Māori Law Review
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Ngā ture o ngā iwi taketake – Indigenous law

Legal pluralism and reconciliation[1]

By Val Napoleon[2]

Foreword by Carwyn Jones, Māori Law Review co-editor

In August 2019, the Māori Law Review, AlterNative: An International Journal of Indigenous Peoples, and the Aotearoa New Zealand Centre for Indigenous Peoples and the Law, jointly supported the visit to Aotearoa of Cree legal scholar, Professor Val Napoleon.

Professor Napoleon is from northeast British Columbia (Treaty 8) and a member of Saulteau First Nation. She is also an adopted member of the Gitanyow (Gitxsan) House of Luuxhon, Ganada (Frog) Clan. She is currently the Law Foundation Professor of Aboriginal Justice and Governance and the Director of the Indigenous Law Research Unit at the University of Victoria, British Columbia.

Professor Napoleon is an internationally recognised scholar in the field of Indigenous law and has taught and published on topics such as, Indigenous law and legal theories, Indigenous feminisms, governance, critical restorative justice, oral traditions, and Indigenous legal research methodologies.

Professor Napoleon is also one of the team that has driven the establishment of the ground-breaking Indigenous law degree programme at the University of Victoria. The program is taught jointly with a common law degree and core courses are delivered transsystemically, that is, across Canadian law and one or more Indigenous legal tradition. For example, students might take a Constitutional Law course which addresses Canadian constitutional law alongside Anishinaabe constitutional law. The programme welcomed its first cohort of students in September 2018 and is a leading example of deep engagement with Indigenous law in legal education. Professor Napoleon teaches Gitxsan land and property law along with common law property.

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During her visit to Aotearoa, Professor Napoleon delivered a number of lectures and presentations including the Nin Tomas Memorial Lecture at the University of Auckland and a keynote lecture at Te Hunga Roia Māori o Aotearoa (Māori Law Society) conference held at Te Herenga Waka - Victoria University of Wellington. These presentations addressed important conceptual and practical issues relating to working with Indigenous law.

We are very pleased to publish Professor Napoleon's essay entitled 'Legal Pluralism and Reconciliation, a version of which was originally presented at the Commission on Legal Pluralism conference that was held at the University of Ottawa in 2018. This paper builds on comments made in the Final Report of the Truth and Reconciliation Commission of Canada which addressed the experiences of Indigenous people in Canada's Indian residential school system. The Truth and Reconciliation Commission issued 94 'calls to action', including some relating specifically to the legal profession and legal education, aimed at advancing a process of reconciliation. The Commission defined reconciliation as 'an ongoing process of establishing and maintaining respectful relationships', including through the 'revitalization of Indigenous law and legal traditions'.

Professor Napoleon's essay explores the establishment of respectful relationships between state and Indigenous legal orders. These are issues which are equally relevant to reconciliation in Aotearoa and matters with which our legal system will need to grapple as Māori-Crown relationships continue to develop.

A tiny backdrop to the Canadian conversation

> For over 100 years, Aboriginal children were removed from their families and sent to institutions called residential schools. The government-funded, church-run schools were located across Canada and established with the purpose to eliminate parental involvement in the spiritual, cultural and intellectual development of Aboriginal children. The last residential schools closed in the mid-1990s.
>
> … more than 150,000 First Nations, Métis, and Inuit children were forced to attend these schools some of which were hundreds of miles from their home. The cumulative impact of residential schools is a legacy of unresolved trauma passed from generation to generation and has had a profound effect on the relationship between Aboriginal peoples and other Canadians.
>
> Collective efforts from all peoples are necessary to revitalize the relationship between Aboriginal peoples and Canadian society – reconciliation is the goal. It is a goal that will take the commitment of multiple generations but when it is achieved, when we have reconciliation – it will make for a better, stronger Canada.[3]

Introduction

The terms 'legal pluralism' and 'reconciliation' are enormous, intuitively connected concepts that, for decades, have generated an immense interdisciplinary scholarship around the globe.[4] Both constructs, legal

pluralism and reconciliation, with their diverse definitions and various political positionings, are prominent throughout the Indigenous legal and political discourses in Canada as well as elsewhere. In particular, reconciliation has been resonating nationally, as it should, since the 2015 release of the Truth and Reconciliation Commission of Canada's (TRC)[5] extraordinary and far-reaching reports and calls to action.

There are rich and seemingly endless debates about the many issues,[6] strengths,[7] human rights,[8] problems,[9] and definitions generated by both the constructs of legal pluralism and reconciliation.[10] Some twenty years ago, Sally Engle Merry defined legal pluralism as a situation in which two or more legal systems co-exist in the same social field.[11] More recently, von Benda-Beckmann and Turner have argued that legal pluralism must be conceived as "a broad empirical and comparative concept that calls attention to the *possibility* that more than one legal system could be relevant for social interaction..."[12] The von Benda-Beckmann and Turner view of legal pluralism helps to create a broader understanding wherein "constellations of legal pluralism differ widely in scope and that the relative importance of their components varies. It has served to study modes of governance and the ways in which power relations are inscribed into law, and to understand how law regulates access to resources and justice – and the lack of it."[13]

Turning to reconciliation, the TRC states that reconciliation is "an ongoing process of establishing and maintaining respectful relationships".[14] Further, that the purpose of reconciliation is to repair, "damaged trust by making apologies, providing individual and collective reparations, and following through with concrete actions that demonstrate real societal change. **Establishing respectful relationships also requires the revitalization of Indigenous law and legal traditions**."[15]

Against this vast and important literature, this is a small paper wherein I take up several questions that require more exploration and critical thought to identify what is useful and applicable to Indigenous legal worlds. First, what is the relationship between legal pluralism and reconciliation? I take the position that if reconciliation is being considered between Indigenous peoples and others, usually represented by a state, the starting place must be that Indigenous societies the world over had legal orders as part of their governance. And, if reconciliation is to be symmetrical, part of what must be comprehended is how Indigenous law relates to state law without assuming inferiority, or a deficit or incommensurability on the part of the Indigenous society and its law. Otherwise, the reconciliation process will be imagined entirely within a state law purview, a contradiction as well as a *de facto* denial of legal plurality.

Legal pluralism and reconciliation

My initial premise is that depending on the type of legal pluralist relationships that are in place between Indigenous peoples and the state, reconciliation might provide an opportunity and ongoing process through which Indigenous peoples and allies can build and maintain a decolonialised model of legal pluralism. Given this, the first step in reconciliation would seem to require a thoughtful, hard-nosed assessment

of the type of legal pluralist relations that are in place. In other words, across what legal pluralist divide is reconciliation imagined and desired.

My other questions concern the possibilities of reconciliation at three levels: (i) within an Indigenous legal order, (ii) between Indigenous legal orders, and (iii) between an Indigenous legal order and the state legal order. When and how does reconciliation between legal orders amount to legal pluralism, and if so, what forms? I will also engage with two Indigenous narratives, one historic and one more recent, as sites of practical exploration into legal pluralism and the potentiality of reconciliation.

Legal pluralism denotes a situation where two or more legal systems coexist in the same social field. It has a long historical pedigree and exists everywhere from localised communities to the international system. Legal pluralism tends to be rooted in the state's historical and political context and as such, there is no standardised relationship between the state and non-state system. Legal pluralism has been defined in numerous ways. Definitions are almost always rooted in idealised notions of how the state and non-state justice systems should operate. Legal pluralism is used here as an umbrella term to capture states where there are multiple forms of binding dispute resolution.[16]

Both the constructs of legal pluralism and reconciliation contemplate more than one legal order, and in their most positive form, they provide ways to imagine dialogue and constructive engagement across those legal orders. Such an interaction involves the "encounter of two or more traditions of normative decision making, each of which contains its own methods, protocols, modes of argument, and processes of judgment".[17] For our purposes here, the definition of legal pluralism will be the existence of multiple sources of non-state and state law within the same geographical area.[18] Interestingly, it has been argued that legal pluralism is the fact while legal centralism is a myth, an ideal, a claim, and an illusion.[19]

For the definition of reconciliation, I draw on the TRC's calls to action which begins with, "reconciliation is about establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples in this country. For that to happen, there has to be awareness of the past, acknowledgement of the harm that has been inflicted, atonement for the causes, and action to change behaviour."[20] And again, the ambit of what is imagined in the name of reconciliation must include legal orders – Indigenous[21] and Canadian – as the starting place.

Legal pluralism has always existed between Indigenous societies across Great Turtle Island, and now it is part of Canada. Historically, Indigenous legal orders formed the entirety of the lawscape[22] across Great Turtle Island with intersocietal trade, marriage, agreements, and sometimes war, and the creation of geopolitical spaces with more than one legal order operating at any given time. Once past the initial period in which the traders and settlers needed Indigenous peoples to survive, colonialism denigrated and denied Indigenous law[23] attempting to erase the existence of Indigenous legal thought from the state mindset.[24] We know that during this time, Indigenous law did not go anywhere, but it was rendered invisible, sometimes made illegal according to state law, and often so

disabled as to become inoperative or dysfunctional.[25] Given this, one requires a more complicated understanding of legal pluralism to account for continuing colonial conditions.

