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Relational Legal Pluralism and Indigenous Legal Orders in Canada

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The new JD/JID Joint Degree Program in Canadian Common Law and Indigenous Legal Orders at the University of Victoria starts from the premise of a multi-juridical Canada and envisions symmetrical legal relations between state and Indigenous law. How can state and non-state law interact across vastly different normative worlds? How can their interaction address colonial power imbalance, and what role should recognition play in this relationship? This paper draws on the work of Ralf Michaels on Relational Legal Pluralism and Aaron Mills on Anishinaabe Constitutionalism to explore how a legally plural society must embrace Michaels' challenge of constitutive external recognition—the idea that legal orders mutually constitute each other through recognition without interfering in each other's factual status as law. External recognition is consistent with strong legal pluralism and is distinct from recognition within the multicultural liberal state, a form of weak legal pluralism. Mills' discussion of treaty, rather than contract, as a foundation for shared political community assists in imagining a Canadian constitutional framework in which distinct legal orders can mutually constitute each other without domination. Linkage rules may help establish reciprocal relations among state law and Indigenous legal orders, and the enactment of such rules of recognition from within Indigenous legal orders may itself shift the balance of power.

Le nouveau programme intégré JD/JID de common law canadienne et ordres juridiques autochtones à l'Université de Victoria part de la prémisse d'un Canada multijuridique et envisage des relations juridiques symétriques entre les droits étatique et autochtone. Comment les droits étatique et non étatique interagissent-ils à travers des mondes normatifs très différents? Comment leur interaction peut-elle répondre au déséquilibre de pouvoir issu du colonialisme, et quel rôle la reconnaissance doit-elle jouer dans cette relation? Ce texte s'appuie sur les travaux de Ralf Michaels sur le pluralisme juridique relationnel et ceux d'Aaron Mills sur le constitutionalisme anishinaabe. Il vise à explorer comment une société juridiquement pluraliste doit accueillir le défi d'une reconnaissance externe constitutive, formulé par Michaels. Il s'agit d'une conception selon laquelle des ordres juridiques se constituent mutuellement par la voie de la reconnaissance, mais sans disputer que chacun constitue bien du droit. La reconnaissance externe est cohérente avec un pluralisme juridique fort et se distingue de la reconnaissance au sein de l'État libéral multiculturel, une forme de pluralisme juridique faible. La discussion de Mills considérant le traité, plutôt que le contrat, comme fondement d'une communauté politique partagée aide à imaginer un cadre constitutionnel canadien dans lequel des ordres juridiques distincts peuvent se constituer mutuellement sans domination. Des règles favorisant la connexion pourraient aider à établir des relations réciproques entre le droit étatique et les ordres juridiques autochtones. L'adoption de telles règles de reconnaissance provenant des ordres juridiques autochtones pourrait modifier le rapport de force.

Introduction

> *"I see you; you see me; this is reciprocal; this reciprocity signals justice."*
> - Audra Simpson[1]

Canadian-Indigenous legal relations are at a particularly unique historical moment. The Supreme Court of Canada's 2014 declaration of Aboriginal title in *Tsilhqot'in* actualized a standard of consent in Canadian law, clarified that title is a limit on both provincial and federal jurisdictions[2], and implicated a sphere of Indigenous jurisdiction and law internal to the title area[3]. Indigenous peoples are exercising their inherent right to self-government and rearticulating their legal orders in myriad forms, asserting these in ways cognizable to Canadian law[4] while, as ever, contesting colonial legal forms with distinctive normative worlds. In 2018, the first cohort of the JD/JID Joint Degree Program in Canadian Common Law and Indigenous Legal Orders commenced at the University of Victoria, the first of its kind. This program will soon see up to 25 graduates annually with a legal training that takes Indigenous multijuralism as its premise and employs a transsystemic method to envision, as Val Napoleon articulates, symmetrical legal relations between state and non-state law.[5]

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[1] Audra Simpson, *Mohawk Interruptus: Political Life Across the Borders of Settler States* (Durham: Duke University Press, 2014) at 23.
[2] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 141, [2014] 2 SCR 257.
[3] Brian Slattery, "The Metamorphosis of Aboriginal Title" (2006) 85 Can Bar Rev 255 at 270.
[4] *R v Van der Peet*, [1996] 2 SCR 507 at para 49, 137 DLR (4th) 289.
[5] For example, Val Napoleon & Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions through Stories" (2016) 61:4 McGill LJ at 725.

The 2015 Truth and Reconciliation Commission Calls to Action called upon Canada to adopt and implement the *United Nations Declaration on the Rights of Indigenous Peoples*[6] and to reconcile Aboriginal and Crown constitutional and legal orders, including the recognition and integration of Indigenous laws and legal traditions.[7] In 2019, after years of advocacy by Indigenous peoples, the BC legislature passed the *Declaration on the Rights of Indigenous Peoples Act*[8]. A federal UNDRIP bill has, at the time of writing, passed first reading in the House of Commons.[9] One of the hopes for these measures is that the adoption of international human rights standards and harmonization of Canada's laws with them will help to fulfill the as-yet unmet promise of section 35(1) of the *Constitution Act, 1982*[10], creating space for Indigenous governments and legal traditions to take their rightful and self-determined place within Canada's constitutional order.

