were raised totally understanding the principles and rules of respect. What place you had in society. And the requirement that you always had to be respectful regardless of the situation and of who you were dealing with.”<sup>116</sup>

Don Ryan has engaged in dispute resolution in the Fireweed (Gisgaast) clan, and explains how,

[e]ven when there are disputes inside the House, the classic ones are when the names are given, when someone dies and there is a dispute about who will assume the name...if it is a Fireweed House and I’ve been part of that. I’ve been asked to mediate disputes. And there is a process, if you know how it is done, then you can do it. There is lots of negotiations.

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<sup>113</sup> Daly, *supra* note 21 at 58.

<sup>114</sup> Quoted in Daly, *ibid.*

<sup>115</sup> Anonymous, *supra* note 15 at 3.

<sup>116</sup> Wilson, 14 July 2005, *supra* note 33 at 7.

Well I think that, there's disputes with respect to a House, there's different protocols and different things that you could do if it is a House dispute. If it is a dispute in the clan, there are things that you can do there. If it is a dispute between [Houses] from...different clan[s], there's different things that you can do there.<sup>117</sup>

Joan Ryan (former Hanamuxw) describes the responsibility of the father's House when there is a dispute that involves an injury to a House member. Again, she emphasizes the importance of knowing the chiefs and elders, knowing the protocols, and allowing adequate time for a great deal of negotiation to take place:

The Gitksan have their own dispute resolution. If there is a dispute, then you call in the father's clan. You call in the elders of your own clan because you will need their knowledge. You can invite other knowledgeable people because in the west we have the four clans – [frog,] fireweed, wolf, eagles – and they sit down and discuss the problem and offer different solutions that might resolve the issue. And usually there is a timeline that is attached to the suggestions about how you can resolve it. They spend a lot of time talking through the problem. They walk everybody through the different options that you have for resolving it. And it can take many months, it can even take years. In the end, they make a decision to either leave the problem the way it is or find [a way of] handling the issue.<sup>118</sup>

Joan Ryan also explains the necessity of taking a long view of conflict and of accepting compromises. In order for the disputants to accept compromise, they must recognize the legitimacy of the conflict management processes and legal order even though they do not get their way, and they must also recognize the shared nature of a common future for Gitksan people. She explains:

Or they compromise and say this is how far we can take it, we have to accept where it is. We may, in the future, find a way of resolving it completely. If not, we make an agreement now that we are not going to allow it to block our progress, our journey.<sup>119</sup>

Lest this account give rise to any misconception that the Gitksan system is harmonious and peace loving, Richard Daly offers this observation about the highly

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<sup>117</sup> Don Ryan, 9 July, 2005, *supra* note 8 at 6.

<sup>118</sup> Joan Ryan, 15 July 2005, *supra* note 68 at 9-10.

<sup>119</sup> *Ibid.* at 10.

competitive nature of Gitksan society, which comprised strong and independent, but relational, individual agents and kinship groups.

At a feast, the hosting House, with its Clan support, fulfills its obligations to the limits of its current collective ability, striving to live up to the locally recognized status and legitimacy of its matrilineal pedigree...thereby reconfirm[ing] its ownership of crests, narratives, spiritual powers, and land...The most prevalent arena for competition is usually not between descent groups but, rather within them, focusing on the question of succession to high names and the associated rights and duties – a competition usually conducted out of the public eye. Fierce internal competition attests to the continuing vitality of the feasts and the social relations and cultures in which they are embedded.<sup>120</sup>

In summary, Gitksan society had conflicts and ways to manage conflicts that are part of a decentralized legal order. The internal contestation among the Gitksan occurred within this legal order, over time. The outer bounds of the contestation, including its time depth, was formed and is contained by the Gitksan legal order and it is this entirety that forms its stability and effectiveness.

Finally, to return to the two themes initially set out in this section: the Gitksan conflict management processes fundamentally reflect the construction of the Gitksan self in the legal traditions. Second, Gitksan legal obligations and legal capacities are organized through the kinship structure in which the main emphasis is on questions of legitimacy within Gitksan jurisprudence.

#### **4.7 Analysis**

The question we return to in this section is, “To what extent might the present day internal conflict among the Gitksan be attributed to the *Delgamuukw* legal action?” There are two points to keep in mind here: First, for Gitksan people, *Delgamuukw* comprises the years of preparation, the litigation, the appeals, and the plurality of court decisions. Second, the

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<sup>120</sup> Daly, *supra* note 21 at 58.

Gitksan are obviously not alone in experiencing internal conflicts; rather, this is the reality for many, if not most aboriginal groups in Canada.<sup>121</sup> What matters here is that not all of the many aboriginal political collectivities that are experiencing internal conflict have actually been a party to a major legal action.<sup>122</sup> The Gitksan have not been isolated from the other experiences of colonization that have hammered all aboriginal peoples the world over, so the situation is clearly not one of “but for *Delgamuukw* the Gitksan would not have any internal conflict”. Rather, the challenge is to identify the particular ways that *Delgamuukw* may have generated conflict among the Gitksan, and that is what this section attempts to do.

Richard Daly argues that one of the consequences of *Delgamuukw* has been to “coagulate” the essential fluidity of Gitksan society wherein the cycles of life were structured by history, kinship, and Feasting.<sup>123</sup> This coagulation has meant that relationships, territories, and names have become absolute and resistant to conflict management processes that require ongoing conversations, negotiations, and relationship building:

The litigation process changed perceptions: what was once seen as fluid, ongoing social relationships were now being seen as immutable truths. The names of chiefs entered on the territorial maps and submitted to the court, and that appear in books...take on an immutability that does not readily admit to further discussion

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<sup>121</sup> I have had a number of personal conversations with people involved with other major aboriginal rights cases, and there are many concerns and conflicts similar to those expressed with regard to *Delgamuukw*.

<sup>122</sup> The Nisga'a were also party to a major litigation (*Calder*, *supra* note 18), but the Tsimshian have been involved in numerous, often internally conflicted, legal actions rather than one overall case. For example, see *Lax Kw'Alaams Indian Band v. British Columbia (Minister of Forests)*, [2004] B.C.J. No. 747, 2004 B.C.S.C. 420, *Lax Kw'Alaams Indian Band v. British Columbia (Minister of Forests)*, [2005] B.C.J. No. 520, 2005 B.C.C.A. 140, 7 W.W.R. 601, *Kitkatla Band v. British Columbia (Minister of Forests)*, [1999] 2 C.N.L.R. 156 at para. 62 (B.C.S.C.) (QL). The Haida Nation is presently engaged in an aboriginal title case, but their territories are surrounded entirely by water which defines their outer boundaries. The Haida have been successful in negotiating various agreements to protect selected lands and resources. Internal boundaries have not arisen as a public issue for the Haida in any of these undertakings thus far.

<sup>123</sup> Daly, *supra* note 21 at 289.

and adjustment. In fact, such discussion more often leads to animosities and a sense of injustice.<sup>124</sup>

According to him, this fixing of fluid elements of Gitksan society has generated new social and economic divisions at the local level, and hence, more conflict. So how did this freeze-drying take place? In what follows I argue that several major factors have contributed to this freeze-drying effect.<sup>125</sup> These include (1) a reconceptualizing and fixing of House territories into maps which enabled people to relate to their territory without physically being on the land, and (2) reifying the House groups into fixed entities resembling corporate models rather than fluid points of reference in the larger kinship network. Furthermore, I identify three other factors that have substantially contributed to the internal conflict among the Gitksan: (1) creating centralized hierarchies and failing to recognize the resistance deriving from a profound Gitksan ethic that decentralizes authority, (2) the difficulties of supporting and maintaining Gitksan presence on the land and economic viability of Gitksan economic enterprises, and (3) inability to maintain a larger political project capable of contextualizing *Delgamuukw*.

#### **4.7(a) Maps**

Richard Overstall explained that in preparation for *Delgamuukw*, the House groups' territories were mapped out, and "[t]here were all kinds of discussions of where boundaries should be and whose names should be on them, etc."<sup>126</sup> At this point Gitksan people knew from direct experience where the territories that they had access to were, and they also

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<sup>124</sup> *Ibid.* at 288.

<sup>125</sup> It is arguable that this "freeze drying" began with the early ethnographers, most notably Franz Boas and Marius Barbeau, and perhaps to some extent with their respective fieldworkers, Henry Tait and William Beynon. However, the development of this aspect of northcoast history is beyond the scope of this research project.

<sup>126</sup> Overstall, 16 July 2005, *supra* note 36 at 4.

knew where the boundaries of the other Gitksan territories were. And whereas in the past disputes about territories would “discussed, argued, and settled on the land. Now they discuss, argue, and sometimes settle looking at maps.”<sup>127</sup> The combined Gitksan territories comprise a vast land with mountain ranges, enormous river valleys, big rivers, and many lakes. Boundaries look different and likely have a different meaning in such a landscape than they do as social constructions on a map where they become difficult to question and even more difficult to change.

Furthermore, as the example provided earlier by Martha Brown (Xhliimlaxha) demonstrated, in addition to knowing the territories and boundaries, one also has to know the history and terms of access (such as *yuugwilatxw*) to the territories and resources.<sup>128</sup> This means knowing other people, their lineage and relationships, and various histories, because on their own, previous use and maps are no guarantee of continued future use. Today, the interpretation of maps necessitates another level of knowledge, experience, and memory.

This is not to suggest that maps or mapping are not useful or are harmful for aboriginal peoples. What seems to become problematic is when maps completely replace other more direct ways for House members to relate to and represent their territories. When this is the case, there is a serious possibility of creating and perpetuating conflict. Richard Overstall observes that “if there was a retrial today, a lot of the discussion would be about maps, not about territories. I’m not putting a value judgment on that; it is just that it would be that much different.”<sup>129</sup>

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<sup>127</sup> *Ibid.* at 5.

<sup>128</sup> Martha Brown (Xhliimlaxha), quoted in Daly, *supra* note 21 at 242.

<sup>129</sup> Overstall, 16 July 2005, *supra* note 36 at 5.

So is mapping a factor that generated present-day conflict attributable to *Delgamuukw*? Certainly, the Gitksan completed the mapping of their territories in preparation for *Delgamuukw*, but other aboriginal peoples regularly create maps to represent their ownership of land in various legal proceedings.<sup>130</sup> Furthermore, at least several other aboriginal political collectivities have also experienced internal boundary disputes. For example, both the neighbouring Nisga'a<sup>131</sup> and the Tsimshian<sup>132</sup> have had internal legal actions challenging the *Nisga'a Treaty* and authority to claim aboriginal rights respectively.<sup>133</sup> However, since most other aboriginal political collectivities have mapped their territories, but have not been party to a major litigation, and since at least some of them have also suffered from internal disputes, it would seem to follow that *Delgamuukw* cannot be the entire cause of the internal disputes arising from mapping of House territories. The bigger picture here, of course, is the colonial reality that aboriginal political collectivities are forced to produce maps in order to secure State recognition of

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<sup>130</sup> I am not referring to situations in B.C. in which smaller groups (basically Indian Bands) such as such as Lheidli T'enneh or Tswassen, who are part of larger political collectivities, have mapped territories for the purposes of negotiating treaties under the British Columbia Treaty Commission. As described earlier, these treaty claims and maps have also generated much overlap conflict, but that is not what I am attempting to describe here.

<sup>131</sup> In the case of the Nisga'a, the final treaty included a "common-bowl" approach that combined all the internal House territories into one Nisga'a territory. Several internal legal actions have challenged the Nisga'a Treaty because some Nisga'a House groups lost territories as a result of the common-bowl map. See e.g., Christopher F. Roth, "Without Treaty, Without Conquest: Indigenous Sovereignty in Post-*Delgamuukw* British Columbia" (2002) *Wicazo Sa Rev.* 143 at 151.

<sup>132</sup> See *Tsimshian Tribal Council v. Metlakatla Indian Band*, [2005] B.C.J. No. 1845, 2005 BCSC 1186 (QL). The Tsimshian bands have experienced a roller coaster ride of conflict and litigation. For a short period of time, a separate Tsimshian umbrella organization was formed in opposition to the Tsimshian Tribal Council leadership. But the Tsimshian Tribal Council constitution and bylaws actually prohibited member bands from opting out, so this group was unable to secure recognition or funding from external governments. Meanwhile the actions of these "rogue" Bands had effectively marginalized them. Consequently, Metlakatla, Hartley Bay, Kitselas, Kitasoo, Lax Kw'Alaams, and Kitsumkalum had to initiate a (successful) legal action to be reinstated in the Tsimshian Tribal Council.

<sup>133</sup> There are also many aboriginal political collectivities that, at least initially, developed maps primarily of the outer boundaries of their lands (e.g., James Bay Cree in Quebec) that do not appear to suffer internal boundary conflicts to the same extent.

their interests in the land so that they can protect and continue to use their lands and resources.

To conclude: Perhaps the main difference and resulting conflict for the Gitksan is that the mapping of the individual House territories corresponded with the apparent reification of House groups which is explored in the next subsection. Nonetheless, the issues concerning how maps can eclipse people's direct relationships to land remain, and may thereby alter or change internal conversations between Gitksan people about territories, and also, external conversations between Gitksan people and neighbouring aboriginal political collectivities, the Crown, and third parties.

#### **4.7(b) Reification of the House as Corporation**

Another factor that may have contributed to increased internal conflict for the Gitksan might be the inadvertent and unexamined transformation of the House into a fixed entity that has begun to look and operate more like a corporation with the chief as the CEO.

The basic conceptual political unit in Gitksan society is the *wilp* (pl. *huwilp*, House), and each Gitksan person is born into his or her mother's House, a matrilineal kinship group of about 150 persons who share a common ancestry. The term "House" originates from the historic longhouses, although plainly all members of the same House did not actually live under the one roof. Rather, House members were and are widely distributed by marriage and occupation throughout the different villages across the whole of Gitksan territory and beyond.<sup>134</sup> Historically, House members have rights and responsibilities in many other Houses through their roles as spouses and clan members, and they also have different privileges and territorial access rights by virtue of the types of

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<sup>134</sup> Many Gitksan also reside outside of Gitksan territories for the same kind of reasons.

relationships that they are a part of. Each House belongs to one of the four larger clans that share a broader history—the *gameda* (frog),<sup>135</sup> *gisgahast* (fireweed), *lax gibuu* (wolf), and *lax skiik* (eagle). While it is the House that is the territory and fishing site-owning entity, it might be more accurate to conceptualize the House as a point of reference for Gitksan people within the kinship network. This is further explained by Viola Garfield who, during the 1930s and 1940s, was writing about the neighbouring and closely related Tsimshian who live along the coast of northwest British Columbia.

Theoretically each member of a clan was concerned with the welfare of every other member of the same clan. Obviously clan members were scattered over such a wide area that such responsibility was impossible. It was equally impossible for all members of a sub-clan [House] or branch of a clan to function as a unit since their members likewise did not occupy common territory, but were scattered throughout many villages, often far removed from each other. Even members of the same House were often scattered. The functioning unit was the lineage; those clan relatives within a House who were not only directly and closely related to each other by blood, but who usually lived in the same village or in neighbouring villages.<sup>136</sup>

Neil J. Sterritt (Mediig'm Gyamk) suggests that one outcome of *Delgamuukw* has been what he calls an “over-emphasis on House as an entity as opposed to the broader relationships between villages”.<sup>137</sup> He explains that as a result, the House has gained a prominence in a way that has not been positive for Gitksan people, and this “seems to have brought out more conflict and more, in some cases, selfishness”.<sup>138</sup> Practically, he argues that “[i]n this day and age, there is a benefit to having the Houses, there is a benefit to the village relations, there is a benefit to the nation.”<sup>139</sup> The problem is that the concept of the House “seems to have taken precedence in a way that isn’t...positive”:

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<sup>135</sup> In the eastern villages, the frog clan is called *lax seel*.

<sup>136</sup> Viola E. Garfield, *Tsimshian Clan and Society* (1939) 7:3 University of Washington Publications in Anthropology 167 at 257.

<sup>137</sup> Sterritt, 11 July 2005, *supra* note 14 at 20.

<sup>138</sup> *Ibid.*

<sup>139</sup> *Ibid.*

There seems to be such an emphasis on the House and the so-called “sovereignty” of the House or the primacy of the House to the exclusion of other. Where that is not the basis of it [House], they are interrelated and so I think there is less co-operation and more conflict. . . . But in terms of these other applications, it seems to have lost its, the respect and interconnectedness and so on that it is supposed to have.<sup>140</sup>

Peter Grant makes similar observations about the increased focus on the House.

According to him, some Gitksan people behave as if they do not understand that when “you are a chief and a House with one territory, that you [also] have relationships all around.

That a bunch of people who are not in your House have rights and access, *wilksi'witxw*, going up to the grandparents.”<sup>141</sup> Mr. Grant explains:

All of which was testified to in *Delgamuukw* – that you don’t have exclusive final say. In other words there are prerogatives that others have on your land. Now as one person who was an expert witness said to me, [now] it is like a model of mini-corporations. [Now] the Houses are like corporations who can do what they will with their House territory and let whoever should be on it or not [on] it. That is not the Gitksan tradition from what I learned. I think there is this gap right now. My hope is that. . . the younger generation coming up after them [current generation of chiefs] can learn. I’ve observed many of the next generation are keenly interested in understanding the traditions. That is, the rules and how the lands are utilized and things. There is hope.<sup>142</sup>

However, Peter Grant is not linking the political orientation to the House with *Delgamuukw*; rather, he sees that many of those who now hold chiefly positions were among those who were the most heavily impacted by the residential schools.<sup>143</sup>

Richard Daly also argues that the litigation experience resulted in creating an excess of legitimacy to the chiefs and Houses at the expense of the broader processes of social interaction:<sup>144</sup>

Another problem arising from the land claims process is the way the filing of evidence has tended to encode what is a living social process into a documented

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<sup>140</sup> *Ibid.*

<sup>141</sup> Grant, 9 July 2006, *supra* note 1 at 11.

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.* This point requires further consideration, since many of the earlier aboriginal rights leaders from around the province were also residential school survivors.

<sup>144</sup> Daly, *supra* note 21 at 287.

custom or law. Once immured in juridical archives, these customs and laws tend to acquire a legitimating mystique within the eyes of members of their communities of origin.<sup>145</sup>

But Richard Overstall brings another theory to this discussion, which is that, basically, through *Delgamuukw* there was a necessary emphasis on the House and the House chiefs as the legal and political entities as a way to represent the Gitksan system.<sup>146</sup>

Through their evidence, the Gitksan attempted to explain the complex processes of consultation between the Houses, the alliances of Houses, and the web of relationships around every individual Gitksan person. But as this went through the trial court's deliberations, the appeals, and the decisions, the only concept that remained was the simplest, and this was the authority of the House as the legal and political entity for Gitksan society. Through the court decisions, this became the new reality and the new truth at the local level for those Gitksan who were not as well versed in Gitksan law and political structures as the witnesses who testified.<sup>147</sup>

One of the factors that may have contributed to the reification of House groups is the selection process for witnesses in *Delgamuukw*. According to Richard Overstall, this selection actually resulted in increasing some individuals' status in the community.<sup>148</sup> He explains that, "[a]lthough certain people would have been selected as witnesses for what they knew or represented for a certain knowledge area, that became a source of power".<sup>149</sup> In other words, having been selected to be a witness in the court case became a sort of local

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<sup>145</sup> *Ibid.*

<sup>146</sup> Overstall, 16 July 2005, *supra* note 36 at 5.

<sup>147</sup> There is an extraordinary colonial power play involved when a people are externally redefined and it is extremely difficult for people to overcome such imposed definitions in order to redefine themselves. For a brilliant example of how exactly such a power play was accomplished by historians about the Anishinabek people, see Darlene Johnston, *Litigating Identity: The Challenge of Aboriginality* (Vancouver: UBC Press, forthcoming 2009).

<sup>148</sup> Overstall, 16 July 2005, *supra* note 36 at 5.

<sup>149</sup> *Ibid.* at 5.

currency of power. This shows the extent to which external recognition, through the court process, became a part of local, internal power dynamics. Ultimately, it is likely indicative of the relative felt sense of power or powerlessness experienced by the Gitksan witnesses inside the judicial process.

Another factor closely related to the reification of the House groups is the shifting role of the chief from that of a consultant and spokesperson on behalf of the House to that of its boss. Richard Overstall observed that the selection of witnesses for *Delgamuukw* corresponded with the chiefs being “seen as representatives or bosses of their Houses rather than spokespersons. You could certainly see that”.<sup>150</sup> However, Peter Grant argues that the older chiefs who were involved earlier in the *Delgamuukw* journey understood themselves as spokespersons rather than as representatives or bosses.<sup>151</sup>

The avalanche that became *Delgamuukw* continued after the S.C.C. released its decision because Gitksan people continued to try to force the issues of aboriginal rights and title through direct political action and specific legal actions. The inadvertent, and therefore unexamined, shifting of the chief’s role from that of a consultant to that of a representative and boss continued post-*Delgamuukw*. This is not to suggest that the Gitksan political and legal order is incapable of change or that the Gitksan should not change, but rather, that the consequences of change need examination, discussion, and where possible, choice. Richard Overstall explains:

One of the things I remember was that after *Delgamuukw*, there were a number of logging blockades on different territories which were subject to either injunctions from the forest companies or against the forest companies. It tended...because of the speed of which those things were required, just the chief of a House group on whose territory the blockade was situated, was named, and in many cases, there

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<sup>150</sup> *Ibid.* at 6.

<sup>151</sup> Grant, 11 April 2008, *supra* note 31.

wasn't time and maybe they thought they didn't have to talk to all the neighbouring and wing chiefs and so on.<sup>152</sup>

Another dynamic generated by *Delgamuukw* was the attempt by local social service agencies and other groups to revise their structures to reflect the story of *Delgamuukw*. The primary way that this was carried out was to set up House members or chiefs as House representatives on boards of directors and committees.<sup>153</sup> By not recognizing the network of horizontal consultations and reciprocal relations between chiefs and Houses as part of Gitksan law, this organizing tactic served to isolate the chief as a representative for bureaucratic purposes, and to separate the Houses from the vital and ongoing consultative interactions between them. Fortunately, the local social services bureaucracy is moving toward a model of care that recognizes and builds on the broader kinship networks. For example, Merle Green explains,

[t]he care-giving model is documenting the connection that each one of us belongs to a House, we have our wil'naat'ahl, and there are people in our House group and in our wilk'siwitwx that have certain responsibilities to our care if a child or a family or any members in a House requires help. What the care-giving model does is show what roles and responsibilities are of each of us as sisters, aunts, mothers, uncles, brothers, you're your father's clan, the wilk'siwitwx.<sup>154</sup>

#### **4.7(c) Resistance to Hierarchy**

There were various tensions within *Delgamuukw*, some arising from differing expectations and others arising from a deep societal ethic of resistance to centralization and hierarchy.

Hedda Schuurman provides an example from Innu society of a dynamic created by

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<sup>152</sup> Overstall, 16 July 2005, *supra* note 36 at 6.

<sup>153</sup> Richard Daly & Val Napoleon, "A Dialogue on the Effects of Aboriginal Rights Litigation and Activism on Aboriginal Communities in Northwestern British Columbia" (2003) 47:3 *Social Analysis* 108 at 118.

<sup>154</sup> Interview of Merle Greene (July 9, 2005), Hazelton, B.C. at 1.

disregarding a deeply held societal ethic.<sup>155</sup> She suggests that the current Innu conception of “community” does not derive from Innu language or culture, and the experience of living within a fixed settlement is entirely foreign. Historically, Innu lived in small, mobile social units with a dynamic pattern of social organization and coherent identities, but with shifting social and geographic boundaries.<sup>156</sup> One of the consequences of 1960s settlements has been a social stratification of subgroups that were created by contact – external privileging according to the degree of acculturation or isolation of the subgroups. This newly developed hierarchy now determines status, social positions, and political leadership. For the Innu, settlement has meant individual households, a cash economy and dependence, changes to Innu economic and social practices, breakdown of social relationships, centralized schools, and increased conflict. According to Schuurman, among the Innu there is an anti-community consciousness that raises particular difficulties for leadership and the implementation of self-government.<sup>157</sup>

Many of the people working on *Delgamuukw* were also Gitksan people with separate roles and responsibilities in their Houses and kinship networks. The course that *Delgamuukw* took brought with it increased technical demands, and consequently, the subsequent negotiations resulted in more reliance on a paid central bureaucracy. This created a dilemma for the Gitksan staff:

[B]ecause most of the people within the bureaucracy had positions within the Gitksan and Wet’suwet’en systems, then it became very difficult for a lot of them. They had pressure from their House groups and closely related chiefs to do certain things as chiefs or House members. On the other hand, they were charged with this overall mandate to evenly advance everybody forward.<sup>158</sup>

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<sup>155</sup> Hedda Schuurman, “The Concept of Community and the Challenge for Self-Government” in Colin Scott, ed., *Aboriginal Autonomy and Development in Northern Quebec and Labrador* (Vancouver: UBC Press, 2001) 379-95.

<sup>156</sup> *Ibid.*

<sup>157</sup> *Ibid.*

<sup>158</sup> Overstall, 16 July 2005, *supra* note 36 at 6.

The resistance to hierarchy and centralization derives from the decentralized nature of Gitksan society and the Gitksan legal order, in which “authority was diffused through the reciprocal gifting between the clans and their respective Houses, between villages, and even sometimes between neighbouring peoples”.<sup>159</sup> The time-honoured absence of a “big boss” over the Houses or the clans has resulted in what Richard Daly describes as “distrust and dislike of enduring leadership that extends its authority beyond the scope of the descent group”.<sup>160</sup>

The tensions and shifts in the old power relations developed in the wake of *Delgamuukw* despite the best efforts of people like Ardythe Wilson (Skanu’u), Gary Patsey (Galli Skalan), and many others who worked hard to keep the people in the villages involved with and informed about the trial. Ardythe Wilson (Skanu’u) describes some of this work:

And we went out into the community like we had never done before. We had always come together before as a nation in our feasts, but we went out into our communities to deal with alien thoughts, concepts, procedures by going to court. So we spent a lot of time in the community meeting with people. Simplifying the language, plain-languaging the process, and then translating that process. As a result there was a whole new level of social interactions that took place, and the connections made in the community and a lot of that still exists today.<sup>161</sup>

One of the early local strategies for *Delgamuukw* was to organize large conventions or mass meetings. Ardythe Wilson (Skanu’u) explains that this was because “as Gitksan, we always have to do our business in public...otherwise it becomes suspicious.”<sup>162</sup> This approach was based on the idea of the Feast as an inclusive public process. However, while the Feast does allow for some very careful and skilful interventions and additions – for

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<sup>159</sup> Daly, *supra* note 21 at 31.

<sup>160</sup> *Ibid.* at 30.

<sup>161</sup> Wilson, 14 July 2005, *supra* note 33 at 7.

<sup>162</sup> *Ibid.* at 15.

example to accounts of the oral histories<sup>163</sup> – the Feast is not the forum for House deliberations, negotiations, or sorting out disputes. As I explained earlier, the Feast was actually the culmination of many smaller House-based meetings and was intended to affirm the agreements and decisions that had already been reached by the Houses.