Historically and in the present day, the legal worlds of Indigenous peoples had to have been pluralistic with its continuing contemporary forms varying according to the violence of colonialism, power dynamics, their own resistance and present ability to practice their laws. The mere fact of the continuing existence of Indigenous law, however damaged and undermined, in a world along with imposed Canadian law means that legal pluralism was at least implicitly, if not explicitly, always a part of Indigenous peoples' legal thought. Today, implicitly and explicitly, legal pluralism in its many conceptions is a part of rebuilding Indigenous legal traditions – in Indigenous direct political actions,[26] Indigenous communities,[27] and in universities with initiatives such as the dual Indigenous Law Degree Program (JID/JD) launched in 2017 at the Faculty of Law, University of Victoria.[28]

Reconciliation between legal orders

Turning now to the big issue of reconciliation, as the TRC's definition makes clear, there is no place of arrival. Rather, reconciliation across societies requires a commitment to maintaining respectful relationships that are founded on understanding the past and to creating a non-colonial future. Given this, the work requires first setting out the terms of measure for reconciliation, and second, articulating what is actually being reconciled (e.g., aspects of social, political, economic, or legal life). In other words, how will you know whether reconciliation has been started or established, and whether it has been successful? What exactly are the terms of measure or the standards?

According to the TRC, future respectful relationships require the revitalisation of Indigenous law and legal traditions.[29] When thinking about the relationship between Canadian law and Indigenous law, it is easier to consider thinking across the respective legal orders to relate and connect purposes, aspirations, and functions of law rather than the actual form of law or the public legal institutions through which law operates. For example, the law of most Indigenous societies aspired to community safety, fairness, inclusion, dignity, and legal agency.[30] These aspirations are similar to those of state law and to other legal orders around the world. What differs is how Indigenous peoples structured their non-state legal orders, and legal institutions, and their legal processes and practice to work toward their aspirations. To build on the words of the TRC, for reconciliation to be possible, there must be an awareness of the past and the historic existence of Indigenous legal orders, acknowledgement of the harm that has been inflicted to the legal order, recognition of the causes, and action to change behaviours so that it is possible to build an ongoing mutually constructive and respectful relationship between legal orders into the future.[31] Given this, some creative reflection on what constitutes a respectful relationship between legal orders becomes necessary.

Why does this matter? There are some who argue that reconciliation today is basically another form of colonisation.[32] While there is certainly some truth to this bleak statement and on-the-ground experiences that would

verify this perspective,[33] I take the position that unless we interrogate our own expectations of reconciliation and set out our terms of measure, we will miss fully understanding both our successes and failures, and their causes. How we build a future does matter, and how Indigenous law relates to Canadian law matters too since neither state law nor Indigenous law are going anywhere. Again, reconciliation, as defined by the TRC, is one way to deliberately restructure a robust legal pluralism in a way that is not oppressive.

Legal pluralist archetypes and strategies

We know that not all legal pluralism is created equally. From a feminist perspective, the early work of Ambreena Manji is insightful and critically important to thinking about Indigenous legal pluralism and Indigenous feminist concerns because she makes visible the legal worlds of women. Manji's first argument is that in order to articulate a feminist view "of the (legal) world requires an engagement with legal pluralism"[34] which necessarily moves feminism away from legal centralism and "out of the orbit of state law".[35] This shift in orientation is necessary in order to look beyond the reform of state legal systems and to see law in non-western societies with research into "issues such as marriage, kinship relations, labour and property rights".[36] For Manji, failure to make this shift in order to see beyond the state means that "feminist theory remains simply reactive, merely a critique, paradoxically it affirms the very paradigms it seeks to contest … it remains on the very ground it wishes to question and transform".[37]

In addition to Manji's approach, I draw on the helpful work of Geoffrey Swenson here to provide a framework to begin imagining a non-oppressive, decolonised form of legal pluralism.[38] While his case studies were located in the post-conflict countries of Timor-Leste and Afghanistan, many of Swenson's insights are applicable to Canada. From Manji's perspective and mine, Swensen is still operating within the orbit of state law with his four theoretical archetypes for placing and analysing the fluid relationships between state and non-state legal orders' sectors: combative, competitive, cooperative, and complimentary.[39] Briefly, these are:[40]

- Combative: Here the state and non-state legal orders do not recognise the validity of each other and instead, actively seek to destroy each other.[41] Recall the state prohibition of the potlatch and the state killing of the legitimate actors legally responding to wetikos (Cree, also known as windigos in Anishnaabemowin) for example.[42] The potlatch (or feast) was and still is the important legal, political, and economic forum and institution for collectively witnessing major decisions for the memory commons for Pacific and northcoast peoples.[43]
- Competitive: Here, there are conditions of deep tensions between the state and non-state legal orders and frequently clashes, but the state's legal authority remains essentially unchallenged. Nonetheless, there exists some mutual respect for the autonomy of each legal system and its right to exist. Arguably the intersocietal period in which the historic treaties were first negotiated fits this archetype.[44]
- Cooperative: The non-state legal order retains a significant degree of authority and autonomy, and the respective legal authorities are willing

to work together on shared goals. Perhaps specific pockets of self government and administration (e.g., land regimes established under the Canadian *First Nations Land Management Act*)[45] or justice type initiatives (e.g., policing and child welfare) established by agreement might fit in this archetype, but of course would require a critical assessment on the part of the Indigenous parties.

- Complimentary: Both the state and non-state legal order exist, but the non-state legal system operates under the umbrella of state authority. Perhaps various types of government-to-government agreements or modern-day treaties reflect a complimentary archetype of legal pluralism, or at least holds the potential for this type of arrangement.

Swensen is careful to point out that these are descriptive[46] categories without suggesting that one legal order is automatically superior insofar as human rights, especially since in combative (and colonial) conditions, the institutional, political, and legal checks on authorities in non-state (read Indigenous) legal orders were intentionally suppressed or destroyed.[47] Arguably, it is this very suppression and destruction of Indigenous law that has generated so much of the violence and conflict experienced in many Indigenous communities today. For example, I have long argued that geopolitical spaces where Indigenous law has been undermined causes gaps in Indigenous legal worlds which when combined with failures of Canadian law, creates spaces of lawlessness where violence happens. It is usually the most vulnerable who suffer the consequences, mainly Indigenous women and girls.[48] While this level of violence exists in some Indigenous communities, this brutal phenomenon is also found in non-Indigenous cities where Indigenous women and girls are sexually assaulted or murdered, or they disappear.[49]

The past relationships between Indigenous and state legal orders reflect the full spectrum of Swensen's archetypes – sometimes simultaneously. This emphasises the importance of appreciating the constant fluidity of these legal pluralist relationships as they are reflected in any current contexts. Given that the fluidity of past legal pluralist relationships also exists in the present and will do so into the future, how might we account for this as we rebuild Indigenous legal orders in Canada and elsewhere?

Swensen continues to develop his theory by identifying five common strategies that are usually applied to establish varying forms of legal pluralistic relationships between state and non-state legal orders. These range from positive and proactive, to colonial and destructive:[50]

- Bridging: Cases are allocated to state or non-state legal orders based on state law, participant preferences, or venue appropriateness. For example, serious crime in Canada is within the jurisdiction of the federal government while summary offences and prevention may be negotiated within local community justice mandates.
- Harmonisation: Non-state legal outcomes are consistent with the state's core values. Examples here might include some of the Aboriginal justice initiatives operating within the auspices of the federal Department of Justice.
- Incorporation: The distinction between the non-state and state legal orders are eliminated, and non-state justice becomes state justice. Some of the historic adoption and marriage cases might fit here where

the courts found the Indigenous legal proceedings to be legally valid.[51]

- Subsidisation: State legal orders seek to increase its capacity and appeal relative to non-state legal orders. Examples here include legislative reforms, symbolic representation, capacity building, public engagement, and some self-government agreements and political arrangements.
- Repression: State legal orders actively undermine and try to eliminate non-state legal orders.

Again, it should be immediately apparent that all these strategies have been employed by the state at different times in the legal pluralistic relationships between Indigenous peoples and Canada. Furthermore, in variable forms, all these strategic practices continue today as Indigenous peoples struggle to protect and rebuild their legal orders. Given this, to discern these strategies in practice, a deeper understanding of Indigenous law is necessary to get past generalities and to create the necessary traction for Indigenous peoples to rebuild their legal worlds and legal practice. This would require what Swensen suggests, a thicker conception of the rule of law would include its extensive institutional, economic, cultural, and political requirements.[52] This is in contrast to a thin conception which would be limited to an understanding of law being "set forth in advance (be prospective), be made public, be general, be clear, be stable and certain, and applied to everyone".[53] While obviously important to law's overall legitimacy, such a thin conception of Indigenous law, at its best would be partial and impoverished because it would not include legal history (or other history for that matter), capitalism as the foundation for colonialism, and structure and organisation of social, political, economic, or legal authorities and institutions. The importance of societal structure to understanding that society's legal order cannot be overstated as it is essential to being able to discern the aspirations of law, logics, patterns, change, and legitimacy.[54] In short, whether one brings a thin or thick conception of law will determine the depth and scope of legal pluralism of one's analysis.

