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ABSTRACT

The living tree doctrine of the Canadian Constitution uses the metaphor of a tree to present the Constitution as a dynamic organism which can evolve over time to accommodate new influences. This essay examines the history of this doctrine along with its possible Indigenous counterparts. In this examination, both the arboreal imagery of such doctrines and their dynamic approach to law are considered. The essay explores the benefits and disadvantages of employing a living tree approach to accommodate Indigenous legal traditions within the Canadian formal legal system.

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INTRODUCTION

> "The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada."
>
> Lord Sankey[1]

> "All the Gitksan people use a common law. This is like an ancient tree that has grown the roots right deep into the ground. This is the way our law is. It's sunk. This big tree's roots are sunk deep into the ground, and that's how our law is."
>
> Chief Gwis Gyen (Stanley Williams)[2]

In many Indigenous societies, the law is inextricably rooted in trees and tree lore. Often endowed with sacred significance and invested with cultural authority, trees offer a powerful symbol of traditions that are at once grounded in the past and flourishing in the present.[3] Trees also have a metaphorical life in Western concepts of law. A notable example of this is the living tree doctrine of the Canadian constitution, which presents the constitution as a dynamic organism which can evolve over time to accommodate new influences.[4] This essay will examine the history of the living tree doctrine, along with a range of legal and cultural practices related to trees among various Indigenous societies in North America. The parallels between the two will lead us to consider how "living tree" jurisprudence might provide a common ground for exploring intersections between foundational Indigenous legal traditions and the Canadian constitution. This essay further argues that the "living tree" doctrine is a preferable approach for Canadian courts to take when considering Indigenous claims, as it can help courts move away from the restrictive "frozen rights" approach when

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[1] *Edwards v Canada (Attorney General)* (1929), [1930] 1 DLR 98 at para 54 [1930] AC 124 [*Edwards* 1930].

[2] Don Monet & Skanu'u (Ardythe Wilson), C*olonialism on Trial: Indigenous Land Rights and the Gitksan and Wet'suwet'en Sovereignty* (Gabriola BC: New Society Publishers, 1992) at 101.

[3] See Michael D Blackstock, *Faces in the Forest: First Nations Art Created on Living Trees* (Kingston: McGill-Queens University Press, 2001) at 42–44; John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at 151–153 [Borrows, *Freedom and Indigenous Constitutionalism*].

[4] See W J Waluchow, "The Living Tree" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) 891.

faced with Indigenous cases,[5] and aid in the incorporation of Indigenous values into the Canadian legal system.[6]

I. A COMPARATIVE AND ETHNOHISTORICAL APPROACH

This essay, which involves juxtaposing and comparing legal concepts from distinct cultures, is an exercise in comparative law.[7] The purpose of employing a comparative approach is not to use legal data from one culture to elucidate or critique comparable data from another. Rather, the aim is to explore possibilities of rapprochement between very different and often-contending legal systems—those of the Canadian state and those of diverse Indigenous cultures—in relation to one common ground: the vital and flourishing earth. There is an underlying presumption that each legal culture is unique and the product of a particular set of social and historical circumstances.[8] The unique nature of legal cultures means that comparative law projects must consider the conceptual frameworks that shape legal sensibilities in a particular society, rather than simply compare specific laws or practices.[9] This perspective informs the present examination of how trees have provided a conceptual and experiential model for envisioning law in state and Indigenous systems in Canada.

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[5] See Borrows, *Freedom and Indigenous Constitutionalism*, *supra* note 3 at 128–156; John Borrows, "Challenging Historical Frameworks: Aboriginal Rights, The Trickster, and Originalism" (2017) 98:1 Can Historical Rev 114 at 125 [Borrows, "Challenging Historical Frameworks"].

[6] See Fraser Harland, "Taking the 'Aboriginal Perspective' Seriously: The (Mis)use of Indigenous Law in *Tsilhqot'in Nation v British Columbia*" (2018) 16:17 Indigenous LJ 21 at 47–50.

[7] In fact, it can be considered an exercise in comparative constitutional law, insofar as it compares a framing model for the Canadian constitution with framing models from traditional Indigenous constitutions. On comparative constitutional law, see Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford: Oxford University Press, 2014).

