Clash of the Legal Theories: The hidden task in acknowledging Indigenous Legal Traditions in Canada

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CPSA May 2018

I. Introduction

In *Canada's Indigenous Constitution* (2010) John Borrows argues that for many Indigenous people in Canada the dominant legal traditions (common and civil law) do not accurately capture their experiences both in terms of their relationships with one another and with the land.[1] Borrows goes on to argue that Indigenous legal traditions must be recognized as a part of the legal system in Canada.[2] Borrows' project is important, perhaps essential, to the larger project of reconciliation between Indigenous and non-indigenous peoples in Canada. The Canadian court system has largely treated Indigenous legal traditions (historical and continuing) as evidence of culture, not legal norms.[3] In order to move along the path to reconciliation, Canada must find a way to acknowledge Indigenous legal traditions.[4] It may appear that recognition and elevation of such legal traditions is the appropriate solution.

The problem with the approach from Borrows is that it relies on the assumption that Indigenous legal traditions and the common and civil law in Canada are sufficiently similar that they could work alongside one another. In one sense this may be true: both systems contain commands and penalties, and therefore may *look* similar. However, I argue in this paper, that we must look at the underlying source of legitimization in each system. It is here that we will see the crucial ways in which these legal systems differ, ways that, if unacknowledged, will in the least cause problems for the integration of Indigenous legal traditions, and at worst undermine the entire project. This is the hidden task in the project of recognizing Indigenous legal traditions. It stems from a fundamental difference in the nature of the two legal systems. To be successful in Borrows' project, this task must be acknowledged and addressed. Doing so may indicate which options are available as we move towards reconciliation.

II. Borrows' *Indigenous Constitution*

In *Canada's Indigenous Constitution* Borrows acknowledges the successes of the Canadian legal system while also noting that there are continued conflicts about the "legitimacy of its origins and the justice of its contemporary application."[5] One example of this tension is illustrated by the circumstances of Indigenous peoples in Canada, who have, "never been convinced that the rule of law lies at the heart of their experiences with others in this land."[6] This happens, in part, because Indigenous people have pre-existing legal systems that are often ignored, denied, or diminished. In *Canada's Indigenous Constitution* Borrows argues for the recognition of Indigenous legal traditions within the Canadian legal framework. Borrows is seeking to expand what we consider to be "authoritative" in making judgements about the law in Canada.[7]

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[1] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 6.
[2] *Ibid*.
[3] For example, see discussion of *R v Marshall* below.
[4] As reflected in the mandate of the Government of Canada in creation of commissions like the Royal Commission on Aboriginal Peoples (1991). The "project of reconciliation" is also discussed in *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 81; and *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 23 [*Tsilhqot'in Nation*].
[5] Borrows, *supra* note 1 at 6.
[6] *Ibid.*
[7] *Ibid.*

One reason Borrows provides for this project is that there is an important connection between the culture of a group and the laws that govern that group. Laws are created from a particular cultural context and reflect cultural norms and social relationships. As Borrows says, "Legal traditions are a cultural phenomenon."[8] As such, the common and civil law in Canada reflects the culture of both British and French colonists at the time of colonization as well as changes enacted by those groups from colonization to the present. What is not reflected, generally, in the common and civil law is the culture of Indigenous peoples in Canada as they were excluded both legally and socially from this group until recently.[9] This means that Indigenous peoples are governed by a legal system that reflects the culture of colonists and their decedents. The result is that the relationship between common and civil laws and Indigenous peoples is different than the relationship between non-Indigenous peoples and these same laws. In a sense, because the law lacks a cultural connection, it is more likely that an Indigenous person would see the common and civil law as simply the result of the State using its power to force obedience.

Borrows argues that Canada needs to "recognize Indigenous legal traditions" as able to give rise to "jurisdictional rights and obligations in our land."[10]Borrows points out that Canada is already multi-juridical as it has both common and civil law. The integration and recognition of these two legal systems within one State can provide guidance as we add Indigenous legal traditions as a third.[11] While, as Borrows notes, there have been times when the common law has dominated civil law in Canada, Borrows focuses on the dialogue created between common and civil law. He points out that there have been times when the common law has influenced civil law, but there have also been times when the civil law has influenced the common law.[12] This suggests that even if Indigenous legal traditions were influenced by the common or civil law, there is still benefit in elevating and recognizing it.

