

THE STANDING SENATE COMMITTEE ON ABORIGINAL PEOPLES

EVIDENCE

OTTAWA, Tuesday, October 17, 2017

The Standing Senate Committee on Aboriginal Peoples met this day at 9 a.m. to study the new relationship between Canada and First Nations, Inuit and Métis peoples.

Senator Lillian Eva Dyck (*Chair*) in the chair.

The Chair: Good morning. I would like to welcome all honourable senators and all members of the public who are watching this meeting of the Standing Senate Committee on Aboriginal Peoples either here in the room or listening via the Web. I would like to acknowledge for the sake of reconciliation that we are meeting on the traditional unceded lands of the Algonquin peoples.

My name is Lillian Dyck, I'm from Saskatchewan and I have the honour and privilege of chairing this committee. I will now invite my fellow senators to introduce themselves, starting with the deputy chair.

Senator Patterson: Dennis Patterson, Nunavut.

Senator Raine: Nancy Greene Raine, British Columbia.

Senator Doyle: Norman Doyle, Newfoundland and Labrador.

Senator Manning: Fabian Manning, Newfoundland and Labrador.

Senator Pate: Kim Pate, Ontario.

Senator McPhedran: Marilou McPhedran, Manitoba.

The Chair: Thank you, senators. Today we continue our study on what a new relationship between the government and First Nations, Inuit and Metis peoples of Canada could look like. We continue looking at the history of what has been studied and discussed on this topic. Today we are glad to welcome Val Napoleon, Law Foundation Chair of Aboriginal Justice and Governance and Director of Indigenous Law Research Unit, Faculty of Law, University of Victoria.

Professor Napoleon, you have the floor. If you could do about a five to 10-minute presentation, then we will have questions from the senators following that.

Please proceed.

Val Napoleon, Law Foundation Chair of Aboriginal Justice and Governance and Director of Indigenous Law Research Unit, Faculty of Law, University of Victoria, as an individual: I am

honoured to be here on these historic Algonquin lands. I want to begin with two quotes. One is from the recent Ministry of Justice principles regarding the government relations with indigenous peoples.

That quote reads:

The Government recognizes that Indigenous self-government and laws are critical to Canada's future, and that Indigenous perspectives and rights must be incorporated in all aspects of this relationship.

The second quote is from the Truth and Reconciliation Commission, recommendation No. 50. That calls for:

... the establishment of Indigenous law institutes for the development, use, and understanding of Indigenous laws and access to justice in accordance with the unique cultures of Aboriginal peoples in Canada.

I have been working on the substantive articulation of indigenous legal traditions for some years, and one of the ways I have begun to think about reconciliation is that rather than continuing a colonial asymmetrical relationship between indigenous legal orders and Canada, we work to develop a symmetrical relationship between indigenous peoples and Canada, which includes indigenous legal orders and Canadian legal orders. And that means rebuilding indigenous law across Canada so that it can do the work that is necessary for law in our societies.

We've worked in partnership with indigenous communities to restate, research and articulate law relating to lands, water and governance, and we've been working with gender in indigenous law and with human rights within indigenous law. It's the human rights lens that I want to use to frame this conversation that we have this morning.

The starting place is that all law, including indigenous law, must do the work of law. Our societies had to deal with the messiness and complexities of collective human life in the past, as it does today; and that within our legal traditions, our processes include substantive constructs for human rights; and that human rights within indigenous law is an integral part of self-government in Canada. The places where indigenous law has been undermined or where there are distortions or gaps -- and in those same places where Canadian law has failed -- are places of violence. And that violence is experienced by those most vulnerable, women and girls and others in our communities. So the task of thoughtfully rebuilding indigenous law in those places is one that is the work of Canada today, if Canada is going to be a multi-judicial, legal pluralistic society, and one with symmetrical relationships between peoples.

You know with the work you do here, and from your own lives in the communities, how central Canadian law is to our understanding of ourselves and how we order ourselves, how we manage ourselves.

Just take a moment and imagine, if everything you knew about Canadian law disappeared or was rendered inoperable to your lives, what a profound disorientation that would have in so far as your understanding of yourself and who you are in relation to the rest of Canada. That loss and the gaps of indigenous law, that's exactly part of colonial history, where indigenous law, as a part of how indigenous peoples manage ourselves, has been rendered invisible or has been undermined.

The work that we do to substantively articulate indigenous law — and I've given an example of one of our reports and some of our other legal resources that we've created — will serve as the foundation for the indigenous law degree program that we're proposing at the University of Victoria. So this is the first of its kind in the world where people will receive an indigenous law degree and a Canadian law degree over a four-year period. It will be taught similarly to how civil law and common law is taught at McGill, with the trans-systemic teaching methodologies. So, as an example, one could have an Anishnabe constitutional law and Canadian constitutional law, perhaps Tsimshian property law and Canadian property law, Cree, Dene and so on. What people that go through the program will be able to do is to draw on the legal resources from more than one legal order in order to solve human problems and conflicts, which is essentially the work of law. The demands for doing this work are many. It's rigorous and complex work. Indigenous law is no more a quick fix for real human problems and complexities than Canadian law is, but it's an essential part of people being a people.