Jeremy Webber interrogates some of the assumptions found in the legal pluralism scholarship and his findings are in line with Swensen's arguments for legal pluralist fluidity and thick conceptions of law. Key in Webber's work is his insistence on the importance of deliberate and conscious action, and disagreement in the formation of legal norms. His criticism is that legal pluralists tend to speak in a descriptive mode that simplifies lived legal pluralism which can "obscure the very heart of law: the need to establish, at least provisionally, a single normative position to govern relations within a given social milieu, despite the continuing existence of normative disagreement.[55]

Why does this matter? It matters because without a critical understanding of Indigenous law as law, there is a tendency to describe and idealise Indigenous law as if it has no internal modes of argumentation and legitimisation, or collective reason and accountability. Indeed, treating Indigenous law in this overly simplistic way reduces it from a normative order requiring intellectual engagement and reasoning, to mere behaviour. Without such a critical perspective, one cannot see how Indigenous legal

orders manage and resolve arguments to solve human problems – critical elements in the actual practice of law.

Internal reconciliation within an Indigenous legal order

I turn now to an example concerning reconciliation within an Indigenous legal order, that of Gitxsan society.[56] Here, Xhliimlaxha (in English, Martha Brown), is recounting what she told some young people about their illegal use of her fishing site.

> Why not ask if you can use it? I said to them. They said, but their grandmother used it. Yes, I said, lots of people have used it, but we own it. If you just ask me, you can use it. I will even tell you where you can set your net. By marrying into our House they had the right to use it in the past. But those marriage ties died out long ago, and they were told, right in the feast, that they could not use it anymore.[57]

In this short excerpt, Xhiimlaxha makes it clear that there are ownership laws and as a House Chief, she along with her House members, own the lands and fishing site she is referring to. As the territory owner, she knows the land, water ways, and where the fishing sites are, and she has the authority to determine access and resource use. Xhliimlaxha explains that there are processes for approving varying terms of access and use, and for ending those arrangements. She also explains that this particular right of access to the fishing site on her territory was legal for a set period of time according to certain terms, but that use was ended publicly at a feast where most Gitxsan legal business is declared and witnessed for future recall.

The Gitxsan people she was speaking to did not know Gitxsan land laws and were in violation of those laws when they went to her fishing site. They either had not attended the public forum of the feast where the matter had been attended to or they had not received the necessary information due to some other cause. Possibly, they ignored the legal decisions and simply carried on fishing. Xhliimlaxha also stated that she could have given approval had she been asked permission, so she was prepared to be generous and reasonable. The individuals that Xhliimlaxha is addressing have obviously made a claim based on former use, perhaps informed by a notion deriving from use or adverse possession in western property law.

For this next section, I have found that graphic representations are helpful, if not critical, to understanding the differing temporality of the Gitxsan legal perspectives that are at issue. The following chart[58] sets out the internal reconciliation problems in the Gitxsan legal world raised in this Xhliimlaxha example.

	Historic Gitxsan Law, Legal Institutions and Legal Process	**Colonisation**	**Current Gitxsan law, Legal Institutions and Legal Process Current**
Peoples and Change Over Time	The temporal scale is critical to see both time depth and change. Over time, Gitxsan society incorporated other societies (cultures and languages) so the Gitxsan were never culturally homogenous.[59]	Classification of Indigenous peoples for the purposes of federal administrative control and distribution of *Indian Act*[60] 'benefits'.	According to the Canadian law, the static categories were Indians, Métis, Eskimo/Inuit. Now the static categories are Cree, Gitxsan, Dené, etc., because they are effectively frozen.
Relationships	Internal and external political, social, and legal relations were made in the context of horizontal, bottom-up and publicly validated kinship groups (Houses) allied through marriage. Political, economic, and legal relationships that mattered both internally within Gitxsan society and externally with other peoples, were horizontal.	Indigenous legal order and community cohesion deliberately undermined by missionaries, *Indian Act*[61] reserves, residential schools, potlatch ban, sixties swoop and impact benefit agreements.	*Indian Act* band relations reduced to individual votes and hierarchical representative governance inappropriate for small communities of inter-related and intermarried people. Gitxsan communities became geographically pinned as reserves, and the relationships that mattered shifted from horizontal to vertical both within small Gitxsan communities, and between small Gitxsan communities and the state.[62]
Jurisdictional Reach	Each Gitxsan House held exclusive land and riverine territories woven together through Clan and feast-validated marriage alliances	Gitxsan divided into six *Indian Act* bands, fracturing the wider jurisdictional reach and cross-cutting collective	Each Band`s authority restricted to municipal responsibilities to each village reserve. In total Gitxsan

	Historic Gitxsan Law, Legal Institutions and Legal Process	**Colonisation**	**Current Gitxsan law, Legal Institutions and Legal Process Current**
	to extend jurisdiction over all Gitxsan territories – 55,000 square kilometres.	legal responsibility.	reserves total 120 square kilometres.
Legal Institutions	Historically, Gitxsan society included public legal institutions through which law operated, a public legal archive or memory commons (oral histories), legal pedagogies, authority to enforce, and public presentation and formal witnessing (recording) of decisions.	Undermining of entirety of Gitxsan law, legal institutions, and pedagogy. Imposition of state law to displace areas and practices of Gitxsan law.	Today there are fewer feasts, those that remain are primarily concerned with the succession of Gitxsan names as in the Xhliimlaxha example above. [63]
Economy	Survival required close cooperation with others balanced with competition between individuals and kinship units. These were the centripetal force driving the legal and social system. Each House was the primary economic unit, frequently collaborating with other kin- or marriage-related Houses.	Group cooperation was partially replaced by possessive individualism fostered by missionaries, *Indian Act* agents and the dominant settler ethic. Wage labour and welfare payments replaced the group-based economy.	Individuals are able to subsist either outside or within the feast system. Some, like those referred to by Xhliimlaxha, attempt to use hereditary resource rights for individual gain.
Reconciliation	The Gitxsan, like other Indigenous peoples, were pragmatic in their legal and political efforts to deal with the coercive power of the Canadian settler state. They cooperated and negotiated with the state when necessary for safety and survival.	To date, there has been little deliberate or thoughtful reconciliation of the historic and present Gitxsan legal orders (internal reconciliation). There also has been no attempt to reconcile Gitxsan legal orders and the	The lack of reconciliation results in contradictions, incomplete Gitxsan legal pedagogy and powerful neoliberal ideologies and hierarchical representative governance that informs and influences

	Historic Gitxsan Law, Legal Institutions and Legal Process	**Colonisation**	**Current Gitxsan law, Legal Institutions and Legal Process Current**
	Xhliimlaxha is informed by this frame: horizontal, decentralized non-state Gitxsan law, authorities and legitimacy, and legal practice.	Canadian state (external reconciliation). This means that between the historic and present day legal institutions and law, there are contradictions, incomplete Gitxsan legal pedagogy, and powerful capitalist and neoliberal ideologies that inform and influence contemporary Gitxsan governance and legal order. Federal and provincial governments continue to try and reshape Indigenous peoples into their forms of political and legal ordering.[66]	present Gitxsan internal and external relations. Federal initiatives have resulted in the incremental revision of the *Indian Act*:[64] Self-government agreements and modern-day treaties. Third party agreements with industry (e.g., Impact Benefit Agreements, etc.). 'Government to government' agreements. Private property – Indigenous peoples own private property and have created private property regimes such as the Nisga'a.[65] The young people Xhiimlaxha was talking to are informed by this frame.

What is necessary for a coherent operation of Gitxsan law to be possible, an internal reconciliation between the legal perspectives held by Xhiimlaxha and those held by the young people illegally using her fishing site. Without such a deliberate and thoughtful reconciliation within the Gitxsan legal world, conflict such as that set out here, will continue to be generated.

Narrative sites for exploration of historic and present day legal pluralism and reconciliation

In what follows are two examples drawn from historic and present-day references of Gitxsan narratives in which we find legal pluralist and reconciliation elements that offer a fruitful source of thinking about current questions.