Further, Borrows is not concerned that recognizing Indigenous legal traditions alongside common and civil law may change those traditions. In answer to the fear that civil lawyers expressed that the interaction between common and civil law would "taint" civil law, Borrows says:

> This approach fails to recognize that the integrity of a legal system is not solely dependent on its relative isolation, internal logic, or doctrinal purity. Integrity also depends upon the systems' recognition, from within and by others. Recognition secures a jurisdictional space for its operation that encourages the respect of the public and facilitates access to resources. When legal systems do not have to continually defend and justify their existence or worth, they are less vulnerable to argument that challenge their authenticity. When they gain recognition, they are much freer to interact with other systems without fear of assimilation.[13] [emphasis added]

This passage emphasizes the importance of recognition over concern of potential change or influence caused by other legal systems on Indigenous legal traditions. Once Indigenous legal traditions are recognized within the Canadian legal framework this will, in a sense, secure their future existence while also providing the chance that Indigenous legal traditions will be available to Indigenous (and potentially non-Indigenous) persons. It could be the case that, in fact, Indigenous legal traditions end up influencing common and civil law. In particular, it is interesting to note that Borrows says that recognition will remove the "fear of assimilation." This suggests that such recognition carves out an

[8] *Ibid* at 8.
[9] And, arguably, still are excluded in many ways.
[10] Borrows, *supra* note 1 at 7.
[11] *Ibid* at 113.
[12] *Ibid* at 114-115.
[13] *Ibid* at 116.

undeniable space for Indigenous legal traditions and that this, rather than "doctrinal purity" is of greatest value.

Throughout the book Borrows makes many suggestions as to how the Canadian government could do this, including by (i) more fully recognizing treaties, (ii) working to better (and more widely) understand the sources of Indigenous legal traditions, and (iii) greater explicit acknowledgement that the common and civil law gain their authority from culturally contingent factors.[14] Borrows argues that as the government achieves these broad tasks, it will create space to recognize Indigenous legal traditions.[15] Further, Borrows argues that the government can formally recognize Indigenous legal traditions by turning to their constitutional obligations under s.35(1) of the *Constitution Act, 1982* which states, "[t]he existing Aboriginal and treaty rights of Aboriginal peoples of Canada are hereby recognized and affirmed."[16] One such "Aboriginal right" could be the practice of Indigenous legal traditions.[17] In addition to this, Borrows also suggests that s.35 will not be enough to ensure the "building of a harmonious nation state" and he includes other areas in which the federal government can provide recognition for Indigenous legal traditions.[18]

Given Borrows' argument about the importance of acknowledgement and creating space for Indigenous legal traditions, his project appears reasonable and likely, if enacted, to be successful. However, by focusing on recognition, Borrows relies on the ability of Indigenous legal traditions to survive this process without losing anything of importance. Arguably, the common and civil law (happily) coexist in Canada. Therefore Indigenous legal traditions can as well. What this ignores is that common and civil law originate from similar cultures from the same area of the world and, while different, also share many foundational similarities. Indigenous legal traditions (and Indigenous culture more generally) evolved independently of European influences. Where the culture is different the social norms and theories of legitimization of the law will also be different. The question then, is, are Indigenous cultures and legal traditions too different to work alongside the common and civil law?

III. Restorative Justice: An Example

To begin, I turn to an example to illustrate the importance of acknowledging and addressing the differences between Indigenous legal traditions and the common and civil law. This example comes from Rupert Ross, an Assistant Crown Attorney for the District of Kenora since 1985.[19] Ross looks at what has happened with restorative justice between 1996 and 2005.[20] He discusses the 1995 enactment of section 718 of the *Canadian Criminal Code* and the 1999 *Gladue* decision by the Supreme Court of Canada. Both of these provide evidence that the law and elected officials approve of the "efforts of communities to create a wide variety of restorative processes tailored to local perspectives."[21] While this is a positive change in Ross' evaluation, he makes the following comment:

> I am increasingly concerned, however, that the task may be more daunting than it first appears. Restorative justice processes require such a fundamentally different way of thinking that even the best-motivated people seem to be having problems escaping the preconceptions and

[14] *Ibid* at 177.
[15] *Ibid*.
[16] *Ibid* at 185.
[17] *Ibid.*
[18] *Ibid* at 198.
[19] Rupert Ross, *Returning to the Teachings: Exploring Aboriginal Justice* (Canada: Penguin Group, 2006)
[20] These dates reflect the first publication of *Returning to the Teachings* and the date when he wrote the Introduction for this volume.
[21] *Ibid*, Introduction xv.

> commandments of our western way of seeing. Too frequently, the result is a wholly unsatisfactory mix of two approaches that results in the mangling of both.[22]

Ross discusses that in current use restorative justice practices have become about reaching an agreement with the main focus on mediation regarding the material concerns of the participants.[23] For example, if Bob vandalizes Lucy's car, mediation focuses on finding a "win-win" agreement looking to what appropriate compensation would be.[24] Ross contrasts this approach to the "originating vision" of restorative justice as found in Indigenous traditions (as well as other groups like the Quakers). In these accounts, the focus is on the relationship between the participants. Lucy must be helped to "explore the depth and range of relational" injuries she has suffered, and Bob needs to understand his act of vandalism in light of the larger impact of the offence. This allows Bob to take responsibility for his action in a meaningful way, which may lead him to act differently in the future.[25] Ross says that in too many cases restorative justice has become about efficiency and this original purpose for using this process has been lost.