[8] On the challenge of comparing incommensurable legal systems see Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 5th ed (Oxford: Oxford University Press, 2014); Vernon Valentine Palmer, "From Lerotholi to Lando: Some Examples of Comparative Law Methodology" (2005) 53:1 The Am J Comp L 261 at 265.

[9] See Palmer, *supra* note 8 at 265.

An ethnohistorical approach is employed to provide cultural and historical context.[10] This approach gathers material from a broad range of sources, including written histories and oral accounts, along with traditional practices and artefacts. Such a broad approach is required because ideas about the law are encoded in multiple social and material sites, and not solely in written records. As regards Indigenous legal traditions, the analysis presented here links data obtained through an ethnohistorical approach to current Indigenous viewpoints.

In the case of Western formal legal systems, written resources are abundant. However, when exploring conceptual frameworks, it helps here, as well, to go beyond formal codes and case law to bring broader social histories to bear on the interpretation of particular legal values and constructions. The legal and social antecedents of the living tree doctrine of the Canadian constitution discussed in this essay demonstrate that this doctrine is an expression of longstanding perspectives and practices.

In an essay seeking to promote a greater openness to Indigenous law within Canada's formal legal system, it is important to be attentive to Indigenous perspectives and worldviews. Such attentiveness is essential to a respectful consideration of the cultural traditions and practices of Indigenous peoples. After all, it is not only the formal legal system which needs to open up to Indigenous ways of making and living law, but also formal modes of legal research and writing. In traditional Western legal research, sometimes known as "doctrinal research," legal principles are examined within the context of a state legal system, making use of conventional legal sources.[11] Such a formal approach can work well in a society which compartmentalizes law as a separate domain of knowledge and which privileges written documentation. However, in many Indigenous cultures, legal principles are interwoven with multiple strands of cultural expression and are conveyed and

[10] On the development and aims of the ethnohistorical approach, including its use in Indigenous land claims, see Michael Harkin, "Ethnohistory's Ethnohistory: Creating a Discipline from the Ground Up" (2010) 34:2 Soc Science History 113.
[11] See Dawn Watkins & Mandy Burton, eds, *Research Methods in Law*, 2nd ed (Oxford: Routledge 2018) at 7−17.

interpreted through multiple modes of communication.[12] It is therefore important to explore Indigenous legal concepts within the larger context of what Anishinaabe legal scholar Aaron Mills has called the "lifeworld."[13] This lifeworld includes not only human and sacred domains, but also the interrelated world of plants and non-human animals.[14]

Various contemporary scholars have broken new ground by drawing attention to the presence of deep-rooted Indigenous legal traditions in Canada.[15] While these scholars differ in their approaches, they share a broad outlook on the key considerations that must be taken into account when undertaking research on Indigenous legal systems. The considerations most relevant to this essay are the following: Indigenous laws are often conveyed orally and through non-verbal practices;[16] historical and ethnographic accounts can provide a valuable resource for legal and cultural traditions when used with caution;[17] Indigenous laws can change

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[12] For examples of some of these diverse modes of communication, see Birgit Brander Rasmussen, *Queequeg's Coffin: Indigenous Literacies and Early American Literature* (North Carolina: Duke University Press, 2012).

[13] See Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847 at 850 note 6 [Mills, "The Lifeworlds of Law"].

[14] *Ibid* at 862.

[15] See, for example, Borrows, *Freedom And Indigenous Constitutionalism*, *supra* note 3; CF Black, *The Land is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (Oxford: Routledge-Cavendish, 2010); Catherine Bell & Val Napoleon, *First Nations Cultural Heritage and Law: Case Studies, Voices, and Perspectives* (Vancouver: University of British Columbia Press, 2009); Hadley Friedland & Val Napoleon, *Gathering the Threads: Developing A Methodology for Researching and Rebuilding Indigenous Legal Traditions* (2015–2016) 1:1 Lakehead LJ 16; Aaron Mills, "Miinigowiziwin: All That Has Been Given for Living Well Together: One Vision of Anishinaabe Constitutionalism" (PhD Dissertation, University of Victoria, 2019) [unpublished] [Mills, "Miinigowiziwin"].