So despite the conventions or mass meetings, the underlying assumption was that the group of chiefs and activists in the tribal council (later called the Gitksan Hereditary Chiefs' Office) were operating without a mandate. According to Richard Overstall, "it became very difficult to get that overall mandate....[because] mass meetings don't work...for the Gitksan and Wet'suwet'en unless there is a lot of preparation beforehand [with] smaller group discussions."<sup>164</sup> As he explains further, "People were used to mass meetings – say the Feast – as a sort of rubber stamp on a long drawn-out process of smaller meetings. But within the complex of *Delgamuukw* and subsequent injunction-type litigation, there just wasn't time for that."<sup>165</sup>

In the end, these dynamics created an overall tension within the whole of *Delgamuukw* that pulled the people apart.

In order to run a court case, you need a relatively small group of people that can instruct lawyers – essentially be the client and instruct lawyers throughout the case. On the other hand, the society you are representing says that you can't have people up there who are representing everyone. Essentially, I think that is why people like Neil and Don were driven out in the end. In fact, all of the people who worked on that team. I guess Glen is still around, he's with Gitanyow. Susan Marsden, myself, the lawyers, pretty much were driven out in the end.<sup>166</sup>

Would this have happened without *Delgamuukw*? The pressure to centralize authority and more closely resemble State institutions is unrelenting because it is the only way that the State wants to relate to aboriginal peoples. This is replicated time and again

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<sup>163</sup> I have written about this elsewhere. See Napoleon, *supra* note 55.

<sup>164</sup> Overstall, 16 July 2005, *supra* note 36 at 6.

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid.* at 10.

through self-government negotiations, treaty negotiations, and other agreements for education, justice, social services, etc. For example, much of the early self-government discussions were focussed on how to make the House legally and politically cognizable to the State. So it is very likely that without *Delgamuukw*, the Gitksan would have experienced some of the same problems caused by trying to centrally organize a people that were formerly organized on a decentralized basis. In part, my response to pressure from the State is to suggest that one potential form of resistance is to rebuild citizenry through a substantive re-articulation and reassertion of the Gitksan legal traditions.

#### **4.7(d) On the Land**

The witnesses during *Delgamuukw* had lifetimes of experience on the land and many were familiar with many territories. Peter Grant explains: “Stanley Williams is an example. Pete Muldoe is an example. Two hereditary chiefs. Stanley spoke on twenty-six different house territories throughout a huge, huge area. Pete Muldoe spoke about twelve or fifteen. I remember Stanley, when he was questioned, said that he would not speak of any land that he had not walked on himself.”<sup>167</sup>

During and after *Delgamuukw*, there was a resurgence of a sort with younger Gitksan people consciously heading back to their territories in order to establish a continued presence on the land. The various on-the-land activities included trail making, mapping, cabin building, selective logging,<sup>168</sup> and commercial fishing. Most of these were not continued because, according to Richard Overstall,

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<sup>167</sup> Grant, 9 July 2006, *supra* note 1 at 1.

<sup>168</sup> There were also Gitksan people involved in commercially logging their territories and the territories belonging to others.

there wasn't a sustained economic reason for them to be out there, that tended to falter a bit. Most of the work on the territories arose out of either a general land use, monitoring-type program, particularly for fisheries, along with a couple individuals who attempted to set up a whole economic-type enterprise on the territory. Those bigger efforts didn't get a lot of support from the tribal council bureaucracy.<sup>169</sup>

Ardythe Wilson (Skanu'u) shared her experience of coming up against her own fellow House members when she attempted to protect her territory:

The other thing that I see is a lot of people went out on their lands and they built on there. And a lot of people actually protected their territories, I know we did. I don't know how many months we spent out there protecting the last little stand of trees that they were going to clearcut. And then those sleazy bastards, they gave the licence to one of our people so we had to come up against to our own bully boys [and brothers] on the land.<sup>170</sup>

The larger purpose of *Delgamuukw* was to enable the Gitksan to protect their territories through the recognition of Gitksan aboriginal title in Canadian law. In the end, another trial was ordered, and a new legal aboriginal title test was developed, but Gitksan aboriginal title was not recognized. The practical on-the-ground efforts by Gitksan people to protect their territories are highly problematic and pressured by continued demands for resources by government and third parties. Several of the specific problems described by the interviewees include: (1) It is difficult for the Gitksan to develop sustained economic enterprises. (2) Government strategies deliberately undermine and divide Houses. (3) There is a lack of political support from the current Gitksan bureaucracy.<sup>171</sup>

Can these problems be attributed to *Delgamuukw*? Perhaps, but it is more likely that the Gitksan would have experienced these difficulties on the land with or without *Delgamuukw*. In fact, *Delgamuukw* actually served as a catalyst for a return to the territories by younger Gitksan, some of whom are still active on the territories.

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<sup>169</sup> Overstall, 16 July 2005, *supra* note 36 at 7.

<sup>170</sup> Wilson, 14 July 2005, *supra* note 33 at 10.

<sup>171</sup> These are important questions, but a further exploration of them is beyond the scope of this dissertation.

#### 4.7(e) Larger Political Project

Ardythe Wilson (Skanu'u) observed that “[i]mmediately after the decision came down from the S.C.C., our people were celebrating and all that. There was a high level of energy for awhile, but then it dissipated. And now there is an apathy, almost like a big silent void that exists now.”<sup>172</sup> What her observation suggests is that one of the hardest things to maintain around a major legal action such as *Delgamuukw* is a larger political project to provide meaning and maintain citizen involvement. A legal action, even one as inspiring and all encompassing as *Delgamuukw*, cannot sustain a political movement for a people. It has to be a tool for the accomplishment of a larger political aim. In this case, failure to thoroughly ground the litigation in the over-arching aboriginal political struggle could easily create a situation where the legal action becomes an end in itself, absorbing all the aboriginal group’s resources – time, energy, and finances. Despite many persons’ best efforts, this may have occurred in *Delgamuukw*. Don Ryan reached a similar conclusion:

Like I said, through the whole process I kept on saying, listen, litigation is just one of the things that you can do. It is not the end all thing. The elders said capture all this so we did all that so we could show people, you’ve got this. Stand up and assert it. To go into negotiations and get lulled to sleep. And even in litigation, it lulled everybody to sleep.<sup>173</sup>

#### 4.7(f) Turning to the Canadian Legal System

Did turning to the Canadian legal system to resolve the question of Gitksan aboriginal title serve to undermine the Gitksan conflict management processes, laws, and legal order? Can the various internal legal actions be understood as resulting from such a devaluing of Gitksan law? There is a range of opinions on this issue.

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<sup>172</sup> Wilson, 14 July 2005, *supra* note 33 at 8.

<sup>173</sup> Don Ryan, 9 July 2005, *supra* note 8 at 7.

Since other aboriginal groups are experiencing internal legal actions without having been party to a major legal action, it seems that this trend cannot be laid at the feet of *Delgamuukw*. However, legal actions can change the way people communicate. For example, it is much easier and far less frightening to tell lawyers what to do about my dispute than it is to sit down with the other disputant and related parties to work out the problem. What the interviews show is that this is especially the case when one feels insecure about his or her own knowledge of the Gitksan legal order and position in Gitksan society.

#### 4.8 Chapter Conclusion

Ardythe Wilson (Skanu'u) describes cycles of changes that she has seen: "The immediate change that I saw was when *Delgamuukw* was being framed for presentation to the courts, the changes that took place as the trial took place, the changes that came after [*Delgamuukw*], and the changes that are taking place now."<sup>174</sup> In the early days of *Delgamuukw*, she perceived a "wall...of people, chiefs and elders in our community with that wealth of knowledge" which gave her "the courage and the commitment to stand to make a change".<sup>175</sup> "So that was the era of pre-*Delgamuukw*", she continues, "and throughout the trial, that solid wall of people was always there. There was never any doubt where you stood and that you had protection – that was what that wall represented."<sup>176</sup> However, according to Ardythe Wilson, that wall of people no longer exists since most of the Gitksan plaintiffs and witnesses have passed away. For some of the Gitksan chiefs' names, she says, "this is the third time the blankets have been passed on for those people

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<sup>174</sup> Wilson, 14 July 2005, *supra* note 33 at 7.

<sup>175</sup> *Ibid.*

<sup>176</sup> *Ibid.*

that took us through that era, that phase [of *Delgamuukw*].” Unfortunately, she interprets this as confirmation of the notion of the “vanishing Indian” rather than an appreciation that the next generation of Gitksan are Gitksan too – but they are Gitksan in a different way in the world of their day.

The wall of chiefs and elders that were there at the start of *Delgamuukw* also represented Gitksan society – complete with knowledge, history, law, and political and social structures. Gitksan conflict management, laws, and legal order are always contextualized within the larger whole of Gitksan society. One of the critical questions is how Gitksan conflict management, law, and legal order will operate without that wall described by Wilson.

In looking at the subject of some of the current conflicts, it might be helpful to consider the work of Margaret Anderson and Marjorie Halpin. For example, according to them, there is always competition for the valued crests, and, crest management is an important aspect of the chiefs’ responsibilities in order to prevent internal strife. They write: “Houses that become depleted in numbers, or that do not take care of their crests, risk having others disregard or even usurp their rights.”<sup>177</sup> Historically, these crest management practices included carefully arranged marriages, adoptions, public proclamations and witnessing of successors, and also strategic crest retirement. Anderson and Halpin question whether management of the crests can successfully happen outside the institution of the Feast because of the critical need for active and knowledgeable elders to deal with the complexities of the *adaawk*, crests, and privileges.<sup>178</sup> This raises serious

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<sup>177</sup> Anderson & Halpin, *supra* note 55 at 17.

<sup>178</sup> *Ibid.* at 49-50.

considerations for future Gitksan conflict management strategies and for Gitksan laws and legal order generally.

Ardythe Wilson argues that there is another aspect of Gitksan life that has been absent as a result of the intense focus on political and legal goals:

The way we used to take care of ourselves, the medicines we used to keep. And the ceremonies that we used to do, that has fallen by the wayside in our march toward gaining legal rights in this country.

I think we need to rebuild that spirit, because it is that spirit that connects you to your land. You need to go and sit, bare-ass if you have to, and sit on the land and talk to your grandmothers, and we have to do that.

And we have to take our children out there with us, show them the boundaries, tell them the histories. And we have to build the capacity of our people as Gitksan. We talk about building our capacity to meet the technological age, I say we need to build our capacity to meet the history of our grandmothers as Gitksan. That is what we need to do.<sup>179</sup>

While it is not possible to attribute all the conflict experienced by the Gitksan to *Delgamuukw*, it was obviously a complex and very powerful force in the lives of Gitksan people for several decades. Conflict is an integral part of any human interaction. The challenge is not to prevent conflict or even to resolve it, but rather, to effectively manage it so that it does not paralyse people. Historically, Gitksan managed conflict through their legal traditions and political systems, and it is the undermining of this conflict management system that has created the pervasive conflicts among them. In the end, the conflicts must be politically contextualized, and further, the conflict management processes must be contextualized within an understanding of Gitksan laws and legal order.

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<sup>179</sup> Wilson, 14 July 2005, *supra* note 33 at 19.

## CHAPTER 5

### Gitksan Legal Theory

[S]upposed necessary conditions or features of law are not completely immune from revision in light of empirical observations. Given that law is a social phenomenon, which means that its existence and character are constituted by how those in life under law view and understand it, a concept of law which fails in explanation of particular or borderline instances of law begins to lose its claim to be offering an account of social reality. (Michael Giudice)<sup>1</sup>

#### 5.1 Introduction

The purpose of this chapter is to establish a theoretical basis for the articulation and development of a preliminary Gitksan legal theory that is founded on the Gitksan legal order and laws as described earlier in chapters 3 and 4. This will substantively root my version of Gitksan legal theory in the lived actuality and dynamic functioning of Gitksan legal traditions.<sup>2</sup> This approach reflects the importance I place on firmly grounding indigenous legal theory in empirical research so that it is not built entirely on rhetoric or historic idealism, but on the substantive practice of law and how people apply law in managing their lives.

My approach is to avoid the purist position wherein an indigenous legal theory must derive solely from within indigenous experiences and be informed only by indigenous legal

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<sup>1</sup> “Ways of Understanding Diversity Among Theories of Law” (2005) 24 Law and Philosophy 509 at 530 [Giudice].

<sup>2</sup> Given that not all law is created intentionally, I am not ascribing intentionality to my use of the term “functioning” here; rather, I understand that law, including common and civil law, may also be created “through the gradual emergence of customs and conventions”. See Leslie Green, “The Functions of Law” (1998) 12:2 *Cogito* 117 at 117. Furthermore, my definition of functional is more dynamic than static, which leaves less room for the consideration of change. Robert Bee explains: “This [static functionalist] perspective is basic to the ‘equilibrium’ concept ... the [social] system is regarded *as if* it is in a state of equilibrium in which the component parts are mutually adjusted into a working whole.” Alternatively, the dynamic definition of functionalism is one wherein “a social system *may* be in *relative* equilibrium, but there are always present certain sources of intrasystemic tensions or strains (‘oppositions’).” Robert Bee, *Patterns and Processes: An Introduction to Anthropological Strategies for the Study of Sociocultural Change* (New York: Free Press, 1974) at 134-35 [emphasis in original].

traditions. Such a limited approach would ignore the extensive influence on indigenous peoples, nationally and internationally, of the changing social, political, legal, and economic circumstances which surround them and of which they are an active part. In this way, I intend to avoid conceptualizing a Gitksan legal theory that is shaped by and constrained within the shallow space created by a dichotomous relationship with the Canadian State. This not to say that this Gitksan legal theory will be imagined in some fantasized and unattainable isolation, but rather, that it not be theorized entirely as different from and in opposition to the Canadian state.

In Canada, legal scholar Gordon Christie argues that the development of an indigenous legal theory “may borrow from other sources, but ... in some central way must be connected to Indigenous communities”.<sup>3</sup> Christie’s main concern is that formative colonial constructs can remain hidden in the unexamined language of legal theory, and therefore will serve to continue colonization rather than add to the decolonization project for indigenous people. In fact, he remains somewhat skeptical about whether colonial assumptions can actually be excised out of western legal theories at all – and if so, whether there is enough substance left to be useful to indigenous peoples.<sup>4</sup>

The work of Gordon Woodman and Akintunade Olusegun Obilade informs my approach to developing a fledgling Gitksan legal theory. Woodman and Obilade argue that while there is a deficit in western legal theory insofar as African societies are concerned, there are nonetheless resources in western legal scholarship that might usefully be applied

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<sup>3</sup> Gordon Christie, “Indigenous Legal Theory: Some Initial Considerations” in Benjamin J. Richardson, Shin Imai & Kent McNeal, eds., *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Hart, 2009) c. 8 [Christie, “Indigenous Legal Theory”].

<sup>4</sup> Gordon Christie, “Indigenous Legal Theory: Thoughts Around its Emergence” (Paper presented at the Indigenous Peoples and Governance Conference, University of Montreal, 10-11 October 2008) [unpublished].

to developing an African legal theory or theories.<sup>5</sup> They argue that trying to construct “an entirely new African legal theory or set of theories would be intellectually wasteful and probably in the end futile” because after all, societies in the west and Africa are both human societies.<sup>6</sup> From their perspective, modification of western legal theory is wiser than the construction of entirely new theories which they liken to “reinventing the wheel in order to use a different type of road”.<sup>7</sup> Instead, Woodman and Obilade advocate the recognition of African legal experience as contributing to general legal theory and a global jurisprudence:

This should not be seen as a contribution from Africa to western theory. To view the process thus is to concede ownership of legal theory to the west, and that is effectively a surrender to the claims of western ethnocentrism. The proponents of African legal theory are not required to choose between being campfollowers of the western intellectual world or setting up their own, unique theoretical system.<sup>8</sup>

I will return to this issue later in this chapter in the Gitksan legal theory section.

An important factor in my approach is that, although I am focusing on a Gitksan legal theory, I am not Gitksan. Rather, I am drawing from what I have learned as an interactive outsider working with Gitksan people and learning about their legal traditions. I also draw from my own indigenous experiences and legal traditions as a woman of Cree, Saulteaux, and Dunne’za heritage, as well as from a range of western and non-western legal scholarship. I do so in the spirit of comparative law scholar William Alford, who wisely advocates that we must pay attention to our own cultural biases so that we may recognize them in our expectations, responses, and judgments of other peoples’ laws.<sup>9</sup>

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<sup>5</sup> Gordon R. Woodman & A.O. Obilade, eds., *Introduction to African Law and Legal Theory* (New York: New York University Press, 1995) at xxv.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.* at xxv-xxvi.

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

<sup>9</sup> William P. Alford, “On the Limits of ‘Grand Theory’ in Comparative Law” (1986) 61 Wash. L. Rev. 945-56. Also see generally, William Ewald, who advocates that we must all take time to understand how law

The field of legal theory is a perennial hothouse of vigorous debate, and its controversies and dichotomies have fuelled the careers of many a scholarly writer. However, according to comparative law scholar William Twining, “[j]urisprudence is a wasteland of false polemics and one way of disposing of such squabbles is to show that the best interpretation of two apparently conflicting positions is that they provide answers to different questions rather than rival answers to shared questions.”<sup>10</sup> While there is obviously much substance in the scholarly debates over legal theory, there is a tendency to treat all legal theories as if they are attempting to answer a single “ambiguous question: ‘What is law?’”<sup>11</sup> Consequently, there are few theorists “who have not been subjected to criticism which either distorts or ignores what they were trying to do.”<sup>12</sup> Twining suggests that such thinking reflects a basic “error of treating all legal theories as comparables” when in fact, it would be more useful to identify the “questions that worried or puzzled” the theorist.<sup>13</sup>

Twining’s approach of stepping away from an emphasis on legal comparables is helpful to my work in this chapter. Basically, I intend to sidestep most western legal theories which, for the most part, do not concern or inform my project here.<sup>14</sup> Given this

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makes sense in that other culture. William Ewald, “Comparative Jurisprudence (I): What was it Like to Try a Rat?” (1994-1995) 143 U. Pa. L. Rev. 1889-2149. See also William Ewald, “The Jurisprudential Approach to Comparative Law: A Field Guide to ‘Rats’” (1998) 46 Am. J. Comp. L. 701-707.

<sup>10</sup> William Twining, *Globalisation and Legal Theory* (New York: Cambridge University Press, 2000) at 39 [Globalisation].

<sup>11</sup> William Twining, *Karl Llewellyn and the Realist Movement* (1985; repr., London: Weidenfeld and Nicolson, 1973) at 3 [Twining, *Llewellyn*].

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> For example, there was a very well-known (but perhaps overstated) debate between Herbert Hart and Lon Fuller concerning the relationship between law and morality. The substance and issues of that debate continue to reverberate throughout legal scholarship, as is illustrated by the recent publication of Peter Cane, ed., *The Hart-Fuller Debate Fifty Years On* (Oxford: Hart, 2009). Also, Hart is described as a “lively polemicist” and his work was heavily criticized by many including well established legal theorists Ronald Dworkin and

approach, I will draw only minimally from the broad spectrum of western legal theory scholarship and avoid addressing the many divides that Twining refers to in western legal theory.<sup>15</sup>

In this chapter, I explore some of the possible resources contained in western legal theory scholarship that may support my own theorizing of Gitksan legal traditions.

Specifically, I draw on Herbert Hart's positivist legal theory<sup>16</sup> because I can disconnect his primary and secondary rules model from that of a centralized State in order to explore its application to decentralized Gitksan society. I also draw on Lon Fuller's law-as-interaction theory to inform my development of a Gitksan legal theory and, as with Hart, I disconnect his theoretical model from that of a centralized State and apply it to the decentralized Gitksan legal order.<sup>17</sup> The issues I consider here are types of implicit Gitksan law; how implicit Gitksan law transforms into explicit, formal Gitksan law; and the construction of agency in Gitksan social interaction. For my definitions of implicit and explicit law, I look to Gerald Postema who describes implicit law as "the vast body of law lying beneath the

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Joseph Raz. See Leslie Green, "The Concept of Law Revisited" (1995-1996) 94 Mich. L. Rev. 1687 at 1689 [Green, "Concept"].

<sup>15</sup> I do not draw from the works of legal theorists whose work can be described either as imperative positivism, e.g., John Austin, *The Province of Jurisprudence Determined, with an Introduction by H. L. A. Hart* (London: Weidenfeld and Nicolson, 1968 [1832]) [Austin] or Jeremy Bentham in James Henderson Burns & Herbert Lionel Adolphus Hart, eds., *The Collected Works of Jeremy Bentham: An Introduction to the Principles of Morals and Legislation* (Oxford: Oxford University Press, 1996), or the more state-based legal theorists (e.g., John Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap Press, 1971), Hans Kelsen, *Pure Theory of Law*, trans. by M. Knight (Berkeley: University of California Press, 1967), Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977), or Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979).

<sup>16</sup> H. L. A. Hart, *The Concept of Law* (1975; repr., Oxford: Oxford University Press, 1961) [Hart].

<sup>17</sup> Lon L. Fuller, "Human Interaction and the Law" in Kenneth I. Winston, ed., *The Principles of Social Order: Selected Essays of Lon L. Fuller*, rev. ed., (2001; Portland: Hart Publishing, 1981) 231-66 [Fuller, "Human Interaction"].

surface” of explicit law.<sup>18</sup> Furthermore, the “existence and content of explicit law” depends on implicit law’s “network of tacit understandings and unwritten conventions, rooted in the soil of social interaction”.<sup>19</sup> Implicit rules arise from the sustained interaction and conduct of people over time and, generally, they enable groups of people to mutually predict the behaviour of others. The practical force of implicit law “depends neither on authority nor on enactment, but on the fact that they find ‘direct expression in the conduct of people toward one another’”.<sup>20</sup> In contrast, explicit laws “are general normative propositions conceived prior to and projected onto conduct” in order to direct it.<sup>21</sup> The expression, form, and operation of explicit law vary in accordance with each society’s legal order.

I will also briefly review and draw lessons from the work of two indigenous legal scholars whose work relates to my own: John Borrows and Gordon Christie. Finally, I will develop a preliminary Gitksan legal theory that is built on the descriptions of the Gitksan legal order and laws set out in chapters 3 and 4. I will employ William Twining’s legal theory framework as the scaffolding for my development of a Gitksan legal theory.

## 5.2 Drawing from Positivist Legal Theory

The diverse coinhabitants of legal theory include moral, political, or normative theories, descriptive-explanatory theories, social scientific theories of various kinds, and participant or internal as opposed to non-participant or external theories of law and legal phenomena. What is the best way to understand this situation of competition, missed connections, and perhaps even missed conflicts?<sup>22</sup>

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<sup>18</sup> See Gerald J. Postema, “Implicit Law” in Willem J. Witteveen and Wibren van der Burg, eds., *Rediscovering Fuller; Essays on Implicit Law and Institutional Design* (Amsterdam: Amsterdam University Press: 1999) 255 at 255 [Postema, “Implicit Law”].

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.* at 257.

<sup>21</sup> *Ibid.* at 256.

<sup>22</sup> Giudice, *supra* note 1 at 509.

Despite the dynamic diversity in the field of legal theory that Michael Giudice refers to in the above quotation, the dominating legal theory, at least in western law, is still that of legal positivism. While many legal scholars have formulated different theoretical approaches for organizing, describing, and understanding positivist law, unfortunately, the basic premise remains – law is only that which is deliberately and officially created by centralized state processes. Other sources, expressions, and practices of law may be allowed to emerge for brief moments around the farthest edges of the common law either through the legal tests to determine custom<sup>23</sup> or by being recognized as evidence to inform judicial decisions.<sup>24</sup> In the main, however, the modern state-based conception holds that law is a system of rules that emanate from the centre through bureaucracies such as legislatures, courts, and police.

Perhaps the best known, most controversial, and most widely accepted work in today's legal theory field is that of Herbert Hart.<sup>25</sup> The ongoing controversy over Hart's work has prompted Leslie Green to ask, "[How] can there be such a wide divergence in views about Hart's theory, such confusion about his central claims?"<sup>26</sup> Hart's theory of law is sometimes described as weak or soft positivism, as compared to the nineteenth century legal theory of John Austin for whom the command of the sovereign was central to law.<sup>27</sup> Hart's legal theory moved beyond regarding law entirely as an external system of coercion.

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<sup>23</sup> Michael Zander, *The Law-Making Process*, 6th ed. (New York: Cambridge University Press, 2004) at 448-55. According to Zander, there are seven tests for establishing local customs. The custom must have (1) existed from time immemorial or from 1189, (2) existed continuously since 1189, (3) been enjoyed peaceably without opposition, (4) been understood as obligatory, (5) been capable of being defined precisely so as to ensure certainty, (6) been consistent with other customs, and (7) been reasonable, at 449-50.

<sup>24</sup> Kirsten Anker, *The Unofficial Law of Native Title; Indigenous Rights, State Recognition and Legal Pluralism in Australia*, (PhD Dissertation, Faculty of Law, University of Sydney, 2007) [unpublished] at 41 [Anker].

<sup>25</sup> Hart, *supra* note 16.

<sup>26</sup> Green, "Concept", *supra* note 15 at 1688.

<sup>27</sup> Austin, *supra* note 15.

He sought to provide an improved positivist account of the law in which human agency and normative social rule were given their due weight. To this end, Hart argued that there was an internal dimension to law that enabled people to obey laws out of a sense of obligation rather than the threat of force.<sup>28</sup> Hart's explicit aim was to "advance legal theory by providing an improved analysis of the distinctive structure of a municipal legal system and a better understanding of the resemblances and differences between law, coercion, and morality as types of social phenomena".<sup>29</sup>

According to Giudice, Hart's legal theory is imperialistic because it seeks "to find and demonstrate the truth of a single methodological approach to understanding law. Any theory which does not adopt the method claimed to be the proper one is inadequate."<sup>30</sup>

Giudice argues that Hart's imperialism actually obscures debates about other legal theories since it tends "to privilege one incomplete theoretical approach over complementary or competitive approaches whose independent merits deserve serious attention".<sup>31</sup> Green, however, argues that since for Hart "law has a history", he should be considered a social

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<sup>28</sup> This raises the question of whether the internal view of law is shared by judges. Leslie Green explains Hart's perspective on this question, "Is the situation different for officials and judges charged with application of the law? Their perspective is different from that of the citizen, according to Hart, since it is a condition of the existence of a legal system that its secondary rules are 'effectively accepted as common public standards of official behaviour by its officials'. Officials, unlike citizens, must adopt an 'internal' point of view with respect to the rules of the system, since otherwise the system, inevitably lacking efficacy, cannot exist." Green, "Concept", *supra* note 14 at 880-81.

<sup>29</sup> Hart, *supra* note 16 at 17.

<sup>30</sup> Giudice, *supra* note 1 at 509. Giudice admits that Hart is not the only "imperialist" in the field of legal theory. There are others who also claim supremacy for their own approaches. For example, "Richard Posner is well known for his dismissal of Hartian conceptual analysis and Dworkinian moral theorizing about law" at 510. According to Giudice, other imperialists include Hans Kelsen, who attempted to purify legal theory, and John Finnis and Ronald Dworkin, who argued that a serious theory of law must include normative standards, at 511-12.