The other aspect that's important to this work is that it be done on a regional or larger scale because the indigenous communities are very small and fracture the larger legal orders that they're a part of. So the scale on which the work has to be done has to consider those kinds of factors in order to ensure, among other things, the ability to deal with power imbalances and accountability.

This is the work that we have been doing. We're particularly concerned with ensuring that not just lands and resources and water and so on are dealt with but that governance, in its fullness and ability to deal with human struggles and realities, is part of the rebuilding that we do.

The other parts of the proposed indigenous law degree program include field schools. We would be taking 25 students a year into it, and it's one way to advance the work of rebuilding indigenous law and one way to substantively work across Canada to deal with the kinds of experiences that people are now having.

I want to give a small example of what happens when we don't do the homework with indigenous law and where our expectations and understanding of indigenous law actually get in the way of indigenous law itself.

Recently, I was at a major national event, and there was an elderly woman who was asked to talk about the laws from her traditions. She explained that she was part of an arranged marriage at a very young age and that, throughout her marriage, she had been disciplined, and that was the indigenous law for her society.

What's important about looking at that incident is to understand how, as someone who was asked to speak to indigenous law, the way that she is going to find meaning and dignity is to frame her experience as lawful, as mattering to law.

The problem is that, when we just have declarations of law without the background and the homework being done about the legal resources and principles and processes to draw from, law by declaration doesn't allow the kinds of accountability and fullness and problem solving that we need.

A declaration of that similar kind about Canadian law wouldn't stand. People would know that there are legal resources. You pose a question, and you draw on those legal resources to come up with a response, which is legitimate, according to the people's legal order. What I'm talking about with indigenous law is not going back in time but looking at historic legal institutions and law and looking at

how those can be brought forward in a way that is legitimate so that, when people don't get their own ways, they're able to uphold the decisions anyway.

The kinds of thinking around human rights, indigenous human rights: In our work across Canada, what we found is that, while forms and expression of law differ according to indigenous societies, the problems we experience are universal, but there's also a similarity in terms of the kinds of aspirations that our laws seek. So, just as Canadian law has aspirations of equality and fairness and the things that we aspire to in Canada, no legal order ever lives up to the aspirations, but it's important that a people have them.

For indigenous law, we found that people's aspirations were safety, were inclusion, were fairness. We found that with Mi'kmaq, with Anishnabe, with Cree, with Tsilhqot'in, with Secwepemc, Coast Salish, Dene and others. So there are those aspirations, and there are legal resources in terms of the oral histories. We draw on those systematically and critically to inform the work that we do.

Sally Engle Merry, who is a really important legal scholar, has done a lot of work with human rights in the world, and one of the things that she has argued is that whether one understands themselves as being rights-bearing depends on their experience in the world and the legal institutions in the world. So their experiences with the law enforcement or courts or probation officers or whatever, will determine whether they believe their experiences matter to law. So here's the thing; we have to ask that same question for indigenous law. Are women's voices heard within indigenous law, and, if not, how do we rebuild in order to ensure inclusion? That's the kind of critique, critical work, that's necessary to rebuild those intellectual traditions.

I'm delighted to answer any questions that anyone might have. I think my five minutes are probably long past.

The Chair: Thank you, Professor Napoleon. The floor is now open for the first round of questioning.

Senator Patterson: Thanks very much for your presentation, stimulating presentation that it was.

You talked about developing a multi-juridical regime as part of the new order, and you quote the federal government's principles as fitting in with that. I guess I'll ask what may be simplistic questions about that.

First of all, is there anywhere else in the world where this has happened? Second — and this may be the simplistic question — do you foresee problems of conflict between the well-established body of the Anglo-Saxon Western legal system and its precedents and the new respect for indigenous self-government and laws emerging in this multi-juridical system?

Dr. Napoleon: Thank you. That's an excellent, multifaceted question.

First, on the multi-juridical landscape, in different countries there are to varying degrees some countries that provide constitutional or legislative space for what's often called customary law. There's nothing established that looks anything like the indigenous law degree program that we're proposing or the reconciliation of laws approach that I'm suggesting here.

We have international folks coming to us wanting to look at the work we're doing as well as the kinds of things that we're planning for the law degree program. There's a lot of interest because it is hard work to do.

For instance, in South Africa, the constitutional courts are looking at our methodology because the judges in those courts are not able to adequately deal with the issues coming before them that are rooted in customary law. What they're suggesting is that the kinds of training that we provide now to practitioners, students, faculties and so on are employed in South Africa for those courts.

Insofar as conflicts of laws, if the starting place is the aspirations of law, there are similarities in the kinds of things that indigenous people care about as well as other Canadians. We care about safety in our communities, we care about inclusion and fairness and those come through every legal tradition that we've worked with. There are processes for adaptive management within our legal traditions as well that can be brought forward and added to trans-systemic and comparative processes as being employed at McGill.

The other point on that is that I have spent a lot of time looking at the legal history of the common law and there are points we can also learn from in thinking about our indigenous legal theory and the kinds of struggles that went on in Europe and seeing that there are similarities in terms of what people understand as law, what matters as law, who should be included and so on.

I think that there are differences in form and expression between different legal orders that are societally based, but law has to do the hard work of law in every society. It has to have authoritative decision makers, it has to have legitimate responses, legal obligations, substantive and procedural rights and guiding legal principles. There has to be law and legal processes, so that law can look differently but the work of law is done through those different societal systems.