It is difficult to know with any level of certainty why this happened when restorative justice was codified in the *Criminal Code*. One possible explanation might be that this "reinterpretation" of restorative justice maintains the foundational elements from Indigenous practices, and simply translates the practice from one culture into another. Here the claim is that if *Harry Potter* is translated into French, the words may be different, but the story is essentially the same. This type of response assumes that different cultures, in this case Indigenous and Non-indigenous cultures, are, at heart, the same. They simply use different words or practices, but this is only different ways of expressing the same fundamental values and worldview.

A second explanation might dig a little deeper. Perhaps the reason why the practice of restorative justice looks different from the Indigenous practice once it was codified is that the practice itself represents a particular worldview. It is not the actions or the words, but the *reasons* for those actions and words that give the practice meaning. When restorative justice was moved from one culture into another, the words and actions were moved, but the underlying *reasons* for those words and actions were not. They could not be, as they are a manifestation of Indigenous culture and worldview, which is not the same as the culture and worldview of Non-Indigenous Canadians.

This is a difficult claim to make, and I will spend the remainder of this paper attempting to unpack and defend it. If I am correct, then what happened with restorative justice can serve as a cautionary tale as we follow Borrows' suggestions. It is important that if we do, in fact, recognize and acknowledge Indigenous legal traditions we do so in such a way that those traditions are not divorced from their underlying meaning. To do so is an act of assimilation, and cannot be part of the path to reconciliation.

IV. Legitimacy of the Law

To proceed with this task, I could take many different approaches. The idea of identifying and categorizing the underlying worldview of a culture (in particular a culture that is not my own) is a daunting task. For this paper, I will approach this problem through the lens of legal theory. One place where we can look to see the difference in the culture and worldview of Indigenous and non-Indigenous peoples in Canada is to look at Indigenous legal traditions versus the common and civil law. As noted above, the law is a reflection of our social and cultural norms. Thus, if we treat legal systems like *Harry*

[22] *Ibid* at xvi.
[23] *Ibid*.
[24] *Ibid*.
[25] *Ibid* at xvii.

Potter and simply translate it into a different language, we fail to understand that the way the law is structured and the reason it is legitimate, does not reside in the language that is used, but rather in the values and worldview that it represents. To unpack this claim, I will turn to a characterization of natural law theory versus positive law theory and show that many Indigenous legal traditions rely on principles that are relevant under natural law theory whereas the common and civil law relies on principles relevant under positive law theory. I am not claiming that either legal system is a perfect representation of these legal ideals, but rather that in thinking about the differences between these legal theories we may be able to better see the difference between the actual legal systems relevant to this discussion.

a. Natural Law Theory

To understand what it means to claim that Indigenous legal traditions are a natural law theory I begin with a discussion of natural law theory and then will turn to an examination of Indigenous legal traditions as natural law theory. For something to be considered a law it usually has to meet some criteria that separate it from a mere rule, command, or request. The fact that something is a law suggests that it ought to be followed. The justification for this response must rest on something. This is the subject matter of legal theory. Jonathan Crowe identifies two possible candidates for what law is:

(1) Law is necessarily a socially recognized standard for conduct.
(2) Law is necessarily a rational standard for conduct.[26]

Crowe says that (1) is accepted among many contemporary legal philosophers.[27] It describes the legal positivist tradition. Under this tradition, the law is what is created through the appropriate process and applied to individual cases. The authority of the law, therefore, comes from how it was created rather than the content of the law. Legal positivism is the dominant view in current legal philosophy and the dominant legal tradition in Canada. What justifies the content of the *Canadian Criminal Code, Constitution*, or even the *Canadian Charter of Rights and Freedoms* is the process through which those documents have been created and the way in which they are applied to individual cases.

Crowe says that (2) is part of the natural law tradition.[28] While Natural Law has its contemporary proponents[29] is it still strongly associated with its more classical theorists, such as St. Augustine who said: "an unjust law is no law at all."[30] This quote suggests that it is not simply the procedure by which a law is created or made, but also the content of that law, which is relevant to the binding force of any given law. The use of "rational" in the description of natural law under (2) refers to the content of the law. It would be possible to pass a law in Canada that no person can own or ride a red bicycle. If the proper procedures were met, it would conform to (1). If you would not feel compelled to obey this law, then it may be that the law, while procedurally correct, is irrational with regards to its content. In other words, as Crowe writes, natural law theory explores "how law can be based on principles of practical rationality so as to engage the rational agency of legal subjects."[31]

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[26] Jonathan Crowe, "Natural Law Theories" (2016) 1:1/2 Philosophy Compass 91 at 91.
[27] *Ibid*
[28] *Ibid*
[29] See e.g. John Finnis, *Natural Law and Natural Right* (Oxford, Oxford University Press, 2011) and Lon Fuller, *The Morality of Law*, rev'd ed. (New Haven, CT: Yale University Press, 1969)
[30] Augustine, *On Free Choice of the Will*. Translated by Thomas Williams (Indianapolis, IN: Hackett, 1993) at bk I pt V. Translated from latin: *Lex iniusta non est lex.*
[31] Crowe, *supra* note 26 at 95.