Dim Xsaan

This first narrative is part of an ancient Gitxsan oral history[67] and what makes it fascinating is that it involved Nisga'a, Wet'suwet'en, and Gitxsan peoples (three distinct non-state peoples with decentralised legal orders),[68] all of whom recognised the exercise of Gitxsan law in a case involving a Wet'suwet'en person while on Nisga'a lands. At trial in the *Delgamuukw* case, hereditary chief, Stanley Williams (Gwis Gyen), told the Court that it was determined that no compensation would be paid because the wrongdoer broke the law (*a hla gansxw*).[69] According to Mr. Williams, this event occurred thousands of years ago when Dim Xsaan raised a pole with a stone *hlgimadaa sook* crest on the top:

> Dim Xsaan really wanted to protect this pole and his crest, and when the…Hagwilget people, Kispiox, Gitan'maaxs, Gitwingax, they travelled down to…make some oolichan grease. And the people of Kitwancool – and when they started travelling, there was a man from – a young man from Hagwilget [Wet'suwet'en].…they started travelling towards the Nass. This would be about March because this is when the oolichans run at the Nass. As they got closer to the boundary line where the pole and the stone figure was, known as Hlgimadaa sook, the young man from Hagwilget looked up and he laughed at this crest, the stone figure on top of this pole, and he…took a stick and he pushed it down, and…the stone fell.
>
> Dim Xsaan found out who made fun of his crest and the pole [he then travelled to the Nass Valley], and as [he] arrived to the village of the Nass, Dim Xsaan took his spear and he knew this young person from Hagwilget was…in this certain house, and he went in and…he stabbed him on the chest with the spear. There was no hard feelings between the [Wet'suwet'en] people of Hagwilget and the people of the Nishga, because this young man had broken the law. He should have never done that. And what happened is…some of the people from Hagwilget came and they picked the body up and they left without confronting the Nishga people.[70]

Since all the parties agreed that the young man was in the wrong and "had broken the law", there was no compensation or retaliation as a result of his capital punishment. In this case, and in some of the other older cases, the punishment was extreme in the form of legal killing, but the chief has the authority to vary or even to waive the punishment altogether, usually when the wrongdoer accepts responsibility for her or his actions. For example, regarding the law of trespass, hereditary chief Solomon Marsden (Xamiaxyetxw) told the Court that if "the person that trespasses, if he apologizes to the chief then the chief would forgive this person".[71] One must keep in mind the extensive arrangements, as evidenced by Xhliimlaxha, of privilege to lands and resources though the kinship system. Given this, the first order of business in any trespass situation would be to

determine a person's lineage and whether he or she had access or resource privileges through their complex of legal relationships – mother's side, father's side, grandparents, spouse, or some other use or access arrangement.

At the heart of this matter is the harm and shame to Dim Xsaan's *daxgyet* or chiefly authority.[72] In this decentralised society, authorities are distributed horizontally, and it is the protection of the chiefs' daxgyet that in part maintains and balances the legitimacy of the overall political and legal structures. A chief's *daxgyet* enables a chief to maintain her or his position and role, and the prerogatives of their name (e.g., access to land, resources, etc.). A Chief's own bad behaviour or disrespectful behaviour toward her/him that remains unaddressed can undermine her/his daxgyet which in turn will cause shame and the diminishment of her /his authority in the Feast Hall (i.e., the main public political, legal, and economic assembly).

So what went on in this narrative? How does it concern legal pluralism? First of all, there were three non-state legal orders involved here: Gitxsan, Wet'suwet'en, and Nisga'a. The people within each legal order had to understand the full legality of each of the others, as well as the land owned through each legal order. There had to have been an understanding and acceptance of mutual lawfulness, and of unlawfulness, in this case with the shaming and damage to the Dim Xsaan crest, access across territories, legal killing, and compensation. Gitxsan law was acted upon in Nisga'a territories, and it was upheld on by the Nisga'a and the Wet'suwet'en. Also, Wet'suwet'en law was recognized on both Nisga'a and Gitxsan territories by allowing access and recovery of the Wet'suwet'en man's body. Furthermore, this oral history has been recounted for thousands of years because it forms an important part of the legal memory or commons that future legal decisions can draw upon. Arguably, this narrative provides an example of positive legal pluralist relations that allowed the instance of this conflict to be resolved in this way. In other words, without such legal pluralist relations in place, this conflict could not have been dealt with as it was.

Returning to Swensen's archetypes, again, the shortcoming is his conceptual state orbiting. However, in imagining extending legal pluralism between the non-state legal orders here and setting aside the state, the closest fit would be the cooperative category, and the closest response category would be that of incorporation. Arguably, there are elements of bridging, harmonisation, and incorporation in the interactions between the Gitxsan, Wet'suwet'en and Nisga'a at different moments, but given that the purpose here is to make historic Indigenous legal pluralism visible, the usefulness of further extension of Swensen's archetypes is limited. As Jeremy Webber has suggested, they are starting points to reasoning and are "destined to be surpassed and developed".[73]

Wet'suwet'en

In another recent example which took place in the non-Indigenous town of Smithers, B.C., Wet'suwet'en House chief Mabel Forsythe was wrongly accused of shoplifting, and she and her daughter were publicly searched

on the sidewalk of the main street.[74] One of the Gitxsan expert witnesses in *Delgamuukw*, Mrs. Mary McKenzie (Gyoluugyat) explained:

Another example is when a person is embarrassed by another group, like last summer in the City of Smithers a lady Chief again was embarrassed. Her case came up as theft at that time, so after the court was finished she put on a Feasting to wipe off that embarrassment, and that word theft, that she steals something, that's no longer to be remembered towards her when she put this Feast on.[75]

In this case, the police officer further detained Mrs. Forsythe and her daughter by driving them to the Forsythe's residence where he questioned Mrs. Forsythe's other daughter. No charges were laid, and Mrs. Forsythe filed a legal action for damages in which she successfully claimed the cost of hosting a shame Feast so that she could publicly cleanse her chief's name. The Court "found that Mrs. Forsythe and her daughter were wrongfully imprisoned and as a result suffered embarrassment and shame".[76] When assessing damages, the Court took into account Mrs. Forsythe's greater rank in the community and awarded her $2,000 toward the cost of a shame Feast.[77]

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

To return to Swenson's framework, this Wet'suwet'en narrative fits Swensen's complimentary archetype, and the response category would be subsidisation.

Conclusion

As a result of their widespread acceptance and usage, and because so much is at stake, reconciliation and resurgence are used in a wide variety of ways. These terms are continuously contested and reformulated in practice, policy, and academic research. Thus practice-based struggles over reconciliation and resurgence are also struggles over the meanings of the terms themselves. Reconciliation and resurgence have become contestable and contested concepts within the semantic field and human activities in which they are used.[78]

There is no arrival in the integrally intertwined journeys of reconciliation or legal pluralism – they will remain contestable and contested as demonstrated in the examples above. But there is hope and promise – with hard work, and critical legal and political assessment by Indigenous peoples. There is no room for romanticism here (or anywhere else for that matter). To build on the words of the TRC, for reconciliation to be possible, there has to be awareness of the past, acknowledgement of the harm that has been inflicted to the legal order, acknowledgement of the causes, and action to change behaviours so that it is possible to build an ongoing

mutually constructive and respectful relationship between legal orders into the future.[79] And to draw from Swenson, "Robust legal pluralism challenges the state's claim to a monopoly on legitimate resolution of legal disputes as well as the ideal of uniform application of the law."[80] There is a way forward, but it must be firmly grounded at the local level in Indigenous law and experiences – where the legal world of Xhliimlaxha, Dim Xsaan, Gyoluugyat and all the others are taken seriously and interrogated as legal records and precedents – so that their teachings can be applied today.

Notes

[1] Presented at the plenary panel of the Commission on Legal Pluralism held at the Faculty of Law, University of Ottawa, August 22, 2018. The Truth and Reconciliation Commission of Canada was created as a result of the largest class action in Canadian history, and was officially launched in 2008 as part of the Indian Residential Schools Settlement Agreement. This was a six-year process, intended as a process that would guide Canadians through the difficult discovery behind the residential school history and its human consequences, the TRC was meant to lay the foundation for lasting reconciliation across Canada. See Ry Moran, *Truth and Reconciliation Commission* (September 24, 2015) online: https://www.thecanadianencyclopedia.ca/en/article/truth-and-reconciliation-commission.

[2] LLB, PhD (Law and Society), Law Foundation Chair of Aboriginal Justice and Governance, Director of the Indigenous Law Degree Program and the Indigenous Law Research Unit, Faculty of Law, University of Victoria. I am a member of the Saulteau First Nation in northeast British Columbia, one of the communities in the historic Treaty 8 area. I am also an adopted member of the House of Luuxhon, Gitanyow, northern Gitxsan, and I lived and worked in Gitxsan and Wet'suwet'en lands for over two decades.

[3] Truth and Reconciliation Commission of Canada, Reconciliation … towards a new relationship, n.d., online: http://www.trc.ca/reconciliation.html.

[4] For an informative historical perspective, see Keebet von Benda-Beckmann & Bertram Turner, Legal Pluralism, Social Theory, and the State (2019) 50:3 The Journal of Legal Pluralism and Unofficial Law 255, online: https://www.tandfonline.com/loi/rjlp20 [von Benda-Beckmann & Turner]. Also see seminal article, John Griffiths, "What is Legal Pluralism?" (1986) 24: 1 Journal of Legal Pluralism and Unofficial Law 55.

[5] Truth and Reconciliation Commission of Canada*, Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) [TRC Summary Report].

[6] For example, Geoffrey Swenson, Legal Pluralism in Theory and Practice, International Studies Review (2018) 0 1 [Swenson]. Also see Emmanuel Melissaris, The More the Merrier? A New Take on Legal Pluralism, Social and Legal Studies (2004) 13:1 57.

[7] Rebecca Johnson, *Ceremony as Remedy? A Heiltsuk resource for doing TRC#28 work in the law school* (March 8, 2020) reconciliationsyllabus, online: https://reconciliationsyllabus.wordpress.com/author/rebeccajohnsonlaw/.

[8] Ghislain Otis, Individual Choice of Law for Indigenous People in Canada: Reconciling Legal Pluralism with Human Rights? (2018) 8:2 UC Irvine Law Review 207 at 225. Otis argues that modern treaties have added a new layer of

complexity to legal pluralism in Canada, and that individual choice of law is one possible way of reconciling legal pluralism with human rights at 225.