Indigenous peoples have always been strong participants in Canada's constitutional tradition, through Indigenous diplomacies pre-dating the arrival of Europeans, treaties, the enactment of s. 35(1), and the continuity of Indigenous constitutionalism, law and legal authority to the present day.[11] Aaron Mills reminds us that we, Indigenous and non-Indigenous peoples in what many today call Canada, are inextricably tied, mutually constituted by relationships between

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[6] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples* (October 2007) online: <https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf> ("UNDRIP").
[7] Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: 2015) Calls to Action 45(ii)(iv), online: <http://trc.ca/assets/pdf/Calls_to_Action_English2.pdf>
[8] *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44 ("DRIPA").
[9] Parliament of Canada, *Bill C-15 (First Reading): United Nations Declaration on the Rights of Indigenous Peoples Act* (December 3, 2020) online: <https://parl.ca/DocumentViewer/en/43-2/bill/C-15/first-reading>
[10] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11.
[11] John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at 109.

our unique and interdependent political communities.[12] Indigenous peoples embody this understanding in their unique assertions of law and jurisdiction alongside provincial and federal jurisdictions, often demonstrating principles of cooperative federalism in areas such as environmental protection and disaster response, and, most recently, COVID-19 response.[13] While cooperative federalism is a fixture of Canadian constitutional life[14], to date Canadian federalism has largely excluded Indigenous peoples and denied their laws and lifeways. The persistent denial of Indigenous peoples' legal worlds and jurisdictions has led to conflicts across the country as Indigenous peoples assert and uphold their legal obligations to their territories. These are manifestations of contested legality and governance in a context of land dispossession and genocide by the state, and the absence of reciprocal legal relations between Canadian and Indigenous polities.

A federalism among distinct peoples in Canada necessarily must embrace the fact of legal pluralism. Napoleon observes that since legal pluralism has always existed between Indigenous societies across Turtle Island and is now a part of Canada, what is imagined in the name of reconciliation must include legal orders – Indigenous and Canadian – as the starting place.[15] As many have observed, thinking about legal pluralism is not new to Canada's constitutional order:

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[12] Aaron Mills/Waabishki Ma'iingan, "What is a Treaty? On Contract and Mutual Aid" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimaginging the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) at 208 – 247.

[13] See Heiltsuk Tribal Council, "Dáduqvḷá qṇtxv Ğviḷásax, to look at our traditional laws: Decision of the Heiltsuk (Haíłzaqv) Dáduqvḷá Committee Regarding the October 13, 2016 Nathan E. Stewart Spill" (2018) online: <http://www.heiltsuknation.ca/wp-content/uploads/2018/10/Heiltsuk_Adjudication_Report.pdf>; See also Council of the Haida Nation, "New BC Order Better Aligns with Haida Law and Haida Gwaii's COVID-19 Response" (July 2020) online: <https://www.haidanation.ca/?nooz_release=new-bc-order-better-aligns-with-haida-law-and-haida-gwaiis-covid-19-response-july-30-2020>

[14] Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Oxford: Hart Publishing, 2015) at 169.

[15] Val Napoleon, "Legal Pluralism and Reconciliation" (2019) November Maori LR 2 at 5.

Quebec's unique place in the federation is reflected in the co-existence of civil law and common law, and since the 1990s, McGill University Faculty of Law has employed the transsystemic method for analyzing the relationship between them.[16] Yet these two legal traditions are both Euro-colonial newcomers, and what's more, they are both state-based, that is, based on a centralized administrative structure that is legislative in nature. In contrast, although Indigenous legal orders are themselves plural and diverse, they tend to be decentralized, discursive, and relational, with obligations refracted throughout kinship systems.[17] How can Indigenous and non-Indigenous legal orders in Canada interact across vastly different normative worlds? Further, how can their interaction deal with the reality of colonialism and asymmetrical legal relations?

This paper aims to make a small contribution to the literature on legal pluralism by focusing on the work of two scholars: Ralf Michaels on Relational Legal Pluralism[18] and Aaron Mills on Anishinaabe Constitutionalism and Treaty[19]. Specifically, it will explore how an effective multi-juridical, legally pluralist society will need to embrace Michaels' challenge of constitutive external recognition: the idea that legal orders mutually constitute each other through recognition without interfering in each other's factual status as law. The discussion begins with an overview of pluralism and continues with the distinction between "strong" and "weak" legal

[16] Jeremy Webber et al, "Sally Engle Merry, Legal Pluralism, and the Radicalization of Comparative Law" (2020) 54:4 Law Soc Rev 846 at 847.
[17] Val Napoleon, "Living Together: Gitksan Legal Reasoning as a Foundation for Consent" in Webber & Macleod, eds, *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010)
[18] Ralf Michaels, "Law and Recognition – Towards a Relational Concept of Law" in Nicole Roughan & Andrew Halpin, eds, *In Pursuit of Pluralist Jurisprudence* (2017) at 90-115.
[19] Mills, *supra* note 12.

pluralism, the role that recognition plays in each, and how these forms of pluralism manifest in Canada's current legal and political landscape with respect to Indigenous law. The author's engagement with the BC Utilities' Commission's recent Indigenous Utilities Regulation Inquiry serves as a case study of these dynamics.

The paper proceeds with tackling the problem of power posed by Michaels, Napoleon and others, in that the imagined formal equality of state and non-state legal orders is not sufficient for effective legal pluralism in a context of ongoing settler colonialism. The dominant Western ideologies of state-based liberalism and market-based neo-liberalism are founded on the notion of contract and involve assimilation and accommodation of diverse normative orders by the most powerful. One response to this problem is to approach legal pluralism from the perspective of treaty and mutual aid, as does Mills. Mills' suggestion of treaty, rather than contract, as a foundation for shared political community assists in imagining a constitutional framework in Canada in which distinct legal orders can mutually constitute each other without one dominating the other. The paper concludes by considering the importance of linkage rules that can establish mutually constitutive external recognition among state law and Indigenous legal orders, and how the process of enacting such rules of recognition may itself shift the balance of power.