Natural law theory aims to supply members of the relevant legal community with "shared rational standards for actions."[32] What supplies this shared standard depends upon the particular community being examined. In the classic versions of this theory what would make a law rational was often the fact that it reflected a divine truth or a truth about human nature. Today a law is more often considered rational because it reflects morality or sometimes, as Mark Murphy argues, simply the law will not be effective because it does not provide people with sufficient reason to comply with it.[33] For this paper, I focus on the idea of natural law as rational regarding the more classic conception of rationality – it conforms to divine will and/or human nature.

b. Indigenous Legal Traditions as Natural Law Theory

In order to argue that Indigenous legal traditions are a type of natural law theory, it is important to examine each of the five sources – sacred law, natural law, deliberative law, positivistic, and customary law – that Burrows identifies. Through his description of these five sources he is careful to clarify that they appear to a different degree, and in a different way, in different Indigenous legal traditions. His account provides a general characterization of Indigenous legal traditions. Following Burrows approach, I will evaluate this general version of Indigenous legal traditions. As such, any conclusions reached will apply to the degree that any particular Indigenous legal tradition emphasizes a particular source of law. With this said, what is important to identify is the type of legal theory that is in play and what justifies the creation and enforcement of particular laws. While individual Indigenous legal traditions may differ greatly, insofar as they are derived from a similar source they fall under the same legal theory.

The first source Borrows discusses are sacred laws. These laws come from creation stories or revered ancient teachings.[34] In this way, these laws are the result of a divine command, and their authority derives from that source. Creation stories contain rules and norms that guide how to live one's life and how to address conflict.[35] These laws are often regarded as foundational to the operation of other laws.[36] This source of law engages the rational standards of the community because it is rational, if you believe in the truth of the creation stories, to follow the rules they set out. The source of information as to how we ought to act is unimpeachable. There is the possibility of interpreting the stories in different ways, but this does not detract from the claim that when the source of the law is divine in origin, it is rational to comply with the law.

Borrows argues that while Canada's laws are becoming more secularized, there is the same influence from a divine source in the formation of the Western legal tradition as there is in Indigenous traditions. He cites the preamble to the *Constitution* which states that Canada is founded on principles that recognize the supremacy of God.[37] However, this is a poor comparison. Likely these references are merely remnants from when Western legal traditions were highly influenced by religious traditions and potentially were, themselves, a natural law theory. When examined today it would be incorrect to say that the Western legal system bases its authority on the claim that the laws are the dictates of a Christian God. Rather, the Western tradition is justified upon concepts such as due process, fairness, and the rule of law all of which rely on the positivist vision Crowe identifies under (1) above. The rich relationship between creation stories and the justification of the resulting rules is apparent in Indigenous legal traditions but is absent from the dominant legal system in Canada.

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[32] *Ibid.*
[33] Mark Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge: Cambridge University Press, 2006.)
[34] Borrows, *supra* note 1 at 24.
[35] *Ibid* at 25.
[36] *Ibid*.
[37] *Ibid*.

Natural laws (not to be confused with natural law theory) is law that is developed based on observations of the physical world.[38] This source of law is secondary to sacred law as the physical world is that which was created in the creation stories. Borrows says that,

> Indigenous peoples who practise this form of law might watch how a plant interacts with an insect, and draw legal principles from that experience. Others may study how an insect interrelates with a bird, and take legal guidance from that encounter.[39]

He continues to describe other examples, and says that in this way law may be "regarded as literally being written on the earth."[40]

Borrows is careful to distinguish natural law from natural law theory, in particular, pointing to the fact that in some natural law theories humans are considered separate and distinct from the natural world, a view that is quite different from Indigenous legal traditions that see humans as part of the natural world.[41] Borrows is correct to point out this difference, but he errs when he notes this difference as relevant. Natural law theory is a category, and I am arguing that Indigenous legal traditions are but one example of natural law theory. What is important is how each example of natural law theory conceives of the law. When you examine the key concepts in these natural laws, they are quite similar to natural law theory. Natural laws in Indigenous legal theories are laws that we get through observation of human nature and the nature of the natural world. While there will always be issues regarding how we are to interpret such observations, it remains true that the idea is that these facts about the world create the law. Thus the law originates in facts. It is not the case, as it would be under a positivistic framework that the laws could be something else if Parliament had worded them differently or decided to go another way. It is not true that the laws, thus conceived, could be different to reflect different cultural norms. Again, the laws have to be interpreted, and it is not claimed that this will be done perfectly, yet the source of the law is, arguably, a fact about the world. In this way, natural laws do fall under the same rubric of natural law theory.