Senator Patterson: As you know, we have embarked on this ambitious study which we hope will help the government in its ambitious goal of redefining the relationship with Canada's indigenous peoples. You've told us that the key issue is the law and how it has really caused violence and injustice to indigenous peoples.

Our mandate is to make recommendations to the government, and I think we're looking at a time frame within the life of this government for coming up with recommendations that hopefully can be acted on.

My question is this: In pursuit of the lofty goals that you describe and the vision that you have of really transforming our view of law and our legal system, what would you like to see us recommend as a first step in this direction? How do we start? We have an Aboriginal Minister of Justice and you have noted that at least one of the principles released by that minister is very much in tune with your world view. What should the federal government do to move forward on this, besides funding your proposal at UVic? I'm being a little flippant there, but I do think it would be exciting if that got off the ground. What should the government do to start this process off?

Dr. Napoleon: I think the way to begin is to acknowledge that indigenous societies were lawful, that indigenous societies had complete systems of law and to find ways within every part of the government that relates to indigenous peoples or indigenous communities for conversations that allow that breadth

and scope for what's possible at the local level and, where possible, through the different aspects of the government, to support indigenous communities in that rebuilding.

So the starting place of the conversation is that indigenous law existed and that the relationship between indigenous peoples in Canada doesn't have to be entirely defined by Canadian law but that there are other ways of understanding legality that can be brought to that relationship.

I think just creating the intellectual space initially in the legal imaginary of Canada is the place to start, and this is happening in different ways across Canada. Last year, the Federation of Law Societies asked what a lawyer needs to know today about indigenous law in order to be competent.

There's recognition across many parts of our society and parts of Canada of the centrality of indigenous law not just for relationships between peoples but for economies and decisions that have to do with governance, lands, resources and so on. Those relationships matter and the way to deal with them legitimately is to start by acknowledging that indigenous law exists.

Senator Patterson: Thank you.

Senator McPhedran: Welcome, Ms. Napoleon. It is a huge pleasure to see you down there and I know that you're running on tiny amount of sleep because of the time difference in travelling, so that's an extra thank you for that.

I want to frame my question around the visionary leadership of indigenous women in this country and I want to include you in that question as, undoubtedly, a visionary leader. There's really only one explanation for why UVic is going to be the first in the world to offer a dual degree and that explanation has a great deal to do with the leadership at UVic and your leadership in particular, so thank you for that.

I also want to acknowledge Senator Sandra Lovelace Nicholas, who is not able to be here today but is a member of our committee, and leaders like Mary Two-Axe Earley, who have been among the many indigenous women in this country — Sharon McIvor being another who comes to mind — who have led over and over again using the existing legal system, both nationally and internationally, to try and gain justice for indigenous women.

Here's my question. In one of the wonderful resources that you've given to us, you address gender in indigenous law. You said when people say that sexism should not be talked about or that it is an irrelevant issue, we should ask why they are making this claim and who benefits from an approach that leaves gender questions out of the analysis.

In the struggles that I've referenced briefly, one of the key issues that arose over and over again was sometimes a struggle between chiefs, leaders within communities denying indigenous women who were claiming their gender equality and fair space.

How do you see a reconciliation or a use of the Canadian Charter of Rights and Freedoms vis-à-vis indigenous law in these kinds of contested situations?

Dr. Napoleon: I think one of the things that I mentioned was human rights indicators, which is a model used internationally but is useful for indigenous governments to look at, and indigenous women

in particular. I also think there are a number of tools we're creating and that others are advancing to make sure indigenous women's voices and experiences are at the forefront of the conversations.

Part of what happens is that the big issues of self-government, self-determination and so on are often seen as the really important issues and the rest of the issues, whether it's violence against women or other social issues and so on, are women's issues. And those big issues of self-government and self-determination, those are women's issues, and those other issues of the struggles at the local level are everyone's issues. That's the kind of thinking that we have to advance in all of the conversations and interactions, whether it's about child welfare, citizenship or anything else that people are grappling with.

There's also a spectrum, at one end, of violence against indigenous women and girls and at the other end, essentialization and idealization of women's roles in a very narrow way. And all along that spectrum are different decisions that have material consequences on women's and girls' lives, including participation in local government processes and other things, like housing decisions and so on. All law is gendered, and how people experience the effects of legal decisions are determined by what they've been able to have in their lives by the different constraints and so on in their lives.

So that actuality and that reality has to be a part of the considerations about legal processes, legal resolutions and so on. The tool kit we developed is intended to support communities to go through and think critically about indigenous law, to look at where it is gendered and where the outcomes of decisions are different if you're a woman as opposed to if you're a man. It points out that the stand-in for most discussions is the Indian male or the indigenous male. What does it mean and what are the consequences of that for women and girls locally, provincially and nationally? That's part of it.

Senator McPhedran: As has happened in numerous cases in this country, certainly not limited to indigenous communities at all, women within defined cultural communities have had to fight leadership over and over again, very often on issues of violence, including sexual abuse.

So what happens when the process reaches an impasse between the dual systems? Do indigenous women, as has happened, for example, in the Muslim community in Canada, reach out to the Canadian Charter of Rights and Freedoms? Is that where they end up, in that kind of struggle that is contained within a community and where justice cannot be found at that point in time within a particular community?