External Recognition as an Element of Law(s)

Indigenous law is *law*.[20] Indigenous peoples have maintained and adapted legal procedures and kinship-based governance structures through the fragmentation and violence of colonization, and are rebuilding their polities in diverse ways.[21] Indigenous law is not frozen in the past[22], nor is it a static set of rules; rather, it is adaptable, deliberative, reasoning, and reasonable.[23] Indigenous legal orders identify authoritative decision-makers, contain substantive rights and obligations that can evolve through legitimate procedures, and put in place procedural safeguards for the protection of individual and community well-being.[24] They assist in finding answers to legal questions, set standards, and generate criteria for making sound judgments.[25] They possess the basic tenets of law identified by Hart[26], referenced by Michaels in his discussion of rules of recognition: primary rules, which identify foundational rules of obligation or duty, and secondary rules, or rules of internal recognition, by which primary rules are recognized as authoritative and through which they can be legitimately changed. Hart argues that secondary rules, in addition to primary rules, are necessary for a legal order to be complete.[27]

Michaels agrees that non-state normative orders may have the factual status of law by way of internal rules of recognition. Yet he argues that, in contexts where multiple normative and legal

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[20] Napoleon, *supra* note 18 at 58. See also John Borrows, "Sources and Scope of Indigenous Legal Traditions" in *Canada's Indigenous Constitution* (Toronto: University of Toronto, 2010) at 23 – 58.
[21] Napoleon & Friedland, *supra* note 5.
[22] Borrows, *supra* note 11 at 131.
[23] Napoleon, *supra* note 18 at 64-66.
[24] Napoleon, The Accessing Justice and Reconciliation Project, *Cree Legal Summary* (University of Victoria, 2012).
[25] John Borrows, "Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education" (2016) 61:4 McGill LJ 795 at 797.
[26] Val Napoleon, JD/JID in-class presentation, September 2018.
[27] HLA Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961).

orders operate, a sequence which first identifies what counts as law, and then asks how that system of law interacts with other laws, is insufficient to grasp the reality of legal pluralism. This resonates with scholarship that views legal pluralism as a characteristic of virtually all societies and all law[28], and is consistent with a transsystemic approach, described as a shift away from "comparing the terms of a closed set of legal orders to the challenge of how to maneuver in a normatively diverse world"[29]. For Michaels, interlegality cannot be an afterthought, as in today's world no legal order exists in a vacuum. Rather, legal orders mutually constitute each other through *external* recognition—what he calls tertiary rules, which are also necessary to make a legal order complete.[30]

The notion that Indigenous legal orders require recognition as law by other legal systems, especially by state law, is inherently suspicious in a colonial context.[31] So-called radical legal pluralists such as Griffiths reject the concept of external recognition as a manifestation of legal centrism, the idea that all law is state law and that non-state law's status as law depends on state recognition.[32] Yet a nuance in Michaels' argument gives pause: Indigenous law is unquestionably, factually law, and its status as such does not depend on recognition by the state but rather on its own internal recognition. Yet in a legally pluralist reality in which Indigenous legal orders and the state contend with each other and with overlapping jurisdictions, external recognition may indeed be necessary for the effective, practical

[28] Webber et al, *supra* note 17.
[29] *Ibid*, citing Macdonald and Glover at 848.
[30] Michaels, *supra* note 18 at 91.
[31] *Ibid* at 99.
[32] John Griffiths, "What is Legal Pluralism?" (1986) 24 J Legal Pluralism and Unofficial Law, 1-55.

interrelation of Indigenous law and state law. Michaels uses McCormack's example of the interaction of EU and UK law to demonstrate this dynamic (admittedly outdated post-Brexit):

> "EU law is law in an objective sense, independent of its recognition. However, it is law for UK law only if, and only because, it is recognised by UK law. Similarly, UK law is law in an objective sense, independent of its recognition. However, it is law for EU law only if, and only because, it is recognised by EU law. At least in their inter-relation, recognition therefore matters."[33]

In such an imagined situation of formal equality of legal systems, how are irresoluble conflicts solved? In the EU example, it is suggested that both EU and national law operate within a "common legal universe"[34] with international law as the umbrella normative order. Yet, this seems to be merely another form of legal centrism. In this conception, Michaels points out, external recognition becomes not a constitutive but an accommodating operation, as the recognition between legal systems is no longer governed from within each system per se, but by a higher system. To avoid a centralized conception of power, and embrace a pluralism in which each legal system determines its interactions with another from its own perspective, requires interface norms[35], or linkage rules[36]. But before discussing these linkage rules further, it is useful to review what is meant by legal pluralism and its status within the colonial state.

Weak and Strong Legal Pluralism

[33] Michaels, *supra* note 18 at 101.
[34] *Ibid.*
[35] *Ibid* at 103 citing Nico Krisch.
[36] *Ibid* citing Detlef von Daniels.

In another article, Michaels summarizes two types of legal pluralism identified by theorists, particularly Griffiths: weak legal pluralism, which he argues is compatible with the liberal state, and strong legal pluralism, which he argues is not compatible.[37] Weak legal pluralism is, in fact, societal pluralism under unitary law. The liberal state is grounded upon societal pluralism, including pluralism of the media, thought, political parties, religions and other associations, as elements of a democratic society. Yet societal pluralism is not legal pluralism, but legal centrism. Even groups that are recognized as having some level of autonomy under societal pluralism do not, from the liberal state's perspective, have law-making power independent of it. Such power would threaten the very foundations of liberalism, which guarantees one rule of law under which all abide, with the state as the guarantor of basic rights and freedoms.