Borrows identifies three additional sources of law: deliberative, positivistic, and customary. These forms of law are all concerned with the day-to-day operations or the specific details of the law. The underlying principles appear to derive from sacred and natural law. Deliberative law is law that is formed through particular recognized processes: persuasion, deliberation, council and discussion.[42] Positivistic law is described as the actual proclamations, rules, regulations, codes, teachings and axioms that are considered binding on people's behaviour.[43] Customary law refers to practices that are developed through repetition within a society or culture.[44]

Borrows points out that in some cases the law in some Indigenous communities has become divorced from any sacred or natural law underpinnings.[45] In such cases, it may be considered law simply because of the authority or power of the person declaring that it is. Arguably, in such cases, you may conclude that this is positivistic law (as Borrows does). I put this concern to the side as this seems to be an issue with regards to the modern application of the law. You could similarly argue that the *Canadian Criminal Code* is law because the government says that it is and can enforce it through the police and

[38] *Ibid* at 28.
[39] *Ibid* at 28.
[40] *Ibid* at 29.
[41] *Ibid*.
[42] *Ibid* at 35.
[43] *Ibid* at 46.
[44] *Ibid* at 51.
[45] *Ibid* at 47.

other mechanisms. Of course, if this is the only reason that something is illegal, we fall into the trap of characterizing law as an arbitrary use of force on the citizenry. From the perspective of the legal theories (positivist or natural law), this would undermine not only our legal system but the political construction of our State. As such, in what follows I assume that even where the sacred or natural laws have been lost or forgotten when you view Indigenous legal traditions through the lens of legal theory you must consider that traditionally it was the sacred and natural laws that gave content to the laws. The deliberative process, positivistic nature, and customary laws all followed from those original sources.

Insofar as Indigenous legal traditions are derived from sacred and natural laws, they provide not only the laws themselves, but a rational reason to follow those laws. They fit into Crowe's (2) because if the laws impart information from a divine source and/or relate a truth about humans or the world around us, then they provide substantive reasons to follow the law. The above is a general account based on Borrows' description, and would, arguably, be accurate only insofar as the general description fits with any single Indigenous legal tradition.

In the above I have mentioned the dominant legal traditions in Canada briefly, framing them as positivistic. I have dismissed claims that this legal tradition could be characterized as a natural law theory because the references to God are likely no more than historical remnants and do not appear to sway decisions in the application or creation of law.[46] One may argue that Canada's dominant legal system must be more than the process itself as this process seems to require a certain level of fairness and the content of the laws support ideas like the inherent value of human autonomy (freedom from control or harm inflicted by others). It is true that fairness is an organizing principle in Canadian law, and has been identified as a key component of the rule of law. However, even though this is true, at most this is a recognition of the most efficient way to run our liberal democracy. It is not a reference to human nature or the divine. This seems rooted more in the idea that our laws are part of a social contract between citizens and the government. Under such an account the laws could be different than they are (as there may be more than one way to create a just society.) This is not true under Indigenous legal traditions that may allow room for more than one interpretation of Creation stories or lessons from the natural world, but the laws are still rooted in non-contingent facts about existence.

I have placed the dominant Canadian legal tradition within a positivistic framework and Indigenous legal traditions within a natural law framework. However, even if these labels are not helpful, the differences between these two approaches to the law should now be apparent. In an Indigenous legal tradition if you asked the question: "but why is that the law?" your answer would likely be in the form of a creation story or a story about an observation of the natural world. If you ask the same question in the dominant Canadian legal tradition, your answer would likely be a description of the legislative or judicial process. Both traditions are pointing to the laws that govern our daily lives, but the source of our obligation to follow those laws come from very different places.

V. The Hidden Task: Can it be done?

The differences between the Western laws and Indigenous legal traditions raises concerns as to how these systems could be integrated. The common and civil law work side by side, but they are also both positivistic theories. Adding Indigenous legal traditions will require bringing in a form of legal reasoning that is rooted in a very different conception of what it means for something to be a law. If we were to proceed with Borrows' project unprepared, this could cause problems like those identified above in Ross' account of restorative justice.

[46] Even if the Western legal tradition in Canada could be considered a natural law theory, it clearly would be one that relies on a different "divine" authority than Indigenous legal traditions.