[9] See for instance, Jean L. Cohen, The politics and risks of the new legal pluralism in the domain of intimacy (2012) I–CON 10, 380; and Ambreena S. Manji, Imagining Women's 'Legal World": Towards a Feminist Theory of Legal Pluralism in Africa (1999) 8:4 Social & Legal Studies 435 [Manji, Women's Legal World].

[10] See for example: Kim Stanton, Reconciling Reconciliation: Differing Conceptions of the Supreme Court of Canada and the Canadian Truth and Reconciliation Commission (2017) 26 Journal of Law and Social Policy 20; Matt James, Changing the Subject: The TRC, Its National Events, and the Displacement of Substantive Reconciliation in Canadian Media Representations (2016) 51:2 Journal of Canadian Studies 362; Jesse Wente, *Reconciliation is dead and it was never really alive* (February 25, 2020) Globe and Mail, online: https://www.cbc.ca/news/canada/toronto/jesse-wente-metro-morning-blockades-indigenous-1.5475492;

[11] Sally Engle Merry, Legal Pluralism, (1988) 22:5 Law and Society Review 869 at 870.

[12] von Benda-Beckmann & Turner, *supra* note 4 at 264.

[13] *Ibid*.

[14] *Ibid.*

[15] TRC Summary Report, *supra* note 5 at 16. The emphasis is mine.

[16] Meghan Campbell & Geoffrey Swenson, Legal Pluralism and Women's Rights after Conflict: The Role of CEDAW (2016) 48 Columbia Human Rights Law Review 112 at 115.

[17] Jeremy Webber, Legal Pluralism and Human Agency (2006) Osgoode Hall L.J. 44 167 at 170 [Webber, Legal Pluralism].

[18] Shivit Bakrania with Huma Haider, *Safety, Security and Justice* (Birmingham, UK: GSDRC University of Birmingham, 2016) at 12.

[19] Referring to the work of John Griffiths, see Margaret Davies, *Oxford Handbooks Online*, www.oxfordhandbooks.com at 4.

[20] TRC Summary Report, *supra* note 5 at 6.

[21] There is no one Indigenous society in Canada. Rather, there are about 60-80 or so Indigenous societies, that comprise over 20 linguistic groups. Canada, Report of the Royal Commission on Aboriginal Peoples, *Restructuring the Relationship* Volume 2 (Ottawa: Supply and Services Canada, 1996) at 182 [RCAP Restructuring].

[22] Nicole Graham defines "lawscape" as a perception and understanding of a landscape complete with humans and human practices and law across it. In other words, law is never placeless even though we often treat it as such, nor is the landscape a "detached and separate physical realm, 'the land'". Nicole Graham, *Lawscape: Property, Environment, Law* (Oxfordshire: Routledge, 2011) at 5.

[23] Keith Cherry, *Practices of Pluralism: A Comparative Analysis of Trans-Systemic Relationship in Europe and on Turtle Island* (2020) PhD Dissertation, Faculty of Law, University of Victoria, online: https://dspace.library.uvic.ca/ [Cherry, Practices of Pluralism].

[24] Hadley Friedland & Val Napoleon, 2015 1:1 "Gathering the Threads: Indigenous Legal Methodology" Lakehead Law Journal 33 [Friedland & Napoleon, Gathering]; and Hadley Friedland & Val Napoleon, "An Inside Job: Engaging with Indigenous Legal Traditions through Stories" 2016 Special Issue, McGill Law Journal 725 [Friedland & Napoleon, Inside Job].

[25] Val Napoleon & Hadley Friedland, "From Roots to Renaissance", in Markus Dubber, ed., *Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014) [Napoleon & Friedland, Renaissance].

[26] For example, Chantelle Bellrichard, *Wet'suwet'en, B.C. and Canada sign MOU on negotiations for legal recognition of title* (May 14, 2020) CBC online: https://www.cbc.ca/news/indigenous/wetsuweten-mou-title-negotiations-signing-1.5570128.

[27] There are currently two Indigenous law research centres that are partnering with Indigenous communities across Canada to rebuild specific areas of Indigenous law such as lands, water, child welfare, governance, dispute resolutions, gender, etc. See for example the Indigenous Law Research Centre at the Faculty of Law, UVIC, online: https://www.uvic.ca/law/about/indigenous/indigenouslawresearchunit/index.php and the Wahkohtowin Law and Governance Lodge at the Faculty of Law, University of Alberta. A new center has been established, the Indigenous Legal Orders Institute at the Faculty of Law, University of Windsor, online: http://www.uwindsor.ca/law/Indigenous-Legal-Orders-Institute.

[28] Joint Degree Program in Canadian Common Law and Indigenous Legal Orders (JD/JID), University of Victoria, https://www.uvic.ca/law/about/indigenous/jid/index.php.

[29] TRC Summary Report *supra* note 5 at 16.

[30] See for example, Napoleon & Friedland, Renaissance, *supra* note 25; Friedland & Napoleon, Gathering, *supra* note 24; Friedland & Napoleon, Inside Job, *supra* note 24; and Val Napoleon, Gitxsan Democracy: On Its Own Terms in James Tully *et al*, eds., *The Crisis in Democracy* (provisional title) [forthcoming, 2021] [Napoleon, Gitxsan Democracy].

[31] TRC Summary Report, *supra* note 5 at 6.

[32] See for example, see Fred Guerin, *The Colonization of Reconciliation* (May 26, 2019) Ricochet Public Interest Journalism, online: https://ricochet.media/en/2633/the-colonization-of-reconciliation. But also see, Tony Penikett, *Reconciliation: First Nations Treaty Making in British Columbia* (Vancouver: Douglas & McIntyre, 2006).

[33] Justine Hunter, *Solidarity protest for Wet'suwet'en at B.C. Legislature winds down after five arrested for mischief* (March 5, 2020) Globe and Mail, online: https://www.theglobeandmail.com/canada/british-columbia/article-solidarity-protest-for-wetsuweten-at-bc-legislature-winds-down/; and Leyland Cecco, *Canada: Wet'suwet'en sign historic deal to negotiate land rights* (May 15, 2020) The Guardian, online https://www.theguardian.com/world/2020/may/15/canada-wetsuweten-historic-deal-land-rights-pipeline.

[34] Manji, Women's Legal World *supra* note 9 at 436.

[35] *Ibid.* at 439.

[36] *Ibid.*

[37] *Ibid.*

[38] Swenson *supra* note 6.

[39] *Ibid.* at 5.

[40] *Ibid.* at 17 and 19. While Swenson uses the term "justice sector", I have instituted "legal order" or "legal system".

[41] See the historical treatment of legal pluralism in Canada's relations with Indigenous peoples, Cherry, Practices of Pluralism *supra* note 23.

[42] According to Hadley Friedland, the wetiko is a Cree legal construct that allows a collective to legitimately deal with those that have become harmful. See Hadley Friedland, *The Wetiko Legal Principles* (Toronto: University of Toronto, 2018); and Val Napoleon, *et al*, *Mikomosis and the Wetiko* (Victoria: UVIC, 2015).

[43] Richard Overstall, Encountering the Spirit in the Land: 'Property' in a Kinship-Based Legal Order in John McLaren, ed., *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2004) [Overstall, Property].

[44] The term 'intersocietal' has been usefully employed for this period. See Janna Promislow, Towards a Legal History of the Fur Trade: Looking for Law at York Factory, 1714-1763 (2004) PhD Dissertation (unpublished) archived with the author. See for example, Janna Promislow, 'Thou wilt not die of hunger ... for I bring thee merchandise': Consent, Intersocietal Normativity and the Exchange of Food at York Factory, 1682-1763" in Jeremy Webber & Colin Macleod, eds., *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010) 77-114.

[45] *First Nations Land Management Act*, S.C. 1999, c. 24.

[46] According to Sally Engle Merry, "Legal pluralism is not a theory of law or an explanation of how it functions, but a description of what law is like. It alerts observers to the fact that law takes many forms and can exist in parallel regimes. It provides a framework for thinking about law, about where to find it and how it works." See Sally Engle Merry, McGill Convocation Address: Legal Pluralism in Practice (2013) 59:1 McGill Law Journal 1 at 2 [Engle Merry, Convocation].

[47] Swenson, *supra* note 6 at 335. Also see the important report, International Council on Human Rights Policy, *When Legal Worlds Overlap: Human Rights, State and Non-State Law* (Geneva: ATAR Roto Press, 2009).

[48] Val Napoleon, An Imaginary for Our Sisters, book chapter for Jeffery Hewitt and Richard Moon, eds., *Indigenous Spiritual Collection* [provisional title], forthcoming 2020.

[49] See the two-volume *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (2019) online at: https://www.mmiwg-ffada.ca/final-report/; and Val Napoleon & Hadley Friedland, Expert Witness Testimony (2017) Quebec Commission d'enquéte sur les relations entre les Autochtones et certains services publics, online: https://www.cerp.gouv.qc.ca/index.php?id=2.

[50] Swenson, *supra* note 6 at 440.