Groups, and not just individuals, can be rights-bearers within the liberal view. The inherent and treaty rights of Aboriginal peoples are protected by s. 35(1), and although the jurisprudence has been clear that these rights arise not from Canada's constitution but from Indigenous peoples' prior occupation of the land in organized societies[38], in practice, Canada still treats them as rights distributed within the framework of the liberal state, subject to the normative superiority of Canadian law. In contrast, strong legal pluralism is what is meant in this paper by legal pluralism, what Napoleon refers to as decolonized legal pluralism.[39] In strong legal pluralism, state law is not hierarchically superior to non-state law, and instead is just one of many

[37] Ralf Michaels, "On liberalism and legal pluralism" in Miguel Maduro, Kaarlo Tuori & Suvi Sankari, eds, Transnational Law: Rethinking European Law and Legal Thinking (Cambridge: Cambridge University Press, 2014) at 122.
[38] *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313 at para 383.
[39] Napoleon, *supra* note 15.

legitimate legal orders. It follows that in a strong legal pluralism, non-state legal orders are peremptory, not open to challenge or appeal to state law (unless this is mutually agreed), because they operate externally to the state rather than under its umbrella.

This paper argues that the Canadian state remains invested in a form of weak legal pluralism that treats its own law as normatively superior to Indigenous law, despite superficial recognition of Indigenous legal orders as a form of societal pluralism. Simpson critiques this kind of recognition as the "gift" of the multicultural state[40], which accords a protected space of legal recognition only to groups that evidence difference in acceptable terms and therefore requires their contortion. Recognition in this sense is a continuation of colonialism[41], rather than the kind of tertiary rule of external recognition that Michaels asserts is necessary for genuine legal pluralism. External recognition is an element of law enabling legal orders that spring from different normative worlds to effectively interact without one denying the other's fundamental difference. Strong legal pluralism call for a "relational ontology"[42] in which legal orders can co-exist without domination. Such a relational ontology of external recognition, and not colonial recognition, must be the foundation for linkage rules that enable them to communicate.

Strategies of Accommodation

[40] Simpson, *supra* note 1 at 12.
[41] Michaels, *supra* note 18 at 134.
[42] Kimberley Hutchings, "Decolonizing Global Ethics: Thinking with the Pluriverse" (2019) 33:2 Ethics & Int'l Affairs 115 at 116.

It is not consistent with modern liberalism for the state to outright deny the existence of Indigenous legal orders. Within its liberal paradigm, Canada finds ways to accommodate Indigenous law and self-governance within unitary state law. In accommodating Indigenous law without fundamentally disrupting its own normative authority, it creates and administers weak legal pluralism. Michaels emphasizes three main strategies state law uses to accommodate non-state law by translating or transposing it into "the semantics of its own system": incorporation, deference, and delegation.[43][44] Incorporation copies non-state norms into state-based norms, for example by codifying them. Deference transforms non-state laws into facts. Delegation treats non-state law as subordinated law by allowing a space for the development of autonomous norms—norms that achieves their validity, from the state's perspective, only because and insofar as the state recognizes them. Therein lies the problem of colonial recognition articulated by Simpson and others.

Each of these strategies of accommodation is in evidence in the Canadian state's treatment of Indigenous law. The state demands that Indigenous legal orders be "cognizable" to state law[45], requiring the translation of Indigenous lifeways into legislative and codified forms, a contortion consistent with multicultural recognition. Legislation both incorporates Indigenous legal norms to give them effect and purports to delegate authority and jurisdiction.[46] This legislation is (occasionally) passed after consultation with Indigenous peoples, a deference that treats their

[43] Michaels, *supra* note 18 at 131.
[44] See also Val Napoleon, *supra* note 15 at 7-9 for an analysis of Swensen's strategies of legal pluralism between state and non-state law.
[45] *R v Van der Peet* [1996] 2 SCR 507 (SCC) at paras 550-551.
[46] eg. *An Act respecting First Nations, Inuit, and Metis children, youth and families*, SC 2019 c 24.

contributions as data that informs "the" law. The duty to consult and accommodate includes a duty to consult on Indigenous governance systems and laws, yet these laws are also treated as factual in nature and are accommodated by incorporating them into the Crown's regulatory requirements for proponents.[47] In general, Canadian courts treat Indigenous perspectives as evidence, rather than as a source of law.[48] The BC Supreme Court in the recent *Coastal GasLink* decision stated that Indigenous law can only be incorporated into domestic law by operation of treaty, court declarations or statutory provisions.[49] Self-government agreements between Indigenous Nations and the state empower space for Indigenous jurisdiction, but such agreements are made legal through legislation—the source of legal authority for Indigenous self-governance in these cases, from the state's perspective, is not Indigenous legal orders but the enactment of legislation.[50] Legislative schemes such as the *First Nations Land Management Act*[51], while offering an opportunity for Nations to get out from under the *Indian Act* and regain a greater degree of decision-making control, is still restricted to reserve lands and purports to delegate legal authority. In the words of Dimdiigibuu, a House chief of the Gitxsan Nation, the FNLMA creates an interest in the land that does not need to exist[52], because Indigenous peoples already have established legal – and jurisdictional – interests in their lands by virtue of their own laws and constitutions.