[16] As well as through oral forms of communication, such as addresses and storytelling, Indigenous legal principles may be communicated through such non-verbal modalities as ritual, dance, and craftwork. See John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 57; Hadley Friedland, "Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws" (2012) 11:1 Indigenous LJ 1 at 8. Indigenous laws are not necessarily exclusively oral and customary, however, and may also be expressed through formal means. See the examples provided in Rasmussen, *supra* note 12.

[17] Historical and ethnographic accounts of Indigenous culture must be treated with caution because these accounts are usually presented within a non-Indigenous framework and from a non-Indigenous perspective. They also often contain stereotypes of Indigenous culture

over time to accommodate new situations and influences;[18] and Indigenous legal principles and actions are integrated into holistic social, environmental and cosmological contexts—the lifeworld mentioned above.[19]

By juxtaposing a Canadian constitutional doctrine with Indigenous legal principles, this essay aims to highlight the value of making such comparisons. Hadley Friedland has written that, while "Indigenous legal traditions may be deeply meaningful and have great impact on the lives of people within Indigenous communities… outside those communities those traditions are largely invisible or even incomprehensible."[20] Indeed, those who are only able to recognize law in its narrow formal expressions, such as written statutes and a judiciary, may even hold that Indigenous law is non-existent.[21] Given such attitudes, increasing the visibility of Indigenous legal systems through comparative research plays an important part in creating more space for Indigenous law in the Canadian legal landscape.

This exercise in comparative law begins with an exploration of the historical background and present-day applications of the living tree doctrine. This is followed by an examination of the social significance of trees in a range of Indigenous legal systems and cultures. The essay then evaluates the extent to which a "living tree" constitutional approach can offer a more open-ended, culturally relevant model for assessing Indigenous legal claims than conventional "frozen-rights" approaches. It concludes by considering whether the diverse tree metaphors of Indigenous and state law might provide a common conceptual ground for exploring potential interconnections between Indigenous and state legal systems in Canada.

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which need to be identified and challenged. However, they may also provide otherwise unavailable insights into historical practices within a particular Indigenous society.

[18] See Friedland, *supra* note 16 at 21.

[19] See Mills, "Lifeworlds of Law," *supra* note 13 at 850.

[20] See Friedland, *supra* note 16 at 3.

[21] Thus, for example, the Chief Justice of a provincial appellate court stated to John Borrows that "You say Indigenous law exists; I don't believe it for a minute." As related to Val Napoleon in April 2010, cited in *ibid*. For a discussion of the American tribal court system in relation to the situation in Canada, see *ibid* at 4−6, 17.

II. THE LIVING TREE DOCTRINE

In 1928, the question of whether women were "qualified persons" eligible to sit in the Canadian Senate came before the Judicial Committee of the Privy Council in the case of *Edwards v Attorney General of Canada* (Persons Case).[22] The Supreme Court of Canada (The Supreme Court) had previously decided that women were not "persons" for this purpose. In arriving at that decision, the Court considered the original intentions of the drafters of the *British North America Act* (*BNA Act*) of 1867 when listing the necessary qualifications for a senator. The fact that women could not sit in Parliament in 1867, and the fact that the pronoun "he" was used throughout section 24 of the *BNA Act* dealing with senators, were among the reasons which convinced the Supreme Court that women were not eligible for appointment to the Senate.[23] The Privy Council in England, which at that time was the court of last resort for Canada, came to a different decision upon appeal. Ready to take a freer approach to the *BNA Act*, the Privy Council ruled that the word "persons" in section 24 included women, and thus that women were eligible to be called to the Senate of Canada.[24] In justifying this decision, the Lord Chancellor Viscount Sankey wrote:

> The *British North America Act* planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada… Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation.[25]

This notion of the Canadian constitution as a "living tree capable of growth and expansion" and as amenable to a "large and liberal interpretation" presented a striking contrast to the originalist approach employed by the Supreme Court, which focused on the original, and presumably narrow, intentions of the drafters of the *BNA Act*.[26] Lord Sankey's living tree doctrine has often been invoked as a more flexible and open counterpart to the originalist or "frozen rights" approach, which confines the scope