Dr. Napoleon: Turning toward the Charter or other indicators of processes that allow dignity and agency to women is a part of contemporary interpretations that are necessary for indigenous law where practices have been oppressive or sexist. It's my experience that while there are certainly oppressions and violence within indigenous communities, I don't want to suggest that our communities or our societies are any more violent than anyone else's. But it is nonetheless a part of what women are experiencing.

It's also why, in trying to do this work, it's so important to factor in how to create safety for those voices that aren't currently being heard. I think that if we were able to fully articulate law and legitimate legal processes for indigenous, as well as for Canadian application of law in situations locally, that over time — not necessarily a long time but over time — it would be worked through because people fundamentally want to solve problems. Women certainly want to solve problems. And the reality is that

right now, unless there's space given for that, there will be conversations going on about all manner of things while women are whispering to me about the fact that they are not safe in their communities.

Senator McPhedran: Thank you.

Senator Pate: Thank you, Dr. Napoleon. I want to echo the thanks of others for your work. I'm very much looking forward to seeing these tool kits and examining them because as you're undoubtedly aware, I've used many of your materials in other contexts, both in teaching law students but also in community development work, so thank you for that.

My question is trying to look pragmatically at something you suggested in your keynote presentation at the Broadbent Institute. I loved the image of your grandson and a colleague trying to solve some of the issues.

I was struck this summer in particular when I visited a couple of indigenous communities, met with justice committees and found how colonized the justice committees were. There were attempts to provide restorative justice options, but they were really an overlay of the systems as opposed to an integration of the systems, from my ignorant perspective. I'm wondering what would a process look like for someone who has experienced violence in the community and has been a woman who was trying to escape violence, who wanted it to stop but didn't necessarily believe in the system. How would that look? Many of these justice committees are also dealing with minor charges, not dealing with significant issues in the communities. How could that benefit communities in Canada?

Related to that, we've had lots of discussions about the issue of missing and murdered indigenous women. Right now we have an inquiry. What would a process look like that would incorporate both teachings and legal traditions, or the multiplicity of legal traditions, if we were looking at missing and murdered indigenous women 20 years hence with a group of lawyers and community members who now have this integrated approach?

Dr. Napoleon: Thank you. Regarding the comments about the justice committees, it is true that the forum through which many of the community endeavours takes place looks much like state-fostered forums. It is also often the case that what people are trying to fulfil through those forums are historic legal obligations. So when I've asked people why they're doing the work that they've been doing and why they've been doing it for 20 or 25 years, it's because they are fulfilling historic legal obligations and that's been the only way they've been able to do it.

Having said that, the rebuilding work of indigenous law is complex and it takes time, especially if there are gaps in a community. It takes at least 12 months for us to produce a law report on one question. For instance, we did work with communities on harms and injuries, and this would apply to the violence question. We start with the oral histories and the stories, and we ask the specific legal questions of those oral histories and stories, so asking what the legitimate response to harms and injuries in this legal tradition is could be a starting place. You critically and systematically analyze the oral histories so you have a body of materials that you then synthesize into the authority of decision makers, legal responses, obligations, rights and so on. So you have a comprehensive understanding of what people do in legal response to those kinds of problems.

The next step is to look at how to begin to implement those things. That's where you've got to consider questions of safety. That's where you've got to consider alliances between communities to

allow some distance around people who are in danger or who have been injured. That's where trauma-informed responses and so on have to be brought into play.

I think with the National Inquiry into Missing and Murdered Indigenous Women and Girls, which is doing important work and is certainly looking at the failures of Canadian law and those processes, asking the questions about indigenous definitions of rape, sexual assault and sexual violence and posing them through a rigorous indigenous legal methodology would inform where people could go into the future. In our oral histories, when you look back 20,000 years, we've had to deal with sexual violence so we can learn from that in terms of principles and processes for today. Where there were sexist practices, then we have to change them today, which is drawing on the Charter and other experiences around the world.

Law is a living, dynamic process over time, and indigenous law has to be similarly understood in its fullness and complexity.

Senator Enverga: Thank you for your presentation. I have learned a lot of things from you.

My question is more on self-determination. The Royal Commission on Aboriginal Peoples viewed self-determination as the basis for indigenous governance and argued that Aboriginal people have the inherent right to self-government within Canada.

Can you tell me, please, what relationships, institutions or activities are required to grow and advance indigenous communities' aspirations for self-determination and self-government? Can you also let us know how the relationship between indigenous law and Canadian law would help in this matter?

Dr. Napoleon: Thank you.

Senator Enverga: Could you let me know how self-determination in indigenous law and Canadian law working together would help the community?

Dr. Napoleon: Yes. So if we understand a people as a society, in order to be a society we had to be able to manage ourselves, just as everybody else around the world had to be able to do that. One way to understand law is as a distinct mode of governance. Law is a part of how Canada governs itself. It's a way that Canada and Canadians understand themselves as lawful people.

For indigenous people to understand ourselves as lawful peoples means that we also have to be able to see our legal histories, the full scope of our law and legal processes and legal institutions and be able to draw from those, along with those available in Canada. So Canada will be richer for indigenous legal traditions. Citizenries will be expanded because the way of working with indigenous law that's inclusive and builds citizenry, is about intensive democracy.

