

Submission on the Re-establishment of the B.C. Human Rights Commission

Dr. Val Napoleon, Law Foundation Professor of Aboriginal Justice and Governance,
Director of the Indigenous Law Research Unit
October 16, 2017

The Indigenous Law Research Unit (ILRU), housed in UVic's Faculty of Law, is the only dedicated Indigenous law research unit in Canada. The ILRU partners with Indigenous communities to articulate their own legal principles and processes, on their own terms, in order to effectively respond to today's complex challenges. The ILRU also works to deepen broader engagement with Indigenous law through the delivery of workshops and the development of academic and public legal education resources. The ILRU team develops and employs innovative methods for engaging with the full scope of Indigenous laws and critical Indigenous legal issues, including legal questions on Indigenous Human Rights Law.

Around the world there are continual struggles and conflicts involving land, economies, resources, poverty, health, and social justice. Complicated and inter-related dynamics of power, oppression, racism, sexism, and violence play out globally, and in many contexts. Through time, the concept of human rights has developed and evolved, and is still evolving – arguably within every legal order, including Indigenous legal orders. The concept of human rights is founded on respect for the dignity and worth of each person, and the laws that emerge from this concept aspire to building and maintaining safe and inclusive communities for all citizens. In this sense, human rights laws are an integral part of conceiving and building governance and healthy citizenries.

In its current form, the articulation of human rights in British Columbia is informed solely by Canadian and, to a lesser degree, international law. Yet, British Columbia is home to many legal orders, such as the Secwepemc, Tsilhqot'in, Tsimshian, Cree, Dene, and Coast Salish legal traditions, among many others. We know that the legal traditions that are rooted in, and remain important to, Indigenous societies in British Columbia contain rich information on how to understand and measure human rights, and how to uphold these rights and protect citizens, particularly the most vulnerable of citizens in these societies.

A new B.C. Human Rights Commission will be tasked with addressing those complex intersecting conditions that foster and preserve systemic discrimination. Colonialism, including the imposition of colonial law on Indigenous peoples in Canada, is a fundamental condition that continues to foster and preserve such systemic discrimination against Indigenous people. In the context of Indigenous laws, colonialism has been articulated through its historic and contemporary erasure of the Indigenous legal traditions operating within British Columbia. It has impacted the operation of Indigenous law, leaving gaps and distortions in some contexts, and denying its existence in others. This is the backdrop that enables the substance, expression and the fulfillment of provincial and federal human rights laws, such as dignity, safety and agency, to ignore Indigenous intellectual traditions and resources.

A commitment to substantive human rights and reconciliation, thus, includes a commitment to doing the hard work of seeing, understanding, and making space for Indigenous legal traditions. There must be political space for Indigenous laws, to provide Indigenous communities entry points within political conversations and processes to express themselves, on their own terms, and using their own laws. There must be, at the very least, the aspiration to provide legislative space to enable the engagement with Indigenous legal traditions, and the articulation and implementation of Indigenous human rights laws within specific legal contexts and across legal traditions. At a systemic level, this would foster and promote the creation of symmetrical relationships of respect across legal orders in British Columbia today.

Actualizing these aspirations, which would build a robust, inclusive human rights commission, will take focus, vision, and resources. The first challenge is in rebuilding Indigenous legal systems in the spaces where Canadian legal systems have failed Indigenous communities and where Indigenous legal systems have been undermined and are not functioning. Human rights and dignity need to be posited as core elements of law – as integral elements. The new B.C. Human Rights Commission, thus, must provide space and support to Indigenous communities, to articulate and restate their human rights laws within their legal traditions, toward the goal of implementing human rights laws that can address systemic and individual injustices, and build healthy, safe, and inclusive communities.

The Indigenous Law Research Unit starts with the premise that Indigenous laws need to be taken seriously as laws. This means employing methodologies that are rigorous and transparent. All conclusions, inferences, and interpretations in ILRU reports are carefully cited to their sources – often oral narratives, but also ethnographic resources, or interviews that we have conducted with community members for a particular Indigenous laws research project. In part, this is to move beyond the simple declaration of laws (a statement about what is law), to uncovering the legal principles and processes that actually help resolve conflicts between individuals, as well as within and between groups. This moves all of us beyond essentialism, absolutism, and fundamentalism, enables the practical application of law to contemporary issues, and recognizes the dynamic and flexible nature of all law.