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[22] See *Edwards* 1930, *supra* note 1.
[23] *Ibid* at paras 4–6; *Edwards v Canada (Attorney General)*, [1928] SCR 276 at paras 9, 22, 24–25 [1928] 4 DLR 98 [*Edwards* 1928].
[24] See *Edwards* 1930, *supra* note 1 at para 98.
[25] *Ibid* at paras 54–55.
[26] See *Edwards* 1928, *supra* note 23 at paras 9–13, 37–39.

of laws to that envisioned by the original framers.[27] Notably, this doctrine was alluded to during the process of patriating the Canadian constitution in 1982 and influenced a number of key cases thereafter.[28] For example, in response to questions posed by the Government of Canada dealing with same-sex marriage (*Reference Re Same-Sex Marriage*, 2004), the Supreme Court expanded the notion of marriage to include same-sex couples. In so doing, the Supreme Court relied on the argument that "our constitution is a living tree which… accommodates and addresses the realities of modern life."[29]

As Indigenous rights and legal traditions acquire more recognition in contemporary Canadian society, questions arise as to the relevance of the living tree doctrine to Indigenous peoples.[30] This essay evaluates whether the "large and liberal" nature of this doctrine can provide for a greater accommodation of Indigenous claims, similar to the way in which it has made more room for the claims of other marginalized groups in Canadian society. Before undertaking this exploration, however, it is important to consider counterparts to the living tree doctrine existing in Indigenous cultures and legal traditions in Canada. Lord Sankey's reasoning in the Persons Case suggests that the living tree of the constitution was "planted" in Canada, as opposed to growing naturally from the native soil of the land. In reality, the constitution is an alien species, and its success at propagating itself should not render us oblivious to the forest of diverse legal systems that already existed in this land at the time of its introduction.

III. INDIGENOUS LEGAL TRADITIONS AND THE LIVING FOREST

It is appropriate to say that the Indigenous legal systems of the land now known as Canada constitute a "living forest" for several reasons. For one, the multiplicity of Indigenous cultures means there is a corresponding multiplicity of legal values and

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[27] See Waluchow, *supra* note 4 at 892, 906.
[28] *Ibid* at 895–899; For a discussion of the living tree doctrine in relation to the *Canadian Charter of Rights and Freedoms*, see Allan C Hutchinson, "Living Tree" (1992) 3:4 Constitutional Forum 97.
[29] *Reference Re Same-Sex Marriage*, 2004 SCC 79 at para 22.
[30] See, for example, Borrows, *Freedom And Indigenous Constitutionalism*, *supra* note 3 at 128–156; Borrows, "Challenging Historical Frameworks," *supra* note 5 at 125.

practices. For another, despite important differences among these cultures, a close relationship with the forests which cover so much of the Canadian landscape is often a vital part of Indigenous identity and law.[31] Although non-Indigenous Canadians may think of the living tree doctrine as a unique legal innovation, there are pre-existing counterparts to this organic approach to law in Indigenous societies.[32] This section explores the vital links integrating trees, culture, and law in various Indigenous Nations of Canada to better understand the forest of traditions already existing in this land when the *BNA Act* was "planted" here.

Trees are powerful emblems of strength, longevity, and growth in numerous Indigenous cultures.[33] They may also serve as media of communication and constitute a focus of ritual practices.[34] Trees and forest locations may be employed as sites of communion with spiritual beings and of encounters with ancestral ways of life.[35] Among the peoples of the Northwest Coast, such as the Haida and the Kwakiutl, spruces and cedars are traditionally revered as the embodiments of forest spirits. One of the best-known examples of this is K'iid K'iyaas (elder tree), a giant spruce tree with golden needles that was regarded by the Haida as the arboreal embodiment of a Haida ancestor.[36] Trees are valued for their spiritual importance even when used for practical purposes. When the Kwakiutl took bark from a cedar tree to make baskets and other items, they were careful to ensure that enough bark was left for the tree to survive.[37] Indeed, traditional stories warn of the havoc that vengeful tree spirits could wreak on abusive humans—a divine punishment that enhanced the importance of respecting these powerful entities among the Kwakiutl.[38]