Case Study: Indigenous Utilities Regulation Inquiry

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[47] *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 (CanLII), [2019] 2 FCR 3 at para 567.
[48] *Coastal GasLink Pipeline Ltd v Huson*, 2019 BCSC 2264 (CanLII) at para 146.
[49] *Ibid* at para 127.
[50] For example, *Sechelt Indian Band Self-Government Act*, SC 1986, c 27.
[51] *First Nations Land Management Act*, SC 1999, c 24 ("FNLMA").
[52] Dimdiigibuu Ardyth Wilson, JD/JID in-class presentation, 2019.

To see the concerns of the state in maintaining weak legal pluralism while upholding legal centrism, and using the strategies of incorporation, deference, and delegation to do so, the BC Utilities Commission (BCUC)'s recent Indigenous Utilities Inquiry[53] provides a fascinating example. This Inquiry was launched in 2019 in response to a growing number of Indigenous-owned or governed electrical utilities applying to be exempted from being considered a "public utility" under the *Utilities Commission Act*[54]. Exemption would mean that the Indigenous utility would not have to meet the restrictive rate application criteria applied by the BCUC to the main public utility in the province, BC Hydro. The need for a government regulator is clear when one considers the nature of electrical utilities: they are almost always natural monopolies given the infrastructure required to distribute electricity, and consumers of electricity within their service areas do not have market choice that would theoretically maintain rates at a reasonable level. The regulator's job is to protect consumers by keeping rates low while ensuring that the public utility can make "a fair return on its investment".[55] BC Hydro enjoys a monopoly and an economy of scale that allows it to comply with the regulation while making a profit. However, small-scale Indigenous utilities trying to produce or distribute electricity do not enjoy the advantages of a public utility like BC Hydro, having been excluded from the energy market while BC Hydro enjoyed a largely unregulated infrastructure build-out on their territories. The BCUC's criteria for assessing rate applications does not take into account socio-economic, financial,

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[53] BC Utilities Commission, *Indigenous Utilities Regulation Inquiry* (2019) online: <https://www.bcuc.com/ApplicationView.aspx?ApplicationId=669>

[54] *Utilities Commission Act*, RSBC 1996, c 473, s 1(1) ("UCA").

[55] BC Utilities Commission, "What is Energy Utility Regulation"? (2019) online: <https://www.bcuc.com/Documents/Proceedings/2019/DOC_53998_BCUC-Infosheet-Regulation-2019-05-13-WEB.pdf>

governance and other factors of importance for First Nations. The Inquiry's task, then, was to determine how, or if, Indigenous utilities should be regulated by the province.

Although the Inquiry took place relatively quietly, it was an extraordinary process that saw a provincial regulator and First Nations intervenors genuinely grappling with issues of legal pluralism. It explored issues of territory and overlapping jurisdiction as well as the potential relationship between Indigenous dispute resolution processes and the state in safeguarding citizen-consumers' rights, which was the Commissioners' primary concern. The process was touted as the first act by a provincial regulator in accordance with BC's UNDRIP legislation through implementing self-determination and economic reconciliation. However, in the Final Report BCUC released in April 2020[56], it is clear that its recommendations remain limited to weak, rather than strong, legal pluralism. The report's primary recommendation was that Indigenous utilities should determine the means of regulation of an Indigenous utility providing services on that First Nations' reserve land.[57] This stays safely within the colonial structures of the *Indian Act* and is consistent with a delegated law approach. The Commissioners shied away from addressing the complex work of a territorial approach to self-regulation, which would contend with the reality of Indigenous procedures and governance decisions applying to non-Indigenous people off-reserve and would in effect acknowledge Indigenous legal jurisdiction that does not have its source in the *Indian Act,* but in the Nations' own laws.

[56] BC Utilities Commission, *Indigenous Utilities Regulation Inquiry Final Report* (April 30, 2020) online: <https://www.bcuc.com/Documents/Proceedings/2019/DOC_56154_2019-11-01-BCUC-IUR-Inquiry-Draft-Report.pdf>
[57] *Ibid* at 41.

The other primary recommendation was that self-regulation, even within reserve boundaries, would depend on the Indigenous Nation demonstrating that it has an appropriate complaint and dispute handling process to protect ratepayers.[58] If the protections are not deemed adequate, the BCUC would retain jurisdiction to handle complaints. BCUC would also be available as an appeals body to any ratepayer who was dissatisfied with the First Nations' dispute resolution process, which it does not do in the case of municipalities, which are exempted from regulation under the UCA.[59] This is a clearly a component of weak legal pluralism, where two legal systems are not genuinely external to each other, but rather ordered hierarchically, with the state as the normatively superior order. It is a kind of incorporation or delegation, where the state embraces a non-state process only insofar as it is consistent with state values and does not challenge the state's ultimate authority. The role for distinctive dispute resolution forums and substantive laws in alignment with distinct Indigenous legal orders is restricted to dispute forums that are state-like. Here we see a state body grappling with the ideological conflict between Indigenous self-determination and the state as the guarantor of rights.

It is unclear whether the Commissioners do not believe that Indigenous law is truly law, whether they believe it is law but think it is inferior or ill-equipped to protect individual rights, or whether they believe Indigenous law is capable of providing robust individual protections but

[58] *Ibid* at 44.
[59] *Ibid* at 45.

are unwilling or unable to recommend transformative change because they feel they would be overstepping the BCUC's legal mandate by doing so (which in fact they stated in the Final Report)[60]. Their intent was clear to empower a form of administrative self-determination on a limited land base within the state's normative framework, but fundamentally they were unable to consider a genuinely external legal system.