It's something that not just indigenous people should do but all Canadians should do. Every Canadian should have a deep understanding of the power dynamics that surround their lives and have a way in and understand themselves as rights-bearing in Canadian law. That's what we need for indigenous peoples as well.

I think that's how I understand self-determination. We have to build it. We have to create it, and it's not going to happen tomorrow. It's going to take time, so the commitment is just for the first step. It's

just to get the direction right and to not allow for the continued erasure of indigenous law as in the past but to change it. We have that opportunity now.

Senator Enverga: As we try to progress with indigenous law, what would you say to the second, third or fourth generations of indigenous peoples who have already accepted Canadian law? What would you tell them? Are they going to be under the governance of the indigenous law that you are proposing or would they be under a separate law?

Dr. Napoleon: Canada, even without indigenous legal traditions, has multiple legal orders within it operating simultaneously in the same geographic spaces. I'm an indigenous person with Saulteaux legal traditions and I teach Canadian law. We're able to draw on more than one legal order to do the work that we have to do in the world. And there may well be indigenous peoples who decide that what they would prefer is not to maintain those kinds of relationships with their own histories but to take on other ways of being. That's the freedom that they have, as human beings, to do so.

Senator Enverga: Thank you.

Senator Raine: Thank you very much for a very thought-provoking presentation this morning. I think it's hard for those of us who don't have a legal background to totally wrap our heads around it, so I do have some questions. Over the last six to eight years, I've come to understand that there are as many differences among First Nations as there would be among the various nations that make up Europe. I'm quite sure there are also a lot of differences among the different legal systems historically in those First Nations.

So when you talk about indigenous law, are you saying that the commonalities among the many First Nations should come together and be added to the commonality of British common law and the French laws that are currently governing in Quebec? So the totality of all of these legal thoughts, then, would make up a greater Canadian law? It seems to me like there needs to be some kind of hierarchy. In the end, which law are you accountable to no matter who you are as a Canadian?

I see the real value in bringing indigenous legal principles, from whichever First Nation they come, to the greater pool of understanding in the totality of Canadian law, while at the same time respecting that each community would have certain kinds of traditions and customs that are theirs and theirs alone. Is that how it would work?

Obviously, in the work you're doing, you must reach out to all of the different First Nations for input if you're striving to have one indigenous law, or are you not? Is it that all of them fit in somehow? I almost need a kind of a chart to describe it because the task you're taking on is enormous.

Dr. Napoleon: Yes. We use the definition actually set out by the Royal Commission from the earlier reports about what the group is that you're working with, and it's not individual communities. It's a legal-order scale.

For instance, there are seven communities within the Tsimshian people. The Tsimshian linguistic groups also includes the Nisga'a and the Gitksan. So there are similarities between those peoples. The other thing to keep in mind is that there are different kinds of laws, those that have to govern the mundane and those that have to cover the more challenging areas of our lives. So different laws will require different kinds of considerations because of that relationship with Canada. So the Nisga'a

modern-day treaty, for instance, has some laws where Nisga'a law is paramount and some laws where either B.C. or Canadian law is paramount. That's an arrangement that people were able to organize and negotiate and put into practice.

Again, that's at the legal-order scale, so it's not small, individual, 600 communities across Canada. For the larger groups like the Cree or the Anishinabe, what makes sense is how people are already working, either regionally or in an alliance model.

So there are different possibilities. Canada and provinces already have a multitude of relationships with indigenous peoples for everything that you could possibly imagine. Their relationships are already there. So some of the work is figuring out how to make more sense of all of that in a way that allows for a more fundamental appreciation for who indigenous peoples are as peoples. What I'm not advancing is a pan-indigenous model, but what I am advancing is that the starting place for conversations is that indigenous peoples had law that, in its fullness and scope, managed all aspects of human lives, that, at the bare minimum, included authoritative decision-makers, legitimate legal responses, substantive and procedural rights, obligations and guiding legal principles in order to deal with human conflicts when they arise.

So the way that that looks will be different according to the different societies, but there are a lot of similarities too. But the work of the law is the same. I compared, for instance, Gitksan law with Canadian law, a Canadian court process with a Gitksan feast process. The processes look really different. The expression of law is different, but the work that law did was the same. It's about some starting places and then to figure it out as we go forward.

Senator Raine: Just following up on the example that you gave in the beginning of the Tsimshian group. The Nisga'a was under that, but now the Nisga'a have a treaty. They've established self-government and their own laws. Now, does that make them above the Tsimshian?

Dr. Napoleon: No.

Senator Raine: How does it fit in? It's evolving at different speeds, kind of.

Dr. Napoleon: We've been kind of freeze-dried since colonial history. That's a legal term. There's a Tsimshian linguistic group. There are a number of linguistic groups; like Athabaskan and Algonquin linguistic groups, in Canada. Within that, there are different peoples. Within the Tsimshian linguistic groups, there are, as I said, the Tsimshian peoples on the coast and the Gitksan and the Nisga'a. How that's going to develop over time, just because of scale and numbers of people, there are a lot of questions, and I don't know what kinds of arrangements people will arrange with each other in terms of legal processes or other questions that have to do with scale. I don't know how that will play out. But it's already there, and it's already working.