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[31] See Blackstock, *supra* note 3 at 42–43; Borrows, *Canada's Indigenous Constitution*, *supra* note 16 at 28–35.
[32] See Borrows, *Freedom and Indigenous Constitutionalism*, *supra* note 3 at 151–153.
[33] See, for example, Blackstock, *supra* note 3 at 35–43; Marie Mauzé, "Northwest Coast Trees: From Metaphors in Culture to Symbols for Culture" in Laura Rival, ed, *The Social Life of Trees: Anthropological Perspectives on Tree Symbolism* (London: Routledge, 1998).
[34] See Blackstock, *supra* note 3 at 15-19, 35-43.
[35] *Ibid.*
[36] See Susanna Quail, "Yah'guudang: The Principle of Respect in the Haida Legal Tradition" (2014) 47:2 UBC L Rev 673 at 683–684. See also Blackstock, *supra* note 3 at 155.
[37] See Hilary Stewart, *Cedar: Tree of Life to the Northwest Coast Indians* (Madeira Park BC: D & M Publishers, 2009) at 179–180.
[38] *Ibid.*

The importance of trees as sacred entities and repositories of cultural knowledge becomes especially apparent when they have been modified by Indigenous peoples and brought within the network of human activities. In *Faces in the Forest: First Nations Art Created on Living Trees*, Gitxsan artist Michael D. Blackstock describes the Indigenous carvings and paintings done on trees throughout Canada.[39] In the case of the Iroquois, for example, masks carved on living trees were thought to be imbued with the tree's spirit and hence capable of communicating some of the tree's knowledge and power.[40] Through such practices, formative cultural representations are endowed with organic vitality and integrated into the life of the forest. These markings also signal that the forest is not a "wilderness" in a traditional Western sense, but a site of culture and knowledge.

The cultural and spiritual significance of trees for many Indigenous peoples have led to their use as symbols for society, and for the laws that give society its structure and stability.[41] The Gitxsan of British Columbia describe their laws as "an ancient tree that has grown the roots right deep… into the ground."[42] The Anishinaabe of Eastern North America likewise developed legal concepts based on the imagery of trees.[43] The Haudenosaunee, in turn, conceptualized the treaties that bound them to a peaceful coexistence with their neighbours in terms of a sheltering "Tree of Peace," depicted as a pine tree. The counterpart to the Tree of Peace was the Tree of Council—an oak tree—which represented the deliberations and judgements of the Haudenosaunee elders.[44] The Great Law of Peace, which established a confederacy among the six nations of the Haudenosaunee, was described as a tree with roots reaching out in all directions: "I plant the Tree of the Great Peace… Roots have spread out from the Tree of the Great Peace, one to the north, one to the east, one to the south and one

[39] See Blackstock, *supra* note 3.
[40] *Ibid* at 39.
[41] *Ibid* at 42–43; Borrows, *Freedom and Indigenous Constitutionalism*, *supra* note 3 at 152–153.
[42] See Blackstock, *supra* note 3 at 43.
[43] See Borrows, *Freedom and Indigenous Constitutionalism*, *supra* note 3 at 300 n 207.
[44] See Kayanesenh Paul Williams, *Kayanerenkó:wa: The Great Law of Peace* (Manitoba: University of Manitoba Press, 2018) at 333–336.

to the west. The name of these roots is The Great White Roots and their nature is Peace and Strength."[45]

While symbolic, the Tree of Peace and the Tree of Council were not purely figures of speech. Actual pines and oaks could serve to remind people of the continuing existence of the laws of peace and council, and to provide assembly sites for the consideration of these laws.[46] Certain leaders of the Haudenosaunee confederacy were themselves conceptualized as pine trees—tall, straight, and overlooking the land. Such leaders are traditionally accorded the title of "Pine Tree Chief."[47]

The continuing relevance of arboreal imagery to Indigenous ways of thinking about law today is well-illustrated by the following quotation from Aaron Mills' "Lifeworlds of Law":

> One day I see poplar, another maple, sometimes oak, most often white birch. The roots push deep into the earth. They grow solid and powerful, holding the tree in place. They draw life from the earth up into a stout trunk—strong enough to support the entire canopy about it… I think this image is a map for the relationship between lifeworld and law. The roots of a society are its lifeworld; the story it tells of creation, which reveals what there is in the world, and how we can know… The trunk is a constitutional order: the structures generated by the roots, which organizes and manifests these understandings of political community. The branches are our legal traditions, the set of processes and institutions we engage to create, sustain, and unmake law.[48]

As we can see from this and previous examples, the concept of "tree" in Indigenous cultures has a fluidity that enables it to move from the natural world to the spiritual world and to the human world, without losing its essential "treeness."