There is another reason why the BCUC example is relevant to Michaels' discussion of legal pluralism. He concludes that state liberalism is incompatible with strong legal pluralism, because the state will decline to recognize non-state law that is either too weak to present an alternative, or too strong, presenting a genuine threat to the state's authority.[61] Only non-state law that is "just right" in terms of its power will be granted "recognition" within the liberal state. However, he questions if neo-liberalism might be compatible with strong legal pluralism, because neo-liberalism itself transcends the state as the ultimate regulator and guarantor of freedom. The neo-liberal view sees maximum freedom flowing from subjecting the state itself to the forces of the market, and this freedom is primarily economic rather than political. From this perspective, the state is merely one of many legitimate normative orders, and not necessarily superior to private institutions, groups, or corporations.[62]

One can certainly see how the interests of First Nations, in having the freedom to develop in the relatively autonomous space of the market and set their own regulations according to their

[60] *Ibid* at 15.
[61] Michaels, *supra* note 37 at 132.
[62] *Ibid* at 137.

own laws and priorities, could be better supported by a neo-liberal framework. Entering into contractual relationships with corporations that offer economic opportunities, and that create a space to embed Indigenous laws and standards, may be preferable than trying to demand justice from the state under a social contract that was first imposed and has since failed Indigenous peoples so epically. Even the state may find it more palatable to consider Indigenous law as a kind of private contract law rather than an alternative public law that has its own constitutional framework(s). The BCUC Final Report is consistent with this idea. It suggests that individuals within the service provision area of the Indigenous utility who are not members of the First Nations would have to be consulted and agree to the Indigenous utilities' rates and to be subject to the governing body's dispute resolution forum – in short, they would have to contract in to be governed by a different set of private rules and norms.[63]

Yet there are dangers for legal pluralism and Indigenous legal orders in embracing a neo-liberal, privatized framework. Smaller, local, and community-based legal orders may be overwhelmed by the dominance of the market, as capitalism tends to atomize communities and reduce their members to market participants[64]. Neo-liberal private property frameworks may undermine kinship-based legal obligations, eroding Indigenous law rather than creating space for it to grow.[65] The problem is that neo-liberalism is still based on a paradigm of domination of one normative order over all others – a colonial paradigm – substituting transnational market and

[63] BC Utilities Commission, *supra* note 56 at 32.
[64] Michaels, *supra* note 37 at 140.
[65] Brian Egan & Jessica Place, "Minding the gaps: Property, geography, and Indigenous peoples in Canada" (2013) 44 Geoforum 129-138; see also Val Napoleon & Emily Snyder, "Housing on Reserve: Developing a Critical Indigenous Feminist Property Theory".

capitalist domination for state domination. Whether Indigenous law is managed by the state or channeled by market forces, neither results in decolonized legal pluralism. Michaels comes to a similar conclusion: neither liberalism nor neo-liberalism is compatible with strong legal pluralism.[66]

Indigenous legal orders spring from distinctive normative orders that are external to both state-based liberal norms and market-based neo-liberal norms. Yet these legal orders exist in a shared effective reality of interaction with these other legal and normative worlds, not to mention with each other's normative worlds, which also may differ significantly. This interaction is subject to an extreme imbalance of power that needs to be corrected to allow for mutual external recognition – necessarily an element of law, Michaels argues, in a legally plural world. As we have seen, neither liberal nor neo-liberal paradigms are up to the task of correcting the balance of power. It seems logical that solutions to a colonial problem cannot come from within a colonial paradigm. Indigenous ontologies must provide the framework within which Indigenous law exists autonomously, yet in relationship with, the state and other legal orders.

Mutually Constituting Political Community

Anishinaabe constitutional scholar Aaron Mills identifies the problem as one of relationships based on contract. For him, contract is an inherently violent way of relating, because contractual relationships have a beginning and an end, at which point, presumably, the parties

[66] Michaels, *supra* note 37 at 140-142.

can walk away from each other. This stands in contrast to Anishinaabe conceptions of constitutionalism and relationality.[67] An alternative to contract as the basis of our shared life is treaty, understood as "the intentional deepening of the intersocietal political community that always-already exists" on Turtle Island.[68] This view affirms both the uniqueness of Indigenous and non-Indigenous normative worlds as well as the interdependence between them. An Anishinaabe ontology would have us constitute ourselves as shared political community on the basis of networks of mutual aid, in which we are capable of forming direct relationships and rely on each other's unique gifts. In communicating Anishinaabe constitutionalism, Mills invokes Elder Gary Potts' metaphor of two saplings, a birch and a black spruce, growing out of a decomposing old white pine, "and none was offended in the least by the presence of the others because their identities were intact".[69] In this rooted and mutually constituting view, the saplings necessarily exist in relationship to one another and to what has come before without one overpowering the other. Rather than one living tree within which all difference must struggle for its right to expression, Mills envisions our constitutional order as a treaty confederacy – a forest instead of a single tree.