Senator Raine: I'll have another question later.

The Chair: Second round?

Senator Raine: Yes.

Senator Christmas: Thank you, Ms. Napoleon, for coming all this way to share your wisdom with us. I'm very heartened, and my sincerest congratulations to you for the proposed indigenous law degree program. That's very exciting.

I also appreciate your focus on indigenous human rights. I found that very interesting. As you know, one of the difficult challenges that we face as indigenous people is discrimination and racism. Can you explain how indigenous law deals with acts of discrimination and racism, both within indigenous communities and outside of indigenous communities?

Dr. Napoleon: So I developed a course on human rights in indigenous law this past summer and taught it in Winnipeg. For that course what the students had to do was to articulate indigenous law from the oral histories that we provided for Cree, for Secwepemc and for Dene legal traditions. There were case studies that they had to apply them to, and what we focused on as the starting place, as the question to ask the oral histories, was on human dignity and agency. One of the case studies was the First Nations caring society case, which is still not dealt with, as you know. We asked how the Cree and the Secwepemc, how that would be dealt with according to those traditions. That was part of the students' assignments that they had to do.

So the proposal for articulating human rights as a part of self-government, as a way to deal with the issues that we have, is relatively new. We're just starting to work with it and to develop materials and workshops for people. We've worked with over 40 communities in Canada. We've trained over 300 people in the indigenous legal methodologies that we've developed, but that's just a start.

What has yet to be done is to support communities at the implementation stage so that, say, Treaty 8 could take on and develop an indigenous human rights law, drawing from the legal traditions in that region. Then there would have to be indicators that are measurable to ensure accountability along with everything else, and there would have to be people and resources so that the whole process could be managed. That's the way that I think we could deal with discrimination internally. We have to define that according to each legal tradition, and I think that can inform how we relate to Canadian human rights law as well.

Senator Christmas: Maybe I'm putting words in your mouth, but I think your work is uncovering the distinctions and differences between different indigenous law traditions. Do any come to mind that intrigued your curiosity about why different linguistic groups have different indigenous law traditions?

Dr. Napoleon: Law is societally bound and created. The kinds of problems that law deals with are universal, but the way that we organize and understand ourselves and our problems is societal, and with the forums through which clans or family groups, whatever the authoritative decision-making groups and processes are, there is always more than one in every legal tradition. There are at least four in every legal tradition. Again, it's back to looking at what is the work that those processes do as opposed to the actual forms and expressions of it.

Senator Christmas: Thank you.

Senator Pate: Could I ask a supplementary question? I am curious. Dr. Napoleon, you raised that your students looked at the First Nations Caring Society. Could you talk about what they discuss and how they discuss resolving an issue that, as you pointed out, with several non-compliance orders has still not been dealt with?

Dr. Napoleon: I started with that because one of the complaints about indigenous legal orders is often that we're going to violate human rights, so this is a case where Canada is violating human rights according to Canadian law. What students were able to do with that case is set out the rights of children, set out the obligations to children, set out the processes. And it's different within every society. For instance, within the — society or Tsimshian society, the child belongs to their clan, so you have to account for that. It was sorting out the processes and what the steps are. In the range of oral histories that they threw drew on, what are the different kinds of legitimate legal responses that could be applied? That's what they had to articulate.

The other case study was the missing and murdered indigenous women. They had a series of oral histories to draw on, some of which could be understood as counter-stories where there is gender discrimination and sexism, and law is always about interpretation; it doesn't interpret itself. They had to prepare a presentation from the different legal traditions to deal with gendered violence.

Senator Pate: Would it be possible to get copies of some of those if the students are amenable?

Dr. Napoleon: Most of it was on flip charts. They were written, but this was in an intensive classroom that went from 8:30 in the morning to 5 in the afternoon, so it wasn't typed up. But we have other materials that cover similar ground.

Senator Pate: Has that been left with the clerk?

Dr. Napoleon: Yes.

Senator Boniface: Senator Christmas covered part of my question, so I would like to get information around implementation. I appreciate that the stage you may be at might not be quite at implementation. What kind of take-up are you getting from organizations? I'm thinking about large regional organizations or treaty organizations, or are you starting out community by community?

Dr. Napoleon: For the indigenous law degree program, we have support from the AFN and every other law school in Canada. With the actual work of indigenous law, we work by invitation. We start with training local people in the methodologies that we're going to employ. So it isn't experts coming in, asking people to tell us what their law is, which is a hard question if you think about a Canadian family and someone coming in and asking them to tell them about Canadian law. It's not an easy process. So for the take-up, we can't keep up with the demand that we have, either in Canada or elsewhere. And with the implementation, the people that are moving right now are the — and the Tsilhqot'in National Government. There are others who are almost there, and we'll see what will happen as people go forward with that.

Senator Boniface: How do you see it from an urban setting? How do you see trying to integrate the two? How would that work?

Dr. Napoleon: That's such an important question. There are different ways to think about it. One is thinking about everyone in the city as remaining fundamentally connected to wherever they come from. That's not particularly helpful when people have lost those connections, so I think a more interesting question would be to ask what is it that makes a people, and I think there are two things. One is when people start to generate informal law or processes through which they are able to anticipate, at least on a

general basis, the behaviour in their larger group. And the second is when diverse oral histories become collective oral histories.