<sup>31</sup> *Ibid.* at 509. Brian Tamanaha argues that the problem with Hart is that he was "compelled to identify a single concept of law" as is reflected in his book title, *The Concept of Law*. B.Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford: Oxford University Press, 2001) 150-51, quoted in Giudice, *supra* note 1 at 520.

constructivist.<sup>32</sup> According to Green, “Hart’s resulting concept of law is antiessentialist...[because] although legal theory is right to strive to understand law’s central features, knowing these will not give us the key to all the sound generalizations about legal systems.”<sup>33</sup> In other words, for Hart, “There is no essence to the phenomena we call ‘law’”.<sup>34</sup> The imperialism that is perceived in Hart’s theory then, is not a generalization about law, but rather concerns what he describes as the central features of law.

William Twining has criticized the field of legal theory for promoting a general ethnocentricity in that it focuses almost entirely on “modern Western, mainly Anglo-American law which comprises a very narrow slice of the full heritage of legal theory”.<sup>35</sup> Indeed, there is little mention of Hindu, Islamic, or Jewish jurisprudence and there are only passing references to Chinese, Japanese, or Latin American, African, and other indigenous legal traditions. This ethnocentrism is one of my chief concerns because the powerful ideological grip that positivism has on western legal thinking has generally caused indigenous legal traditions to be ignored, marginalized, and under-theorized. Twining writes,

A theory of state law such as Hart’s provides an inadequate theoretical framework for grounding our discipline as it becomes more cosmopolitan and more concerned with multiple levels of legal relations and legal ordering. Hart’s concept of state law cannot easily fit European Union law, contemporary public international law, religious law, canon law, medieval and modern *lex mercatoria*, let alone other forms of traditional and customary law that are candidates for our attention as legal scholars and jurists.<sup>36</sup>

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<sup>32</sup> Green, Concept, *supra* note 15 at 1692.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> William Twining, “Globalisation and Comparative Law” in Esin Öricü & David Nelken, eds., *Comparative Law: A Handbook* (Portland, Or: Hart Publishing, 2007) 69 at 71-72 [Twining, “Globalisation”].

<sup>36</sup> *Ibid.* at 71, fn 6.

Nonetheless, it is still Hart's positivist legal theory that continues to pervade much of the academic legal scholarship and most standard law school curricula (although according to Leslie Green, this pervasiveness is suspect since "Hart's book is known as much by rumor as by reading").<sup>37</sup> Nonetheless, Hart's predominance prompted legal historian Janna Promislow to write that "the influence of positivism is often 'unconscious', located in epistemological orientations with respect to information and knowledge rather than in the application of specific definitional criteria."<sup>38</sup> Promislow, whose thoughtful work explores the development of intersocietal law during the fur trade, argues that even "if it is acknowledged that positivist conceptions of law do not correspond with all legal systems, positivist ideas still inform assessments of legality in non-Western systems".<sup>39</sup> And in jurisprudence, while courts may explicitly endeavor to avoid imposing positivist concepts of law, they still rely heavily on positivist approaches in their reasoning.<sup>40</sup>

Unfortunately, Hart's *Concept of Law* is written seemingly as a counterpoint to what he imagined as non-positivist legal systems – all that is "primitive" (meaning "simply organized") and either not legal or, at most, pre-legal.<sup>41</sup> In effect, Hart consigns what he calls customary systems (which he admits have some characteristics that are in common with western law)<sup>42</sup> to the far-flung margins of state legal systems. In fact, in reading Hart, one has a sense that primitive or customary law is somehow a straw-person (i.e., straw-

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<sup>37</sup> Green, *supra* note 14 at 1687.

<sup>38</sup> Janna Promislow, *Towards a Legal History of The Fur Trade: Looking For Law At York Factory, 1714-1763* (LLM Thesis, York University, 2004) [unpublished] at 30 [Promislow].

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.* According to Promislow, such positivist reasoning is evidenced in the Australian High Court's decision in *Yorta Yorta*. See *Members of the Yorta Yorta Aboriginal Community v. Victoria* (2002), 194 A.L.R. 538. [2002] HCA 58 (AustLii). Promislow also argues that such positivist reasoning was demonstrated by Chief Justice McEachern in the trial decision of *Delgamuukw*. Anker, *supra* note 24 at 159, concurs with Promislow about Hart's explicit influence on the *Yorta Yorta* decision.

<sup>41</sup> Hart, *supra* note 16 at 89-91.

<sup>42</sup> Basically Hart suggests that primitive or simple societies had primary rules of obligation.

theory) that he sets up as an unfortunate and largely unnecessary launching pad for his own arguments.

In the *Concept of Law*, Hart argues that there are three major defects in simple (i.e., non-state) societies: an uncertainty of rules, the static character of rules, and the inefficiency of rules.<sup>43</sup> By Green's interpretation, what Hart means is that "the 'defects' that law 'remedies' are not defects in simple, transparent forms of social order. They are, in a sense, defects in us".<sup>44</sup> Nonetheless, the resulting problems for such a simple society include (1) widespread confusion caused by the lack of authoritatively clarified rules, (2) lack of formal processes to deliberatively change rules as necessary to keep up with societal conditions and change, and, (3) uneven diffusion of social pressure to maintain uniform rules and differing interpretations as to whether the rules have been violated.<sup>45</sup> Hart argues that such problems arise for simple societies because they have only primary rules of obligation that are maintained and validated solely by the citizens' internal view and resultant sense of obligation:<sup>46</sup>

In the first place, the rules by which the group lives will not form a system, but will simply be a set of separate standards, without any identifying or common mark, except of course that they are the rules which a particular group of human beings accepts. They will in this respect resemble our own rules of etiquette. Hence if doubts arise as to what the rules are or as to the precise scope of some given rule, there will be no procedure for settling this doubt, either by reference to an authoritative text or to an official whose declarations on this point are authoritative.<sup>47</sup>

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<sup>43</sup> Hart, *supra* note 16 at 90-91.

<sup>44</sup> Green, "Concept", *supra* note 14 at 1698.

<sup>45</sup> Hart, *supra* note 16 at 90-91.

<sup>46</sup> *Ibid.* at 89. Hart explains that these are rules that impose obligations when the "general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great". *Ibid.* at 84-85. Two other characteristics of rules of obligation are that they are believed to (1) be "necessary to the maintenance of social life", and (2) require sacrifice or renunciation, or "the standing possibility of conflict between obligation or duty and interest".

<sup>47</sup> *Ibid.* at 90.

Hart's remedy is to supplement what he calls the primary rules<sup>48</sup> of obligation with secondary rules that will specify the way the primary rules are "conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined".<sup>49</sup> Hart's secondary rules include (1) rules of recognition which will specify the conclusive and affirmative indicator that a rule has become a rule of the group, (2) rules of change which will empower "an individual or body of persons to introduce new primary rules for the conduct of the life of the group",<sup>50</sup> and (3) rules which will empower individuals to make "authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken".<sup>51</sup> Hart explains that there are both external and internal perspectives on rules of recognition:

[W]e need to remember that the ultimate rule of recognition may be regarded from two points of view: one is expressed in the external statement of fact that the rule exists in the actual practice of the system; the other is expressed in the internal statements of validity made by those who use it in identifying the law.<sup>52</sup>

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<sup>48</sup> Kenneth I. Winston, ed., *The Principles of Social Order: Selected Essays of Lon Fuller*, rev. ed., (2001; Portland: Hart Publishing, 1981) at 35 [Winston]. According to Winston, Hart's primary and secondary rules may also be considered restraining and empowering rules respectively. Winston subsumes Hart's private rules of change into the restraining rules, and explains that "[r]estraining rules make certain types of conduct obligatory, such as refraining from violence and paying taxes.... Empowering rules, by contrast, are second-order rules in accordance with which public agencies introduce, apply, modify, and repeal restraining rules."

<sup>49</sup> Hart, *supra* note 16 at 92.

<sup>50</sup> *Ibid.* at 93. There are two types of change: (1) private rules of change such as contracts and laws that confer power on citizens in their private capacity rather than imposing duties, and (2) public rules of change which confer power to officials in their legislative capacity. While judicial decision making would apply to interpreting both forms of change rules, I would not consider judges to be the type of officials that Hart was imagining.

<sup>51</sup> *Ibid.* at 94. These are mainly rules regarding adjudication and the management of courts. Winston argues that this is a major weakness in Hart's legal theory: "Hart allows that for a legal system to exist it is necessary only that the officials, especially the judiciary, adopt the internal point of view. It is sufficient for the majority that they simply obey the officials.... The core of Hart's account is that the criteria employed by judges to determine the validity of laws, and hence the obligations of citizens, have their status (as criteria) simply from being 'accepted' by (the majority of) judges.... Once this issue is pressed, we can observe that judicial choice of criteria is not, and cannot be, whimsical or ad hoc; there are a variety of constraints on judicial choice, constraints deriving from many sources not the least of which, as Fuller would stress, is the nature of the enterprise in which the judges are engaged", Winston, *supra* note 48 at 36.

<sup>52</sup> Hart, *supra* note 16 at 108.

In Hart's legal theory, it is the development and implementation of this second tier, or secondary rules, that enables a society to move from "the pre-legal into the legal world".<sup>53</sup> Since the three remedies that Hart proposes contain elements that permeate law, "certainly all three remedies together are enough to convert the régime of primary rules into what is indisputably a legal system".<sup>54</sup> While Hart does acknowledge that the rules of recognition may be unwritten and known only as a matter of social practice (otherwise known as custom), such customary legal systems have not yet evolved to be fully legal – because such societies were able to manage without secondary rules.<sup>55</sup> This is the central danger of drawing on H.L.A. Hart's theory for application to decentralized societies – that the identification and explication of primary and secondary rules will become a centralized process instead of being dispersed throughout the society in a decentralized way that enables the maintenance of meaningful authority away from the centre. This is my main inquiry here: can Hart's legal theory be credibly unhinged from his assumptions about state-centered legal orders?

According to Jes Bjarup, Hart not only rejects custom as a source of law; he completely overlooks the possibility of "primitive societies" having "customary procedures that serve as secondary rules for the creation and application of primary rules".<sup>56</sup> Bjarup argues that Hart failed to understand that procedures to "create customary law can change

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<sup>53</sup> *Ibid.* at 91. See Brian Bix, *Jurisprudence: Theory and Context* (Boulder: Westview Press, 1996) at 41. [Bix]. According to Bix, "[t]he rule of recognition expresses, or symbolizes, the basic tenet of legal positivism: the fact that there are (in principle) criteria, largely agreed upon by officials, for determining (in the vast majority of cases) which rules are and which are not part of the legal system, points to the separation of the identification of the law from its moral evaluation, and the separation of statements about what the law is and what it should be."

<sup>54</sup> *Ibid.* at 96. Hart cautions that the "union of primary and secondary rules is at the centre of a legal system; but it is not the whole".

<sup>55</sup> *Ibid.* at 92.

<sup>56</sup> According to Jes Bjarup, "Social Interaction: The Foundation of Customary Law" in Peter Ørebech *et al.*, *The Role of Customary Law in Sustainable Development* (Cambridge, UK: Cambridge University Press, 2005) 89 at 142 [Bjarup].

or abolish existing rules as well as create new rules”.<sup>57</sup> Bjarup describes Hart as having the same limitations as Bentham and Austin – wherein all reject customary procedures in favour of state-centered legislation as the only valid way to create legal rules in a modern world.<sup>58</sup>

Hart’s unfortunate use of the term “evolve” appears to reveal what might be characterized as a universalist approach to legal theory – that there exists a single imaginary evolutionary ladder that all peoples must make their way up in order to move from being a simple pre-legal society to being a mature society with a full-fledged legal system. Janna Promislow argues that this universalist approach has caused legal theorists before and after Hart to condemn custom as “arbitrary and insufficiently certain to attain the character of law.”<sup>59</sup> However, while I am concerned with how Hart’s legal theory has contributed to narrowing the understanding of what law is, Hart’s alleged imperialism and the prevalence of his positivist legal theory is not my focus here. Mainly, I am interested in whether and how Hart’s legal theory might be usefully applied to the more formal and explicit aspects of Gitksan law.

Despite the stress of recent history, the Gitksan witnesses did not describe a society that exhibited the kind of problems predicted by Hart as being associated with the lack of centralized authority and secondary rules – namely widespread confusion caused by the lack of authoritatively clarified rules, lack of formal processes to deliberatively change rules, or uneven diffusion of social pressure to maintain uniform rules and differing interpretations as to whether the rules have been violated. Instead, the Gitksan legal order described by the witnesses clearly has legal processes that fulfill the functions of Hart’s

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

<sup>58</sup> *Ibid.*

<sup>59</sup> Promislow, *supra* note 38 at 35.

secondary rules including rules of recognition, rules of change, and rules of adjudication which empower people to make “authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken”.<sup>60</sup>

There is an obvious resemblance between Hart’s categorization of primary and secondary laws, and legal scholar Richard Overstall’s identification of three types of Gitksan laws within the Gitksan legal order.<sup>61</sup> As I described earlier, in chapter 3, they are:

[P]rimary laws – the rules that have to be followed in order to carry out one’s reciprocal obligations to others. Examples include asking permission from a plant or animal before taking it, never taking more than needed from the land, and always giving in return.

[S]econdary laws – rules that enable people to interpret the primary laws. These are rules governing the feast hall, where the Houses, through their chiefs, validate and recreate the original relationships of the host House group, the succession of individuals within the host House to chiefly names, and the allocation of use rights to lands and resources.

“[S]trict” laws ... that are constitutional in nature, being concerned with establishing and maintaining the legal framework of the society and its ability to maintain its obligations to the land. Examples ... include the law against marrying within one’s own clan, the inalienability of territory, and a lineage’s absolute liability for human actions on its territory.<sup>62</sup>

As we can see, Overstall’s categories differ in content but not function. His primary laws and strict laws are both concerned with obligations that correspond with Hart’s primary rules of obligation. In keeping with Hart’s definition for rules of obligation, the Gitksan legal cases related by the plaintiff witnesses in chapter 3 clearly demonstrate a demand for general conformity and the application of serious social pressure to deviators.<sup>63</sup>

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<sup>60</sup> Hart, *supra* note 16 at 94.

<sup>61</sup> Richard Overstall, “Encountering the Spirit in the Land: ‘Property’ in a Kinship-Based Legal Order” in John McLaren, Andrew R. Buck, & Nancy E. Wright, eds., *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005) 22 at 44 [Overstall]. Overstall takes the general concept of primary and secondary rules from Hart. Also see Matthew L. M. Fletcher, “Rethinking Customary Law in Tribal Court Jurisprudence” (2007) 13:1 Mich J. Race Law 57-97. Fletcher argues that tribal court judges could learn from Hart.

<sup>62</sup> Overstall, *ibid.* at 44.

<sup>63</sup> Hart, *supra* note 16 at 84.

The Gitksan legal processes and deliberations conducted as part of resolving the Gitksan legal cases also fulfill Hart's characterization of the rules of obligation because people were acting on a belief that the rules are necessary to the maintenance of social life, and may require sacrifice or renunciation.<sup>64</sup>

Overstall's secondary rules operate without a central Gitksan bureaucracy, yet are nonetheless similar to Hart's secondary rules. Basically, the Gitksan legal order fulfills Hart's requirement for a second-tier affirmation of law wherein law is recognized and changed, and legal processes are agreed to. The application of these secondary rules is demonstrated in the discussions and deliberations, and publicly witnessed agreements for settlements, compensation, etc. These secondary laws are continually restated and reinforced at each Feast and through the extensive traditions and practices that contain and form part of the record of Gitksan law.

This case example demonstrates an application of the Gitksan primary rules of obligation: Roddy Good had a legal obligation to fulfill the responsibilities of his wing chief name, Ax gwin desxw, which he owed to the House of Malii, his wil'naat'ehl, and wilksi'witxw.<sup>65</sup> (There is a broader network of reciprocal obligations in Gitksan society, but for my purposes here, I will focus on those relationships with the most direct legal obligations.) At issue was Roddy Good's failure to fulfil his legal obligations; among other things, he did not attend Feasts or uphold the duties required by and associated with his name. To use Hart's language, ascertaining Mr. Good's behaviour as a failure of legal obligations indicates both the Gitksan requirement for general conformity and their

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<sup>64</sup> *Ibid.* at 85. For Hart, both primary and secondary rules are social because they arise in a social context, apply to a social activity, and have social consequences.

<sup>65</sup> Glen Williams (Ax gwin desxw) May 30, 1988, B.C.S.C. trial transcript, 6620 at 6678-80 evidence for *Delgamuukw v. The Queen* (1991), 79 D.L.R. (4th) 185.

application of serious social pressure. Continuing with Hart's language, through their assessment of the problem, consultations and deliberations, and agreement as to a final decision, the Gitksan chiefs were obviously working to maintain their social life. In the end, Mr. Good was "blown out of the Feast hall" (*suuwiiis 'wen*).

The fulfilment of the secondary rules is demonstrated in how Mr. Good was formally, collectively, and publicly dealt with. Malii, the wolf chiefs, and Malii House members met to review Roddy Good's behaviour and his abuse of the name Ax gwin desxw. The House of Malii consulted with the other wolf Houses and the frog Houses from Gitanyow to discuss the problem of Mr. Good and decide how to deal with the situation. In the end, the House of Malii, the wolf chiefs, and the frog chiefs decided to remove the name from Mr. Good and reassign it to Glen Williams, another Malii House member. Effectively, the decision by the chiefs was to "blow Roddy Good out of the Feast hall". At the Feast, Malii publicly explained the problem of Roddy Good's behaviour and his failure to fulfill his legal obligations to the name and to the House of Malii. In addition to describing the problem at the Feast, Malii explained (1) who was consulted, (2) the decision reached to reassign the name, Ax gwin desxw, to Glen Williams, and (3) the reasons for the final decision.<sup>66</sup> Each formal iteration of the complex of rules surrounding Roddy Good's failure to fulfill his legal obligations through the collective and public processes is, in fact, a form of recognition and a confirmation of the law and its application.

While Overstall's strict laws correspond less obviously with Hart's primary and secondary law model, a useful parallel can be drawn nonetheless. Hart's primary and secondary rules model is founded on a largely implicit world view that includes, among

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<sup>66</sup> Theoretically, Roddy Good could restore his standing in the Feast, not to get the name Ax gwin desxw back, but perhaps another name. The Gitksan system is basically very forgiving in that it allows people to cleanse themselves of past shameful acts or behaviours.

other things, his ontology and cosmology. According to legal scholar Andrée Boisselle, to understand law one must appreciate its background of tacit understandings that are “particular to our political community’s culture and history, from which emanate the structure of our institutions and the very terms of the exchanges with which we frame our problems”.<sup>67</sup>

[T]he law is not captured by pointing solely to the moment of its articulation, or to the articulation itself, as standing apart from an underlying cultural background, for law is the articulation of *some of what is already there* in the background. The formulation of law, be it orally, in writing, or directly through action, cannot *mean* anything if it is cut out from this implicit background. Conceptualizing this background is thus essential to uncover the complex nature of law as an activity consisting *at once* in the creation and discovery, not of our consensuses, but of something more amorphous which we might term *our shared understandings*.<sup>68</sup>

Hart had no reason to make his cultural and historical foundation explicit since he very likely assumed it was generally shared. Consider the unstated ontological and cosmological assumptions that underlie Hart’s argument, which Kenneth Winston critically summarizes:

[A]ny system of municipal law will find it necessary to enforce rules protecting persons against violence, securing their property, and imposing liability for breach of promises in order to ensure the voluntary conformity and cooperation upon which social order depends. The argument proceeds by noting a few salient features of human life which, given the minimum aim of survival, provide compelling reasons for the rules in question. The critical features include: the extreme vulnerability of human beings to bodily attack; the approximate equality of persons in their powers of domination; their limited altruism and consequent lack of confidence in the future conduct of others; the scarcity of natural resources and the special advantages of a division of labor; and, finally, limited knowledge, understanding, and strength of will.<sup>69</sup>

William Twining offers this observation about the implicit and usually unexamined cultural-boundedness of many western legal theorists, which would include Hart: “The

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<sup>67</sup> Andrée Boisselle, “Beyond Consent and Disagreement: Why Law’s Authority Is Not Just about Will” (2008) forthcoming in the inaugural journal of the Consortium on Democratic Constitutionalism (Demcon), University of Victoria at 2-3.

<sup>68</sup> *Ibid.* at 2 [emphasis in the original].

<sup>69</sup> Winston, *supra* note 48 at 38.

Anglo-American, and more broadly the Western, intellectual traditions in law have tended to be quite parochial and inward-looking.”<sup>70</sup> Twining continues, “Most legal scholarship is particular and most legal concepts are culture bound. So, on the whole we lack adequate analytical concepts and reliable data for giving general accounts of law in the world that include and transcend different legal traditions and cultures.”<sup>71</sup>

Overstall, on the other hand, did not assume that the Gitksan world view, ontology, and cosmology were widely shared, or even known – and it is the relevant ontological and cosmological underpinnings of Gitksan legal traditions that he makes explicit in his strict laws category. To do so, Overstall articulates strict rules that are drawn from what Boisselle calls the “background”, those basic premises that form the centre of the Gitksan world view and from which reciprocal obligations and privileges flow between human and non-human life forms within a dynamic and enduring partnership. In this relationship, “the land has a legal status equivalent to that of its human counterparts.”<sup>72</sup>

The relationship Gitksan people have with their world is complex and multi-dimensional. At its heart is the power created by fusing the spirit of a reincarnating human line with the spirit of a specific area of land – a partnership in which both human and non-human parties have reciprocal obligations and privileges. Two sets of obligations flow from that encounter: first, that the people respect the land and achieve a balance in both natural and social life; and, second, that the power-giving encounters be recreated in the feast hall to maintain the relationship.<sup>73</sup>

The key difference between the Hart and Overstall models is the partial articulation of the Gitksan background including the ethic of reciprocity to land, people, and non-human life forms that governs the legal framework of Gitksan society. Described as constitutional in nature, the strict laws govern the public witnessing and accountability

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<sup>70</sup> Twining, “Globalisation”, *supra* note 35 at 71.

<sup>71</sup> *Ibid.* at 71-72.

<sup>72</sup> Overstall, *supra* note 61 at 44.

<sup>73</sup> *Ibid.* at 31.

processes, the various levels of consultations (i.e., House membership, wil'naat'ehl, clan, wilksi'witxw, niidihl, niid'nt, marriage, and village), and the fulfilment of the roles and responsibilities of Gitksan people throughout the society. For Hart, the implicit foundational processes, or background, likely would have included representational democracy, nation-state governing structures, and voting, and an understanding of human beings as independent atomistic agents (at least primarily); but again, he did not have to articulate these.

Turning back to the Hart and Overstall models of primary and secondary rules: While they differ insofar as source and form, arguably the functions are basically the same. (I will discuss the source of rules a little later in this chapter as part of the Gitksan legal theory.) Hart imagined the secondary rules to be in the form of official empowerment of individuals or groups of individuals who would then formally carry out specific private and public tasks such as negotiating and fulfilling contracts, adjudication, and changing or introducing new rules. Since the Gitksan legal order and laws do not have dedicated officials who are solely responsible for the secondary rules, such form and specificity, or reliance on individuals as the basic political unit, is not possible. Instead, Gitksan legal traditions are deeply embedded with other economic, political, and social institutions, and the chiefs have multiple responsibilities throughout Gitksan society. The responsibility for maintaining and applying the Gitksan legal order and laws rests with the chief who does not have sole authority and must consult – as broadly or narrowly as the problem or decision merits. Overstall explains that in the complexly structured, formal Gitksan legal processes, “deaths and injuries, insults and debts are the responsibility of kinship groups, not individuals. From the international to the family level, the law takes the kinship units as

the legal actors”.<sup>74</sup> I contend that the Gitksan secondary rules fulfill Hart’s functions of adjudication (albeit in a different form) and rule changing (through extensive consultation and public validation of decisions, settlements, and agreements at the Feast).

Finally, considering Hart’s ultimate rule of recognition, the Gitksan equivalent is the formal public witnessing at the institution of the Feast. Solomon Marsden (Xamlaxyeltxw) explained Gitksan recognition when he was asked why compensation was dealt with in the Feast: “It is not for Gitksan people to do this by themselves, because no one would know about it. And in order for people to recognize what has been done and what’s going on, they announce it in the Feast and this is – this is a correction that’s made before the people.”<sup>75</sup> Furthermore, as I have explained in greater detail in chapter 3, while all the Houses attending a Feast are responsible for witnessing (and remembering) the business of the host House, it is the host House’s opposite clan (*‘nii dil*) that has the greatest responsibility for this function. Every House in every village has a reciprocal *‘nii dil* from that village, so the role of the *‘nii dil* is fulfilled at every Feast. It is the formal, organized witnessing at the Feast that confers legal validity on the decisions, settlements, and agreements, which are then recorded in the collective memory for future reference as precedent. Just as the rule of recognition lies at the heart of the western legal system, so too does the formal witnessing conducted at the Feast form the heart of the Gitksan legal order. As with Hart’s rule of recognition, Gitksan witnessing resolves the problem of uncertainty as to the legality and validity of rules, and is itself identified by formal criteria in the Feast.

Taking Hart’s rule of recognition a step further, Fuller writes about a “mutuality of recognition” that enabled by the performative aspects of the various types of Gitksan Feasts

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<sup>74</sup> *Ibid.* at 44.

<sup>75</sup> Solomon Marsden (Xamlaxyeltxw) May 9, 1988, B.C.S.C. trial transcript, 5932 at 5938-39, evidence for *Delgamuukw v. The Queen* (1991), 79 D.L.R. (4th) 185 [Solomon Marsden (Xamlaxyeltxw) 9 May 1988].

when the host House recounts and performs the *adaawk*, *nax nox*, and songs, and demonstrates material representations (e.g., crests, blankets, poles, etc.).<sup>76</sup> In other words, “a significant function of ritual is precisely that of communication, of labelling acts so that there can be no mistake as to their meaning.”<sup>77</sup> For the Gitksan, the continual public recreation and witnessing of the House’s *adaawk*, *nax nox*, and other traditions fulfills a formal mutuality of recognition of the House’s origins and history, covenants with the land, lineages and relationships, major events and experiences, and important encounters represented in the House crests, songs, and names. Overstall summarizes this:

[A] House’s histories, crests, and territories revolve around one another to recreate the *daxgyet* [chief’s power] power of the lineages’ original marriage with the land. While a House may possess *naxnox* spirit powers unconnected with its crest powers, most of its possessions derive their legitimacy from that originating event, including any conflicts and consequences that arise from its responsibility for all human activity on its territory.<sup>78</sup>

In the next section I will expand on how the *adaawk* form part of the record of Gitksan law that is continually recognized and reaffirmed through the Feasts.

### 5.3 Law from Social Interaction

In this section, I draw primarily on Lon Fuller’s social interaction theory of law, which in the spectrum of legal theory is usually relegated to the opposite end from Hart’s *Concept of Law*.<sup>79</sup> According to Fuller, in state-based societies there are always two kinds of law that

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<sup>76</sup> Fuller, “Human Interaction”, *supra* note 17 at 237. In this quotation, Fuller is actually describing the approach of Erik Erikson, “Ontogeny of Ritualization” in Rudolph M. Loewenstein, *Psychoanalysis – A General Psychology: Essays in Honor of Heinz Hartmann* (New York: International Universities Press, 1966) at 603.