[51] There is a long history of Canadian courts considering or incorporating, varying degrees, Indigenous laws concerning adoption, marriage, band custom elections, and other matters. See for example, Sébastien Grammond, *Terms of Coexistence: Indigenous Peoples and Canadian Law* (Toronto: Carswell, 2013)

at 374-385; Norman K. Zlotkin, Judicial Recognition of Aboriginal Customary Law in Canada: Selected Marriage and Adoption Cases (1984) 4 C.N.L.R. 1; Cindy L. Baldassi, The Legal Status of Aboriginal Customary Adoption Across Canada: Comparisons, Contrasts, and Converges (2006) 63 U.B.C.L. Rev. 63. More recently there is a line of Canadian cases that are actually engaging with Indigenous law: *R v Ippak* 2018 NUCA 3 (Justice Berger, concurring reasons); *Beaver v. Hill* 2018 ONCA 816; *Restoule v. Canada (Attorney General)* 2018 ONSC 7701 (Justice Hennessy); *Pastion v Dene Tha' First Nation* 2018 FC 648 (Justice Grammond); *Ontario Lottery and Gaming Corporation v. Mississaugas of Scugog Island First Nation* 2019 FC 813 (Justice Grammond); *Alderville Indian Band v Canada* 2014 FC 747); and *Clark v. Abegweit First Nation Band Council* 2019 FC 721 (Justice Favel).

[52] Swenson, *supra* note 6 at 442. While Swenson is writing about the rule of law, I am extrapolating his discussion to law, and to Indigenous law specifically.

[53] *Ibid.*

[54] Friedland & Napoleon, Gathering, *supra* note 24; Friedland & Napoleon, An Inside Job, *supra* note 24; and Napoleon & Friedland, Renaissance, *supra* note 25.

[55] Webber, Legal Pluralism, *supra* note 16 at 169.

[56] The Gitxsan were one of the plaintiff groups in the seminal title court action, *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010). The other plaintiff group was the Wet'suwet'en.

[57] Richard Daly, *Our Box Was Full* (Vancouver: UBC Press, 2005) at 242 [Daly, Box]. Xhliimlaxha is also spelled Khliimlaxha.

[58] I am grateful to Richard Overstall for his clarifying additions to my original chart.

[59] See generally, Val Napoleon, Ayook: Gitksan Legal Order, Law, and Legal Theory (PhD Law dissertation, University of Victoria, 2009) 91 Unpublished, archived with author. [Napoleon, Ayook].

[60] *Indian Act,* R.S.C. 1985, c. I-5.

[61] *Ibid*.

[62] In addition, according to the Royal Commission on Aboriginal Peoples, "In the case of First Nations, for example, of the effects of the band orientation of the *Indian Act* has been to foster loyalties at the level of the local community, at the expense of the broader national affinities arising from a common language, culture, spirituality and historic experiences." Canada, Report of the Royal Commission on Aboriginal Peoples, *Restructuring the Relationship* Volume 2 (Ottawa: Supply and Services Canada, 1996) at 235 [RCAP Restructuring].

[63] In former times, feasts were held for all major legal, social, and political transactions including marriage, shaming (to control harmful and injurious behaviour), cleansing (to restore spirits after serious injury), restitution, birth, graduation (to celebrate achievements), naming, reinstatement (for Gitxsan persons who disobeyed the laws), coming of age, "smoke" (for obligations related to organizing settlement feasts), gravestone placing, settlement (repayment of obligations arising from a death), divorce, and pole raising. See generally, Daly, Box *supra* note 57.

[64] As an example of continued positive pragmatism, see Naiomi Metallic, "Indian Act By-Laws: A Viable means for First Nations to (Re)Assert Control over Local Matters Now and Not Later" (2016) 67 UNBLJ 211. For examples, see: *First Nations Land Management Act*, S.C. 1999, c. 24; the *Family Homes on Reserves and Matrimonial Interests or Rights Act* (S.C. 2013, c. 20); *Nisga'a Final Agreement Act*, R.S.B.C. 1999 c.2; and *Sechelt Indian Band Self-Government Act* (S.C. 1986, c. 27).

[65] For example, the legislative body of Nisga'a Lisims Government unanimously passed the *Nisga'a Land Title Act*, *Nisga'a Property Law Act*, *Nisga'a Law and Equity Act,* and the *Nisga'a Partition of Property Act*.

[66] Napoleon, Gitxsan Democracy, *supra* note 30.

[67] Gitxsan society is organized in matrilineal kinship groups that own a formal oral history (*adaawk*) that links the group to its territories and establishes rightful ownership of the land and resources. The adaawk tells of the origins and migrations of the group to its current territories, of explorations and covenants established with the land, and of songs, crests, and names that result from the spiritual connection between the members and their land. Susan Marsden, "Defending the Mouth of the Skeena: Perspectives on Tsimshian Tlingit Relations" in Jerome S. Cybulski, ed., *Perspectives on Northern Northwest Coast Prehistory* (Hull: Canadian Museum of Civilization, 2001) 61 at 62.

[68] The Gitxsan and Nisga'a are from the Tsimshian linguistic group located on the northcoast of British Columbia. The neighbouring Wet'suwet'en are part of the Athabascan linguistic group, and are located inland, in the north central part of the province. Please note that there are a number of spellings for Wet'suwet'en and Gitxsan.

[69] Stanley Williams (Gwis Gyen) April 19, 1988, B.C.S.C. commissioned evidence transcript, 160 at 167, for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185 [Stanley Williams (Gwis Gyen) 19 April 1988]. According to Fred Johnson (Lelt), *a hla gansxw* means breaking the law. Fred Johnson (Lelt) 2 September 1986, B.C.S.C. commissioned evidence transcript, 1-39, for *Delgamuukw v. The Queen*, [1991] B.C.J. No. 525, 79 D.L.R. (4th) 185 [Fred Johnson (Lelt) 2 September 1986].

[70] Stanley Williams (Gwis Gyen) 19 April 1988, *supra* note 69 at 167.

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

[72] Overstall, Property, *supra* note 43. Overstall explains that "A House's histories, crests, and territories revolve around one another to recreate the daxgyet [chief's power] power of the lineages' original marriage with the land. While a House may possess naxnox spirit powers unconnected with its crest powers, most of its possessions derive their legitimacy from that originating event, including any conflicts and consequences that arise from its responsibility for all human activity on its territory."

[73] Jeremy Webber, personal communication, June 8, 2020 (archived with the author).

[74] Smithers is located in Wet'suwet'en territories but has a predominately non-Wet'suwet'en population.

[75] Mary McKenzie (Gyoluugyat) 13 May 1987, B.C.S.C. trial transcript, 160 at 248 evidence for *Delgamuukw v. The Queen* (1991), 79 D.L.R. (4th) 216.

[76] *Forsythe v. Collingwood Sales Ltd.,* [1988] B.C.J. No. 683 [B.C.C.A.].

[77] *Ibid.*

[78] Michael Asch, John Borrows, and James Tully, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018) at 3-4.

[79] TRC Summary Report, *supra* note 5 at 6.

[80] Swenson, *supra* note 6 at 440.

Te Kōti Taiao o Aotearoa – Environment Court

Natural resource management – consent conditions – differing effects on mana whenua groups

Ngāti Whātua Ōrākei Whai Maia Ltd v Auckland Coucil & Panuku Development Ltd

[2019] NZEnvC 184
14 November 2019

Report by Tom Bennion

Overview and result

A consent authority can take account of the fact that mana whenua interests will be of differing degrees of connection in assessing effects and setting conditions.

Natural resource management – consent conditions – differing impacts on mana whenua groups – relative strengths of iwi and hapū interests	
Date	14 November 2019
Case	*Ngāti Whātua Ōrākei Whai Maia Ltd v Auckland Council & Panuku Development Ltd* (25 MB PDF)
Citation	[2019] NZEnvC 184
Court	Te Kōti Taiao o Aotearoa – Environment Court
Judge(s)	Judge Newhook, Judge Doogan and Commissioner Paine
Earlier/later decisions	*Ngāti Whātua Ōrākei Whai Maia Limited v Auckland Council* [2019] NZEnvC 51; *Ngāti Whātua Ōrākei Trust v Attorney-General* [2019] 1 NZLR 1116.
Legislation cited	Resource Management Act 1991, ss 2, 5, 6, 7, 8, 104, 108, 108AA, 116, 120 and 274; Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014, s 3; Marine and Coastal Area (Takutai Moana) Act 2011; Te Ture Whenua Māori Act 1993, s 30.
Cases cited	*RJ Davidson Family Trust v Marlborough District Council* (2018) ELRNZ 367; *Newbury District Council v Secretary of State for the Environment* [1981] AC 578; *Waitakere City Council v Estate Homes Limited* [2007] 2 NZLR 149; *Friends & Community Ngawha Inc v Minister of Corrections* [2002] NZRMA 401; *Ngāi Hapū Incorporated v Bay of Plenty Regional Council* [2017] NZEnvC 073; *Te Runanga o Ngāi Te Rangi Iwi Trust & Others v Bay of Plenty Regional Council* [2011] NZEnvC 402; *Ngāti Ruahine v Bay of Plenty Regional Council* (2012) 17 ELRNZ 68; *Maungaharuru-Tangitū Trust v Hastings District Council* [2018] NZEnvC 79; *SKP Incorporated v Auckland Council* [2018] NZEnvC 81; *SKP Incorporated v Auckland Council* [2019] NZHC 900; *Auckland Council (formerly Auckland Regional Council) & Others v Auckland Council (formerly Manukau City Council) & Others* [2011]

	NZEnvC 77; *Tūwharetoa Māori Trust Board v Waikato Regional Council* [2018] NZEnvC 98; *Ngāti Pāoa Iwi Trust v Ngāti Pāoa Trust Board* (2018) 173 Waikato-Maniapoto MB 51 (173 WMN 51); *Rangitane o Tāmaki Nui-A-Rua Incorporated Society v Tāmaki a Nui-A-Rua Taiwhenua* (1996) 11 Tākitimu Appellate Court MB 96 (11 ACTK 96); *Panuku Development Auckland Limited v Auckland Council* [2018] NZEnvC 179; *Port Nicholson Block Settlement Trust v The Attorney-General and another* [2012] NZHC 3181.
Overview and result	Ngāti Whātua Ōrākei challenged conditions of resource consents for an Auckland port development on the basis that they did not give primacy to Ngāti Whātua Ōrākei interests as mana whenua. **Held**: the Environment Court confirmed a consent authority has jurisdiction to determine the relative strength of iwi and hapū interests in an area affected by an application. Those differing interests can be factored into setting resource consent conditions and assessing the impact of the proposed activities.