Using the language of treaty rights, Mills argues that Canada understands treaties as a second-order constitutional matter of distributive justice that attempts to account for difference within the single social contract.[70] Michaels would argue that this is all the liberal state is capable of

[67] Mills, *supra* note 12 at 210.
[68] *Ibid* at 211.
[69] *Ibid* at 231.
[70] *Ibid* at 220.

doing from its internal perspective. Conversely, Mills is describing a legal and constitutional pluralism of externally-differentiated worlds. In such a plural reality, treaties have first-order constitutional significance, because they form the "total relational means" by which normative orders orient to each other[71]. This renewed relational understanding, for him, is the only way to overcome the fundamental power imbalance of settler supremacy and weak legal pluralism:

> "...we don't escape settler supremacy if all we're prepared to do is tolerate Indigenous legal traditions as a sort of quirky addition to Canada's otherwise uninterrupted constitutional order. We have to transform that very structure to allow Indigenous legal traditions to stand within their own constitutional worlds, not contain and re-express them post-fact within the existing terms of the settler contract."[72]

Mills' treaty vision is legal in nature but also extra-legal, as it transcends any one constitutional order to imagine their relational coordination.

Mills' mutually constituting political community sounds much like Michaels' mutually constitutive external recognition. Further, Mills' observation that our political communities are "always-already" in relationship and fundamentally interdependent resonates with Michaels' assertion that interlegality cannot be an afterthought, but in fact co-arises as part of the very nature of law(s) itself. Our distinct normative worlds are not unshaped by each other – in fact, even when these worlds are in disagreement, they rely on each other for their effectiveness in a shared reality.

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[71] *Ibid* at 242.
[72] *Ibid* at 229.

If our legal systems are always-already in relationship, if they could not even *be* without being-in-relation, why the need for external recognition? Mills clarifies that while our societies were already interrelated, the creation of treaty was an intentional act that deepened political community. Perhaps, then, it is treaty itself that formed the external recognition by which British and Anishnaabe legal systems were originally mutually constituted. Does this suggest that the creation of treaty constituted Anishinaabe law? Not at all. It is important not to forget that Anishinaabe law was here long before, constituted in this place through its creation epics and foundational agreements with other human and non-human orders. It does mean that, in Michaels' formulation, the fact that Anishnaabe law has tertiary rules capable of recognizing and interacting with other systems of law is part of what makes it a system of law in the first place. Michaels discusses the need for external recognition to have "interface norms" or "linkage rules" that allow legal worlds to interact effectively. I prefer to hybridize these terms as "linkage norms". "Linkage" connotes an essence of the early treaties of mutual aid of which Mills reminds us, while "norms" communicates ways of orienting to each other rather than sets of rules. What kinds of linkage norms could enable effective communication between state and non-state legal worlds?

A 2018 case at the Ontario Superior Court of Justice discusses what may be the linkage norms with which the Anishinaabe recognized the British as having legal personality and invited the British into their already rich diplomatic and legally plural reality. In *Restoule v Canada*[73], the Court convened in Anishinaabe communities for weeks, immersed in Anishinaabe legal and

[73] *Restoule v Canada (Attorney General),* 2018 ONSC 7701.

cultural protocols, and called experts in order to consider the intersocietal nature of the Robinson Huron Treaties of 1850. Finding that the treaty continued a relationship with the British begun with the Covenant Chain Alliance and the Treaty of Niagara of 1764, it explored in detail the concept of "fictive kin" that allowed the Anishinaabe to treat with the British.[74] In the kinship-based Anishinaabe legal order, one cannot form relations of any kind with non-kin. If no kin relationship exists, a fictive kin relationship must be created to initiate a relationship and create agreements or obligations between the parties. According to expert witnesses, "only by becoming relatives through long-established Indigenous protocols could Europeans make alliances on which they depended for both trade and security".[75] The British adopted kinship metaphors in communicating with the Anishinaabe, indicating that they understood the moral and legal obligations and duties that kin owed to each other. Importantly, "the Crown had its own principles of obligation to the Anishinaabe based in Euro-Canadian legal traditions".[76] Each legal tradition had its own tertiary rules for recognizing the other's law and determining how it could engage the other.

If fictive kinship is an example of a linkage norm from within Anishinaabe law, perhaps the treaty itself is not the embodiment of linkage norms, but the shared intersocietal agreement only possible with the enactment of linkage norms within each legal order. Said another way, it is the tertiary rules of external recognition within each legal order that make the treaty – the relationship – itself legal. Anishinaabe law was, and is, robust enough to respond to another

[74] *Ibid* at paras 43-47.
[75] *Ibid* at para 44.
[76] *Ibid* at para 46.

legal system, even adapt to it, without losing its own distinct character. It is not entirely clear that Canadian state law today has this same capacity. In the case of historical agreements like the Robinson Huron Treaties, the liberal state has purported to convert these agreements into matters of distributive justice and treat "the Aboriginal perspective" as fact instead of law, a form of deference. In BC, it is widely known that few treaties were concluded and Indigenous territories remain unceded: never gifted, sold, or surrendered, so that the extension of colonial law over Indigenous lands and people is based on the one-sided legal fiction of assertion of sovereignty. BC's modern treaty process has been deeply criticized[77], with preconditions dictated by the state, which Mills might argue is not treaty at all but a species of contract subject to state dominance[78]. Another way of summarizing this situation is that while state law has asserted itself through a bare exercise of power, and while Indigenous legal orders have never gone away or stopped asserting their existence, neither has recognized the other in a way that would create the mutually constitutive situation described by both Mills and Michaels.