<sup>77</sup> *Ibid.*

<sup>78</sup> Overstall, *supra* note 61 at 40.

<sup>79</sup> Fuller, “Human Interaction”, *supra* note 17. There is extensive literature that either seeks find common ground between Hart and Fuller, or that simply draws on aspects of the work of each in such a way that reduces the great divide between their respective theories. See for example Frederick Schauer, “Fuller on the Ontological Status of Law” in Willem J. Witteveen & Wibren van der Burg, eds., *Rediscovering Fuller*:

operate together: enacted or authoritatively declared law (also called “made law”)<sup>80</sup> and customary law.<sup>81</sup> He writes, “Customary law is not the product of official enactment, but owes its force to the fact that it has found direct expression in the conduct of men toward one another.”<sup>82</sup> Fuller describes customary law as a “language of interaction” that is necessary for people to meaningfully engage in effective and anticipatory social behaviour. In other words, it is this language of interaction that enables the creation of social environments where people are generally able to discern and predict repertoires and patterns of behaviours.<sup>83</sup>

On the question of the “law” in customary law, Fuller argues that a basic characteristic of law is that it lays down general rules – in this case implicit rules:<sup>84</sup> “The law does not tell a man what he should do to accomplish specific ends set by the lawgiver; it furnishes him with baselines against which to organize his life with his fellows.”<sup>85</sup> Fuller’s customary law provides an interactive framework for citizens to manage their lives within – and for centralized states, this interactive framework actually forms the essential foundation required for the successful functioning of enacted, official law between the lawmaker and the citizen.<sup>86</sup> In other words, without customary law to govern the

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*Essays on Implicit Law and Institutional Design* (Amsterdam: Amsterdam University Press: 1999) 124-42; Neil Duxbury, *The Nature of Precedent* (Cambridge, UK: Cambridge University Press, 2008) at 27 [Duxbury]; and Jennifer Nadler, “Hart, Fuller and the Connection Between Law and Justice” (2007) 27 *Law & Phil.* 1-34.

<sup>80</sup> On enacted law, Fuller sets out “eight distinct standards by which excellence in legality may be tested”. These are: (1) established rules, (2) adequate publication of the rules, (3) limited retroactivity of laws, (4) clarity of laws, (5) congruence of laws, (6) legal obligations are within the power of the affected party, (7) constancy of the law through time, and (8) congruence between official action and declared rule. Lon L. Fuller, *The Morality of Law*, rev. ed. (1969; New Haven: Yale University Press, 1964) at 42, 39.

<sup>81</sup> Fuller, “Human Interaction”, *supra* note 17 at 232.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.* at 233.

<sup>84</sup> *Ibid.* at 254.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

relationships between the citizenry and the State, an effective system of enacted law would not be possible.<sup>87</sup> Fuller takes this further:

The thesis I am going to advance here is, however, something more radical than a mere insistence that customary law is still of considerable importance today. I am going to argue that we cannot understand “ordinary” law (that is, officially declared or enacted law) unless we first obtain an understanding of what is called customary law.<sup>88</sup>

I want to draw a number of ideas from Fuller’s work that are potentially helpful to informing the development of a Gitksan legal theory. In what follows, I will explore the application of the following concepts to the Gitksan legal order and law. First, the idea of law deriving from human interaction over time is a practical and useful way to conceptualize one of the sources and one form of Gitksan law. The second idea to explore is how the informal, implicit Gitksan law that derives from social interaction changes to become formal Gitksan law that is explicitly recorded in the *adaawk* and as *ayook* (precedent). Finally, interactive law raises questions about the agency of the humans who are socially interacting and generating law over time by their conduct. Specifically, I am interested in exploring how active or passive constructs of agency fit within the Gitksan legal order – and with the construct of the Gitksan self.

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<sup>87</sup> *Ibid.* Fuller has also written about the difficulties experienced by “new” colonial nations that try to institute a single, state-based system of rules over peoples of different cultures. Fuller argues that in these instances, there is a lack of long established state-influenced customary law that derives from social interaction among the citizenry. According to Fuller, political corruption can result because there is no customary law to create and guide the relationships between the state-based law-maker and citizenry. Fuller’s argument has merit; however, I think he is missing a step. I would argue that the customary law, or in the case of Canada indigenous law, that existed prior to colonization also served to maintain order and guided the relationship building between the citizenry and the new State. Further, it was the breaking down of the indigenous legal orders and law by the imposition of state law that created a vacuum of legitimacy within which corruption can and does bloom. This perspective might be usefully applied to aboriginal societies whose own legal orders and law has been disoriented by centralized powers and authorities of the federal government and the colonial band structures. However, such an exploration is beyond the scope of this chapter. See Lon L. Fuller, “The Law’s Precarious Hold on Life” (1968-69) 3 Ga. L. Rev. 530 at 542-45.

<sup>88</sup> Fuller, “Human Interaction”, *supra* note 17 at 233.

### 5.3(a) Implicit Gitksan Law

In an interactional theory of law, law can be distinguished from other forms of social normativity by the specific type of rationality apparent in the internal processes that make law possible. This rationality is dependent upon reasoned argument, reference to past practice and contemporary social aspirations, and the deployment of analogy.<sup>89</sup>

My initial interest in Fuller’s interactive law theory arose when I sought to understand and explore the source of law in the decentralized Gitksan legal order. The Gitksan people clearly had a sophisticated legal order and laws, but no central government, centralized law-making institution, or centralized enforcement bureaucracy. While the Gitksan are a non-state society, they definitely cannot be described as “pre-legal” as per Hart’s legal theory.<sup>90</sup> Fuller’s theory of interactive law proved to be useful in understanding and describing one source<sup>91</sup> and form of Gitksan law – implicit law, which derived from social interaction over time and enabled the Gitksan to effectively manage themselves as a people. Gitksan people also had formal explicit law which I will discuss later in this section.

It is the “over time” aspect that is critical to understanding interaction as a source of stabilizing<sup>92</sup> implicit law in Gitksan society. Gerald Postema explains that “implicit rules emerge over time from a process of mutual accommodation and adjustment of expectations and actions of interacting agents.”<sup>93</sup> For the Gitksan, the time depth of their society is represented in the formal, collectively owned *adaawk* which attest the long-term stability of

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<sup>89</sup> Jutta Brunnée & Stephen J. Toope, “International Law and Constructivism: Elements of an Interactional Theory of International Law” (2000-2001) 39 *Colum. J. Transnat’l L.* 19 at 56 [Brunnée & Toope].

<sup>90</sup> Hart, *supra* note 17 at 92.

<sup>91</sup> According to Fuller, implicit, or customary, law always has some element of enactment or conscious creation that enters into its rules. Lon Fuller, *Anatomy of the Law*, repr. (New York: Praeger, 1968; Westport, CT: Greenwood Press, 1976) at 43 [Fuller, *Anatomy*].

<sup>92</sup> Gerald Postema explains that implicit rules represent the stable points in the social network, and “their content and their reason-giving force – is a function of both their place in this network of intersecting expectations, purposes, and actions”. Postema, “Implicit Law”, *supra* note 18 at 258.

<sup>93</sup> *Ibid.* at 258.

their society and their ability to manage change. The *adaawk* recount how over the millennia Gitksan people faced “new situations and new practical problems”, and how they adjusted, reinterpreted, or replaced existing rules.<sup>94</sup> Such “revising activities” are possible because, in the language of interactive law, the Gitksan developed “shared abilities to negotiate the network of expectations and together arrive at new, relatively stable understandings”.<sup>95</sup> However, it is important to forbear idealizing this process by imagining it as harmoniously emerging from the practice of life. Instead, it is critical and much more useful to appreciate the role of ongoing contestation in the generation of implicit, interactive law or normative order<sup>96</sup> in any society, including that of the Gitksan. In other words, implicit or explicit collective positions are established “against a backdrop of deep-seated normative disagreement. All legal orders, of whatever kind, have to have mechanisms for fashioning these collective positions out of the welter of disagreement”.<sup>97</sup> This means that the Gitksan legal order must be conceptualized as encompassing the outer bounds of all such norm contestation. Furthermore, all norms can lose their usefulness and effectiveness as their background changes or when their underlying social basis erodes.<sup>98</sup>

The Gitksan legal order comprises two levels of implicit interactive law. The first is the everyday variety of implicit law that Fuller believed was a pervasive and essential dimension in all legal systems, “even in those apparently dominated by enacted law and

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<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*

<sup>96</sup> Jeremy Webber, “Naturalism and Agency in the Living Law” in Marc Hertogh, ed., *Living Law: Reconsidering Eugen Ehrlich* (Oxford: Hart, forthcoming in 2008) [Webber, “Naturalism”]. Webber defines a normative order as “a natural dimension of any human interaction, generated through the day-to-day business of human life, perhaps even definitional of the existence of society”.

<sup>97</sup> *Ibid.*

<sup>98</sup> Brunnée & Toope, *supra* note 89 at note 128.

formal lawmaking and law-applying institutions.”<sup>99</sup> This level of implicit law is part of what Andrée Boisselle calls the background, which is comprised of shared tacit understandings. According to her, the relationship between informal and formal law is such that “[l]aw’s authority rests on this interplay between our tacit cultural background and the subsegment of which we bring to the foreground by making it explicit.”<sup>100</sup>

The second level of implicit law in the Gitksan legal order is contained in the content and architecture of two types of oral histories<sup>101</sup> employed by the Gitksan for a range of pedagogical, political, legal, and social purposes: (1) *antamahlaswx* that are considered to be the stories and collective properties of all the Gitksan (as opposed to ownership by a House),<sup>102</sup> and (2) formal oral histories called *adaawk* that are the private and exclusive property of the individual Gitksan Houses.<sup>103</sup> One way to begin conceptualizing this implicit level of law in narrative, or in this case, oral histories, is described by literary scholar Mark Turner: “*Story* is a basic principle of mind. Most of our experience, our knowledge, and our thinking are organized as stories”.<sup>104</sup> In other words,

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<sup>99</sup> Postema, “Implicit Law” *supra* note 18 at 259.

<sup>100</sup> Boisselle, “Beyond Consent”, *supra* note 67 at 3.

<sup>101</sup> According to Margaret Anderson and Tammy Blumhagen, the Tsimshian have a third type of oral history called ‘*txal ‘ya ‘ansk*. I have not yet found a Gitksan equivalent to ‘*txal ‘ya ‘ansk*. See Margaret S. Anderson & Tammy Blumhagen, “Memories and Moments: Conversations and Re-Collections” *BC Studies* 104 (Winter 1994) 85 at 94.

<sup>102</sup> The *antamahlaswx* are described as stories that anyone can tell, such as Weget (Raven) stories and stories told to children. See Erica Ball, *Using Adaawk* (M.A. Thesis, University of Northern British Columbia, 2002) [unpublished].

<sup>103</sup> See Susan Marsden, “Defending the Mouth of the Skeena: Perspectives on Tsimshian Tlingit Relations” in Jerome S. Cybulski, ed., *Perspectives on Northern Northwest Coast Prehistory* Mercury Series, Archaeological Survey of Canada, Paper 160 (Hull: Canadian Museum of Civilization, 2001) 61 at 62-63. There are various spellings of *adaawk* (e.g., *adaox*).

<sup>104</sup> Mark Turner, *The Literary Mind* (Oxford: Oxford University Press, 1996) quoted in Lori Graham & Stephen McJohn, “Cognition, Law, Stories” (2008) Suffolk University Law School, Legal Studies Research Paper Series, Research Paper 08-14, available online: Social Science Research Network, <http://ssrn.com> at 28 [Graham & McJohn].

this form of implicit law is in the very structure of our thinking. The effectiveness and wisdom of the Gitksan oral histories is illustrated here:

A story is almost an ideal data structure for human cognition. Stories lend themselves to learning and memory for several reasons. A story is linked to sequence. Once someone remembers one part of a story, one can then recall the next part or work backwards. Contrast that with other agglomerations of information, where knowing one part does not help remember the next part....A story may be described in the sequence of words, a sequence of events, a sequence of scene, or an abstract summary. There are also different ways to describe the story abstractly: its plot, moral, themes. These levels of abstraction make stories helpful as cognitive units: in learning, in remembering, in conveying information.<sup>105</sup>

For example, at an implicit and explicit level, and in addition to its formal legal and political functions, the *adaawk* “[assigns] meaning to institutions, provide[s] an explanation and justification of social arrangements, and support[s] cultural unity through common belief.”<sup>106</sup> In turn, the *antamahlaswx*, as part of Gitksan pedagogy, reinforces the implicit background of shared understandings and explicitly connects the *antamahlaswx* content to everyday events and experiences.<sup>107</sup> Gitksan education scholar Jane Smith explains the pedagogy of the *antamahlaswx*:

When we teach, we tell stories. We tell stories about our disciplines, about the place of these disciplines in the structure of human knowledge. We tell stories about knowledge, about what it is to be a human knower, about how knowledge is made, claimed, legitimized continuously from and through the experiences of the *Gitksan* over time. The stories that we tell are stories built on others’ stories; they forge the community between our stories and those of others, to confirm community among others and ourselves, and to initiate others into our communities. It is important to realize that stories are performances as well as narratives. They express and represent.<sup>108</sup>

The Gitksan legal order or normative order comprises both implicit and explicit norms. If the legal norms were to be analogized as an iceberg, the explicit aspects would be

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<sup>105</sup> Graham & McJohn, *ibid* at 30.

<sup>106</sup> *Ibid.* at 34.

<sup>107</sup> M. Jane Smith, *Placing Gitksan Stories in Text: Returning the Feathers. Guuxs Mak’am Mik’Aax* (Ph.D. Dissertation, UBC Faculty of Education, 2004) at 43-44 [unpublished].

<sup>108</sup> *Ibid.* at 44.

the tip which is visible above the water; the implicit aspects would be the greater mass of the iceberg which, unseen beneath the water, supports the tip and includes the background of shared tacit understandings.<sup>109</sup>

The “over time” or time depth aspect of the Gitksan oral histories and normative order raises an important generational perspective. After all, it is never just one generation that tidily creates legal norms (i.e., those norms with an obligation)<sup>110</sup> and then modifies them in response to the dynamics of the surrounding world. Rather, legal norms are continually contested. Sometimes norms will change incrementally, other times change takes place in leaps and bounds. According to Jeremy Webber, “The fundamental point is that norms always involve both an argument (perhaps implicit) as to what the norms should be and a mechanism by which that argument is brought to a provisional conclusion”.<sup>111</sup> In any event, changing legal norms are experienced and managed over time and by overlapping generations.

While the testimony of the Gitksan witnesses demonstrated the extraordinary time depth of their ancient *adaawk*, it also described more recent changes to aspects of their legal practices as result of capitalism, the cash economy, settlers, and imposed State laws – which also took place over generations. However, the witnesses also described a stability and constancy of legal norms so that, for example, while cash could be used at the Feast instead of groundhog skins (*gwiikxw*), the purpose of the payments would remain (i.e., ensuring witnesses, compensation, and fulfillment of House obligations to the land and kinship networks).

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<sup>109</sup> I thank Andrée Boisselle for this image.

<sup>110</sup> Jeremy Webber explains that “norms inhere in practices, in forms of life. But they are not reducible to the mere fact that something happens, even repeatedly.” See Jeremy Webber, “Legal Pluralism and Human Agency”, (2005) 44(1) *Osgoode Hall LJ* 167 at 172.

<sup>111</sup> *Ibid.* at 180.

But to return to Fuller: Gitksan implicit interactive law derives from social interaction over time; social interaction is one of the sources of law in the Gitksan legal order. To restate my conceptualization, Gitksan implicit interactive law may be categorized into two levels within the Gitksan legal order: (1) everyday background (which would include reminiscences as a way of organizing lived experiences and constituting the present) and (2) the implicit part of the *antamahlaswx* and *adaawk*. The Gitksan *antamahlaswx* and *adaawk* are integral to the Gitksan legal order – at an informal, implicit level as well as at a formal, explicit level. Jane Smith finds this dual quality in the way Gitksan pedagogy “acknowledges and promotes interconnections between knowledge and relationships with land. As each concept is acquired and reflected upon it returns to the self and becomes circular as everything connects to other spirits. In the story, “The First Salmon Celebration”, the man who is taken by the salmon returns and tells the *Gitksan* the laws of the salmon. These laws are still in effect today.”<sup>112</sup> The laws of the salmon are recognized by the Gitksan through an understanding of the salmon as a people with whom the Gitksan have a reciprocal partnership. This is at once an implicit and explicit understanding of the salmon – the background of tacit shared understandings must enable an ability to imagine and understand the salmon as a people, and it is on this implicit basis that explicit law is generated over time.

This duality in Gitksan law parallels Fuller’s “congruence thesis” in which there is a direct dependent relationship between (official) state law and (unofficial) customary law.<sup>113</sup> According to Postema, Fuller offers a “profound argument for the dependence of

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<sup>112</sup> Smith, *supra* note 107 at 44-45.

<sup>113</sup> Postema, “Implicit Law”, *supra* note 18 at 260.

law on implicit interactive practice”.<sup>114</sup> Fuller argues that “a substantial degree of congruence between enacted laws and background informal social practices and conventions governing horizontal relations among citizens is necessary for the existence of law”.<sup>115</sup> For the Gitksan, this means that the explicit and formal law relies on the undergirding and stability provided by implicit and informal law. Postema calls this Fuller’s “vertical interaction thesis”, in which law is the “product of an interplay of purposive orientations between the citizen and his government...[not] a one-way projection of authority originating with government and imposing itself upon the citizen”.<sup>116</sup> Of course in the case of the Gitksan, governing authority is decentralized, so arguably, explicit formal Gitksan law is even more reliant on implicit informal law.

### 5.2(b) Implicit Law to Explicit Law

To continue with Fuller: my second inquiry concerns how the informal, implicit Gitksan law that originally derives from social interaction changes to become formal Gitksan law<sup>117</sup> that is explicitly recorded in the *adaawk*, the *antamahlaswx*, kinship roles, practices *and* traditions, and Gitksan *ayook* (precedent).<sup>118</sup> Drawing again on Andrée

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<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*

<sup>117</sup> My approach on this issue differs from Fuller, who wrote, “In the first place, the rules of customary law are not first brought into being and then projected upon the conduct they are intended to regulate. They find their implicit expression in the conduct itself. In the second place, the *purpose* of such rules never comes to explicit expression.” Fuller, *Anatomy*, *supra* note 91 at 44 [emphasis in original].

<sup>118</sup> Gitksan precedent is publicly and formally recorded into memory in the Feast hall by the responsible ‘*nii dil* (House from the opposite clan of the host’s House). In turn, these precedents are drawn upon as required in the collective deliberations to resolve legal problems or to sort out legal issues. The legal agreement resulting from the new deliberations is then publicly and formally recorded into memory in accordance with the *ayook* practices. As with common law precedent, Gitksan *ayook* entails both constraint and creativity otherwise, “judges would have very little capacity and opportunity to develop the common law; but if judges could ignore precedents completely, the doctrine [of precedent] would not exist in any meaningful sense.” Duxbury, *supra* note 79 at 27.

Boisselle, the authority of Gitksan law rests on the interplay between the tacit Gitksan background and formal law which is brought into the foreground by making it explicit.<sup>119</sup> In part, this inquiry includes considering how social interaction solidifies into patterns of expected behaviour and to produce norms that turn into legal “oughts”.<sup>120</sup>

The Gitksan legal cases set out in chapter 3 demonstrate how explicit Gitksan law is brought to the foreground of the Gitksan legal order – specifically how it is recorded, deliberated on, amended, publicly pronounced, applied, and enforced. My working definition of Gitksan law includes those general rules and norms (albeit contested) that guide behaviour, in combination with the intellectual processes of legal reasoning,<sup>121</sup> interpretation, and application.<sup>122</sup> After all, “neat collections of statements of rules may not by themselves adequately explain the results of decision-processes....It is sometimes forgotten that rules do not perform identical functions in all contexts.”<sup>123</sup> (I will return to this point later in this chapter).

Rather than draw on the Gitksan legal cases in this inquiry, I have instead selected an antamahaswx origin story to explore the relationship between implicit and explicit law, and the transitioning of implicit law to explicit law. Fuller offers this practical advice for examining and interpreting implicit law:

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<sup>119</sup> Boisselle, “Beyond Consent”, *supra* note 67 at 2.

<sup>120</sup> Brunnée & Toope, *supra* note 89 at 24. According to Brunnée & Toope, “It is on the question how these patterns of expectation become fixed into legal ‘oughts’ that legal theorists remain deeply divided.”

<sup>121</sup> I draw on the work of Gerald Postema to draw parallels between the reasoning processes that are part of the Gitksan legal order and those of English common law. I have written about this elsewhere, see “Living Together: Gitksan Legal Reasoning as a Foundation for Consent” (Paper presented to the “Consent as the Foundation for Political Community,” Consortium on Democracy and Constitutionalism, University of Victoria, 2004). The conference papers will be published in an inaugural consortium journal, forthcoming in 2008. Also see generally Gerald J. Postema, “Classical Common Law Jurisprudence (Part I)” (2002) 2:2 O.U.C.L.J. 155-80, and Gerald J. Postema, “Classical Common Law Jurisprudence (Part II)” (2003) 3:1 O.U.C.L.J. 1-28.

<sup>122</sup> Given that the Gitksan legal cases set out in chapter 3 comprise only a narrow slice of the Gitksan legal traditions, this must be understood as only a partial description.

<sup>123</sup> Twining, *Llewellyn*, *supra* note 11 at 159.

We have to infer what its rules sought to accomplish. We have to assume that these rules arose from some need felt by those who first shaped their conduct by them. If we seek to understand what that need might be, we must place ourselves in the situation of the parties affected and infer why it was they found it appropriate to impose the patterns they did on their actions toward one another.<sup>124</sup>

In the remainder of this section, I am integrating the work of several other scholars with Fuller's approach to implicit law in order to push the exploration to a deeper and more practical level with the Gitksan oral histories. This antamahlaswx narrative is about the origin of Gitanmaax, one of the six present-day Gitksan communities.

*Gitksan* means people of the River of Mist. Salmon has always been the source of wealth for the *Gitksan*; *Gitanmaaxs* means People who harvest salmon by torchlight. The first village of *Gitanmaaxs* was located by the banks of the 'Xsan (Skeena River). This is the story of the beginning of *Gitanmaaxs*.

A young girl, the daughter of a chief, became *ubin* (pregnant). No one knew who the father was. The young girl did not know who the father was either. Each night she climbed a ladder that the servants put up for her and after she climbed up the ladder was taken away, so no one could get to her and she could not get out. Yet each night a handsome young stranger would come to her.

Her father, the chief, was very angry and the *Gitksan* were afraid. The chief ordered the *Gitksan* to pack their belongings and load up the canoes. They were going to abandon the young girl. The handsome young man had disappeared.

The young girl wept as she watched the canoes disappear around the bend in the river. Her mother had left her food and given her hurried instructions on how to deliver her babies when the time came. They did not know that she was going to have triplets.

Her food supply ran out. She sat on the banks of the 'Xsan thinking she could easily slip into the water. Who would know and who would care. It was at this time the babies decided to be born. She knew she had to eat to keep up her strength and feed her babies. She held her three tiny babies and wept.

In the *Gitksan* culture, in times of great distress, *Uun ts'iits'* (supernatural being) comes from the earth, to help. *Uun ts'iits'* appeared before the weeping mother and instructed her to take strips of bark from the birch trees and make torches. [*Uun ts'iits'*] explained that the girl must then place the torches along the riverbank. The light would attract fish and she could spear them. The grateful young mother gave the *uun ts'iits'* her earrings in payment and the *uun ts'iits'* disappeared.

Each night the mother would bundle her babies together and leave them in the longhouse and she would go to the river to fish. She became strong and confident and soon she had many salmon hanging in the smokehouse. Her children grew very quickly and soon were a help to her. They hunted and trapped small animals, they fished and they picked berries.

The mother explained to her children that their people had moved away because she did not know who their father was. She instructed her children and

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<sup>124</sup> Fuller, *Anatomy*, *supra* note 91 at 44.

taught them about the land. Many years passed and her father, the chief, forgot his anger. He sent out his warriors to fetch the bones of his daughter so that he could mourn her. The warriors returned with astonishing news. The chief's daughter and his three grandchildren were alive and well.

The chief and his people returned to the first *Gitanmaaxs* to find a woman with much wealth in the smokehouses. A great feast was held to celebrate the reunion and *Gitxsan* names were given to the children.<sup>125</sup>

According to Jane Smith, the overarching theme of the Gitanmaax origin story is that of trust and protection. Smith argues that the story stands for (1) the importance of looking after young children, and (2) how to forgive and accept forgiveness.<sup>126</sup> From Smith's perspective as an educator, in his anxiousness to protect his daughter, the chief treated her like a prisoner, but when she became pregnant in spite of his efforts, he abandoned her. Smith's conclusions are shaped by her goal, which is to investigate and articulate the antamahlaswx as part of Gitksan pedagogy. As with all interpretations, Smith's conclusions reflect her own approach to narrative, which is, "When we teach, we tell stories....to confirm community among others and ourselves, and to initiate others into our communities....stories are performances as well as narratives. They express and represent".<sup>127</sup> Smith's approach to the antamahlaswx might be described as the narrative mode, which according to legal scholar Stephan Krieger serves two functions:<sup>128</sup>

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<sup>125</sup> Smith, *supra* note 107 at 85-87. There is a 1920 version of this story, entitled "How Gitanmaax Village Began" in John Cove & George MacDonald, eds., *Tsimshian Narratives I: Tricksters, Shamans and Heroes*, Mercury Series Directorate Paper No. 3 (Ottawa: Directorate, Canadian Museum of Civilization, 1987) at 89-92. (Narrated by Isaac Tens to William Beynon.)

<sup>126</sup> Smith, *ibid.* at 107.

<sup>127</sup> *Ibid.* at 43-44.

<sup>128</sup> Drawing on the work of Jerome Bruner in cognitive science, Krieger writes that there are two modes of cognitive functioning: "paradigmatic or logical thinking [that] attempts 'to fulfill the ideal of a formal, mathematical system of description and explanation', [and] narrative thinking [that] constructs stories to account for our experience. Throughout our lives, we are bombarded with hundreds of stimuli in the world around us. To make sense of out of this onslaught, we need to filter out details we consider extraneous and focus on others we consider essential. In the process, we weave stories." These modes of thinking are interconnected and both are necessary for legal reasoning. Stefan H. Krieger, "The Place of Storytelling in Legal Reasoning: Abraham Joshua Heschel's Torah Min Hashamayim" (2007) Legal Studies Research Paper Series, Research Paper No. 07-26 online: Social Science Research Network <http://ssrn.com/abstract=1010930> at 4 [footnote omitted] [Krieger].