To that end, I recommend the following for this work. It must be community-led, but done at the level of a legal order (for example, Secwepemc or Tsimshian). Working regionally or with alliances will foster the healthy articulation and application of law across many communities. It will also, importantly, minimize the power dynamics that can influence law's application within small communities, which tend to particularly harm the most vulnerable members of communities. In the context of human rights, work should include not just the articulation of historical and existing mechanisms to redress oppressive acts within specific legal traditions, but also what indicators would measure the aspirations and health of human rights laws within communities today. It will include defining 'discrimination', articulating who is a rights-bearer, and who has legal obligations regarding human rights within specific legal traditions.

The new B.C. Human Rights Commission will be the body directed to expose challenges and end widespread entrenched structures of discrimination through education, policy and public inquiry. In order to achieve this mandate, the Commission must be attentive to Indigenous legal traditions at an institutional level. It is critical that those working on human rights policy and education, and those working directly with Indigenous communities and people have sufficient training and education to engage with Indigenous legal traditions. Failing to do so will reinforce oppressive practices and may lead to increased conditions of insecurity and danger for vulnerable people. People need the vocabulary to engage with Indigenous laws through their work so as not to reproduce power relations that minimize or silence people or the legal mechanisms that might be helpful for resolving a human rights issue.

For example, recently a Gitxsan woman initiated a claim with the Canadian Human Rights Tribunal and successfully argued that she was discriminated against on the basis of gender by her former employer, a Gitxsan organization. This was a complex case that generated deeply felt acrimony and widespread conflict (the resulting settlement is confidential). While recognition of her wrongful treatment according to Canadian law was important, the major concern for this Gitxsan woman was recognition that the behaviour toward her was also wrong according to Gitxsan law. The Tribunal agreed with her and adjourned for one year during which time this woman and her kin, her former employer, and others were to explore how Gitxsan law would apply in cases such as hers. The intent here is not to “retry” her case, but to engage in an exploration of Gitxsan law and its application to similar, but abstracted cases. Pending the result, the Tribunal will either resume the case or close it.

This woman holds a Chiefly name within Gitxsan society. Within decentralized Gitxsan society, a chief’s authority is their *daxgyet* and this enables a chief to maintain their 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, that remains unaddressed can undermine her *daxgyet*, which, in turn, will cause shame and the diminishment of her authority in the Feast Hall (the public political, legal, and economic assembly in Gitxsan society).

At this point, it is necessary to consider several key differences between Gitxsan law and Canadian law as well as how this woman is situated within each legal order. First, in this case, Canadian law is primarily concerned with the protection of her human rights while Gitxsan law emphasizes the obligations both owed to her and by her to others. In other words, this woman needs to be able to continue to fulfil her Chiefly obligations to her kin and others within the community and Feast Hall. While she has distinct legal obligations to others, those others also hold clear legal obligations to her. Second, it is possible to correlate human rights with this Gitxsan woman’s *daxgyet*. Gitxsan law includes individual and collective human rights, and people are accountable to uphold these rights within the social and kinship system rather than to a centralized state. Given this, it is possible to consider *daxgyet* as a human right.

A key element in this case was the identification of the Gitxsan legal issue by both the Canadian institution and those operating within Indigenous law. In the end, it is only resolving this case and

others like it according to Gitxsan law that will ultimately be considered legitimate by this woman chief and other Gitxsan people. Failure to apply Gitxsan law and the singular reliance on Canadian law, thus, will only result in continued hard feelings, conflict within the communities, and, ultimately, the continued erasure of Indigenous human rights law itself.

We need a B.C. Human Rights Commission equipped with people and resources to address complex human rights questions within multiple legal orders. Identifying Indigenous legal issues, as this case demonstrates, is a great first step. However, creating a process that is flexible and dynamic enough to support the application of Indigenous law will also fulfill the very ambitions of human rights law: protecting and ensuring people's dignity, safety and agency in their every day lives. It will enable some to be full participants in a more resonant, fulfilling human rights process. It will enable others to expand their notions of human rights law, and enable inter-societal learning and understanding. And this should be the human rights standard to which we should all aspire and work toward today.

In summary, my recommendations for the new B.C. Human Rights Commission are as follows:

1. The new B.C. Human Rights Commission must make political and legislative space for the engagement with, and articulation and implantation of, the multiple Indigenous Legal Orders in British Columbia in order to meet the aspirations of both human rights law and reconciliation in this province.
2. The new B.C. Human Rights Commission must support Indigenous communities seeking to articulate and implement their own human rights laws to address systemic and individual injustices, in order to build healthy, safe and inclusive communities.
3. The new B.C. Human Rights Commission must sufficiently educate those tasked with human rights education, policy-making and inquiries in Indigenous legal traditions and, more specifically, Indigenous human rights laws, in order to provide the conditions for healthy conversation across legal orders, achieve human rights purposes within all communities, and not perpetuate the erasure of Indigenous laws today.