This is not for lack of effort on the part of Indigenous peoples. Nations have long sought legitimate and reciprocal legal relations with Canada, and continue to articulate linkage norms from within their legal orders[79]. While Indigenous peoples try to teach the state about these ways of mutual learning and recognition, the state continues to use the only law it seems to be capable of recognizing—its own—to relate to Indigenous legal orders. The state's seeming

[77] Taiaiake Alfred, "Deconstructing the British Columbia treaty process" (2001) 3 Balayi: Culture, Law & Colonialism 37.
[78] Mills, *supra* note 12 at 222.
[79] See the recent G2G Letter of Commitment between Secwepemc Nation and BC which, while is based on the Secwepemc Porcupine Story, which details the process of mutual learning and agreement between nations. Online: <https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/secwepemc_g2g_loc_with_iea__signed.pdf>

incapacity in this regard begs the question: If state law does not have tertiary rules for the recognition of legal systems other than its own, according to Michaels, is it incomplete as law?

Reciprocal Recognition

It is important to acknowledge that external recognition as an element of law is mutual, that is, reciprocal. It is not exclusively about state law recognizing non-state law, as this one-sidedness creates the type of artificial "recognition" critiqued by Simson, a recognition that is code for continued colonization and weak legal pluralism. External recognition is a necessary aspect of strong legal pluralism and is just as much about an Indigenous legal order's recognition of state law and of other Indigenous legal orders as it is about state recognition of Indigenous law. Michaels summarizes that a complete legal order requires primary rules for its content, secondary rules for its operation, and tertiary rules to establish its relation with other legal orders through linkage norms.[80] Applying this analysis to Indigenous legal orders actually treats them on a more on an equal conceptual footing as law. It challenges us to move out of a colonial frame of reference where interlegality is denied, with the result that the status quo is unchanged and Indigenous legal orders remain subordinate to the state, into a frame of reference where Indigenous legal orders determine their interactions with state law and with other Indigenous orders and are more fully constituted in the process. The process of non-state legal orders "offering themselves for recognition"[81] as Michaels suggests is impractical from the

[80] Michaels, *supra* note 18 at 108.
[81] *Ibid* at 109.

perspective of power. The process must be an active one, a claiming of power and legality through the enactment of distinctly Indigenous tertiary rules.

In the BC context, the provincial government has made a commitment to shared decision-making and co-governed processes of reform of provincial laws.[82] Michaels is clear that shared authority is not the same as external recognition. Negotiations between legal orders as to which sections of the legal realm each will inhabit are possible, but external recognition describes "the prior situation that different legal orders recognize each other as laws, so as to make shared authority possible"[83]. The new BC UNDRIP legislation contains a provision that aims to operationalize consent by creating mechanisms for the exercise of a statutory power of decision jointly by an Indigenous governing body and the provincial government.[84] While this theoretically allows Indigenous Nations to take up more jurisdictional space within the province's statutory regime, it is still based on an assumption of a singular source of legal authority. For these arrangements to be lawful or legitimate within Indigenous legal orders requires reciprocal legal processes within those orders themselves.

In a situation of external recognition, legislation might be part of the state's tertiary rules: means by which the state recognizes enactments or expressions of Indigenous law as legal from within its own internal perspective. Simultaneously but separately, tertiary rules in the form of

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[82] Province of British Columbia and First Nations Leadership Council, *Joint Agenda: Implementing the Commitment Document – Shared Vision, Guiding Principles, Goals and Objectives* (2018) online: <https://news.gov.bc.ca/files/BC_FNLC_Vision.pdf>

[83] Michaels, *supra* note 18 at 110.

[84] DRIPA, *supra* note 8, s 7(1)(a).

procedures within Indigenous legal orders would recognize the state's legislation as legal from within *its* own internal perspective. Thus, the two legal worlds would be mutually constitutive – the legislation would have legitimacy for the state according to internal recognition, and it would have legitimacy for Indigenous law according to external recognition *by* Indigenous law. Equally, the Indigenous law-making process would have legitimacy for the Nation according to internal recognition, and would have legitimacy for the state according to external recognition by the state. This would be, perhaps, the beginning of a reciprocity that signals justice.

Conclusion

> *Ours is the gift and struggle of standing side by side, different and together. Ours, to rise to live in right relation*.[85]

Here Mills articulates the work of treaty: learning to interact legitimately and lawfully across external difference. As Webber, Napoleon, Fournier and Borrows have succinctly stated, plurality is an inescapable fact of our human predicament and we had better get to work on understanding how to act in a plural world.[86] The demand of relational legal pluralism for Canada's constitutional order is a federalism that does not seek to subsume, deny or dominate Indigenous normativity. Canada's status in law within multi-juridical Canada will lack legitimacy unless it can develop the capacity for reciprocal processes of external recognition with Indigenous legal orders. Despite this, the state holds onto the myth of legal centrism through colonial strategies of recognition and accommodation that purport to administer difference and

[85] Mills, *supra* note 12 at 209.
[86] Webber et al, *supra* note 16 at 854.

deny Indigenous self-determination. Neither liberal nor neoliberal ideologies are consistent with legal pluralism, and Indigenous ontologies of treaty, relationality and mutual aid are better positioned to form the basis for a unique and just federalism in Canada.

The work that Indigenous peoples are doing to re-articulate their legal orders includes the development and recovery of tertiary rules enabling their recognition and interrelation with each other, with state law and with markets norms. Indigenous legal orders, in the course of their own processes of external recognition, mutually constitute effective realities of legal pluralism on Turtle Island as they have always done. To conclude with the insight of the Honourable Lance Finch, former chief justice of British Columbia, the work of Canadian law is more about finding its place within the plural landscape of Indigenous legal orders, than it is about attempting to make space for Indigenous legal orders within unitary Canadian law.[87]

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[87] The Honourable Chief Justice Lance S.G. Finch, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice" (2012) Continuing Legal Education Society of British Columbia Paper 2.1.