It makes our experience communicable to others and increases cultural solidarity. It also gives “a certain predictability to the plights of communal life and a certain direction to the efforts to resolve them”. Narrative forms are “recipes for structuring experience itself, for laying down routes into memory, for not only guiding the life narrative up to the present but directing it into the future.”<sup>129</sup>

However, when the lens is switched to explore the implicit and explicit law contained in the antamahlaswx origin story, different insights are possible. Here again, different hermeneutic approaches to oral histories create different forms of legal reasoning and also different decisions about legal problems. This is demonstrated by Krieger’s analyses of the writing of two rabbis, Rabbi Akiva and Rabbi Ishmael, and their opposing interpretations of the Torah. Rabbi Akiva interpreted the stories in such a way that the resulting laws were “mandatory, and people have no autonomy in their decision making”.<sup>130</sup> As a result, Rabbi Akiva’s stories “portray a passive people given explicit commandments for all aspects of their lives....Akiva gives no discretion [in decision making] either to the people or their leaders.”<sup>131</sup> In contrast, according to Rabbi Ishmael, people have the ability to reason in their decision-making processes, and individuals have some independence in their own decisions. According to Rabbi Ishmael, decisions “are to be made in the context of the everyday experience of the people and their rabbis, not based solely on some eternal command of Mount Sinai”.<sup>132</sup> In the result, “Ishmael saw the role of the rabbi as a problem solver not as a rigid magistrate.”<sup>133</sup> Krieger explains that

Rabbi Akiva’s stories centered on God’s supernatural and miraculous intervention in the world; God’s anthropomorphic manifestations and loving relationship with Israel; and a passive, dependent role for Israel which one day would be miraculously redeemed from its present misery. Rabbi Ishmael’s narratives, on the

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<sup>129</sup> *Ibid.* at 4. Krieger quoting Anthony G. Amsterdam & Jerome Bruner, *Minding the Law* (Cambridge, Mass.: Harvard University Publishing, 2000) at 115-117 and Jerome Bruner, “Life as Narrative” (2004) 71:3 *Social Research*, 691 at 698 [footnotes omitted].

<sup>130</sup> Krieger, *ibid.* at 44.

<sup>131</sup> *Ibid.* at 45.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.* at 46.

other hand, focused on the natural cycles of the world, a clear demarcation between heaven and earth, and an autonomous role for humans in the decision-making process. Faced with the misery around him, Rabbi Ishmael composed stories, in which, humans, not God, played a prominent role in directing life.<sup>134</sup>

What matters about the approaches of Rabbi Akiva and Rabbi Ishmael for the purpose of legal interpretation of the Gitksan antamahlaswx is how each rabbi's legal rulings directly mirror their own narrative themes and images. In other words, my themes and images will shape how I interpret the antamahlaswx. If I were to take the approach of Rabbi Akiva, I would understand Gitksan people as being passive and without autonomy over their minds, and I would interpret the antamahlaswx rigidly as laying out strict rules to be categorically obeyed. On the other hand, if I were to choose the approach of Rabbi Ishmael, I would understand the Gitksan to be intellectually independent agents who are capable of reason and decision-making – and who would engage in the interpretation of the antamahlaswx on their own behalf as active citizens seeking to understand their world. (I will return to the issue of Gitksan agency later in this chapter.) In any case, as will become clear, my understanding of Gitksan society and of legal traditions closely resembles Rabbi Ishmael's approach as reflected in his narratives, which “portray a nation farther removed from God but with the independence of mind”. Krieger summarizes the overall lessons he drew from the work of Rabbi Ishmael and Rabbi Akiva, and which apply to my overall project:

When rendering their legal decisions, these rabbis probably did not consciously reflect on the different narrative visions they developed. Nor, however, did they simply resort to simple algorithms applying the facts to the rules and established precedent. As human judges, they attempted to relate abstract legal principles to actual cases using both the logical principles of their legal system and the narrative themes and images they had created to find meaning in the world in which they lived. The lesson that these stories and opinions teaches us is that, as lawyers and judges, we need to understand the complexity of the decision-making process and

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<sup>134</sup> *Ibid.* at 55.

recognize the crucial role that our culturally-developed stories play in actual judgment.<sup>135</sup>

Combining Rabbi Ishmael's approach to narrative with Fuller's approach to examining the implicit law contained in the Gitanmaax origin story, layers of meaning and complexity become apparent in what initially seemed to be a very simple story. The chief's response to his daughter's mysterious pregnancy is to pack up and leave her behind. This behaviour might be interpreted as conflict avoidance; rather than stay and deal with his anger or repair his relationship with his daughter, he turned away and abandoned her. One of the ways that Gitksan people managed conflict was through conflict avoidance, which was facilitated by the horizontal mobility within the Gitksan kinship system that enabled members to move freely among and align with a number of kinship groups (e.g., spouse's House, father's House, etc.).<sup>136</sup> Within this flexible kinship structure, a person's House membership remains as a point of reference for political, legal, and economic purposes, but does not constrain the person from moving freely throughout the system. The chief did not force his daughter to leave; rather it was he and the rest of the village who packed up and left.<sup>137</sup> According to various other *adaawk* and *antamahlaswx*, this is not an uncommon response. The person with the problem is the one that leaves.

When the food that her mother had left her had run out, the pregnant girl wept, and in great despair considered suicide by "slipping" into the water, because "Who would know

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<sup>135</sup> *Ibid.* at 56.

<sup>136</sup> For example, the Innu in Labrador practiced conflict avoidance. This worked well with small highly mobile groups of people that were able to travel across a large territory. However, since the establishment of settled communities, the cultural practice of conflict avoidance no longer works. In fact, when people are living close together, the practice of conflict avoidance actually makes the conflict worse. See Hedda Schuurman, "The Concept of Community and the Challenge for Self-Government" in Colin Scott, ed., *Aboriginal Autonomy and Development in Northern Quebec and Labrador* (Vancouver: UBC Press, 2001) 379 [Schuurman].

<sup>137</sup> Interestingly, there is actually less mobility now as many Gitksan people are oriented to their House membership as their only political option within the Gitksan system.

and who would care?”<sup>138</sup> At this time the spirit being, the *uun ts’iits’*, appeared before the girl and taught her how to fish with light so that she and her babies would survive. That the *uun ts’iits’* appeared at the time of the girl’s great distress in order to teach her how to fish confirms the relationship that Gitksan people have with the spirit world. This interaction also confirms Gitksan people’s belief that many of their skills and knowledge were provided to them as gifts from the spirit world of which they are also a part, and these they often recorded in the crests.

The daughter considered suicide, but once her babies were born her responsibilities to them outweighed her own grief. This contains a strong message about the young mother’s responsibility for her own welfare so that she is able to provide for the wellbeing of her children. In other words, the survival of the infants was more important than the mother’s desire to escape her despair by ending her life. In addition, the babies’ father disappeared and their maternal grandparents left. Clearly, it is the mother who is primarily responsible for the babies.

Another thing that we can learn from this story is that it was precisely because the young woman accepted her responsibilities for herself and her babies that she received help from the *uun ts’iits’*, which enabled her and her children to stay alive. As a result, the young woman became “strong and confident” and she capably filled her smokehouse with salmon. This contains an important message about the potential independent and capable roles that women can fulfill – she survived, ensured that her children survived, and became a woman with much wealth in her smokehouse.

The chief, as a father, had a responsibility to his daughter. In his abandonment of his daughter, the chief failed in his responsibilities as a father. It wasn’t until many years

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<sup>138</sup> Smith, *supra* note 107 at 86.

later that he finally “forgot” his anger and decided that he wanted to mourn the loss of his daughter. His overly strict efforts to protect his daughter failed to prevent her from becoming pregnant. As Jane Smith points out, there were other ways the father could have tried to protect the girl,<sup>139</sup> but given that the being that impregnated his daughter was apparently supernatural, it is likely that any protective efforts would have failed.

Finally, as the three children grew older, they began to fulfill a vital role to help the family’s survival – trapping, fishing, hunting, and picking berries. This confirms that the young woman also fulfilled her responsibilities as a teacher: “She instructed the children and taught them about the land”.<sup>140</sup> In turn, the children accepted and acted on their responsibilities to each other and to their mother.

In keeping with Fuller’s approach, these implicit messages contain norms about the obligations of all the parties – the father, the young woman, the *uun ts’iits’*, and the children. There is less in this story about the girl’s mother, who left her daughter some food and birthing instructions. This ambiguity about the mother’s role is surprisingly passive given that her daughter was in her House and she had responsibilities to her both as a mother and as a House member. One can only conclude that the girl’s mother must have agreed with the father’s decision or she would not have abandoned her daughter. The norms in this *antamahlaswx* can be interpreted in a range of ways – depending on the context, the storyteller, and the listener. As such, these norms and their range of interpretations form part of the implicit interactive law, that background of tacit understandings that enables Gitksan formal law to be effective.

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<sup>139</sup> *Ibid.* at 87.

<sup>140</sup> *Ibid.*

I am not concerned here with distinguishing between implicit social and legal norms, because “law as interaction suggests that there is no radical discontinuity between law and non-law, that the process of building legal normativity requires many of the same building blocks as do other forms of social normativity.”<sup>141</sup> In fact, the wisdom of the antamahlaswx stories as pedagogy is that each story actually allows competing norms to be perceived and considered (e.g., the obligations of the father to his daughter), and it doesn’t require the teller of the antamahlaswx story to articulate the norms. Rather, the norms are revealed in the stories only as the listener is able to hear them.<sup>142</sup>

Turning now to the explicit law contained in this story: Graham and McJohn argue that a story should be appreciated as a cognitive unit (i.e, structure that enables the mind to organize, hold, and focus on a set of information or construct of meaning), and helpfully caution against adopting a simplistic view of legal reasoning by analogy.

In cognitive science (as in discussion of legal reasoning), analogical reasoning is usually discussed as projecting inferences about a target to a source. The strong view of metaphor treats metaphor as organizing our thinking about a matter, once the set of facts fall within the domain of the metaphor. This views analogy as a relatively static process. Once similarities are detected between the two cases, then aspects of the first are inferred to be true of the second. But... analogical reasoning is a more dynamic process: Making an analogy is not so much a matter of discovering existing similarities, but rather an active process of reasoning dynamically, to forge an entire network of connections between the two cases. In other words, the making of analogies is like creating a story.<sup>143</sup>

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<sup>141</sup> Brunnée & Toope, *supra* note 89 at 68. It is in the explicit application of law that the legal norms become apparent, but they are still supported by implicit law and social norms.

<sup>142</sup> I draw this concept from the work of Karl Llewellyn with the Cheyenne which is described here by William Twining: “[B]y studying actual cases the phenomenon of competing norms can be perceived and understood; it overcomes the problem of refusal or inability of informants to articulate norms; the extent of coincidence or divergence between articulated norms and the outcomes of dispute-settlement processes can be checked; ... the relationship between the ‘law’ of the group and the ‘sub-law stuff’ of each sub-group may be brought out by the study of disputes; in a crisis one can actually see the culture at work; and finally, trouble-cases are in themselves important phenomena”, *Llewellyn, supra* note 11 at 160-161.

<sup>143</sup> Graham & McJohn, *supra* note 104 at 36-37.

While there are implicit norms about the Gitksan relationships with the spirit world, specifically with the *uun ts'iits'*, there are also explicit laws that govern how Gitksan people must recognize and interact with non-human life forms and spirits. In the story of the chief's daughter, the gift from the *uun ts'iits'* came during a time of great need, and so the Gitksan people understand that they must reciprocate with future acknowledgements,<sup>144</sup> practices (i.e., giving thanks for the first salmon, taking care with animal carcasses, etc.), and offerings or gifts.<sup>145</sup> Failure to do so would result in the spirit world abandoning the Gitksan, thereby causing extreme hardship. In this case, the girl gave the *uun ts'iits'* her earrings. The earrings signified that the girl was a child of royalty and that both her parents were chiefs. Given this, the earrings would have been of great value to her because they were a public representation of her identity, status, and legal capacity in Gitksan society.<sup>146</sup>

As previously explained in chapter 1, Gitksan people are matrilineal. In this story, once the chief was reunited with his daughter and grandchildren, the grandchildren received names from their mother's lineage. There is a local saying among Gitksan people that, "The only thing you can be sure about is who your mother is so the matrilineal system is more practical."<sup>147</sup> In this case, the grandfather abandoned his daughter and grandchildren, and the father of the triplets disappeared, but that did not matter to the children's finding a place in the kinship network and in their mother's House.

Historically, Gitksan marriages were arranged. In the case of the young woman in this story, there was no opportunity to arrange a marriage for her with a husband of the

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<sup>144</sup> The Gitksan also understand that they have a reciprocal relationship with the salmon.

<sup>145</sup> The Gitksan witnesses provided extensive examples of practices intended to demonstrate gratitude in their daily lives. See for example the testimony of Stanley Williams, Solomon Marsden, James Morrison, and Olive Ryan.

<sup>146</sup> See the testimony of Mary McKenzie (Gyoluugyat) May 13-26, 1987, B.C.S.C. trial transcript, 160-615, evidence for *Delgamuukw v. The Queen* (1991), 79 D.L.R. (4th) 185.

<sup>147</sup> Conversation with Marie Wilson in Hazelton, B.C. (1987).

same rank. Other considerations for selecting a husband for the girl would have included historic familial ties and political alliances, the general strength of the young man's character (e.g., work ethic), and the social and economic strength of his House.

The explicit laws that this antamahlaswx story is concerned with are those governing the maintenance of relationships with non-human life forms, marriage arrangements, inheritance and House memberships, and social status and legal capacity. It is my thesis that, while for the Gitksan implicit law is derived from social interaction, some of those implicit laws can become explicit by being recorded in the antamahlaswx and adaawk. Once recorded, the explicit laws become part of the collective memory resource or archive – the Gitksan ayook – to be interpreted, reasoned, applied, enforced, and changed as necessary for the purpose of managing Gitksan society. Depending on the nature of the legal problem or issue to be dealt with, these explicit laws are drawn upon for the deliberation and consultation processes conducted by the Houses and kinship networks. Engagement in the intellectual reasoning and deliberation of these public and collective legal processes requires conscious understanding of the law. Finally, the decisions, agreements or conclusions, along with their reasons, are announced in the Feast hall to become recorded in memory for the ayook. Hence, both the content and architecture of the antamahlaswx and adaawk can be conceptualized as part of the collective oral Gitksan legal archive.

### **5.3(c) Agency in the Gitksan Legal Order**

Norms can be relative to practices and shaped by them without being absolutely constrained by them....Norms themselves help to structure practices; there can therefore be change in the conditioning environment over time as a result of past

normative decisions. Once again, our attention should be drawn to questions of agency.<sup>148</sup>

Interactive law raises questions about the agency of the humans who are socially interacting and generating law over time through their conduct. In this very brief section, I explore how active or passive constructs of agency fit within my construct of the Gitksan legal order.

According to legal scholar Jes Bjarup, Fuller erroneously founded his interactive theory of law on David Hume's naturalistic account of human agency wherein moral relations between human beings are founded on feelings and interactive relations are causal "between human beings in terms of causes of beliefs and feelings and uniformities of behaviour".<sup>149</sup> For Bjarup, the problem is that "Hume endorses the personal perspective in terms of the epistemic authority of the individual who only relies upon his own experience in the pursuit of knowledge".<sup>150</sup> By Bjarup's analysis, Hume "ignores the difference between custom in the sense of regular behaviour and custom in the sense of human action brought about by the intentional activity of persons".<sup>151</sup>

Bjarup argues that the human beings in Fuller's interactive theory of law are rational, but are also basically solitary, passive, and reactionary, and ought to be replaced with Thomas Reid's rationalistic and communal account of human beings "as agents that have the capacity to engage in the intentional activity of performing actions and making rules for their own conduct based upon representations of what to do in specific situations."<sup>152</sup> Specifically, Bjarup advocates for an understanding of "the interpersonal of

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<sup>148</sup> Webber, "Naturalism", *supra* note 96 at 18.

<sup>149</sup> Bjarup, *supra* note 56 at 90.

<sup>150</sup> *Ibid.* at 91.

<sup>151</sup> *Ibid.* at 143.

<sup>152</sup> *Ibid.* at 143-44.

social interaction among human beings as rational but communal agents using the method of customary law to create valid legal rules in terms of customary laws”:<sup>153</sup>

This perspective conceptualizes the concept of *opinio juris* in relation to human agency based upon beliefs that there is reason to believe and do. Thus the relation between the internal operations of the mind and the external action is a conceptual relation that implies that the agent has the capacity to perform actions that fall under a description that the agent understands and endorses. Hence the agent is engaged in the intentional activity of establishing a rule for his own conduct with the further intention that this rule also should be valid for other agents. In this intentional activity the agent cannot be separated from his action since the agent has to understand what kind of action or rule he has in mind to enact.<sup>154</sup>

Bjarup’s thesis, as it applies to agency in the Gitksan legal order, is very useful because it offers an active and communal concept of individual agency that serves to deepen the theory of law as interaction. Bjarup’s construct of the intentional and active agent corresponds with my understanding of the Gitksan self – that is, a very independent self that is at once both highly competitive and absolutely cooperative.<sup>155</sup> Furthermore, the two levels of Gitksan implicit law generated from social interaction, and the way that some implicit law transforms into formal explicit law, suggests agents with capacity and intention to perform actions and make rules for their own conduct.<sup>156</sup>

From a perspective of cultural psychology that is concerned with indigenous agency, cultural identity has been characterized as the “Conceptual Self as Normatively Oriented, a form of conscious, reflexive and evaluative self-understanding relevant to one’s explicit commitment to shared cultural values and practices”.<sup>157</sup> This perspective usefully

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<sup>153</sup> *Ibid.* at 149.

<sup>154</sup> *Ibid.* at 149-50.

<sup>155</sup> According to Joseph P. Gone, Peggy J. Miller, and Julian Rappaport, there is a dichotomy in the social sciences between the person as active agent and the person as culturally determined. See Joseph P. Gone, Peggy J. Miller & Julian Rappaport, “Conceptual Self as Normatively Oriented: The Suitability of Past Personal Narrative for the Study of Cultural Identity” (1999) 5:4 *Culture & Psychology* 371 at 395 [Gone, Miller & Rappaport].

<sup>156</sup> Bjarup, *supra* note 56 at 150.

<sup>157</sup> Gone, Miller & Rappaport, *supra* note 157 at 386-87.

fits with Bjarup's approach as it advocates a much more proactive understanding of the indigenous agent as conscious, reflexive, and evaluative. The idea of indigenous agency is expanded further: "This construct occupies a new theoretical space that includes its co-constituting 'local moral world' – the constructed, intentional moral order which is necessary to any complete understanding of Conceptual Selves as Normatively Oriented".<sup>158</sup>

The Gitksan legal order requires extremely independent people who do not simply operate in terms of their feelings or beliefs, but rather act as a matter of intention and rational<sup>159</sup> deliberation. The Gitksan legal order depends on Gitksan citizens having the intellectual capacity to engage in "the intentional activity of making rules concerning the appropriate human conduct using the method of custom based upon beliefs of what is right or wrong".<sup>160</sup> In other words, the background of shared, tacit understandings that is the foundation for the generation of implicit and explicit Gitksan law is one in which the Gitksan human being is understood as intentional, communal, reasoned, and active – and therefore able to exercise practical reason in the form of Gitksan law. Interaction in this sense is about "communicative relations between persons as communal agents engaged in the exchange of views with respect to what there is reason to believe and to do".<sup>161</sup>

According to Gerald Postema, the authority of law can enhance the self-direction of its citizens, but only when such authority is deeply rooted in the social interaction of the communities it purports to serve.<sup>162</sup> In this way, "Law is not the product of authority but its

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<sup>158</sup> *Ibid.* at 395.

<sup>159</sup> My use of the term rational is to denote reasoned, rather than the supposed objective/neutral form of thought associated with the enlightenment.

<sup>160</sup> Bjarup, *supra* note 56 at 151.

<sup>161</sup> *Ibid.*

<sup>162</sup> Postema, "Implicit Law", *supra* note 18 at 275.

necessary precondition.”<sup>163</sup> For the complex decentralized Gitksan legal order, the authority of the ayook is deeply rooted in social interaction wherein Gitksan citizens must not only be self-directed, but also active, communal, and rational agents.

#### 5.4 Resources from Indigenous Legal Scholars

For indigenous legal scholar Christine Black, developing an indigenous legal theory in Australia is to learn about “how human beings came to be patterned into a particular tract of land”.<sup>164</sup> According to Black, an indigenous legal theory must begin with a people’s cosmology, otherwise the whole endeavour is constrained at a very superficial level.<sup>165</sup>

This is because a People’s cosmological creation stories and events define principles, ideals, values and philosophies, which in turn inform the legal regime. Furthermore, a cosmology can be likened to a theory. A theory is a story of how things happen: this is no different from the creation story, as it is a particular group’s theory of how things came to be and, more specifically, how to live in a particular place.<sup>166</sup>

From another perspective, legal scholar Patrick Glenn argues that

[t]heories are rational constructions, which must first answer to requirements of internal consistency and logic before they are tested for explanatory power in the real world. Theories, and the logic they entail, are part of the tradition of western rationalist thought. As such, a theoretical construct is a creation derived from a particular tradition.<sup>167</sup>

However, Glenn does concede the possibility that such theoretical constructs may have been developed outside western rationalist thought.<sup>168</sup> It is my position that Gitksan society and other indigenous societies developed their own culturally informed theoretical

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<sup>163</sup> *Ibid.*

<sup>164</sup> Christine Morris (Black), *A Dialogical Encounter with an Indigenous Jurisprudence* (PhD Dissertation, Griffith University, Austl., 2007) at 6 [unpublished].

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid.*

<sup>167</sup> H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 2nd ed. (Oxford: Oxford University Press, 2004) at 3-4 [Glenn, *Legal Traditions*].

<sup>168</sup> *Ibid.* at 4.

constructs that were necessary to intellectualize their worlds and allow abstract thought (just as Glenn's theories are culturally informed and bounded). For example, the extraordinary Gitksan oral histories – antamahlaswx and adaawk – would not be possible without such theoretical intellectual capacity. The antamahlaswx and adaawk certainly represent a form of explanatory power in the real world of Gitksan people – both past and present.

In her substantive and ground-breaking work, Jane Smith has articulated Gitksan pedagogy that is founded on the antamahlaswx. The tools of Gitksan pedagogy include dynamic metaphor, reasoning by analogy, and story as cognitive unit – far beyond the employment of simple parables or the static, literal metaphoric interpretations. According to Graham and McJohn, “people could not analyze their metaphors if they didn't command an underlying medium of thought that is more abstract than the metaphors themselves”.<sup>169</sup> Furthermore, metaphor can “help organize and search the vast amount of information that people experience”<sup>170</sup> which is exactly what Gitksan people do with their extensive oral histories. In other words, the range of intellectual activities associated with managing Gitksan society complete with its legal order and other institutions is more than adequate to equip people to meet the terms of Glenn's logic and theoretical constructs.

We are at an exciting time in Canada with a number of established indigenous legal scholars such as Tracey Lindberg, John Borrows, Gordon Christie, Darlene Johnstone, Paul Chartrand, Sakej Henderson, Mark Stevenson, June McCue, Lucy Bell, Larry Chartrand,

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<sup>169</sup> Steven Pinker, *The Stuff of Thought: Language as a Window into Nature* (New York: Viking Press, 2007) at 249, quoted in Graham & McJohn, *supra* note 104 at 17.

<sup>170</sup> Graham & McJohn, *ibid.* at 18.

and Patricia Monture-Angus – to name only a few.<sup>171</sup> There are also a number of new and emerging indigenous legal scholars such as Kinwa Bluesky, Johnny Mack, Sarah Morales, Kerry Sloan, Maxine Matilpi, and Dawnis Kennedy. Despite the increasing number of indigenous legal scholars and expanding literature, I will focus this brief section on the recent work of only two such scholars whose work most directly relates to my own in this project – Gordon Christie and John Borrows.

I will turn first to Gordon Christie, who argues that the very act of theorizing about the law is a political act, “the result being that all legal theory is, to some degree, tied to a political agenda”.<sup>172</sup> That is, whether one chooses to take a descriptive or prescriptive approach to legal theory, each approach is freighted with assumptions and the theorist reliant “on the conceptual apparatus she brings to the task, conceptual apparatus that impacts on the way she goes about investigating this phenomena, and the model of the phenomena she develops”.<sup>173</sup> Contained within such a conceptual apparatus are particular understandings of the world as well as opinions about how the world should be – hence the political agenda.

For a descriptive approach to theory, Christie says, a “legal theorist may carry out theoretical work entirely within a legal framework embedded within a society” in a way that “bypasses questions about the nature of the law by taking as her subject of inquiry the system around her”.<sup>174</sup> This theoretical approach involves asking questions about how the system functions, its purposes, various roles of actors, and developments. Alternatively, a theorist may choose a more prescriptive approach wherein there is less concern about a

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<sup>171</sup> There are also a number of indigenous legal scholars elsewhere in the world such as Christine Black and Jacinta Ruru, to name only a couple.

<sup>172</sup> Christie, “Indigenous Legal Theory”, *supra* note 3 at 10.

<sup>173</sup> *Ibid.* at 8.

<sup>174</sup> *Ibid.* at 7.

particular system of law, and more concern with explaining various ideas of the law and perhaps what the law should be.<sup>175</sup>

In truth, Christie continues, these approaches to legal theorizing run into each other because “in reality we would have to imagine that legal theories that aim to be descriptive have a strong underlying prescriptive current”.<sup>176</sup> Similarly, prescriptive theoretical accounts will be founded on an understanding or idea of some system of law even if this remains within the unstated assumptions of the theorist. To the indigenous legal theorist, Christie poses the question:

What, then, might an Indigenous legal theory look like? Presumably, an Indigenous legal theory would present a theory about law, one issuing from an Indigenous conceptual universe. It would seem folly, however, to imagine that there might be a single Indigenous theory about the law, since such a monolithic theory would require a single conceptual “pan-Indigenous” universe. ...

[T]hat indigenous communities will naturally contain degrees of diversity of opinion and perspective just as we see within non-Indigenous communities. Why should we assume, for example, that the Cree would speak with a single unified voice on theoretical matters while non-Indigenous Euro-Canadian legal theorists produce many and varied theories about the law?<sup>177</sup>

Christie thoughtfully speculates that within the future field of indigenous legal theory, there will be a broad diversity of (1) types of legal theorizing (i.e., prescriptive and descriptive), (2) legal theories about different indigenous legal orders and conceptions of law, (3) legal theories about the Canadian legal regime, and (4) indigenous legal theories about western legal theories.<sup>178</sup> Keeping in mind the importance to my project of embracing the diversity of indigenous legal theory, Christie’s most important comments are these:

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<sup>175</sup> *Ibid.*

<sup>176</sup> *Ibid.* at 8.

<sup>177</sup> *Ibid.* at 12.

<sup>178</sup> *Ibid.* at 13-15.