If we look at groups, indigenous peoples in urban cities, we can ask many of the same questions and go through the same processes as people who are outside of the cities. But it means being more attentive to the kinds of oral histories that can come in, which we have to do anyway. Working in Cree communities, some of my relatives are Mohawks that came across Canada in the 1700s, people say, “That’s a Mohawk story,” but we’ve been telling it, so when does it become a Cree story? We have that exciting international experience. We need to understand it better and factor it into the way we work.

The Chair: Before we move to second round, I’m afraid I have to ask a question. As you know, our committee is studying what the new relationship between Canada and the Aboriginal peoples could like. You said we have to think about what makes a people. People get together to generate law, how to run themselves and so on. When you think about what a nation is, would you consider that that type of process, where you get together to generate those laws, is the fundamental activity that builds a nation?

I think one of the difficulties we have, as you well know, is that indigenous peoples in Canada are ruled by the Indian Act, the elephant in the room, so how do we generate our own laws within what could be considered a nation when we’re also faced with the Indian Act, which is contrary to the concept that indigenous peoples are equal and self governing?

Dr. Napoleon: I think the kind of law people generate when they live together is both formal and informal, and both of those, to varying degrees, are going on in urban settings. So that’s one thing.

I think what’s really important about your question is that in doing this work, we have to appreciate that there are historic legal institutions and law, and there are contemporary legal institutions and law. The work of implementation is going to be about looking at how might we draw from the historic legal institutions and law to inform present-day institutions and law.

Indigenous peoples throughout history have been very pragmatic, making the kinds of decisions they had to make in the context that they were placed in. There are contradictions between contemporary institutions and law and the historic, which generate much of the conflict that’s experienced in our communities now. For instance, if you’re a person who has been informed by the historic legal institutions and law, that’s your understanding of what law is and other people don’t have that, you’re going to be at cross purposes unless you have a productive and constructive way to figure out and reconcile the past with the present.

I think that it’s absolutely possible. I think that these are the kinds of things that people are struggling with and it’s exactly the work that has to take place. Otherwise, we’re going to have continued conflict.

The Chair: Do you have any suggestions on how you would reconcile the conflict between past and present? Is there a process or an appeal body? Where does one start that?

Dr. Napoleon: I think it starts by substantively articulating the historic and the contemporary. So the work we’re doing right now is focused on the historic legal institutions and law, and that’s the authoritative decision makers and so on that I have mentioned. I think it is at the implementation stage,

which we haven't yet started, where the work will have to be in order to figure out what the contradictions are and how they can be dealt with.

Pretending that the contradictions aren't there isn't going to help people but we do need to figure out how to move from one to the other.

The Chair: Thank you. We'll now move to the second round.

Senator McPhedran: Let me just pick up on an approximation of your last sentence.

We have to find a way to move from the colonial to the de-colonial. So I want to preface my question, which is about law and changing law, with an additional acknowledgment of your visionary leadership and education and legal education, which has carried over well beyond law schools in this country. As part of the indigenization program at the University of Winnipeg, where I'm tenured, I wanted to bring to the committee's attention your comic book, *Mikomosis and the Wetiko*, which I teach and use extensively and I think Senator Pate does as well, and this is actually a very serious issue in this comic book. It's the definition of murder under Cree law versus the colonial law, and it is an amazing teaching tool for all ages and all disciplines. I just want to thank you so much for this and I'm going to pass it along so that members of the committee can get a flavour of it. It's not among the materials that you tabled with us but I keep copies in my office, so it was something I could bring down.

Here is my question: In the whole process of decolonization and picking up on the excellent questions from our chair, my question has two parts. The first is that there have been a number of speakers fairly recently — the most recent, to my knowledge, is Phil Fontaine, but not just Dr. Fontaine — who have spoken about the need for a new law in Canada that stipulates three founding peoples as distinct from the usual French and English description. I'd love to get a sense from you about whether you would see that as a positive force for decolonization taking us a step like that in law.

My second question related to the law very much picks up on the materials that you did table with us in dealing with gender and sex equality, that not being the same thing necessarily, and it relates to the current Bill S-3. This committee worked together and proposed amendments to clean up the extensive discrimination that comes out of the Indian Act directed at registration for indigenous women in this country. Those amendments have been removed by the government and the message has come back. We have yet to deal with it here in the Senate but we're right in the midst of that process and I would very much appreciate your thoughts on the value and potentially constructive nature of a thorough cleaning up of the sex-based discrimination in the Indian Act, acknowledging that it is something that many of us would like to see disappear altogether. Our current situation is facing us with the bill actively suspended at this stage but before us in the process.

Where would you see amendments of this nature in the Indian Act in the larger decolonization process for this country?

Dr. Napoleon: So with regard to your first question about the need for a new law in Canada that would more accurately reflect three founding peoples, our focus has been on rebuilding indigenous law from the ground up, with the understanding that that rebuilding will change the kind of conversations we have with Canada and with everyone else. Right now, what happens is that Canadian law and legal processes become the default because we haven't yet been able to do the rebuilding that's necessary.

I can imagine that, once the indigenous peoples have had the time to do the work that's a part of this rebuilding, turning our minds to something like that could be a useful thing. It is not something I have thought about, though.