Background

Ngāti Whātua Ōrākei challenged conditions of resource consents for an Auckland port development on the basis that they did not give primacy to Ngāti Whātua Ōrākei interests as mana whenua.

The conditions required the consent holder to continue to liaise with a number of iwi of the Tamaki-Makau-Rau (Auckland) region as the port development works were undertaken.

The parties asked the Court to determine:

> Does the EC have jurisdiction to determine whether any tribe holds primary mana whenua over an area the subject of a resource consents application a) generally or b) where relevant to claimed cultural effects of the application and the wording of consent conditions?

Relevant definitions from the Resource Management Act 1991 s 2 are:

- "Mana whenua" - "... means customary authority exercised by an iwi or hapū in an identified area."
- "Tangata whenua" - "... in relation to a particular area, means the iwi, or hapū that holds mana whenua over that area."
- "Kaitiakitanga " - "... means the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resource; and includes the ethic of stewardship".

Discussion

The central concern of Ngāti Whātua Ōrākei was that the conditions gave equal treatment to all Māori parties, and did not provide for any assessment that the strength of relationships with the project were stronger for some groups than others.

The Auckland Council argued that referring to one iwi as having primary mana whenua in consent conditions was not a valid resource consent purpose because it did not relate to managing effects on the environment of an activity.

The Environment Court rejected that argument, because the definition of environment in s 2 includes cultural matters and a number of cases have established that tangible and intangible effects on culture can be part of "effects on the environment". The Court also rejected an argument that if mana whenua statements are made, they could only be recorded and not adjudicated upon.

The Court noted Waitangi Tribunal reports and High Court judgments which had grappled with assertions of mana whenua, and which have noted that layered iwi interests in the same area are not uncommon and their different strengths can be assessed.

After removing the reference to "primary mana whenua" in the agreed question, the Court modified the question it had to answer to:

> [88] ... When addressing the s 6(e) RMA requirement to recognise and provide for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga, does a consent authority including the Environment Court have jurisdiction to determine the relative strengths of the hapu/iwi relationships in an area affected by a proposal, where relevant to claimed cultural effects of the application and the wording of resource consent conditions.
>
> [89] Reframed in that way, the answer to the question is "yes", there is jurisdiction, for the reasons we have recorded.
>
> [90] As an aside, we detected in the submissions on behalf of the council a concern that councils or their hearing commissioners are not equipped to make such enquiries. The complaint cannot sway the outcome. Consent authorities must face up to the complexity of issues in all facets of resource consenting, whether of a Maori cultural nature or otherwise. It is likely that there will be few situations faced by consent authorities as complex as the present in terms of the numbers of parties claiming to be affected, or the ways in which effects might be manifested. But that affords no reason for not facing up to the task.

This is a significant decision because, as the Environment Court notes, councils have been reluctant to make judgements about the relative strength of iwi connections to sites over which consents are sought. Assuming that this decision stands, we can expect to see more litigation which raises this type of issue.

However, there are two cautions noted by the Court that need to be borne in mind:

- Relative interests will only need to be determined where such findings are relevant to claimed effects and/or consent conditions;
- Layered iwi and hapū interests are not uncommon. It will be rare that an iwi or hapū has exclusive cultural interests in an area.

Te Kōti Whenua Māori – Māori Land Court

Injunction – refused – trustee elections – delay

Te Korowai Tiaki o Te Hauāuru Incorporated Society v Te Rūnanga o Ngāti Tama Trust

(2019) 407 Aotea MB 47 (407 AOT 47)
23 October 2019

Report by Kelly Mitchell

Overview and result

Application seeking an injunction in advance of determining an application about recent trustee elections and a trust's beneficiary register. Injunction refused.

Injunction – refused – delay – balance of convenience – trustee elections – possible impact of further elections on project under negotiation – procedure (beneficiary as applicant) – trust owning general land – observations about major transactions and approval process	
Date	23 October 2019
Case	*Te Korowai Tiaki o Te Hauāuru Incorporated Society v Te Rūnanga o Ngāti Tama Trust* (319 KB PDF)
Citation	(2019) 407 Aotea MB 47 (407 AOT 47)
Court	Te Kōti Whenua Māori - Māori Land Court
Judge(s)	Judge Stone
Earlier/later decisions	
Legislation cited	Te Ture Whenua Māori Act 1993, ss 19, 67, 71, 236, 237, 238 and 240; Trustee Act 1956, s 68.
Cases cited	*Moke v Trustees of Ngāti Tarāwhai Iwi Trust* [2019] Māori Appellate Court MB 265 (2019 APPEAL 265); *McLaughlin v McLaughlin* [2019] NZHC 2597; *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (HL); *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA); *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90, (2013) 13 TCLR 531; *Taueki v Horowhenua 11 Part Reservation Trust – Horowhenua 11 (Lake) Block* (2016) 347 Aotea MB 269 (347 AOT 269).
Overview and result	Te Korowai Tiaki o Te Hauāuru Incorporated ("Te Korowai") applied to the Court for a number of orders, including an urgent injunction, regarding issues relating to the recent trustee election and the integrity of the beneficiary register of Te Rūnanga o Ngāti Tama Trust ("the Trust"). The orders sought would require the Trust elections to be re-run and for the trustees elected to be restrained from making certain decisions in the interim. Te Korowai is an incorporated society that operates for the benefit of the iwi of Ngāti Tama, while the Trust is a post-settlement governance entity for Ngāti Tama. A significant issue underling the application was the current negotiations between the Trust and the New

	Zealand Transport Authority relating to a roading by-pass at Mt Messenger. Both Te Korowai and the Trust agreed that the project is significant for Ngāti Tama. Te Korowai argued that this meant it was integral that the deal was negotiated by duly elected trustees. The Trust argued that delays in negotiations following a re-election posed permanent risks to the deal. The issues for the Court were threefold: (1) Does the Court have jurisdiction to consider the matters raised by Te Korowai? (2) Assuming the Court has jurisdiction, should injunctions be granted to require fresh elections to be held and to restrain trustee decision-making in the interim? (3) If injunctions are not required, should any other steps be taken now? **Held,** injunctions sought not granted. Te Korowai and the Trust agreed that the Court has jurisdiction to grant injunctions to enforce the Trust Deed. However, the Court noted it would be appropriate for a beneficiary of the Trust to be the applicant and that Mr White had consented to being named as the applicant to address this issue. This issue included consideration of the fact that the Trust is constituted over General land owned by Māori following the 2019 decision of the Appellate Court in *Moke*. While the Court considered there were serious questions to be tried regarding the recent trustee elections and the beneficiary register, it did not consider that the balance of convenience favoured the granting of an injunction. This was because the Court considered that the outcome of the elections could be relied on. The Court also considered that the delay caused by fresh elections could impact the potential Mt Messenger deal being negotiated between the Trust and NZTA. While the Court considered that it was hard to assess whether the delay caused by fresh elections might result in NZTA walking away from these negotiations, it considered that the potential that NZTA might walk away was enough to favour not granting the injunctions. The Court also considered that the interests of justice favoured not granting an injunction. In coming to that conclusion it discussed the delay in filing the application, which it noted could have been done much earlier, and which may have allowed the issues to be resolved before the election progressed. Delay also impacted the registration issue as the issue with registration happened 12 months ago and could have been resolved before the election. The Court directed the trustees to file a written report to the Court about how the Membership Committee determines eligibility to be a beneficiary of the Trust. The Court also noted that there is clearly division within the iwi regarding the Mt Messenger project. The Court noted that there is a live question regarding

	whether iwi approval is required for the project, which will turn on whether the transaction constitutes a major transaction under the Trust Deed. However, given strong feelings held by some iwi members regarding the project, the Court asked whether the trustees would consider seeking iwi member approval of any arrangement with NZTA regardless of whether it constitutes a major transaction or not. The trustees declined and while the Court noted it was unclear why, speculated that it could be because of cost or because there was a chance the iwi members would not approve of the project. The Court noted that while the definition of major transaction could be interpreted in a way that meant the project did not trigger the major transaction threshold, it considered that such an approach could result in further challenge and division. It therefor encouraged the trustees to consider whether the prudent course was to seek iwi member approval of any arrangement agreed between the Trust and NZTA. The Court further noted the cost of inquiring into what the iwi members think of such a significant issue would be relatively insignificant compared to the certainty that would result from gaining an understanding of what the iwi members think.