On the one hand, there is concern over the possibility that Indigenous scholars might unreflectively or uncritically fall into thinking and writing in non-Indigenous ways, a failing that can re-inscribe the very ways of thinking that historically have worked so powerfully against Indigenous peoples. On the other hand, there is concern that an Indigenous scholar might lose sight of the concerns and interests that should be driving their scholarship, concerns and interests tied to Indigenous peoples struggling to survive in ongoing colonial existences. While both concerns relate to the care with which an Indigenous scholar must “ground” her theorizing, the first speaks to the care the scholar must take into being eternally vigilant and meticulous in the use of non-Indigenous knowledges, and the second speaks to the need for Indigenous scholars to be ever cognizant of the larger political struggles that frame their work.<sup>179</sup>

Despite his wariness and many cautions, Christie concludes that indigenous legal theorizing is essential and that there is vital work for indigenous legal scholars to reveal “the ways in which the dominant system has functioned to trap Indigenous aspirations within webs of theory and ‘principle’”.<sup>180</sup> Other such vital tasks identified by Christie include developing theoretical perspectives on both the dominant legal system and indigenous legal orders, and articulating the indigenous underpinnings of such theoretical perspectives. Finally, Christie argues that indigenous scholars can use the tools of non-indigenous legal theory as long as they

(a) maintain their grounding in their communities, (b) carefully assess the web of conceptual relationships within which a non-Indigenous theoretical position or argument is embedded in relation to this grounded Indigenous existence, and (c) excise the content of the non-Indigenous argument or position from these extraneous matters, so it can be put to use by and for Indigenous peoples.<sup>181</sup>

While Christie offers many valuable insights to my research, it appears that he neglects to consider ongoing changes (over time) to indigenous legal orders and law that might be likened to a political act of a political collectivity – what Boisselle<sup>182</sup> calls

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<sup>179</sup> *Ibid.* at 25.

<sup>180</sup> *Ibid.* at 43.

<sup>181</sup> *Ibid.* at 44.

<sup>182</sup> Andrée Boisselle, “Emerging From Colonial Quicksands – Cultural Hybridity and the Stó:lō Transition to Self-Rule: Examining Stó:lō Discourse Around the Experience of Taking on Responsibility for the Delivery of Child and Family Services” (2007) [unpublished, archived with the Stó:lō Research and Resource Management Centre]. A shorter version of this article is forthcoming in the University of the Fraser Valley

“cultural hybridity”.<sup>183</sup> For the Gitksan, such changes are wrought from the experience of the past hundred years. Consider for instance how the cash economy, capitalism, settler population,<sup>184</sup> and corporate third parties on Gitksan territories have been incorporated into or at least tolerated by the Gitksan legal order. Of course, this is not to deny colonial relations of power or the dynamics of power: rather, my intent is to recognize Gitksan agency in colonial history. While it is true that one should seriously examine the possible consequences of changes to law in order to identify those that are destructively neo-colonial<sup>185</sup> in nature, the reality is that over time, implicit and explicit Gitksan law will reflect the world around it – including personal, political, economic, and legal relationships with other peoples. This does not mean, however, that Gitksan people will somehow cease to be Gitksan people, but rather that the Gitksan legal order now reflects the realities of 2009 and Gitksan people are the Gitksan people of 2009. From my perspective, the most crucial process that a people must consider in seeking to understand their own legal order and the legal orders of other is how laws change over time.<sup>186</sup>

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Research Review, 2008. Boisselle is cognizant of the need to consider Nikolas Kompridis’ (“Normativizing Hybridity/Neutralizing Culture” (2005) 33:3 *Political Theory* 318-43 [Kompridis]) argument at a cultural specific level to avoid the damned-if-you-do and damned-if-you-don’t trap of essentialism versus anti-essentialism in the discussions about cultural hybridity.

<sup>183</sup> Cultural hybridity is a hotly contested concept in the academic political discourse. Kompridis, *ibid.* at 322, argues that the “concept of hybridity has undergone a premature, largely unnoticed normativization, thereby making available a framework within which the political claims of culture can be tamed and domesticated”.

<sup>184</sup> For a discussion about re-examining the relationship between Gitksan people and settlers, see P. Dawn Mills, *For Future Generations: Reconciling Gitksan and Canadian Law* (Saskatoon: Purich Publishing, 2008).

<sup>185</sup> Decolonization analysis must be a part of such examinations.

<sup>186</sup> Such a perspective brings us to the present day where the challenge is to see indigenous law in contemporary forms and expressions. I have written about this elsewhere: see Val Napoleon *et al.*, “Where is the Law in Restorative Justice?” in Yale Belanger, ed., *Aboriginal Self-Government*, 3rd ed., (Saskatoon: Purich Press, 2008) 349-72.

William Beynon recorded an example of a recent change and addition to the intellectual property of the House of Gwaxs'án.<sup>187</sup> During a house-to-house *halait*<sup>188</sup> procession in Gitsegukla in 1945, a new nax nox called The Japanese Warrior was introduced and performed.<sup>189</sup> The halait promenaded with nax nox whistles to all the houses in which the visiting chiefs were billeted for a series of pole raising Feasts. Attendants of Gwaxs'án called out, "You had better all flee. Some terrible warrior is running amok among our people. Many have already been attacked. It may be a Japanese warrior, so be on your guard".<sup>190</sup> Beynon describes the drama of this halait performance.

With that, a person came running in with a short dagger and ran about threatening everybody. The attendants were singing the halait song and other attendants were endeavouring to protect the guests. When the halait had stopped dancing about, its gaze wandered about and then it rushed to where one of the visiting chiefs was standing. This chief embraced the warrior after being stabbed by [the] warrior. This chief's particular naxnox was Sneezing, Hat'isiwə, so when he took the warrior in his arms he started to sneeze, and this he done for a long while and then the warrior recovered and then stabbed another guest chief and the chief also embraced the warrior and sang his halait song. After the recovery they both gave the halait \$2.00 each, this being placed on its head. Then the halait stabbed the writer [William Beynon]. I immediately got up and patted the halait on the head and said, "Come, come great one recover your strength"; and as the others had done I also contributed \$2.00 by placing it on the head of the halait.<sup>191</sup>

This example demonstrates how alive and dynamic the Gitksan system was and still is. Contemporary events and characters are recognized and incorporated into the ancient intellectual property held by a House, and then performed. In this way, history is performative and the original powers are continually recreated at the institution of the Feast.

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<sup>187</sup> Margaret Anderson & Marjorie Halpin, eds., *Potlatch at Gitsegukla: William Beynon's 1945 Field Notebooks* (Vancouver: UBC Press, 2000) at 97-98 [Anderson & Halpin]. Gwaxs'án is also spelled Guksen, Gwaxsan or Gwaxsán.

<sup>188</sup> Also spelled *haláit*.

<sup>189</sup> *Ibid.* at 259, note 5. This nax nox does not have a name in Gitksan and is most likely linked to the Second World War.

<sup>190</sup> Anderson & Halpin, *supra* note 187 at 97-98 [endnote omitted].

<sup>191</sup> *Ibid.* at 98.

Christie's suggestions regarding the groundedness of the indigenous legal theories are in keeping with my own premise that Gitksan legal theory must derive from the lived actuality and dynamic functioning of Gitksan legal traditions. As I have written, indigenous legal theory that is grounded in substantive empirical research is less likely to be rhetorical or idealistic, and is therefore more practical and useful for indigenous peoples and the larger indigenous political project. Finally, as Christie observed earlier, descriptive and prescriptive legal theories usually run into each other – and I expect that this will be the case with my project here as well.

Turning now to the work of John Borrows: a major theme that runs through much of it is that the Canadian legal system has recognized and comprises three legal traditions – civil, common, and indigenous. Borrows has argued that the Canadian State has effectively received indigenous legal traditions through treaties, jurisprudence, and constitutional text, and as such, Canada is a legal pluralistic state. In his forthcoming book and most recent and most extensive treatise, *Canada's Indigenous Constitution*, Borrows provides a range of diverse indigenous law examples drawn from the legal traditions of the Mi'kmaq, Haudenosaunee, Anishinabek, Cree, Métis, Carrier, Nisga'a, and Inuit peoples.

In this next quotation about sources of indigenous law, Borrows supports Christie's argument regarding the potential diversity of indigenous legal theories:

There are many sources of law within Indigenous communities. Indigenous peoples hold many different views about the character and practice of law, as is the case in western legal theory. Indigenous peoples hold diverse theories about what gives law its binding force. Disagreement can be an important part of law, as long as there are sufficient convergences to produce ongoing but continuous interim settlements. The civil or common law traditions are not disregarded because of the deep philosophical disagreements about their nature and source. Differences of

opinion are a part of the vibrancy and strength of western law because they provide for shifting appeals to legitimacy through time, or even within a single case.<sup>192</sup>

Borrows argues that indigenous legal traditions are sourced in sacred law, natural law, deliberative law, positivistic law, and customary law. Each of these sources of law stimulates many questions, and this is one of the strengths of Borrow's work – he creates a space within which critical and challenging conversations can take place. While there are many other chapters in this excellent book,<sup>193</sup> it is Borrows' broad conceptualization about the sources that supports my own treatment of Gitksan law and my approach to the formulation of Gitksan legal theory.

Borrows cautions against indigenous fundamentalism, romanticization of past indigenous societies,<sup>194</sup> and the oversimplification of indigenous law. He writes, “When working with Indigenous legal traditions one must take care not to oversimplify their character. Indigenous legal traditions can be just as varied and diverse as Canada's other traditions, though they are often expressed in their own unique ways.”<sup>195</sup> These are important guidelines for the exploration and development of a Gitksan legal theory. It is too easy, for many reasons, to gloss over the complexity of Gitksan society. Arguably this was not the intent, but it is one of the results of the *Delgamuukw* experience for Gitksan people. (I will revisit this later in this chapter).

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<sup>192</sup> John Borrows, *Canada's Indigenous Constitution* [forthcoming, 2009] at 30 [Borrows, *Indigenous Constitution*].

<sup>193</sup> Borrow's other chapters provide discussions on bi- and multi-juridical legal cultures, challenges to recognizing indigenous legal traditions in the Canadian legal system, the roles of courts and governments insofar as entrenching indigenous legal traditions in the legal and political fabric of Canada, the development of Canadian and indigenous legal institutions, and Anishinabek religion and law.

<sup>194</sup> *Ibid.* at 12-13.

<sup>195</sup> *Ibid.* at 30.

## 5.5 A Gitksan Legal Theory

According to William Twining, within the enterprise of law, legal theory performs a range of functions. First, the mapping or synthesising function enables one to “survey the field, or some sector of it, as a whole and see how different parts are related to each other”.<sup>196</sup> Second, the conceptual or analytical function of legal theory can help “to construct and clarify conceptual frameworks, models, ideal types, and other thinking tools”.<sup>197</sup> Finally, the simplifying function enables the construction of “general concepts, principles, taxonomies, and hypotheses [that] can also save repetition and be economical”.<sup>198</sup>

Ideally, a comprehensive Gitksan legal theory would adequately reflect and explain the depth, breadth, and scope of the Gitksan legal order and laws. My efforts here to articulate a Gitksan legal order are not so grand or comprehensive since I am working with a small selection of Gitksan legal cases that can only reveal a slice of the Gitksan legal order. Nonetheless, I am anticipating that my proposed Gitksan legal theory may be tested and extrapolated for a broader application to other areas of law within the Gitksan legal order. Similarly, with care, there may be some potential for considering this Gitksan legal theory as a basic framework model for other non-state and decentralized indigenous peoples, and this will be explored briefly later in this chapter.

According to Twining, legal theorising should be understood as an integral part of law as a discipline and such theorising can perform a number of functions that are concerned with the “health” of law generally.<sup>199</sup> I take the health of law in a society to mean, at the very least, a legal order that (1) is considered legitimate by the people of that

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<sup>196</sup> Twining, *Globalisation*, *supra* note 10 at 11.

<sup>197</sup> *Ibid.*

<sup>198</sup> *Ibid.*

<sup>199</sup> *Ibid.* at 242.

society,<sup>200</sup> (2) is an effective tool by which citizens manage themselves as a society, and (3) provides a constructive way for people to manage internal and external conflict. Legal theorising can support and maintain a healthy legal system by providing, “leadership with inspiring visions and grand designs or hypotheses... setting contexts, sharpening tools, suggesting refinements, questioning assumptions, and generally tidying up”.<sup>201</sup>

Twining argues that a legal theory can offer the following benefits:<sup>202</sup> (1) a coherent total picture, (2) general concepts, (3) general normative principles, (4) general working theories, (5) intellectual history of law, and (6) critical examinations of assumptions. In this chapter, I adopt the first four elements as a framework and starting place for Gitksan legal theory. I will not deal with Twining’s fifth and sixth elements other than to suggest that the intellectual history of Gitksan law can be traced through the *adaawk* by understanding it as a form of Gitksan jurisprudence, and through the Gitksan legal cases as I have attempted to do with my overall project here. On the question of assumptions, it is my position that while I have discussed some underlying assumptions here (mainly in chapters 3 and 6), a more comprehensive critical examination is beyond the scope of my project. Given this, I will deal with Twining’s first four elements in turn. Some of what will follow here are restatements of earlier parts of this chapter and of chapters 3 and 4.

#### **5.4(a) Overview**

The first element in Twining’s framework is “a coherent ‘total picture’, or series of such overviews, of law-in-the-world.”<sup>203</sup> My approach to law is very pragmatic: law is one of

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<sup>200</sup> Legitimacy in the sense that should a legal decision be made against a person, that person will abide by the decision anyway.

<sup>201</sup> Twining, *Globalisation*, *supra* note 10 at 242.

<sup>202</sup> *Ibid.*

<sup>203</sup> *Ibid.*

the ways in which indigenous peoples, in this case, Gitksan people, manage themselves as a society. This is law's most basic function (in a dynamic sense, of course). How Gitksan law is structured and maintained as an institution – complete with its forms, operations, processes, expressions, tacit shared understandings, and implicit and explicit legal norms – is culturally determined and bounded within Gitksan society. Given this, creating a broad “total picture” of Gitksan law is to conceptualize it as an integral part of what historically, and perhaps to a lesser degree contemporarily, comprises governance in Gitksan society.<sup>204</sup> The structure and functioning of the Gitksan legal order reflects the non-state, decentralized governance system in Gitksan society wherein authority is dispersed through a closely interwoven, reciprocal and matrilineal kinship network of Houses and clans.

Another consideration in articulating this Gitksan legal theory is how the decentralized Gitksan legal order relates to other present-day institutions in Gitksan society. “Law-in-the-world” for Gitksan society was and is embedded with other institutions – economic, political, and social. Historically, responsibility for the maintenance of legal and social order was dispersed throughout the kinship network, and while there was no separate group of professionals delegated with the responsibility for law, Gitksan people did have varying legal capacities according to rank that determined corresponding levels of authority and responsibilities within the legal order. Gitksan individuals have agency and legal capacity within the House, but outside the House it is the House that holds the legal capacity and is the legal actor in relation to other Houses. The House is relationally autonomous within the kinship system, and it is as a relationally autonomous unit that it interacts beyond the kinship system with other peoples (e.g.,

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<sup>204</sup> While the decentralized Houses still exist and operate, in the current political life of the Gitksan their authority and function is contested, changing, and in some cases limited.

settlers, Crown, government agencies, corporations, and other indigenous peoples).<sup>205</sup> At the next level, inter-House relations and alliances are formed along clan lines, and these House alliances operate at both the clan level and beyond.

A third consideration of this Gitksan legal theory is the critical question, what binds the decentralized Gitksan legal order together? This is a question that must be asked if we want to avoid the mistake of conflating Gitksan norms with behaviours and if we reject the assumption that Gitksan people just followed rules with little or no critical and intellectual engagement.<sup>206</sup> It is my contention that, overall, the Gitksan legal order is bound together and stabilized by a series of tensions created by parallel and mutually dependent behaviours that are at once highly competitive and co-operative throughout the kinship system.

The Gitksan legal order is founded on extensive family relationships, and it also extends over relationships with other living things including the land. Gitksan kinship is not just about assuming legal responsibility for people and things; rather “kinship is a socially constructed way of looking at and relating to the world. Like science, kinship-based knowledge is logical, and that is what ultimately enables it to create legal relations”.<sup>207</sup> Each lineage has an ancient ancestor that encountered and acknowledged the life of the land, and this is the source of the chief’s *daxgyet*. The system of chiefly names and Houses connects to this *daxgyet* to create obligations that the chiefs must maintain

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<sup>205</sup> Jennifer Nedelsky advances a relational concept of autonomy based on an understanding of the inherently social nature of human beings. She argues that human beings can only be autonomous in relation to each other, not in isolation, since people do not live in isolation. Nedelsky argues that in order to become autonomous, people must develop and sustain the capacity to find their internal law, and the work is to figure out what social relations foster this capability. See Jennifer Nedelsky, “Reconceiving Autonomy: Sources, Thoughts and Possibilities” (1989) 1:1 *Yale Journal of Law and Feminism* 7 at 9-11.

<sup>206</sup> Such conflation is unfortunately too common and leads to the creation of unattainable expectations of indigenous peoples – what I have come to think of as the über-Indian syndrome.

<sup>207</sup> Overstall, *supra* note 61 at 23.

through the generations. Acquisition of House territories and other forms of intellectual property (e.g., crests, songs, spiritual powers, etc.) are recorded in the House's *adaawk*. This broad web of names, relationships, and oral histories is the basis of the Gitksan system of governance and the Gitksan legal order.

At the first level, within the House, there is fierce competition for names and associated privileges because arguably, all are potentially heirs to the highest seat in the House. This competition plays out among House members as individual agents and between lineages within the House. Equilibrium is created because the competition is balanced and held in check by the absolutely necessary corresponding cooperation within the House so that it may fulfill its external obligations. Failure by a House to meet its obligations would mean a serious loss of face, authority, and *daxgyet* within kinship system. As the Gitksan cases concerning legitimacy demonstrate, recovering from such shame is a serious and expensive undertaking for a House.

The other dynamic tension within the House is created by the complete reliance of the head chief and to a lesser degree, the wing chiefs, on the loyalty, work, resources, and contributions of the House members. Without the House members, the head chief could not fulfill the legal obligations of his or her chief's name or the obligations and responsibilities of the House within the kinship network system. Should this happen, the House's authority and *daxgyet* would be severely diminished and the chief humiliated. However, the House members are not so reliant on the chiefs. In other words, the head chief does not have mobility and cannot change Houses. In contrast, the House members, whose House membership does not change,<sup>208</sup> are nonetheless mobile and can attach themselves to other Houses through their various relationships – and House members can take their energy,

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<sup>208</sup> House membership remains a basic terms of reference for members within the kinship system.

resources, and contributions with them. Again, equilibrium is created in each House because the chief and House members must forge stable relationships and bonds of reciprocity that they can live with and sustain.

At the next level, there is fierce competition between the Houses for public recognition of the House's *daxgyet*, wealth, organization, and effectiveness. At the same time, Houses must co-operate and support one another in the Feast system (e.g., *wilksiwitxw* and *wilnadahl*, spouse's House, etc.) – hence, another level of stability is created by the balancing of the tension between the inherent competition and necessary co-operation of the House as legal entity and political collectivity. Again, it is the maintenance and balancing of this tension that creates the equilibrium in the kinship system.

Next, one must consider the sources of Gitksan law. I have argued herein that one of the sources of Gitksan law is social interaction over time (as reflected in the time depth of the *adaawk*) and also current ongoing social interaction. Much of this law remains implicit and unstated. It is alive and present with each generation, and it is mutually constitutive of the implicit norms and shared tacit understandings that render the content of the *adaawk* and *antamahlaswx* both possible and comprehensible. Implicit law is also contained in the architecture of the *adaawk* and *antamahlaswx* – cognitive units that organize information and intellectual processes.

Some of the implicit law becomes explicit as it is recounted in the *adaawk* and *antamahlaswx*, and through the various legal processes that people engage in such as Olive Ryan (Gwaans) describes here:

Mr. Macaulay	And Gitksan law applies to all the Houses, not just Hanamuxw?
Gwaans	Yes, when they talk it over – when they – they call it – the white people calls it a meeting, hey.
Mr. Macaulay	Yes.

- Gwaans                    That's what Gitksan do.  
 Mr. Macaulay            And you meet with the other – with other Chiefs, do you and talk it over?  
 Gwaans                    Yeah, I talk to them. I talk to Gwis gyen and I talk to Herbert Wesley before we decided to build the new pole.  
 Mr. Macaulay            And the law – the Gitksan laws develops from these meetings and discussions of the Chiefs?  
 Gwaans:                    Yes, yes.<sup>209</sup>

This section demonstrates that Gitksan law includes those explicit general rules and norms (including the range of contestations) that guide behaviour, and the intellectual processes of legal reasoning, interpretation, and application. As explicit law, it is a form of pedagogy and a legal archive of precedent that is continually drawn from to inform the collective and public legal reasoning processes employed by the Gitksan chiefs and House members as they manage conflicts and settle disputes. In this way, explicit Gitksan law is brought to the foreground of the Gitksan legal order – it is recorded, deliberated on, amended, publicly pronounced, applied, and enforced. The legal agreements reached as a result of the application of law and legal reasoning processes are publicly recorded, and are thus added to the legal archive of memory for future use. Other forms of legal records include the poles, crests, songs, roles and relationships, and traditions and practices. In other words, implicit and explicit Gitksan law is contained in the content (e.g., songs, oral histories), in the forms and records (e.g., crests, oral histories, legal archive of memory), and in the practices of legal activities (e.g., steps involved with pole raising, respecting other life forms, celebrating the first salmon).

Finally, we contemplate how the Gitksan legal order relates to a geographic space or territory applies a final broad brush stroke to the panorama of Gitksan legal theory.<sup>210</sup>

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<sup>209</sup> Olive Ryan (Gwaans) 18 June 1987, B.C.S.C. trial transcript, 1438 at 1441, evidence for *Delgamuukw v. The Queen* (1991), 79 D.L.R. (4th) 185.

<sup>210</sup> Law can be disconnected from territory, as demonstrated by the Roma and Muslim populations that are scattered across the world.

The Gitksan legal order reflects the entire kinship network because it operates as a whole. Legal accountability is operationalized by and refracted through all levels of reciprocal relational bonds in the kinship system. This web of relationships overspreads the present villages now geographically fixed under the shellac of the *Indian Act*<sup>211</sup> to enfold a people dispersed across Gitksan territory and even far beyond. The Gitksan legal order must be comprehended in its entirety across Gitksan territories because the people that create the legal relationships and accountabilities live throughout the entire territory – not in any one village. Hence, the Gitksan legal order includes the entirety of the Gitksan territories that could be defended – physically, politically, and legally. Finally, this geographic space of Gitksan territory always contained more than one legal order as a result of trade, intermarriage, access agreements, and international agreements with other peoples. Today, of course, Canadian law has also been added to Gitksan territory.

#### **5.4(b) General Concepts**

The second part of the legal theory framework articulated by Twining is “the construction and clarification of important general concepts, including exploration of the extent to which it is feasible and desirable to develop cross-cultural meta-languages for legal discourse (a revived general analytical jurisprudence).”<sup>212</sup>

The first general concept in this Gitksan legal theory is that Gitksan law includes those implicit and explicit rules and norms that guide behaviour, in combination with the intellectual processes of legal reasoning, interpretation, and application. As demonstrated by the legal cases, Gitksan law is applied, enforced, deliberated on, amended, publicly

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<sup>211</sup> *Indian Act*, R.S.C. 1985, c. I-5.

<sup>212</sup> Twining, *Globalisation*, *supra* note 10 at 242.

pronounced, and recorded in the oral histories, songs, crests, traditions and practices, kinship roles, and formal collective memory. Karl Llewellyn wrote about the inadequacy of focusing on the rules rather than on the common law in its entirety. Llewellyn's observation is just as applicable to Gitksan law:

Rules are measures based on ideals, practices, standards or commands, measures cast into verbal form, authoritative verbal form, with sharp-edged consequences. They add thus a tremendous power at once of communication, of rigidification over time, and of flexibility. They are a well-nigh indispensable precondition to any degree of standardization of law-work across space and the generations. They stand with such relative conspicuousness to observation, they accumulate so easily, they can be gathered so conveniently, and they are so easy to substitute for either thought or investigation, that they have drawn the attention of juristsprudes too largely to themselves: to the rules – as if rules stood and could stand alone.<sup>213</sup>

In the 1980s there were several unsuccessful initiatives to codify Gitksan law.

These efforts focused on the identification of rules – “as if rules stood and could stand alone”.<sup>214</sup> For the most part, there was little or no consideration of the intellectual processes that are an integral aspect of Gitksan law. While some Gitksan people have talked about resuming the codification project over the years, it has not been picked up again. I think that Llewellyn's insight about the seeming ease of identifying rules applies as one of the reasons for the Gitksan's early focus on codification. Another factor contributing to the focus on codification is likely the difficulty of identifying the intellectual legal processes as part of law that are often taken for granted or are buried in a complex of other activities, tradition, and practices that can obscure their function and significance to law. Finally, Gitksan people were and are experienced with western courts, and for lay people (as well as for some lawyers), western law is about rules in the form of court decisions and legislation. Here too, the reasoning and deliberation is usually invisible to most people

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<sup>213</sup> Karl Llewellyn, “My Philosophy of Law” in *My Philosophy of Law: Credo of Sixteen American Scholars* (Boston: Boston Law Book, 1941) 181 at 188-89.

<sup>214</sup> *Ibid.*

outside the court, and this can create a narrow and skewed idea of the law that is more in keeping with Rabbi Akiva's approach to law rather than with the more deliberative approach of Rabbi Ishmael.<sup>215</sup>

The second general concept I want to introduce as a part of Gitksan legal theory is that there are three types of Gitksan laws – primary, secondary, and strict, as Richard Overstall initially discerned. While Hart's primary and secondary rules were based on his commitment to positivism and formal centralized legal authorities, Overstall applies the primary and secondary law model to the decentralized Gitksan legal order.<sup>216</sup> Overstall's primary laws contain obligations that correspond with Hart's primary rules of obligation, but the Gitksan version is focused on reciprocal obligations to other humans, non-human life forms, and the land. Overstall provides examples of "asking permission from an animal or plant before taking it, never taking more from the land than one needs, and always giving something in return."<sup>217</sup> Nonetheless, as the Gitksan legal cases demonstrate (chapter 3), there is a societal demand for general conformity and serious social pressure is applied to deviators.<sup>218</sup> Furthermore, in their legal processes, Gitksan people are acting on a belief that the primary rules are, as Hart says, "necessary to the maintenance of social life" and may require sacrifice or renunciation.<sup>219</sup>

The structure and purpose of Overstall's secondary rules are also similar to Hart's, but are a decentralized version that is reflective of Gitksan society. The Gitksan legal order provides second-tier affirmation of law that allows for law's recognition and change, and agreement of legal processes. The application of these secondary rules is demonstrated in

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<sup>215</sup> Krieger, *supra* note 129 at 55-56.

<sup>216</sup> Overstall, *supra* note 61 at 44.

<sup>217</sup> *Ibid.*

<sup>218</sup> Hart, *supra* note 16 at 84.

<sup>219</sup> *Ibid.* at 85.

the Gitksan legal cases involving discussions and deliberations, and publicly witnessed agreements for settlements, compensation, etc. Bjarup supports Overstall's contention that non-state societies are capable of establishing "customary procedures that serve as secondary rules for the creation and application of primary rules".<sup>220</sup> According to Bjarup "custom as a procedure to create customary law can change or abolish existing rules as well as create new rules".<sup>221</sup> This intentionality in decentralized legal orders reflects Bjarup's argument that human beings ought to be understood as active rather than passive agents; and as active agents, humans are rational and intentionally communal (hence the legal order), not rational as isolated and reactive beings.<sup>222</sup>

Finally, I argued earlier that Overstall's third category of strict laws was an articulation of what Boisselle calls the background of tacit shared understandings – those basic premises that make up the Gitksan world view and that underlie that complex of reciprocal partnerships with human and non-human life forms, and with the land. This may be likened to the formative relationship between humans and the land that Australian aboriginal legal scholar Christine Black describes in her work. While she argues that indigenous law actually comes from the land as a form of patterning, I argue that one of the sources of Gitksan law is human experience and relationship with land over time. Overstall describes the strict Gitksan laws as constitutional in nature. These include laws that govern

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<sup>220</sup> Bjarup, *supra* note 56 at 142.

