

Indigenous Laws and the Justice System

Val Napoleon [November 18, 2021]



Photo series: *Law in Improbable Places* by Val Napoleon

Questions about Indigenous law

- Operating through current adjudicative processes
- Shaping of processes
- DRIPA and UNDRIP obligations
- Continued development of Indigenous law
- The expectations of Indigenous law



A Suggested Approach

- Specificity
- Inclusivity
- Nuance



Why? Because Indigenous Law Is Not

Just philosophy

Just ceremony

Just rules to be followed

Only in the past



Specificity



- ❖ Which legal order?
- ❖ Indigenous legal issue?
- ❖ Authoritative decision makers?
- ❖ Legal institutions?
- ❖ Legal processes?
- ❖ Range of legal responses?



What are the

- Remedies?
- Sanctions?
- More than one legal order?

Legal Specificity

One cannot solve problems generally or on a general basis – we have to get specific

This work is absolutely doable, people are doing this work now, we are also doing this work now.

But there are no quick fixes.



Inclusivity and Aspirations of Indigenous Law

- Community safety
- Inclusion in decisions
- Fairness of process for those harmed, those who have harmed, and others affected
- Dignity and Agency – based on the understanding people have free will and operate individually and collectively
- AND flexibility, consistency, and proportionality in responses to human problems





Importance of Nuance

Which authoritative decision-makers and which legal processes depend on the kind of legal problem that has to be managed and resolved. For example, the role of elders can be either persuasive or directional depending on whether community safety is at risk.



UVIC includes

- Law Centre (Clinical) and Coop
- Environmental Law Centre
- Business Law Centre
- Access to Justice Centre

Indigenous initiatives include

- ILRU
- JD/JID
- National Centre of Indigenous Laws



JD/JID

- 2018, graduating in 2022
- About 90 JD/JID students in the law school
- Two law degrees over four years
- First two years of core courses are taught intersocietally/transsystemically
- Years 3 and 4 include a field school located with Indigenous partners
- We also now have transsystemic Administrative Law and Business Associations



ILRU

NCILs



- Multijuridical Canada
- Indigenous law as undermined with gaps
- Rebuilding is necessary

UNDRIP and Obligations

- All legal systems recognize, create, vary and enforce obligations
- Obligations are central to the social role of law and being able to explain obligations is necessary to understand law's authority



If we are to consider what Indigenous law (e.g., administrative law) is, then what is it an alternative to insofar as Indigenous adjudication and governance?

What are the shortcomings or inefficiencies that Indigenous administrative law and tribunal processes should deal with?

Unpacking the Transsystemic in the Classroom



- What are the **societal and historic conditions** under which law develops differently? (e.g., urban)
- What are the **underlying purposes** (e.g., economic) of Indigenous law and its context?
- Oral histories (narratives, stories, etc.) as **precedent** for legal analysis and synthesis
- How might Gitxsan peoples develop **new Gitxsan** laws to govern air space, housing policy, dispute management, etc.?



No straight up comparatives,
but lots of Gitxsan land and
property law has resemblances
and similarities to common law
property law

- such as trespass,
- easements,
- access,
- life interests,
- ownership and co-ownership,
succession,
- marital property,
- and remedies and sanctions.

One Case Scenario



In northwestern British Columbia there are the lands of the Gitksan. Within their lands are individual territories, each of which is owned by a matrilineal kinship unit, an intergenerational group called a House in English.

On the lands of one of the House groups, Luuxhon, a proposal has been made by a non-Indigenous company from a nearby town.

The company is Gold Pan and, unsurprisingly, they propose to establish a gold mine.

Now Gold Pan has heard about UNDRIP and it does not know what to do about either consultation or consent. Gold Pan has many concerns, but they are particularly worried because they have heard the word veto.

What to do? Who to talk to?

Meet Eliza



So it happens that in the House of Luuxhon, there is a young woman named Eliza, who is a recent graduate of the new Indigenous law degree program at UVIC.