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[45] See *The Constitution of the Five Nations* (1916), in Arthur Caswell Parker, *The Constitution of the Five Nations, or, The Iroquois Book of the Great Law* (Ohsweken, Ont: Iroqrafts, 1991) at 30.
[46] See Williams, *supra* note 44 at 333−335.
[47] *Ibid* at 413−415.
[48] Mills, "Lifeworlds of Law," *supra* note 13 at 862.

IV. INTERTWINING LEGAL TRADITIONS

The organic and animate approach to law evidenced in the use of tree symbolism by Indigenous legal traditions can to some extent be seen to constitute a counterpart to the living tree doctrine of the Canadian constitution. Just as trees grow and develop over time while maintaining the roots that give them life, so too, Indigenous traditions tell us, must legal systems.[49] When looking at the Covenant Chain—the complex system of treaties between the Haudenosaunee and Anglo-Americans which set the foundation for Indigenous and Crown interaction—one sees that the Haudenosaunee believed the chain of alliances needed constant "polishing," maintenance and reshaping.[50] This conveys an intention that their relationship with the Crown would be dynamic and responsive to changing needs. In light of this understanding, the living tree doctrine seems to offer an appropriate way to address Indigenous claims.[51] This is particularly relevant given the Supreme Court's declaration in *R v Sparrow* that it is vital to be sensitive to Indigenous perspectives when evaluating Aboriginal rights.[52] Furthermore, the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), now fully endorsed by Canada,[53] affirms the rights of Indigenous peoples to revitalize their laws, customs, and beliefs, and to have state recognition of the inextricable links of their cultures with the land.[54]

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[49] See, for example, Borrows, *Freedom and Indigenous Constitutionalism*, *supra* note 3 at 151–152.
[50] See Mark D Walters, "Rights and Remedies within Common Law and Indigenous Legal Traditions: Can the Covenant Chain Be Judicially Enforced Today?" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 187 at 199; For an introduction to the covenant chain, see Cornelius J Jaenen, "Covenant Chain" (7 February 2006), online: *The Canadian Encyclopedia* <perma.cc/5FCE-C7YX>.
[51] See Borrows, *Freedom and Indigenous Constitutionalism*, *supra* note 3 at 151–153; Borrows, "Challenging Historical Frameworks," *supra* note 5 at 125–126.
[52] *R v Sparrow*, [1990] 1 SCR 1075 at para 69, [1990] SCJ No 49.
[53] Canada fully endorsed UNDRIP in 2016; In June 2021, Bill C-15 (*An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*) came into force. See "Implementing the United Nations Declaration on the Rights of Indigenous Peoples in Canada" online: *Government of Canada* <perma.cc/TBH7-34AW>; Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, 2nd Sess, 43rd Parl, 2021.
[54] *United Nations Declaration on the Rights of Indigenous People*, 13 September 2007, UN Doc A/61/L.67 at Annex, Articles 10−12 & 25−26.

Canadian jurisprudence has typically taken an originalist approach when faced with Aboriginal rights and title claims. In this approach, aboriginal rights are "defined by reference to historic moments of contact, assertions of sovereignty, and negotiated agreements."[55] Instead of looking at how Indigenous communities have survived by *evolving*, as well as by preserving traditions, Canadian courts have focussed on a historical scrutiny of "original" practices and beliefs.[56] If an Aboriginal right, which was not already abolished before 1982, cannot be linked to a pre-European practice, it will generally not be recognized.[57] This "frozen rights" approach has proven to be extremely harmful to Indigenous self-assertion, and has time and again resulted in a denial of rights and land due to this rigid historical test not being met.[58] Ronald Nietzen notes that, within a judicial context:

> A 'frozen in time' approach to culture [can be] avoided only in the sense that practices can survive some discontinuity, not in the sense that affirms the importance of adaptation, creativity and innovation. The judicial approach to culture is thus 'frozen in time' in the truest sense of the term, it sets limits on change, even in response to challenges to the prosperity and survival of distinct cultures as a whole.[59]

Originalism is also problematic when applied to Indigenous social rights, as innovative practices in this domain are often viewed as non-traditional and therefore

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[55] See Borrows, "Challenging Historical Frameworks," *supra* note 5 at 115; For a discussion of different originalist approaches in the Constitution, see Bradley W Miller, "Beguiled by Metaphors: The 'Living Tree' and Originalist Constitutionalist Interpretation in Canada" (2009) 22:2 Can JL & Jur 331.