Borrows argues for the inclusion of Indigenous legal traditions as a third source of law that will govern the lives of Canadians. While there are many advantages to using Indigenous legal traditions for all Canadians, Borrows main focus is on legitimizing these traditions such that use of these laws by Indigenous peoples themselves will be recognized and afforded the proper authority. He writes:

> Indigenous legal traditions must be at the root of Indigenous governments, courts, clan organizations, family relationships, and other important institutions within these societies. Indigenous vantage points should help shape the appropriate balance of rights and responsibilities when judging issues of Indigenous legal traditions.[47]

Here Borrows has drawn our attention to the importance for Indigenous people to be governed by their own legal traditions. This seems especially important when you consider the fact that such traditions are natural law theories and the laws contain within them references to root beliefs about who Indigenous people are. It is through this reference that compliance with the law is justified. He writes that for Indigenous legal traditions to grow we must work to support their development, and this support, although mainly from the Indigenous individual, family, and community also requires the support of the more formal state-like institutions.[48]

At the closing of his book Borrows provides a caution about how we ought to proceed with the project of integrating and acknowledging Indigenous legal traditions. He says:

> While busy working for recognition and affirmation of Indigenous laws within Canada, supporters must also remember that such victories can be hollow if Indigenous peoples' traditional authorities are permanently subjugated in the process…
>
> Canadian law can sometimes be used with great effect, but only if Indigenous cultural values, traditions and authorities are simultaneously part of this process. Canadian law can also be a problem.[49]

This caution points to problems that may arise from subtler forms of rejection of the legal authority of Indigenous traditions. This suggests that even if Indigenous laws are recognized this may not be the solution depending on the value or authority placed on such traditions by the wider legal system.

The hidden task in Borrows' project then is to find a way to recognize and acknowledge Indigenous legal traditions without stripping those legal traditions of their cultural meaning, a meaning that is not shared by the non-Indigenous population in Canada. To take seriously the values and meaning of Indigenous legal traditions for Indigenous peoples is to understand that laws that reflect non-contingent facts about existence will be more binding than laws created through a particular process. In fact, it could be argued, that for Indigenous peoples who see law in this way, the application of the common and civil law to their lives represents an illegitimate use of force by the State. The common and civil law are simply rules created by a powerful force that will use that power to punish those who disobey.

In a similar vein, it could be said that if a non-Indigenous person was subject to Indigenous legal traditions, they might experience a similar situation. The non-indigenous person would feel, perhaps, that the law was unfair or wrong as they did not share the same worldview as that of the lawmakers. In our current situation, it is hard to imagine that this would result in the same problems of imposition and oppression as that experienced by Indigenous peoples who are subjected to the common and civil law.

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[47] *Ibid* at 273.
[48] *Ibid* at 271.
[49] Borrows, *supra* note 1 at 282-3.

This example is meant to merely show that there is a sense of disconnect, of illegitimacy, when a legal tradition from a culture that is not your own is applied to you. You may understand that these are the rules, but you obey only from a sense of avoiding punishment, not because you believe in the legitimacy of the laws themselves.

While the above outlines the difficulty in achieving Borrows' task, it also underlines the importance of success. Indigenous peoples are currently subject to the common and civil law, laws that may appear illegitimate according to their worldview. This creates the possibility that all common and civil law, for Indigenous peoples, is obeyed only to avoid punishment. This leads to a tiered system where non-Indigenous people are governed by laws that appeal to their cultural sense of legal legitimacy whereas Indigenous people are governed by force and fear of punishment – an oppressive practice. Therefore, recognizing Indigenous legal traditions can actually do more than Borrows' claim that it will more accurately capture the experiences and culture of Indigenous peoples, it may also eliminate an oppressive and divisive practice, which is an important step on the path to reconciliation.

Therefore, the question seems to be, not should we recognize Indigenous legal traditions, but can we recognize them alongside the common and civil law? Can we avoid the effects of "translating" that occurred with restorative justice? I agree with Borrows that this process must begin with recognition which will provide the benefit of protection and acknowledgement of Indigenous legal traditions in Canadian society. If this occurs, it may eliminate problematic practices in the court such as in the case of *R v Marshall*[50] where Stephen Augustine, a Mi'kmaq Chief from New Brunswick and member of the Mi'kmaq Grand Council testified in a case about logging rights. Chief Augustine was asked to testify regarding a wampum belt. Chief Augustine concluded that the belt represented the linking of the "Mi'kmaq Nation with Christianity when Membertou was baptized in the early 1600s."[51] However, another witness, Dr. von Gernet went to the Vatican Archives and found evidence the belt had been made 200 years later than Chief Augustine had claimed.[52] In response to this error, Judge Curran clarified that he would consider that "error in weighing Chief Augustine's other evidence."[53] The problem, according to Borrows, is that Chief Augustine is characterized as providing historical information rather than legal commentary. The error about the wampum belt is serious if Chief Augustine's expertise was in the dating of such artifacts. However, if instead he is considered a legal expert who is testifying to the "normative significance" of early colonial encounters in the Maritimes, then his error is not central to his overall testimony, and his historical error would not undermine the remainder of what he was able to provide.[54] This type of problem occurs when the legal traditions of Indigenous peoples are treated as cultural and historical artifacts, rather than as robust and current legal systems. Therefore, recognition of Indigenous legal traditions would change the approach of courts when evaluating this type of evidence.