On the second question with regard to the continuing discrimination and the Indian Act, the reality is we still have the Indian Act and it should not be discriminating. The kinds of amendments that would prevent it from being discriminating have to be made. As long as it's in force and as long as it has material effects and consequences over people's lives, then the discrimination should be dealt with.

Senator Raine: I wonder if you could expand a little bit on the toolkit you mentioned that they have developed for communities. You mentioned that you go to communities by invitation, so is this a toolkit that is individualized for each community that you go to or is it as a way for them to start or to work through the process at the community level? Could you just describe the toolkit a little bit more?

Dr. Napoleon: So we have developed several toolkits. One is the Gender Inside Indigenous Law Toolkit, which includes a case book. What it sets out are questions, lesson plans, ways to analyze stories with a gendered perspective, ways to ask about power and ways to ask about effects of law, so it's a comprehensive toolkit that provides resources and so on.

Then we have the case book, which is Dene, Secwepemc and Cree stories, and we use that as an example about how one could start analyzing the stories with gender in mind, and that the process that we set out is transferable to looking at other indigenous legal orders.

So we have several of the toolkits. The other is on matrimonial real property disputes. We're hoping to be able to develop more on water and on human rights.

The work that we do by communities is specific to their own legal traditions. So we've been working for some years with the Secwepemc, the Shuswap Nation Tribal Council, and developed comprehensive materials for them and now are turning to governance because that's connected to lands and resources. On the North coast, we have been working with lands and resources and water with two Tsimshian communities. Those reports are finished. They now want to work with other Tsimshian communities on dispute resolution. So we will work with them to develop that research on dispute resolution, involving all of their oral histories and interviews with peoples in the communities and focus groups and so on so that, at the end of that project, which will be about a year, they will have that resource — they'll own it — and we will have that resource for the indigenous law degree program.

Senator Raine: Thank you.

The Chair: I believe that's the end of second round. I have one final question for you, Ms. Napoleon. Is there a community or communities that you might suggest that the committee visit that is sort of maybe more well on their way to having developed their own legal traditions so that they could then inform the committee as to how that has worked for them developing their own sense of their own nationhood?

Dr. Napoleon: There are different things that have been completed by different communities. It would be terrific if you were able to talk to Bonnie Leonard who is the leader for the Secwepemc, the Shuswap Nation Tribal Council. There are other communities that have done things like develop environmental assessment tools, which they have been applying to different kinds of industry-scale

developments on their lands. There's a community of Gitga'at, on the North coast. It's also called Hartley Bay. Spencer Greening would be another fantastic person for you to talk to. There are amazing people out there that are in the trenches doing the hard work of law.

Senator Pate: Picking up on Senator Dyck's last comment, are there any that you can think of that are looking at what are often thought of as criminal law areas that would be good for us to speak to or to visit or to hear from?

Dr. Napoleon: Criminal initiatives that are underway take place within the allowable spaces of the Canadian justice system so far, and it's an interesting conversation. One of the things that we've advocated is that part of law includes the full scope of legal responses to harms and injuries, including serious harms and injuries and serious responses. We're not advocating a return to those practices necessarily but to think about the authority through which people can imagine and then act on them.

The question we ask is: What's the efficacy of an incomplete legal order insofar as the intellectual health of that system and insofar as people's understanding of their own law and so on.

There's a paper called from roots to renaissance that I and a colleague authored that addresses that question and provides a history about those projects in Canada.

Senator Patterson: Thank you very much for a most stimulating presentation, professor. I just wondered if I could ask you a very concrete question, and that is: Where is the UVic's proposed law degree program standing right now? I think we're all most interested and impressed by this proposal and how it would aid in the goals you've suggested for Canada. You've said that there is hope that this program will start in September 2018.

How does that look right now and where does the decision-making lie for establishing this program, may I ask?

Dr. Napoleon: Given the lead time that it takes for a program of this size and calibre, we're getting very close to the point of having to start talking about September 2019 unless we have some approvals, federally and provincially, quickly. We're seeking a champion within the federal government. We've talked to people in finance, within the Indigenous Affairs, and infrastructure and across, and we're asking for a line item in the next 2018 budget.

We're hoping that the federal support will be to enable us to build a new wing onto the law school. We had extensive conversations with people at the province, with the minister of advanced education and with the deputy premier and so on. There's support there, but we don't yet have the approval to go ahead.

The provincial support would be for operating, would be for student support and faculty and so on. Then we have a lot of ongoing asks with a number of private sources as well.

We have been talking to a lot of people for some time now, all of whom are very supportive, but we don't yet have any action.

Senator Patterson: Thank you.

The Chair: On behalf of the committee, Professor Napoleon, thank you for the taking the time to appear today to do your presentation and answer the variety of questions. Clearly, you're developing a program that's tremendously exciting, and, having worked at a university before as an administrator, I know these things take a lot of time. I, and, I'm sure, all of the committee members, wish you the greatest success, that the law program is up and running soon rather than later. We may get back to you with other questions. I believe our clerk is trying to get extra copies of your graphic novel, which I'm sure all of us will be most interested in having a look at. With that, thank you again, and this meeting is adjourned.

(The committee adjourned.)