Rehearing – granted – out of time – notice insufficient for original application

Phillips v Paul – Mangorewa Kaharoa 6E3 No 2 Papakainga 15A2A

(2019) 216 Waiariki MB 54 (216 WAR 54)
23 July 2019

Report by Sam Taylor

Overview and result

Application for a rehearing of an application to create an ahu whenua trust granted. The applicant did not receive sufficient notice of the court sitting or of the meeting of owners discussing the establishment of the trust.

Rehearing – application out of time – rehearing granted – notice of original application was insufficient	
Date	23 July 2019
Case	*Phillips v Paul - Mangorewa Kaharoa 6E3 No 2 Papakainga 15A2A* (291 KB PDF)
Citation	(2019) 216 Waiariki MB 54 (216 WAR 54)
Court	Te Kōti Whenua Māori - Māori Land Court
Judge(s)	Judge Coxhead
Earlier/later decisions	
Legislation cited	Te Ture Whenua Māori Act 1993, ss 43 and 215(4).
Cases cited	*Henare v Māori Trustee – Parengarenga 3G* [2012] Māori Appellate Court MB 1 (2012 APPEAL 1); *White v Potroz - Mohakatino Parininihi No 1C West 3A2*

	[2016] Māori Appellate Court MB 143 (2016 APPEAL 143).
Overview and result	Application seeking a rehearing of an application to create the Mangorewa Kaharoa 6E3 No 2 Papakainga 15A2A Ahu Whenua Trust (the trust). The first applicant is an owner in the land and claimed that she had not received proper notice of either the meeting of owners, called to discuss the establishment of the trust, or the court sitting that led to orders establishing the trust. The second applicants filed support for the application and also argued that the notice for the meeting was inadequate. The respondents disagreed with the alleged lack of notification and submitted that the meeting was advertised sufficiently in the newspaper. The applicant, as she was unaware of the proceedings, filed her application for rehearing out of time. **Held,** the application for filing out of time was accepted and the rehearing was granted. The applicant filed the application as soon as she became aware of the situation. Given the timing, she could not have filed in time. The Court accepted that the advertisement in the newspaper was in line with standard procedure but thought that it was not sufficient in these circumstances. The owners in the block are closely related to one another and are aware of each other's contact details, therefore the Court could see no reason why more effort could not have been made to notify all the owners. While the Court noted that an ahu whenua trust will provide for better administration of the land block, it must be properly constituted and account for the opinions of as many of the owners as possible. The proceedings showed that there are owners who feel strongly about the whenua and wish to take an active role in its management, yet they were not provided an opportunity to participate in the decision. The rehearing was granted to allow for all opinions to be taken into account. The Court directed the parties hold a meeting of owners to discuss management of the land going forward and election of trustees, if necessary. The Registrar was directed to advertise the new meeting of owners in newspapers multiple times and to ensure that letters were sent out to all parties affected.

Occupation order – granted with conditions

Faulkner - Ohuki 1C Sec2

(2019) 183 Waikato Maniapoto MB 45 (183 WMN 45)
16 July 2019

Report by Sam Taylor

Overview and result

An application seeking an occupation order granted with conditions.

Occupation order – occupation order granted with conditions – avoiding partial termination of whānau trust – vesting in trustees	
Date	16 July 2019
Case	*Faulkner - Ohuki 1C Sec2* (277 KB PDF)
Citation	(2019) 183 Waikato Maniapoto MB 45 (183 WMN 45)
Court	Te Kōti Whenua Māori - Māori Land Court
Judge(s)	Judge Stone
Earlier/later decisions	
Legislation cited	Te Ture Whenua Māori Act 1993, ss 2, 17, 67, 328 and 329.
Cases cited	*Bhana v Paniora – Wairau North 1B2C* (2013) 69 Taitokerau MB 139 (39 TTK 139); *Whaanga v Niania – Anewa Block* (2011) 2011 Māori Appellate Court MB 428 (2011 APPEAL 428); *McCarthy – Utakura No.9* (2008) 124 Whangarei MB 84 (124 WH 84); *Larkin – Wairau North 2F1* (2008) 124 Whangarei MB 90 (124 Wh 90); *Milner – Takahiwai* (2008) 124 Whangarei MB 95 (124 Wh 95).
Overview and result	An application by the trustees of the Wiringi Faulkner Whānau Trust (the trust) for an occupation order over 0.4532 hectares of the Ohuki No.1C Sec Block (the block). **Held,** orders granted conditionally. The Court was satisfied with the trust's effort in notifying the owners on the block. In particular, the trustees took additional steps to seek consent from owners who had not attended the meeting of owners that was held to discuss and consider the application. The trustees satisfied the requirement that the owners needed to understand that the occupation order would pass by succession and for a specified term, that being a term that would expire on the passing of one of the trustees' last surviving grandchildren. The Court considered there was a sufficient degree of support as owners who hold a majority of the shares in the block supported the application. Although the Court noted that those owners do not represent a majority of owners by absolute number, only the Cotter shareholders do not support the application and the Cotter whānau gave no reason for their opposition. The Court also noted that a majority of the trustees of

	the Matapihi-Ohuki Trust, the administrative structure responsible for the block, signed written consents for the application. The trust proposed to have an occupation order over 0.4532 hectares. While the Court was generally satisfied that the area sought by the applicants was justified based on their interests, it had concerns as to whether the area sought properly reflected an appropriate part of the useable area of the block (only 75% of the overall land area was considered usable, however, the proposed area was determined based on 100% of the land). The Court considered this issue in relation to the assessment regarding the best use and development of the land. The Court noted that some flexibility in the area of the occupation order is required to fit within the Trust's broader scheme for the block. Therefore, a range for the area of the proposed occupation order will be from the minimum lot size to 0.4352 ha. This range will provide certainty to the applicants that they have the right to occupy part of the block, while also giving flexibility to the trustees to make sure that part is appropriate in the broader scheme. The Court overall considered residential use was the best overall use and development of the land and the application supported this use. While the Court acknowledged that an occupation order in this case would mean that other owners of the block would lose the right to utilise that particular area, it noted that is the natural consequence of an occupation order. The request for the occupation order in this case was unusual in that the occupation order would be vested in the trustees of the Trust. Typically orders are granted in favour of named individuals and only in individuals who hold interest in the block. However, the Trust was reluctant to partially terminate so that the order could be granted for a particular owner because the Trust was established to ensure that the land interests of Kahurangi Wiringi were not fragmented. Partial termination of the whānau trust would be contradictory to this purpose. The Court was satisfied that the trustees understood the implications of the law and considered it was sufficient that the trust, through the trustees, intended to build on the land and share with the whānau. The Court made conditional orders vesting exclusive use and occupation of an area no less than than the minimum lot size and no more than 0.4352 hectares to the trust. The trust was to obtain from the Matapihi-Ohuki Trust, an indicative sketch plan of the size and location of future occupation orders over the block and file it with the Court no later than six months from this order. The Court would then need to be satisfied that the proposed size and location of the occupation order

	in favour of the trust was somewhere within the size directed. The order would end and be cancelled if the trustees did not establish or begin the establishment of a dwelling on that area within five years of this order. It would also end and be cancelled on the death of the last surviving grandchild of a particular trustee.

Whiringa-ā-rangi 2019 – additional content online

Te Kōti Whenua Māori – Māori Land Court

Procedure – strike out – variation to roadway order – untenable – *Ohinemango Lands Trust - Waikawa Pahaoa 1B & 1C 2C 1B* (2019) 223 Waiariki MB 78 (223 WAR 78) - Toni Love

Chief Judge's powers – succession – whakapapa record – directions as to further evidence – *Kapua – Estate of Ngamotu Paora* [2019] Chief Judge's MB 1162 (2019 CJ 1162) - Toni Love

Rehearing – refused – insufficient grounds – *Selwyn v Whakatōhea Māori Trust Board – Opape 1A19B* (2019) 220 Waiariki MB 94 (220 WAR 94) - Reto Blattner de-Vries

Alienation – vesting – gift to whanaunga – *Reedy v Atkins* – Waitangi A1A1 (2019) 76 Tākitimu MB 54 (76 TKT 54) - Reto Blattner de-Vries

Trusts – review of trust confirmed – trustee removal dismissed – *Puohotaua v Cribb* (2019) 402 Aotea MB 230 (402 AOT 230) – Sam Taylor

Trusts – review of trust – lease of land – reasonable rent – *Jones v Ratahi – Ngātitara 26B* (2019) 403 Aotea MB 276 (403 AOT 276) – Toni Love

Trusts – administration of whānau house – conflict between will and terms of trust – *Ngamotu – Karatia 3B2A2B2B and others* (2019) 223 Waiariki MB 44 (223 WAR 44) – Reto Blattner de-Vries