The above is my interpretation as to what went wrong in *Marshall.* It provides one way of understanding the problems that we face with integrating the legal systems. The challenge the court faces can be seen in the decision written by Chief Justice McLachlin (as she was then). She writes:

> *Delgamuukw* requires that in analyzing a claim for aboriginal title, the Court must consider both the aboriginal perspective and the common law perspective. Only in this way can the honour of the Crown be upheld.

[50] *R v Marshall*, 2005 SCC 43 [*Marshall 2005*].
[51] *R v Marshall,* 2001 NSPC 2 at para 59 [*Marshall 2001*]; discussed in Borrows, *supra* note 1 at 68.
[52] *Ibid* at para 60.
[53] *Ibid* at para 61.
[54] Borrows, *supra* note 1 at 69.

> The difference between the common law and aboriginal perspectives on issues of aboriginal title is real. But it is important to understand what we mean when we say that in determining aboriginal title we must consider both the common law and the aboriginal perspective.
>
> The Court's task in evaluating a claim for an aboriginal right is to examine the pre-sovereignty aboriginal practice and translate that practice, as faithfully and objectively as it can, into a modern legal right… The Court should take a generous view of the aboriginal practice and should not insist on exact conformity to the precise legal parameters of the common law right.[55]

McLachlin goes on to explain that the court should not impose a "European template"[56] and that the court must "translate" a pre-sovereignty "aboriginal practice" into a modern right. By connecting this practice to a common law right, the court "reconciles the aboriginal and European perspectives."[57]

Examination of the passages above suggests that the Court is unclear how, even with the "best intentions," to bring these two perspectives into one legal system. It is clear that both Indigenous and common law perspectives must be considered, but it is unclear what this means except that the court is seeking to, without subsuming the Indigenous perspective under the European perspective, to somehow "translate" the Indigenous tradition into the common law. However, even if approached with the best intentions, two problems arise from this approach. First, by assuming that Indigenous legal traditions must be translated into the language of common law will require that the Indigenous traditions change to accomplish this. This is like the case of restorative justice discussed by Ross. Since the Indigenous tradition and common law tradition have different objectives and are rooted in different conceptions of the law, to "translate" Indigenous traditions into the common law will likely result in the loss of important aspects of the Indigenous tradition. Second, since it is the Indigenous tradition that must be translated, it is not being held in equal esteem with the common law. The Indigenous tradition will be sacrificed in order to reconcile the two systems.

While I do not know if full recognition is possible (although, as argued above, it is what we ought to aim for) the recent decision in *Ktunaxa Nation v British Columbia*[58] may provide some insight into both the challenges and opportunities that this task creates. In *Ktunaxa Nation,* the Ktunaxa First Nation opposed the building of a ski resort on land that was part of their traditional territories but governed by the federal government as Crown land. The Ktunaxa people refer to this area as "Qat'muk."[59] In the decision it says:

> The Ktunaxa asserts that the project, and in particular permanent overnight accommodations, will drive Grizzly Bear Spirit from Qat'muk. As Grizzly Bear Spirit is central to Ktunaxa religious beliefs and practices, its departure, they say, would remove the basis of their beliefs and render their practices futile. The Ktunaxa argue that the vitality of their religious community depends on maintaining the presence of Grizzly Bear Spirit in Qat'muk.[60]

In this case, the Ktunaxa people claim that development of the ski resort would infringe their freedom of religion as protected under s.2(a) of the *Canadian Charter of Rights and Freedoms*.[61] In evaluating the

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[55] *Marshall 2005*, supra note 50 at paras 46-48.
[56] *Ibid* at para 49.
[57] *Ibid* at para 51.
[58] *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)* 2017 SCC [*Ktunaxa*].
[59] *Ibid* at para 5.
[60] *Ibid* at para 59
[61] *Ibid*.