[56] See Borrows, "Challenging Historical Frameworks," *supra* note 5 at 122−133.

[57] See John Borrows, "Revitalizing Canada's Indigenous Constitution: Two Challenges" in John Borrows et al, eds, in *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Montreal: McGill-Queen's University Press, 2019) at 31. See also *R v Van der Peet*, [1996] 2 SCR 507, [1996] SCJ No 77.

[58] See Borrows, "Challenging Historical Frameworks," *supra* note 5 at 130–133. See, for example, *R v Van der Peet*, [1996] 2 SCR 507.

[59] See Ilenia Ruggiu, *Culture and the Judiciary: The Anthropologist Judge* (Oxford: Routledge, 2019) at 8. See also John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22 Am Indian L Rev 37.

spurious.[60] Essentially, Indigenous people are not permitted to adapt and grow with changing circumstances but are obliged to remain "past-tense peoples."[61]

If the living tree doctrine were more widely employed by Canadian courts, there would be new possibilities for acknowledging the ways in which Indigenous peoples have continued to change since contact and for recognizing that "historical intent provides an entry point for interpreting the law [relating to Aboriginal rights], but it does not represent its end point."[62] The living tree doctrine could allow the impact of colonialism, as well as post-contact cultural development, to be taken into account. However, when asked to consider the living tree approach in relation to Indigenous peoples in the 2003 case *R v Blais*, the Supreme Court simply refused. The Court reasoned that employing the living tree doctrine would lead to a result that conflicted with the original intention of the legislation in question, seemingly disregarding the fact that the doctrine's precise purpose is to allow for an enlargement of original intentions.[63]

In such ways, the Supreme Court has discriminated against Indigenous peoples in its rulings. While applying the living tree approach in other constitutional fields, the Court has retained an originalist approach to Aboriginal claims. This discrimination constitutes a relic of colonialism.[64] The existence of such discrimination is made more apparent when one considers how the Supreme Court has also disadvantaged

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[60] See Borrows, "Challenging Historical Frameworks," *supra* note 5 at 130; In this regard, Patrick Macklem states that adopting an approach which acknowledges the dynamic vitality of Indigenous culture would "allow for constitutional protection not only of traditional practices and their modern variants, but also of other cultural interests, for example, spirituality, language and education"; See Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 171.

[61] See Borrows, "Challenging Historical Frameworks," *supra* note 5 at 120.

[62] *Ibid* at 125.

[63] This case considered whether Métis peoples were "Indians" under sections of the *Natural Resources Transfer Agreement* of 1930. Writing in 2016, John Borrows affirms that this was the only time the Supreme Court considered the living tree approach when dealing with a case related to Indigenous peoples. See Borrows, *Freedom and Indigenous Constitutionalism*, *supra* note 3 at 135–136; *R v Blais*, 2003 SCR 44; Without referring to the living tree doctrine, the Supreme Court has recently shown some openness to employing a more expansive approach to interpreting legislation involving Indigenous peoples. See, for example, *Daniels v Canada (Minister of Indian Affairs and Northern Development)*, 2016 SCC 12.

[64] See Borrows, *Freedom and Indigenous Constitutionalism*, *supra* note 3 at 159; See also Borrows, "Challenging Historical Frameworks," *supra* note 5 at 126.