PART ONE



Eliza worked with others to determine who the authoritative decision makers were for this kind of legal issue

Since the goldmine could impact adjacent territories and waterways, the leadership from those other related House groups were invited to join the process

She identified the procedural steps for making and maintain agreements to manage conflicts including

- Information and evidence gathering
- Consulting with the collective and experts
- Getting assistance from others

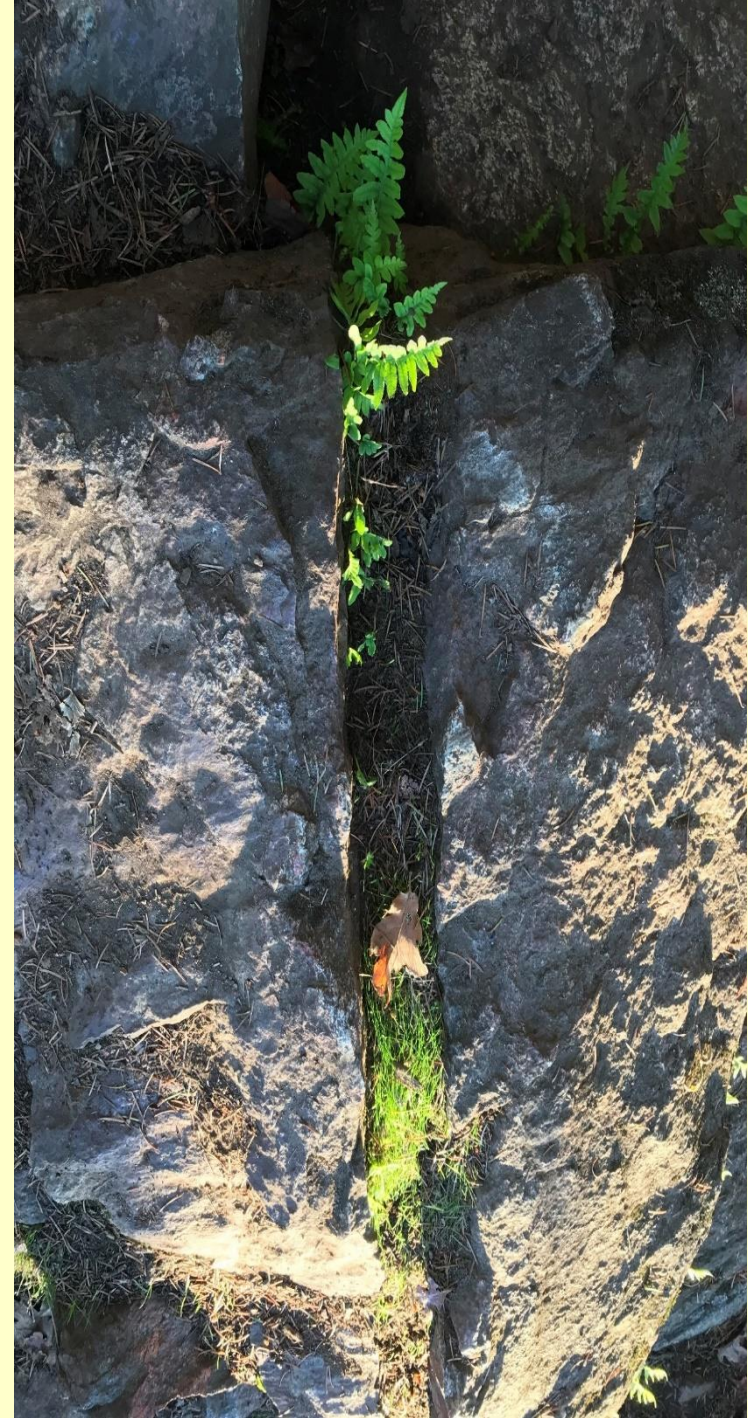
PART TWO

Eliza then asked, what are the relationships, responsibilities, and rights as they relate to:

1. Land and Natural Environment?
2. Other House Groups and neighboring Indigenous Peoples?
3. House of Luuxhon?

How would the gold mine effect the relationships, responsibilities, and rights of each?

What were the consequences for each?



Part three

Eliza asked, what principles govern our appropriate legal responses to this issue? These include:

- Protecting both individual and collective safety of Luuxhon and other House groups
- Gold Pan's acknowledgement and acceptance of responsibility
- Luuxhon's collective responsibilities to the land, water, non-human life forms
- Luuxhon's collective responsibilities to the other House groups
- Maintaining Luuxhon's authority and not causing disrepute (and loss of authority)
- Sharing resources



So here is the thing...

Indigenous law must to deal with contemporary governing institutions and issues, and can draw on **historic** Indigenous law and legal principles, for application in a **present day** context.





Case Studies
and **Pilot Projects** –
then extrapolate,
the work is
absolutely doable

- Millie the Gitxsan Opera
- Single mom and housing



Questions?