case the Supreme Court reflected on the nature of the protection contained in s.2(a), in particular, the (i) freedom to hold religious beliefs, and (ii) freedom to manifest those beliefs.[62] The Court identified the religious beliefs of the Ktunaxa people as sufficient to invoke protection but struggled with the claim that religious freedom could require the protection of an area of land. Ultimately, the majority decided that development of the ski resort did not infringe on the Ktunaxa freedom to "manifest" their beliefs as they could continue to hold their religious views and continue to practice their beliefs engaging in whatever ceremonies and other practices that they chose.[63] The Charter cannot be used to protect "the presence of Grizzly Bear Spirit in Qat'muk."[64]

This answer falls into the same "translation" problem noted with restorative justice above. The religious beliefs of the Ktunaxa peoples are recognized, but they are recognized by "translating" them into what religious belief looks like in the non-Indigenous community. In the non-Indigenous community cases about s.2(a) have included cases on the freedom to wear religious clothing or items,[65] freedom to enforce religious-based community covenants,[66] and freedom to recognize (or not recognize) religious holidays.[67] The cases have focussed primarily on individual actions and the freedom of those individuals to follow their religious beliefs in a society where not everyone has the same religious beliefs. In many cases, the solution is one of accommodation, where the State must simply stop preventing the action of the individual. In the same way, the State is not preventing the Ktunaxa people from their rituals or other religious practices regarding Grizzly Bear Spirit. When we "translate" the Indigenous practice into the non-Indigenous religious freedom, something gets lost.

However, there is hope. In the partially concurring reasons written by Justice Moldaver (with Justice Côté concurring) he identifies that, under the Ktunaxa's understanding and worldview, building the ski resort will "desecrate Qat'muk and cause Grizzly Bear Spirit to leave" the Ktunaxa.[68] The purpose of the Ktunaxa religious practices – their dances and rituals – is connected to the presence of Grizzly Bear Spirit. Without Grizzly Bear Spirit the practices have no meaning. From this Moldaver concludes that by allowing the development of Qat'muk the State renders the religious belief devoid of all religious significance. This infringes the s.2(a) freedom of the Ktunaxa people.[69] Moldaver ultimately conclude that this infringement is justified, however, the fact that they assess the Ktunaxa claim in this manner itself provides hope. Moldaver was able to see the Indigenous religious practice without trying to "translate" it into those practices of other religions that have been protected under the *Charter*. They say, "In many Indigenous religions, land is not only the site of spiritual practices in the sense that a church, mosque or holy site might be; land may *itself* be sacred, in the sense that it is where the divine manifests itself."[70] Instead of trying to understand the Indigenous belief through the lens of Western-European culture where religious sites are important, but not integral, to the religious practice, Moldaver accepts the importance of the site based on the beliefs of the Ktunaxa peoples through the testimony of those peoples. Moldaver is not adopting these beliefs, but they are accepting the validity of these beliefs alongside the already recognized religious freedoms in Canada.

There are many areas of concern with the Ktunaxa decision, not least that the Ktunaxa claim is unsuccessful. This is also a case where Indigenous peoples are subjected to non-Indigenous laws regarding land and land use, laws that have been imposed and that will seem illegitimate to many

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[62] *Ibid* at para 63.
[63] *Ibid* at para 70.
[64] *Ibid*.
[65] See e.g. *Bhinder v CN,* [1985] 2 SCR 561; *R v NS* 2012 SCC 72
[66] See e.g. *Trinity Western University v Law Society of British Columbia* 2016 BCCA 423.
[67] See e.g. *R v Big M Drug Mart*, [1985] 1 SCR 295; *Edwards Books and Art Ltd v The Queen*, [1986] 2 SCR 713.
[68] *Ktunaxa*, *supra* note 58 at para 117.
[69] *Ibid*.
[70] *Ibid* at para 127.

Indigenous peoples as anything more than the exercise of power to force obedience. However, what it does demonstrate is that it may be possible to support two different worldviews when it comes to the nature of religious belief and what that entails. If we can find a way to recognize Indigenous religious belief without falling into the trap of trying to "translate" it into the non-Indigenous religious model, then, perhaps, the same can be true of Indigenous legal traditions.

VI. Conclusion

The purpose of this paper has been to clarify the differences between Indigenous legal traditions and the dominant Canadian legal system. The main source of difference is the way each justifies the existence of the law, the first relying on a natural law theory, the second on a positive law theory. This difference is important; it will make integration of the legal systems difficult, but not impossible. What I have argued in this paper is that we must identify and acknowledge these differences. Borrows' project in *Canada's Indigenous Constitution* will require careful work and thoughtful application. This will not be an easy task. The caution that Borrows provides at the end of the book must be kept in mind. He reminds us that to integrate Indigenous laws through a process that permanently subjugates such legal traditions will only lead to a hollow victory. [71] However, if we proceed with caution, we may be able to achieve his objective of adding Indigenous legal traditions as a source of legal authority in Canada.

[71] Borrows, *supra* note 1 at 282-3.