<sup>221</sup> *Ibid.*

<sup>222</sup> Fuller does imply the need for active human agency, but in an obscure fashion. For example, he wrote: "By the 'forms of social order' I do not refer to the inert, traditional forms by which men's relations are often supposed to be structured, where conformity is assumed to take place automatically without any awareness of an alternative. Rather I have in mind those active processes of social decision by which deficiencies and conflicts are removed, and a stable foundation for future relationships is established." Fuller, "Human Interaction", *supra* note 17 at 217.

the public witnessing and accountability processes that are a part of the various levels of consultations in the net of kinship relationships throughout the society.

The general principle element of Twining's framework included an exploration into "cross-cultural meta-languages for legal discourse".<sup>223</sup> My approach to the development of a Gitksan legal theory may be usefully extrapolated to more broadly apply to other non-state, decentralized indigenous peoples, such as the Dunne'zaa of Northeast British Columbia. Returning once again to Fuller, the constancies among the different indigenous legal orders might be found "in the interactional processes by which those systems come into being, rather than in the specific product that emerges, which must of necessity reflect history and context".<sup>224</sup> Fuller suggests the following series of questions to explore the comparative interactional processes between different peoples:

What are the processes by which these rules are created?... What functions did that law serve among those who brought it into being? Do the same functional needs exist in our society, and if so, how are we ourselves meeting them? Do we have processes going on around us that are similar to those which before state-made law existed brought customary rules into being?<sup>225</sup>

There is no volume of court transcripts for the Dunne'zaa comparable to those produced by *Delgamuukw*. However, it would still be possible to look at historical and contemporary disputes in Dunne'zaa communities to identify norms and legal processes.<sup>226</sup> It would also be possible (at least as a conceptual starting place) to consider the Dunne'zaa as having decentralized primary and secondary laws, sources of law, implicit and explicit laws, oral histories, roles with legal obligations, a territorial span that parallels the

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<sup>223</sup> Twining, *Globalisation*, *supra* note 10 at 242.

<sup>224</sup> Fuller, "Human Interaction", *supra* note 17 at 263.

<sup>225</sup> *Ibid.* at 236.

<sup>226</sup> There is a fairly large literature on Dene peoples (Athapaskan linguistic group) that would support such an inquiry.

Dunne'zaa legal order, cosmology,<sup>227</sup> ontology, and similar normative principles regarding resistance to hierarchy, conflict avoidance, and competitive agency. It is my contention that such a broad-based approach or framework to the Dunne'zaa legal order would provide a solid foundation for the development of a Dunne'zaa legal theory – even though Dunne'zaa law will be very different from Gitksan law.<sup>228</sup>

The Dunne'zaa legal theorist must look beyond formal, centralized processes and idealized renditions of the past in order to find how law is generated from the contested practice of everyday life over time, and from the practical business of the Dunne'zaa managing themselves as a people. While this might be a useful theoretical framework, how Dunne'zaa people form and express their law will clearly be culturally bounded, but with influences from relationships with other indigenous peoples, and more recently, from the Dunne'zaa people's relationships with the Canadian State and settlers. However, in keeping with Fuller's recommendation, it is not the specific product by way of content or outcome of law that one compares, but rather the theoretical underpinnings, functions (as in dynamic), and generative interactive processes that one must examine.

#### **5.4(c) Normative Principles**

The third part of Twining's framework concerns "the development of general normative principles, the clarification of values, and addressing questions about their universalisability."<sup>229</sup> According to Karl Llewellyn, "rules are not equated with 'commands' nor with 'predictions', rather 'rules' are chiefly considered as normative

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<sup>227</sup> The Dunne'zaa cosmology includes reincarnation.

<sup>228</sup> There are many substantive differences between Gitksan and Dunne'zaa peoples – social and political structures, linguistic group, oral histories, etc.

<sup>229</sup> Twining, *Globalisation*, *supra* note 10 at 242.

propositions....The ideal type for such propositions is ‘If X, then Y’....In this ideal type a rule is articulated in propositional form; in everyday life much human behaviour is in fact guided by ‘rules’ that have not been given verbal expression at all”.<sup>230</sup>

If we consider the Gitksan rules in the Gitksan cases (chapter 3) as normative propositions, we will perceive a range of norms. The legal cases involved issues that can be roughly divided into concerns about (1) legitimacy of authority, (2) compensation for loss of life, (3) compensation for debt, (4) disputes, (5) corrections in the Feast hall (e.g., *adaawk*), and (6) types of adoptions.

In the cases involving legitimacy, what is at their heart and what drives the individual and collective actors is the paramount importance of maintaining the *daxgyet* and the overall legitimacy of the legal order (without which there would be no way of having one’s *daxgyet*, history, or territory recognized). This was what Gwaans meant when she explained to the trial Court that the white settlers did not recognize Gitksan ownership of the land they lived on: “They don’t consider Gwaans, the white people”.<sup>231</sup>

Without a centralized enforcement bureaucracy, the legal order is upheld and perpetuated by the *daxgyet*, the behaviours of the individuals and chiefs, and performance of the traditions – which combine in the form of a *sgano* or woven cloth.<sup>232</sup> Art Mathews (Tenimgyet) explains the analogy of the *sgano*: “That is the way we look at ourselves as a woven fabric together....The whole area, the whole Skeena, the whole – all the houses, all the territories woven together as one. But each house has a special interest in their own

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<sup>230</sup> Twining, *Llewellyn*, *supra* note 11 at 489.

<sup>231</sup> Olive Ryan (Gwaans) 17 June 1987, B.C.S.C. trial transcript, 1358 at 1409, evidence for *Delgamuukw v. The Queen* (1991), 79 D.L.R. (4th) 185.

<sup>232</sup> Art Mathews (Tenimgyet) 18 March 1988, B.C.S.C. trial transcript, 4759 at 4778, for *Delgamuukw v. The Queen* (1991), 79 D.L.R. (4th) 216.

territory....All the Gitksan houses.”<sup>233</sup> These norms have to do with maintaining the honour and power of the chiefs’ names through time to form the bedrock for the present and future. Each individual that is held by the name must avoid shaming or dishonouring it. Should the individuals be shamed by their own actions (e.g., Stanley Williams, Gwis Gyen),<sup>234</sup> by the actions of others (e.g., Mabel Forsythe, Wet’suwet’en chief)<sup>235</sup> or by accident (e.g., Edith Gawa, Yahl<sup>236</sup> and Pete Muldoe, Gitludahl<sup>237</sup>), they must cleanse the name or both the name and the House will lose daxgyet.

The other normative principles revealed in the Gitksan legal cases concern the importance of kinship relations, individual and collective accountability, resistance to hierarchy and centralization, reincarnation, relationships with land and non-human life forms, intellectual property, agency and independence, and cooperation. While there is a range of interpretations and disagreements, these normative principles nonetheless underlie the kinds of decisions and agreements reached as a result of the various legal deliberations described by the Gitksan witnesses. At a deep and fundamental level, these normative principles were and are necessary for the maintenance and functioning of the overall legal order.

#### **5.4(d) General Working Theories**

The fourth element of Twining’s legal theory framework is “the generation of middle order empirical hypotheses and general working theories for participants, for example in such

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<sup>233</sup> *Ibid.*

<sup>234</sup> Stanley Williams (Gwis Gyen) 13 April 1988, commissioned evidence transcript, 78 at 108, for *Delgamuukw v. The Queen* (1991), 79 D.L.R. (4th) 185 (B.C.S.C.).

<sup>235</sup> Mary McKenzie (Gyoluugyat) 13 May 1987, B.C.S.C. trial transcript, 160 at 248 evidence for *Delgamuukw v. The Queen* (1991), 79 D.L.R. (4th) 216.

<sup>236</sup> *Ibid.* at 247-48.

<sup>237</sup> Pete Muldoe (Gitludahl) 16 May 1988, B.C.S.C. trial transcript, 6084 at 6108-6109, evidence for *Delgamuukw v. The Queen* (1991), 79 D.L.R. (4th) 185.

areas as constitution-making, dispute-processing, and the methodology of various kinds of transnational enquiry.”<sup>238</sup> Briefly, there is a range of general working principles that are a part of the Gitksan legal theory and that underlie the application of law. These are: (1) a focus on compensation rather than a determination about guilt, (2) public witnessing and accountability, (3) collectivity versus individualism insofar as responsibility and compensation are concerned, (4) the importance of precedent – collective memory that is the public archive, and (5) the critical importance of knowledge of lineage, history, and kinship relationships. This last general working principle is clearly demonstrated by Martha Brown as she describes a dispute with a fishing site:

Why not ask if you can use it? I said to them. They said, but their grandmother used it. Yes, I said, lots of people have used it, but we own it. If you just ask me, you can use it. I will even tell you where you can set your net.

By marrying into our House they had the right to use it in the past. But those marriage ties died out long ago, and they were told right in the feast, that could not use it any more.<sup>239</sup>

As the Gitksan legal cases reveal, the first step to managing disputes is to sort out the relationships and the breadth of history of each relationship (personal, political, legal, and economic). The second step is to engage in a number of horizontal consultations with Houses that have an interest in the outcome of the dispute, and if necessary, with a neutral House or Houses from a neutral village. The third step is to figure out the precedents for similar disputes or problems. The fourth step is to develop an agreement among those involved with the dispute and those consulted. And finally, the fifth step is to explain the process publicly, usually at a Feast – the dispute, consultations, and the agreed course of action. While at first glance, this appears to be a simple process, it involves many people,

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<sup>238</sup> Twining, *Globalisation*, *supra* note 10 at 242.

<sup>239</sup> Xhliimlaxha (Martha Brown), quoted in Richard Daly, *Our Box was Full, An Ethnography for the Delgamuukw Plaintiffs* (Vancouver: UBC Press, 2005) at 242.

and effective deliberations and consultations take time. At the end of the day however, the process has to be legitimate and this relates to my main research question about the *Delgamuukw* experience for the Gitksan. I will return to this question in the next chapter.

## 5.7 Chapter Conclusion

The purpose of this chapter was to establish a theoretical basis for the articulation and development of a preliminary Gitksan legal theory founded on a substantive treatment of the Gitksan legal order and laws. To do so, I have drawn upon resources from western legal theory in the form of Hart's primary and secondary rules, and have argued that decentralized Gitksan law can also be understood as primary and secondary laws, underpinned by the tacit understandings in Overstall's third level of strict laws. I have also drawn upon Fuller's law as social interaction theory to describe one of the sources of Gitksan law, and I have argued that there are intentional and deliberative processes that transform some implicit law into explicit law. As to the ongoing debate over the Hart-Fuller divide, my approach has been to focus on questions rather than on answers because "[o]nce one sees that different theorists are answering different questions, one can see how these theorists are often describing different aspects of the same phenomenon rather than as disagreeing about certain simple claims about law."<sup>240</sup> I contend that the *adaawk* and *antamahlaswx*, and other records such as the songs, crests, kinship roles, and traditions contain implicit and explicit law both as content and in their architecture as cognitive units that enable the sorting of information and dynamic intellectual processes of legal reasoning by analogy and metaphor. I have also drawn on two indigenous legal scholars, Gordon Christie and John Borrows, whose work most closely relates to my own.

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<sup>240</sup> Bix, *supra* note 53 at 4.

I have made the case for a Gitksan legal theory by applying my rendering of substantive Gitksan law to William Twining's legal theory framework. My preliminary Gitksan legal theory comprises a broad overview, general principles, normative principles, and general working principles. While my work herein is based on about twenty Gitksan legal cases, I am confident that it can be extrapolated, with testing, to other areas of Gitksan law, and more broadly, to other non-state, decentralized peoples such as the Dunne'zaa in northern British Columbia.

My use of the scholarship of western legal theorists is not to suggest that those theories somehow vest validity in a Gitksan legal theory, but rather to draw upon those theories as resources and analytical lenses to apply to the Gitksan legal order. I accept the position of Gordon Woodman and Akintunade Olusegun Obilade who argue that African legal theory must be understood as a contribution to a general legal theory and global jurisprudence – not as a mere contribution to western legal theory. In this case, Gitksan legal theory may be understood as an addition to indigenous legal theory, and to general legal theory internationally.

Finally, the Gitksan legal order was not and is not perfect (whatever the state of perfection may be), but nonetheless it was an effective way for Gitksan people to manage themselves over the millennia – and through colonization. Today, many questions remain as to whether and how the Gitksan legal order and law is relevant or has any validity for management of resources, relating to the State, or solving problems. I hope the Gitksan legal theory I have proposed here is a useful intellectual process that will enable the exploration of these and other critical questions. It is only a proposal. There will be and should be other Gitksan legal theories. If the Gitksan legal order is to retain any legitimacy

today, there has to be a way for people to think through the questions, contradictions, and conflicts. After all, my basic position is that law is something that people do – and it has to be practical and useful to life – otherwise, why bother?

## CHAPTER 6

### Returning to the Research Questions

[I]f we do not do the work of subjective introspection, whereby we are consciously and continually renovating the particularities of our ethical composition through deliberative practices, that work will be done subconsciously at the initiative of society's various modes of ideological dissemination which will shape the contours of one's ethical constitution and deeper sensibilities in a manner that is consistent with or does not disturb existing [power] relations of asymmetry. (Johnny Mack)<sup>1</sup>

#### 6.1 Introduction

In the above quote, Toquaht legal scholar Johnny Mack astutely argues that indigenous people have an ongoing responsibility to self-consciously examine our ethics and deliberative practices in light of the power dynamics around us, lest we unthinkingly become another cog in the turning power structures of our worlds.<sup>2</sup> According to Mack, we not only have the power to act, we have an ethical imperative to “use that power in a way that is consistent with the particular values that characterize the vision of justice one's work advances”.<sup>3</sup> While Mack's advice is directly applicable to indigenous academics at a personal-political level, I think it also has broader applicability to indigenous peoples at a collective-political level.

To act on Mack's suggestion at a personal-political level means that I must remember that all writing is embedded in the mesh of relationships that surround us, which would include my relationships with the Gitksan as well as with the State. Furthermore, I must reflexively consider how this dissertation project fits within my own relational ethic,

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<sup>1</sup> Johnny Mack, “Understanding Academic Critique as Relational Practice” in *Thinking Through Relationship: The Ethics of Research and Reflectivity* (Collected papers presented at the Multidisciplinary Student Workshop of the Indigenous Peoples and Governance Conference, University of Montreal, 8-9 October 2008) 25 at 26 [unpublished] [Mack].

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

<sup>3</sup> *Ibid.*

the deeper sensibilities of my ethical composition, and my broader vision of justice. At a collective-political level, acting on Mack's suggestion would mean that indigenous groups, such as the Gitksan, that are engaged in a political struggle to establish their own governance authority (and law is just one aspect of governance) must self-consciously reflect on the web of relationships among the Gitksan, and the web of relationships outside the Gitksan with other indigenous and non-indigenous peoples, and the State. To apply Mack's analysis, the Gitksan (and other indigenous peoples) hold a collective responsibility to use their power and act in a way that is consistent with the values that would characterize a collective Gitksan vision of justice. This larger collective vision of justice must necessarily include and be shaped by the ongoing collective norm contestation that makes life as a human being so interesting, enriching, and also so difficult.<sup>4</sup> In other words, there is no point of arrival in being Gitksan. Rather, being Gitksan (or Dunne'zaa, etc.) in the world is a living and dynamic process that requires constant political reflection and revision over time, through generations.

It is in the spirit of Mack's approach, that I return to my overarching research question of whether and how the experience of *Delgamuukw* in its entirety (i.e., decades of preparation, three levels of court, a plurality of decisions, and ongoing political aftermath), increased the internal conflict among the Gitksan by undermining their conflict management system – as contextualized within my articulation of Gitksan legal traditions and legal theory. While I have learned that there is indeed widespread conflict among Gitksan peoples today, the answers to my research question proved to be far more complex than I initially imagined. (The complexities and dynamics of the internal Gitksan conflict are described in more detail in chapter 4.)

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<sup>4</sup> Jeremy Webber, "Legal Pluralism and Human Agency", (2005) 44(1) Osgoode Hall LJ 167 at 179.

I have come to realize that Gitksan people's *Delgamuukw* experience must be understood as an integral part of the broader power dynamics that are created by history, colonization, and resistance in Canada – that all-encompassing political, legal, and economic maelstrom which is continually forging the relationship between Gitksan people and Canada. Basically, *Delgamuukw* was not and never will be a simple matter of cause and effect for the Gitksan for two reasons: First, it is not possible or desirable to disconnect *Delgamuukw* from its moorings in the legal, political, and economic landscape that is Canada. And second, obviously as plaintiffs the Gitksan were agents in *Delgamuukw* in the fullest sense. In other words, *Delgamuukw* did not happen to the Gitksan; rather, the Gitksan made *Delgamuukw* happen. Obviously it is true that, absent the State's refusal to recognize Gitksan ownership of Gitksan territories, there would have been no *Delgamuukw* legal action. But in the end, it was the Gitksan that collectively decided to undertake legal action (as I explained in chapter 4).

In this chapter, I will first briefly summarize my findings about the internal conflict experienced by the Gitksan and my analysis of the role of *Delgamuukw*, in its entirety, in that conflict. Second, I will reflect on my research findings in light of an anti-reification analytical framework, drawing on James Clifford's indigenous articulation theory which supports an exploration of "long histories of indigenous survival and resistance, [and] transformative links with roots prior to and outside the world system".<sup>5</sup> What Clifford is advocating is an appreciation for indigenous social change – an indigenous articulation – capable of encompassing and reflecting the "pragmatic, entangled, contemporary forms of indigenous cultural politics."<sup>6</sup> While Clifford and other academics have helped to create the

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<sup>5</sup> James Clifford, "Indigenous Articulations" (2001) 13:2 *Contemporary Pacific* 467 at 472 [Clifford].

<sup>6</sup> *Ibid.*

intellectual space for indigenous articulations, the work before the Gitksan and other indigenous peoples remains – what to do with the pragmatic, entangled, contemporary forms of politics – in real life. This is the work that is about how to navigate the entangled politics of today that includes the complex of socio-legal-economic-political changes, as well as the absolute reality of the Canadian State and settlers and third party interests on Gitksan territories.

Third, I will discuss a small case study of a recent conflict of Suu Dii as a way to explore my concern as to whether my findings have relevance and use today for Gitksan and other indigenous peoples. In other words, how might an understanding of Gitksan conflict management, legal traditions, and legal theory matter insofar as how Gitksan people respond to a current pervasive on-the-ground conflict? Furthermore, how might such an understanding inform Gitksan people's interaction within the larger current political context?

Finally, I will conclude with a short argument about how Gitksan legal theory is helpful to encouraging a more creative and critical way of thinking and applying Gitksan law. Basically, I am contending that articulating the structure of the Gitksan legal order and the legal principles as a dynamic model will enable people to see where change is necessary, where there are contradictions, and perhaps how to strengthen the practice of teaching Gitksan law to future generations. As I have argued in chapter 5, my approach to Gitksan legal theory is a useful way to think about indigenous law that is transferable to other indigenous societies.

## 6.2 Research Question: Conflict Management Findings

My original hypothesis was that the entire experience of *Delgamuukw*, inclusive of the decades of preparation, litigation, and resulting decisions, had the practical result of increasing the level of conflict among Gitksan people by undermining their ability to manage internal conflict. Part of the *Delgamuukw* experience included the necessity of Gitksan people describing themselves to the Court in a way that was cognizable to the Western legal system. But I argue that ultimately, in combination with the adversarial court forum, these descriptions were simply unable to translate the full complexity and depth of Gitksan society. In a similar vein, historian Miranda Johnson insightfully argues that while the various government claims and commissions processes initially established to respond to seminal aboriginal rights cases may be understood as a “kind of decolonization in which the relationship between indigenous people and settlers is being renegotiated”, they actually re-found the settler states.<sup>7</sup> According to Johnson, it is the admission and re-evaluation of “indigenous embodied histories” as evidence of claims in legal processes that is central to this recolonization.<sup>8</sup>

I wondered whether this initial distortion was compounded by the written decisions wherein Gitksan concepts and relationships to humans, land, and non-human life-forms were filtered through the construct and language of Western law.<sup>9</sup> Since 1997, the decisions themselves and the various court documents have become a resource from which

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<sup>7</sup> Miranda Johnson, “Struggling Over the Past: Decolonization and the Problem of History in Settler Societies” (Ph.D. Dissertation, Department of History, University of Chicago, 2008) at viii [unpublished] [Johnson]. Her historical research includes Canada, New Zealand, and Australia.

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

<sup>9</sup> The term “Western” is used here to describe Western European-based nation state socio-politico-economic traditions, institutions, and structures as adopted and adapted by Canada and the United States.

Gitksan people are increasingly describing themselves.<sup>10</sup> In fact, for the first time in history, Gitksan people could learn about themselves, their society, and their history without talking to other Gitksan people. They could instead turn to the rich resource created by the plurality of court decisions,<sup>11</sup> transcripts, and expert evidence reports, and more recently, numerous articles and books.<sup>12</sup>

As I explained in chapter 4, my approach is that conflict itself is not a problem, but rather is a necessary and ongoing consequence of people living together in large groups.<sup>13</sup> Conflict only becomes a problem when the group fails to collectively manage its conflicts, and when this happens, the group becomes paralyzed. Norwegian criminologist Nils Christie argues that people need to be responsible for their conflicts, and this requires figuring out the norms necessary for everyday living together.<sup>14</sup> As I have argued in chapter 5, the determination of social and legal norms is an ongoing contested process that is facilitated and managed by a healthy and resilient legal order. Christie writes:

My suspicion is that criminology to some extent has amplified a process where conflicts have been taken away from the parties directly involved and thereby have either disappeared or become other people's property. In both cases a deplorable outcome. Conflicts ought to be used...and become useful, for those originally

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<sup>10</sup> Most of the older Gitksan witnesses who testified in *Delgamuukw* are now deceased. Also, the

<sup>11</sup> Of course, relying on the court decisions to learn about the Gitksan is problematic because Gitksan evidence is basically filtered through the judicial process.

<sup>12</sup> See for instance, Richard Daly, *Our Box was Full, An Ethnography for the Delgamuukw Plaintiffs* (Vancouver: UBC Press, 2005) [Daly]; Terry Glavin, *A Death Feast in Dimlahamid* (Vancouver: New Star Books, 1990); P. Dawn Mills, *For Future Generations: Reconciling Gitksan and Canadian Law* (Saskatoon: Purich, 2008); Margaret Anderson & Marjorie Halpin, eds., *Potlatch at Gitsegukla: William Beynon's 1945 Field Notebooks* (Vancouver: UBC Press, 2000) [Anderson & Halpin]; *Gisday Wa & Delgam Uukw, The Spirit in the Land: Opening Statement of the Gitksan and Wet'suwet'en Hereditary Chiefs in the Supreme Court of British Columbia* (Gabriola, BC: Reflections, 1989); Neil J. Sterritt et al., *Tribal Boundaries in the Nass Watershed* (Vancouver: UBC Press, 1998); Michael D. Blackstock, *Faces in the Forest: First Nations Art Created on Living Trees* (Montreal: McGill-Queen's University Press, 2001); Stan Persky, *Delgamuukw* (Vancouver: Greystone, 1998); Don Monet & Skanu'u (Ardythe Wilson), *Colonialism on Trial* (Philadelphia: New Society Publishers, 1992); Dara Culhane, *Pleasure of the Crown: Anthropology, Law and First Nations* (Vancouver: Talonbooks, 1998). The *Delgamuukw* decisions have also generated an extensive number of chapters and articles across the academic disciplines.

<sup>13</sup> See generally Stuart Hampshire, *Justice is Conflict* (Princeton: Princeton University Press, 2000).

<sup>14</sup> Nils Christie, "Conflicts as Property" 17:1 *Brit. J. Crim.* 1-15 [Nils Christie].

involved in the conflict...[O]ur industrialised large-scale society is not one with too many internal conflicts. It is one with too little. Conflicts might kill, but too little of them might paralyse.<sup>15</sup>

Christie's caution against the citizenry's full scale abdication of responsibility for conflict to "officials" is just as applicable to Gitksan communities as it is to industrialized Scandinavia.<sup>16</sup> In what follows, I argue that Gitksan people's conflict management system has been undermined to the extent that internal conflicts are no longer being effectively dealt with – or managed. The *Delgamuukw* legal action has been a part – but only a part – of this undermining process.

In chapter 4, I explored the extent to which *Delgamuukw* might be considered responsible for the increased conflict among the Gitksan people. To do so, I provided descriptions of past and present conflict as experienced by the Gitksan, and I identified a range of conflict management processes that are a part of Gitksan legal traditions. In what follows, I restate my main research findings about Gitksan conflict and *Delgamuukw* in order to lay the groundwork for the application and analysis of Clifford's articulation theory.

Richard Daly argues that the *Delgamuukw* litigation served to coagulate the essential fluidity of Gitksan society by changing the perception of ongoing social relationships in Gitksan society into viewing them as "immutable truths".<sup>17</sup> The process of transforming the names of chiefs and territories, and those other aspects of Gitksan society that were extruded through the Court into maps, expert witness reports, and court

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<sup>15</sup> *Ibid.* at 1.

<sup>16</sup> *Ibid.* at 4. Christie argues that lawyers are thieves of conflict, which then becomes the property of lawyers.

<sup>17</sup> Daly, *supra* note 12 at 288.

transcripts and decisions, appeared to fix them, resistant to further challenge or change.<sup>18</sup> Certainly, the Gitksan, along with other indigenous groups, produced an extensive number of maps in order to represent and protect their territories. Among other things, these maps illustrated House boundaries, travel and use patterns, village sites, eco-systems, natural resources, fishing sites, and so on. However, I found that while the maps generally raised many serious issues concerning the terms of the relationship between Gitksan people and their territories, it was not the actual maps that proved to be the most problematic in generating conflict.<sup>19</sup> Rather, the main contributor to the internal conflict appeared to be the reification of the House groups into fixed minicorporate-like entities with the chiefs acting as CEOs instead of the former House-as-point-of-reference within the kinship network. The range of factors involved with this reification trend had the inadvertent effect of undermining the extensive horizontal and reciprocal consultative processes within and between House groups – processes that are vital to Gitksan governance, conflict management, and legal traditions.

The reification of the House groups has also had political consequences for House members. Historically, House membership was a reference point for Gitksan people to situate themselves within the kinship network, although they were basically mobile and free to ally themselves with their many other kinship connections (e.g., paternal House group, spouse's House, etc.). Exercising this mobility was one of the conflict avoidance strategies employed by Gitksan members. However, the focus on the maternal House has

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<sup>18</sup> David Buisseret writes that maps are fundamentally about power in terms of “representation, misrepresentation, and unrepresentation”. See David Buisseret, “Maps and Power- or - Something Nasty in the Glovebox”, Book Reviews of *Maps and the Columbian Encounter* by J.B. Harley, *The Geographical Tradition* by David N. Livingstone, and *The Power of Maps* by Denis Wood, (1993) 100:4 *Queen's Quarterly* at 868.

<sup>19</sup> Although, there were and are disputes between Houses caused by boundaries drawn on maps.

obscured the former fluidity with which people could move through the system. With the political emphasis on the House group, members have been constrained from their former options – including the usual conflict avoidance practices.

According to Daly, within Gitksan society, there is a deeply held “distrust and dislike of enduring leadership that extends its authority beyond the scope of the descent group”.<sup>20</sup> This behavioural dynamic is the logical result of a highly decentralized system of authority that managed the political, economic, social, and legal life within Gitksan society. This ethic of resistance to hierarchy and centralized authority was and is severely challenged by the particular high-pressure demands required by the management of a major legal case (in the Canadian legal system) and the ongoing negotiation of numerous necessary agreements with the State. The dynamics created by the unacknowledged resistance against hierarchy, on the one hand, and the imposed requirement for centralized hierarchy to conduct business with the State and in the Canadian legal system, on the other, have generated much on-the-ground conflict for the Gitksan.

Two other factors that have generated Gitksan conflict are (1) the diminishment (and perhaps even disappearance) of the larger political project that gave rise to *Delgamuukw* due to the unrelenting and all consuming demands (e.g., time, resources, and focus) of managing a major legal case, and (2) the corresponding diminishment of Gitksan law caused by turning to and focusing on the Canadian legal system. On this latter point, the language of the courts and Canadian law is the language of power in Canada, and as such, engaging in that language of power is not only seductive, but is a source of addictive adrenalin for many jurists. Without this larger political project (and this too will be forever

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<sup>20</sup> Daly, *supra* note 12 at 30-31.

contested – as it should be), it is more difficult to ensure that the legal action is informed and driven by the political goals that served as the original impetus.

Most of the Gitksan people I interviewed attributed the extensive internal conflict to a general lack of knowledge among the younger members about Gitksan histories and the mesh of consultative legal processes (i.e., *adaawk*, lineage, relationships, laws, and protocols). According to the Gitksan interviewees, in order to properly employ the conflict management strategies, Gitksan people require a basic working knowledge of (1) the names, chiefs, and members, (2) the feasts, *adaawk*, songs, crests, and prerogatives and privileges, (3) the complex web of relationships surrounding all the various players (e.g., life interests by marriage to the territories), (4) the roles and responsibilities of all the members, and (5) the protocols of each of the villages. It becomes clear that much of the Gitksan conflict management strategies included extensive consultations and negotiations within the House and between the Houses, and in the Feast hall. Basically, people had to talk to each other about substantive issues on an ongoing basis in order to both build and maintain relationships.<sup>21</sup>

While lack of cultural (in the broadest, interpretive horizon sense) knowledge and resultant conflict may be attributed, at least in part, to a loss of the Gitksan language as well as youthful inexperience, this is not a very satisfactory conclusion. In fact, it is just as unsatisfying as some of the more rhetorical literature that suggests that indigenous people just have to be better indigenous people (i.e., respectful, knowledgeable, patient, obedient,

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<sup>21</sup> Anderson and Halpin question whether management of the crests can successfully happen outside the institution of the feast because of the critical need for active and knowledgeable elders to deal with the complexities of the *adaawk*, crests, and privileges. Anderson & Halpin, *supra* note 12 at 49-50.

spiritual, and wise),<sup>22</sup> in order to return to some mythical, pre-contact time of social and political harmony. Such conflation of norms with behaviours,<sup>23</sup> while not unusual, is the result of a failure to unpack and examine the implicit law<sup>24</sup> which is part of the tacit background of shared understandings<sup>25</sup> that guide the behaviour of humans in groups. The focus on language and cultural knowledge, while understandably important to how a people describe themselves, might be contributing to the conflict by inadvertently privileging the more fluent and knowledgeable speakers over others. This raises the question about whether such a focus on language and cultural knowledge, if not done reflexively as suggested by Mack,<sup>26</sup> is in itself a form of reification. Furthermore, perhaps attributing conflict to a lack of cultural knowledge and language is to focus on a deficit –

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<sup>22</sup> Invariably, the emphasis is on being and doing, rather than on thinking or the intellectual processes of legal reasoning, interpreting, or application. For one such example, see the Nature's Laws homepage, "The traditional governance of Indigenous People residing in Alberta (Woodland and Plains Cree, Blackfoot and Dene belonging to Treaties 6, 7, 8 and 11) have been the focus of the *Nature's Laws Project*. . . . Spiritual concepts were expressed in terms of 'truths' or 'laws' and people were expected to act according to these laws in every aspect of their daily life. In other words, the laws were meant to be 'lived,' rather than 'obeyed.' Such 'living-out' of Nature's Law promoted a balanced, healthy and well-rounded community." online: Alberta Online Dictionary, [www.abheritage.ca/natureslaws.index2.html](http://www.abheritage.ca/natureslaws.index2.html). For another example, see H. Cardinal & W. Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000). The authors write, "The Elders explain that the Creator made North America as a place where the spiritual traditions and teachings required that First Nations follow a way of life predicated upon peace and harmony" (at 5).

<sup>23</sup> See Julie Cruikshank, *The Social Life of Stories: Narrative and Knowledge in the Yukon Territory* (Vancouver: UBC Press, 1998) at 60. Cruikshank argues that "[t]he pitfall of both axioms – one linking hunters with harmony, the other conflating norms with behaviour – is that each so easily becomes a weapon when indigenous people fail to pass arbitrary tests of authenticity".

<sup>24</sup> See Gerald Postema, "Implicit Law" in Willem J. Witteveen & Wibren van der Burg, eds., *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam: Amsterdam University Press: 1999) 255-78. Building on the work of Lon Fuller, Postema writes that an exclusive focus on explicit law can result in overlooking "the vast body of law lying beneath the surface of the phenomena they seek to understand. Yet the existence and content of explicit laws depend on a network of tacit understandings and unwritten conventions, rooted in the soil of social interaction" (at 255).

<sup>25</sup> Andrée Boisselle, "Beyond Consent and Disagreement: Why Law's Authority Is Not Just about Will" (2008) forthcoming in the inaugural journal of the Consortium on Democratic Constitutionalism (Demcon), University of Victoria (at 3).

<sup>26</sup> *Supra* note 1.

what Gitksan people do not have – rather than developing an appreciation for what Gitksan people do have today. I will explore this further in the next section.

To conclude this section, I found that the undermining of Gitksan conflict management is linked to colonial history and to the contemporary political situation of the Gitksan. Finally, as I explained earlier, I concluded that the conflict experienced by the Gitksan cannot entirely be attributed to *Delgamuukw*, but rather must be appreciated within the complex of power relationships between Gitksan people and Canada, and between Gitksan law and Canadian law.

### **6.3 Main Research Question: Indigenous Articulation Theory**

James Clifford’s articulation theory emphatically rejects equating indigeneity to all that is primordial with “transhistorical attachments (ancestral ‘laws,’ continuous traditions, spirituality, respect for Mother Earth, and the like)”.<sup>27</sup> Clifford also rejects the reductive characterization of indigenous claims as “‘postmodern’ identity politics (appeals to ethnicity and ‘heritage’ by fragmented groups functioning as ‘invented traditions’ within a late-capitalist, commodified multiculturalism)”.<sup>28</sup> Clifford’s indigenous articulation theory will help me to explore the impacts of *Delgamuukw* without sliding into the familiar and comfortable, but nonetheless false, dichotomy of describing an authentic Gitksan people that existed in the past as compared to a less authentic, and therefore problematic, Gitksan people that live in the present. The Gitksan of today are still Gitksan – but they are Gitksan in a way that encompasses all of their experiences and consequent changes, and with the

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<sup>27</sup> Clifford, *supra* note 5 at 472. Clifford’s indigenous articulation theory sets the stage for the arduous work of figuring out its actual application – in real life as in the case of Suu Dii. In other words, Clifford (and other academics) have created the necessary space and indigenous peoples now have to grapple with the practicalities of what indigenous articulation means today insofar as governance, law, conflict, and politics.

<sup>28</sup> *Ibid.*

usual share of problems and successes. The Gitksan are not invalidated in any way by the acknowledgement of how they as a people have influenced and have been influenced by the world around them.

Clifford provides the following definition of indigenous articulation:

The term *articulation*, of course, suggests discourse or speech – but never a self-present, “expressive” voice and subject. Meaningful discourse is a cutting up and combining of linguistic elements, always a selection from a vastly greater repertoire of semiotic possibilities. So an articulated tradition is a kind of collective “voice,” but always in this constructed, contingent sense. In another register – not reducible to the domain of language with its orders of grammar and speech, structure and performance – articulation refers to concrete connections, joints... When you understand a social and cultural formation as an articulated ensemble it does not allow you to prefigure it on an organic model, as a living, persistent, “growing” body, continuous and developing through time.<sup>29</sup>

According to Clifford, indigenous peoples “need to discover a jagged path between the seductions of a premature, postmodern pluralism and the dangerous comforts offered by exclusivist self-other definitions”.<sup>30</sup> This is one of the challenges for the Gitksan and other indigenous peoples if they are to live reflexively in the present as Gitksan – or Dunne’zaa, Sauteaux, Cree, etc. Clifford applies his articulation theory to the indigenous peoples of New Caledonia, one of the western Pacific islands. Since the 1850s, the surviving language groups on New Caledonia regrouped under the name Kanaks and engaged in “a complex politics of alliance and competition within and outside this new political identity”.<sup>31</sup> What Clifford is specifically attending to in his application of the articulation theory is the contemporary mobility of indigenous peoples between their family places of origin and the capital city of New Caledonia, Noumea.

In Clifford’s example, the patterns of mobility happen to predate colonization, albeit at a much slower pace, and obviously there are some additional reasons for travel

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<sup>29</sup> *Ibid.* at 477-78 [emphasis in original].

<sup>30</sup> *Ibid.* at 470.

<sup>31</sup> *Ibid.* at 468.

(e.g., education, employment, etc.). Nonetheless, some of the purposes of the extensive travel patterns, such as the maintenance of family connections and other activities, have deep historic roots. For instance, Clifford explains that he was “struck by a homology of scale between pre- and postcolonial lifeways.... People still travel, circulate, and manage to be home when it matters.”<sup>32</sup> By creating a way to recognize, incorporate, and legitimate recent change into the description, self-understanding, and discourse of a people, Clifford is seeking to find a way to avoid the usual shallow binaries of home versus away, traditional versus non-traditional, or authentic versus non-authentic. Clifford explains the politics of power that are involved:

The city has long been a white enclave. But it’s an edge that has come to be in contact, back-and-forth, with *la tribu* (landed sites of *la coutume*, customary life)... it has never been a matter of choosing one *or* the other, tribe or city, tradition or modernity, but of sustaining a livable interaction as part of an ongoing struggle for power.

Being *à l’aise* with the contemporary world, *as a Kanak*, meant living and working in both villages and cities.<sup>33</sup>

The other very important idea contained in Clifford’s application of indigenous articulation to the Kanaks has to do with recognizing the legitimacy of diversity and alliances of cultures and histories – again, as a part of how a people are described and self-understood. Such an articulation resists identifying essentialized features of indigenous peoples (e.g., timeless continuous traditions, unchanging laws, etc.),<sup>34</sup> and instead, adopts a view that includes deep political relationships, overlapping experiences, and all the various “productive processes of consensus, exclusion, alliance, and antagonism that are inherent in the transformative life of all societies”.<sup>35</sup> Clifford is locating the experiences of the Kanak

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<sup>32</sup> *Ibid.* at 469.

<sup>33</sup> *Ibid.* at 471 [emphasis in original].

<sup>34</sup> *Ibid.* at 472.

<sup>35</sup> *Ibid.* at 473.

in the Pacific “in relation to global forces, not outside them, [so that] historical experiences [are] no longer defined as essentially reactive, forever playing catchup to linear progress.”<sup>36</sup>

In the result, Clifford succeeds in breaking down the binary descriptions of the Kanaks to reveal “a spectrum of attachments to land and place – articulated, old and new traditions of indigenous dwelling and traveling.”<sup>37</sup>

So if we follow Clifford’s lead, and move beyond to consider the Gitksan conflict management and legal order in a pro-active, non-reductive way, then changes to tradition and culture are about transformation, as opposed to what Clifford calls “fatal-impact” notions of cultures characterized as living, organic structures which bear the potential to die.<sup>38</sup> From a non-reductive perspective of Gitksan society, language, traditions, and kinship arrangements are not to be described as critical organs in an unchanging, living body of culture wherein potential changes to or losses of such organs would kill the body. Gitksan society has persisted despite *Delgamuukw*, albeit with fewer Gitksan language speakers, less knowledge of ancient Gitksan legal traditions among members, and despite the many political and economic changes described in chapter 3. Gitksan society now includes participation in the capitalist economy, interaction with and use of the Canadian legal system, the adoption of Western religions by some, Western education, and new ways of living on the land. What has also emerged is an understanding of the Gitksan as being “in relation to” rather than outside of and reacting to global forces.<sup>39</sup> This does not mean ignoring power imbalances, colonization, or oppression, but rather represents a moving

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<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.* at 477.

<sup>38</sup> *Ibid.* at 478.

<sup>39</sup> *Ibid.* at 473.

away from a primarily reactionary stance to creating a political space that allows the self-conscious political reflexivity that Johnny Mack advocates.

An application of the articulation theory to Gitksan society would mean perceiving and appreciating Gitksan legal traditions as including “heterogeneous elements [of] old and new”, Gitksan and foreign.<sup>40</sup> What emerges for the Gitksan is a “quite different picture from that of an authentic, ancient tradition (or structure) persisting over the centuries by selectively integrating and rejecting external pressures and temptations”.<sup>41</sup> So while the Gitksan *adaawk* continue to provide the basis for Gitksan ownership of the territories and hold part of the record of Gitksan law, the intellectual processes of law engage both old and new experiences, information, and processes. It is the historic covenants with the land and the spirits in the land, as recorded in the *adaawk*, that provide the Gitksan with the necessary enduring connection to the land.

In this way, the issue is not the authenticity of Gitksan legal traditions, but recognizing them as an integral part of the ongoing political processes of social and cultural perseverance. Gitksan legal traditions can be recognized as an integral part of the continuum of dynamic political processes that enable the Gitksan to be Gitksan in the past as well as in the present. Gitksan identities have transcended colonial disruptions – but the challenge is to proactively recognize the changes wrought by the disruptions – not as “fatal-impacts”, but simply as changes to be considered. It stands to reason in this articulated frame that *Delgamuukw* was not a fatal impact either, but instead is a part of Gitksan people’s interaction with the larger world which must be consciously and reflexively factored into Gitksan people’s description and understanding of themselves.

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<sup>40</sup> *Ibid.* at 479.

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

Finally, articulation theory is not about plunging the Gitksan into an amorphous postmodern quicksand because the focus is always in relation to their enduring connection to the land combined with a dynamic understanding of the Gitksan in the present. Such an approach would be a useful starting place from which to consider the application of Gitksan legal traditions (described in the earlier chapters) to today's issues and problems.

#### **6.4 Case Study: Suu Dii**

The following account by Tony Penikett describes a very disturbing event that recently took place in Gitksan territory. The Gitksan woman at the centre of this conflict is Yvonne Lattie, who holds the wing chief name, Suu Dii, in the House of Gwininitxw.

On September 17, 2004, I attended a "public negotiation meeting" at the Gitksan treaty office in Hazelton...

Although the B.C. Claims Task Force had recommended a public negotiating process, public meetings like the one in Hazelton are carefully controlled events with the three chief negotiators giving brief reports and answering selected questions from the audience... At Hazelton, commissioner Jodi Wilson chaired the session.

As they entered the meeting room, audience members were handed an agenda and a sheet called "Guidelines for Observers." Those attending were required to sign an attendance sheet and forbidden from taping the proceedings. The guidelines made the position of audience members clear: "You are being permitted as an observer, not as a participant... The Chair will not recognize any speakers from the floor during the meeting. Talking or disruptions are not allowed during the proceedings. The Chair reserves the right to ask anyone who does not respect these rules to leave."

Sitting at the back of the room, I tried to imagine how a local union's rank-and-file members, at a meeting called to report on progress in collective bargaining, might receive such instructions. Not well, I thought. In the midst of this reverie, I noticed someone come to the doorway with an RCMP officer and point out a tiny woman sitting quietly just in front of me. The officer came into the room and told the woman she would have to leave. "This is a public meeting," she protested quietly. The officer said, "I'm just doing my job." "Who told you to do this?" she asked. The officer refused to say, and a moment later he handcuffed the woman. She fell to the floor and started crying.

None of the three treaty commission negotiators came over to ask why someone would be dragged out of a public meeting, but two old women came over to comfort her...

The scene was totally unsettling... Apparently, part of the tension in the community arises from the tribal negotiators' failure to get consensus on a

negotiating mandate, and dissidents allege that millions of dollars...for negotiations...have gone nowhere. Whatever the merits of the arguments on either side, it is outrageous that the B.C. Treaty Commission would hold a public meeting about Gitksan treaty negotiations in a building from which certain beneficiaries had been barred (as I learned later) and that the RCMP would be used to enforce such a ban.<sup>42</sup>

How could such an upsetting and abusive event, which appears to be the very antithesis of the Gitksan legal traditions described in earlier chapters, occur in present-day Gitksan territory? It is not helpful to begin interrogating who was in the right or wrong in this instance because such interactions are always much messier and more complex than they first appear – and they are usually indicative of deeper, sedimented conflicts. When this grim conflicted interaction is considered within the larger frame of Gitksan conflict management and law, it appears to represent what Nils Christie would call a paralysis of internal conflict among Gitksan people.<sup>43</sup>

In this case, the name Suu Dii was publicly shamed, with direct and serious political implications for the House of Gwininitxw. According to Gitksan law, conflict management in Suu Dii's situation would require dealing with the matters in dispute first, and then a cleansing of the name Suu Dii so that the House of Gwininitxw would not lose its daxgyet. Most likely, there would be a compensation payment, perhaps in the form of money to cover the cost of the shame feast.<sup>44</sup>

However at the time of writing, this event has not been dealt with according to Gitksan legal processes (a shame feast perhaps with compensation or cleansing), or under Canadian law (perhaps as wrongful arrest). Because it has not been dealt with according to

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<sup>42</sup> Tony Penikett, *Reconciliation: First Nations Treaty Making in British Columbia* (Vancouver: Douglas & McIntyre, 2006) at 265-66.

<sup>43</sup> Nils Christie, *supra* note 14 at 1.

<sup>44</sup> Historically, compensation has included payment in the form of land, crests, or fishing sites. It is in recent times that compensation has been paid with cash.

either Gitksan or Canadian law, this case remains in a sort of indeterminate state. Without the conflict management procedures built into Gitksan law, internal conflict in the communities is exacerbated and Ms. Lattie's House, Gwininitxw, continues to suffer a loss of daxgyet.

Interestingly, it seems that Suu Dii's situation is actualizing Herbert Hart's speculation about the problems that a society without secondary rules might experience. In other words, around the case of Suu Dii there appears to be (1) widespread confusion caused by the lack of authoritatively clarified rules, (2) lack of formal processes to deliberatively change rules as necessary to keep up with societal conditions and change, and (3) uneven diffusion of social pressure to maintain uniform rules and differing interpretations as to whether the rules have been violated.<sup>45</sup> It is clear from the Gitksan legal cases and the description of the Gitksan legal traditions set out in earlier chapters, that the Gitksan legal order includes laws that can be characterized as primary and secondary rules, and in the earlier Gitksan jurisprudence, these laws were valid and operational in the fullest sense.

However, in the case of Suu Dii, while there are primary laws of obligation concerning Suu Dii within Gitksan society, those laws are not being acted on because people can no longer figure out how to apply them in this highly contentious situation involving complicated modern-day treaty negotiations. Many people around Suu Dii have obligations to act on her behalf – her own House and her father's House (since this involves an injury). The fact that no one is acting on his or her legal obligations signals internal discord regarding, at a minimum, the treaty, Suu Dii's actions, and the role of the current centralized Gitksan Treaty Society (the group that was negotiating the treaty). In

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<sup>45</sup> H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) at 90-91 [Hart].

keeping with Hart's theory, the secondary rules are not being acted on, and hence there are major problems.

The case of *Suu Dii* has another twist. If we return to Miranda Johnson's re-colonization analysis of how the settler state is "re-founded" by the judicial treatments of indigenous embodied oral histories, it would seem that there might be a similar process going with the Gitksan treaty process.<sup>46</sup> In other words, while on the surface, the British Columbia treaty process might be considered to be "decolonizing", the fact that it has enabled the Gitksan Treaty Society to exercise power in order to limit member participation suggests that it is actually a form of re-colonization (or neo-colonization). That is to say, the Gitksan Treaty Society has replicated the centralized role of the State and is continuing the colonization of the Gitksan.

On the one hand, this case could stand for serious questions about the continued vitality, appropriateness, and legitimacy of Gitksan law to deal with issues such as the disputed treaty negotiations. On the other hand, perhaps this case could stand for the development of new legal norms – although the waters around this are still very murky. In any event, an analysis that draws on Clifford's articulation theory and Mack's political reflexivity would be beneficial for the Gitksan and other indigenous peoples in similar conflicted situations.

## **6.5 Conclusion**

As I stated earlier in this chapter, *Delgamuukw* is part of a much larger continuum of political and economic change in Canada and beyond. In other words, there are many interconnected forces of change (e.g., the global economic situation, competition for

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<sup>46</sup> Johnson, *supra* note 7 at viii.

natural resources, corporatism, government power shifts, etc.) which surround and influence Gitksan and other indigenous peoples. Locally, the several decades of *Delgamuukw* preparation and the levels of litigation coincided with major economic shifts involving fisheries, forestry, and mining. All of this means that it is difficult, and perhaps not even that useful, to isolate specific factors of change.

It has never been my intent to suggest that Gitksan society should remain unchanged or that change in itself is a problem. Rather, I contend that problems are created when change remains unexamined, unarticulated, and seemingly beyond the control of Gitksan peoples – and their ability to respond effectively or constructively to it. As the indigenous articulation theory demonstrates, there are ways to rethink Gitksan legal traditions so that they are dynamic in today's world and useful to today's problems.

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**The Consequences of *Delgamuukw*:  
Its Effects on Gitksan People’s Internal Relationships,  
and on Relationships between Them and the Land**

You are invited to participate in research about the “consequences of major litigation for Gitksan people”. The research is being conducted by myself, Val Napoleon. I am an interdisciplinary (law and society) graduate student at the, Faculty of Law, University of Victoria. You may contact me at 780-436-3253.

As a graduate student, I am required to conduct research as part of the requirements for my interdisciplinary Ph.D. My supervisors are Dr. John McLaren (250-721-8162) and Dr. John Borrows (250-721-8167). You may contact either of these supervisors if you have other questions about this project.

You are being asked to participate in this study because you were involved with *Delgamuukw*. I am seeking interviews with a few key people in capacity of researchers, lawyers, directors, interpreters, plaintiffs, expert witnesses, technical support, and politicians from the *Delgamuukw* period. I am looking for thoughtful people with different opinions and experiences who are willing to discuss their observations and insights.

The purpose of this research project is (1) to discover and describe how major litigation affects the identity of an aboriginal people and consequently their relationships with each other and to the land, and (2) to use this understanding to suggest strategies that aboriginal people might employ to reduce the identified potential negative impacts of litigation. The focus of the case study research will be *Delgamuukw v. British Columbia* and the Gitksan plaintiffs located in northwestern B.C. The approach and terms of reference for investigating these changes will be the Gitksan legal order and the western legal order as demonstrated in the *Delgamuukw* decisions.

Research of this type is important because aboriginal people are increasingly reliant on western courts to resolve their internal disputes. For example, in 2003 there were upward of 1,000 court cases dealing with aboriginal and treaty rights before the court (excluding 200 residential school cases). Inevitably, the concept of rights shapes the identities, social and political goals, and contemporary work of aboriginal people. As such, it becomes part of the ongoing changes experienced by aboriginal people because of colonialism. “Change” is not the problem for aboriginal people. Rather, problems are created when change remains unexplained and therefore beyond community understanding and control.

Not much has been written about how the rights framework and major litigation affect aboriginal people. Aboriginal people will continue to litigate, but I hope that my research will help communities understand its potential consequences and the importance on-the-ground political development.

**The Consequences of *Delgamuukw*:  
Its Effects on Gitksan People’s Internal Relationships,  
and on Relationships between Them and the Land**

(Note: My starting premise is that everyone involved with *Delgamuukw* did the best job that they could have under the circumstances. My goal is to learn from the experience of *Delgamuukw*, not to find fault or lay blame.)

How were you involved with *Delgamuukw*?

What did you hope *Delgamuukw* would accomplish?

What was the most important part of *Delgamuukw* from your perspective?

What were the most important lessons that you learned from *Delgamuukw*?

What surprised you the most about *Delgamuukw*?

Since *Delgamuukw*, have there been changes to the Gitksan social relationships (e.g., roles, responsibilities, cooperation, conflict)? If so, how have they changed?

How do you know this?

Since *Delgamuukw*, have there been changes to the Gitksan people’s relationship to the land? If so, how have they changed?

How do you know this?

How do you perceive *Delgamuukw* now?

What are you doing now?

**The Consequences of *Delgamuukw*:  
Its Effects on Gitksan People's Internal Relationships,  
and on Relationships between Them and the Land**

If you agree to voluntarily participate in this research, your participation will include an interview of 1-3 hours with the possibility of one or two follow-up calls to clarify information. I will use an interview guide to help me stay on track and focus the discussion.

Your participation in this research must be completely voluntary. If you do decide to participate, you may withdraw at any time without any consequences or any explanation. If you do withdraw from the research, I will not use your information in my dissertation.

If you require, I would like to compensate you for your time at \$25 an hour. If the pay is the only reason you would agree to be interviewed, then you should decline to participate.

If you want to be anonymous or require confidentiality, I will not use your name or describe you in any detail in the dissertation. I will take such measures as is necessary to protect your anonymity and confidentiality in the dissertation. However, you are part of a group of well known people who have been involved in some capacity with *Delgamuukw*, a major, public court action. Also, the Gitksan are a relatively small nation with small communities so it is inherently more difficult maintain anonymity and confidentiality. If you require anonymity or confidentiality, I will keep the interview data in a secure location, and I will destroy the interview information upon completion of my dissertation.

If you would like a copy of the final dissertation, I will provide you with a copy. I hope to share my dissertation through publication and presentations, and would be willing to present my findings in at a community meeting.

In addition to being able to contact the researcher and the supervisors at the above phone numbers, you may verify the ethical approval of this study, or raise any concerns you might have, by contacting the Associate Vice-President, Research at the University of Victoria (250-472-4362).

Would you like to review the transcript of your interview before I complete the dissertation?

yes       no

Your signature below indicates that you understand the above conditions of participation in this study and that you have had the opportunity to have your questions answered by the researcher.

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*Name of  
Participant*

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*Signature*

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*Date*

***A copy of this consent will be left with you, and a copy will be taken by the researcher.***

Appendix D-1



Appendix “D”

Gitksan Reserves

Source: Delgamuukw BCSC Decision

Appendix D-2





Appendix “D”

Wet’suwet’en Territories  
Source: Delgamuukw BCSC Decision

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Appendix D-4



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