Indigenous peoples by arguing *against* taking a "frozen" approach to Indigenous societies. This occurred in the 2002 case *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*.[65] This case concerned the logging of Culturally Modified Trees which were important to the Kitkatla Band. The Band contested the constitutionality of the *Heritage Conservation Act*, which had allowed the felling of their heritage trees by a lumber company. The Supreme Court unanimously ruled against the Kitkatla Band, holding that the trees, while culturally and scientifically significant, were "commonplace" and so disposable. In the decision, Justice Lebel analyzed the *Heritage Conservation Act* provision that gave the Minister responsible the power to authorize actions otherwise prohibited, including the destruction of "aboriginal heritage objects." He wrote: "No heritage conservation scheme can provide absolute protection to all objects or sites that possess some historical, archaeological, or cultural value to a society. To grant such an absolute protection would be to *freeze a society at a particular moment in time*."[66] In other words, the Court here urges Indigenous peoples not to be "frozen" in the past, and to abandon tradition when necessary for the benefit of the Canadian economy. Clearly, the Supreme Court has not been consistent in its application of frozen rights concepts to different Indigenous claims, instead adopting originalism only when it suits its purposes.

In recent years there has been some limited progress towards the application of the living tree doctrine to Indigenous claims within provincial and federal courts. In 2017, the Yukon Supreme Court in *Ross River Dena Council v Canada (Attorney General)* decided that an 1867 provision guaranteeing compensation to Indigenous peoples who were displaced was not merely a moral obligation (as the legislative bodies at the time likely intended it to be), but rather a "legally binding constitutional obligation."[67] Justice Gower considered the living tree doctrine in reaching this conclusion (although he ultimately ruled against the claim due to other considerations).[68] In the 2019 case of *Picard v Canada (Attorney General)*, the Federal Court referred to the living

[65] *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31.
[66] *Ibid* at para 62 [emphasis added].
[67] See *Ross River Dena Council v Canada (Attorney General)*, 2017 YKSC 58 at paras 150, 167–170.
[68] *Ibid* at paras 148–152, 237–239; The Yukon Territory Court of Appeal dismissed an attempted appeal of this case, affirming the ruling of the trial judge, without, however, referring to the living tree doctrine; See *Ross River Dena Council v Canada (Attorney General)*, 2019 YKCA 3.

tree doctrine in passing, apparently in support of the idea that Indigenous peoples can exercise a certain level of self-government under the constitution, even though the original drafters would not have intended such an interpretation.[69] Most recently, in the 2020 case of *Reference re: Greenhouse Gas Pollution Pricing Act (Can)* at the Alberta Court of Appeal, the dissenting Justice, K.P. Feehan, made use of the living tree doctrine to justify a flexible interpretation of the national concern branch of the peace, order and good government power, to support the legality of the *Greenhouse Gas Pollution Pricing Act*.[70] His use of the living tree doctrine was directly related to the fact that Indigenous peoples would especially benefit from the *Greenhouse Gas Pollution Pricing Act* due to the disproportionate impact of climate change and greenhouse gas emissions on Indigenous peoples.

These signs of progress give hope that the living tree doctrine will be employed more broadly with respect to Indigenous claims in the future. Such use would allow Indigenous peoples to benefit from the doctrine's promotion of a "large and liberal interpretation" of formal law. It would also encourage a more positive attitude towards Indigenous cultures in general, as well as, hopefully, towards the actual living trees playing an important role in these cultures.

Indigenous living tree traditions are arguably a good deal more alive, with their close connections with actual trees, than the living tree doctrine of the Canadian constitution, which appears to be purely a metaphor. Aaron Mills argues that—far from being rooted—the Canadian constitution, along with other state constitutions of Western countries, presumes a basic alienation from the earth.[71] This is an important point. However, the arboreal reference in the living tree doctrine still carries cultural and experiential weight. Canada's living tree doctrine differs from the "living constitution" metaphor employed in the United States, not only because, as Vicki Jackson states, it "may better embrace the multiple modalities—text, original intentions, structure and purpose, precedent and doctrine, values and ethos,

[69] See *Picard v Canada (Attorney General)*, 2018 FC 747 at paras 29–32.
[70] See *Reference re: Greenhouse Gas Pollution Pricing Act (Can.)*, 2020 ABCA 74 at paras 1046–1050; The decision was reversed by the Supreme Court, without much mention, however, of the living tree doctrine; See *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11.
[71] Mills writes that the formal constitutional order "has no roots precisely because it isn't actually connected to life. Humans simply imagined it and built their constitutional order upon an idea," see Mills, "Lifeworlds of Law," *supra* note 13.

prudential or consequentialist concerns—of contemporary constitutional interpretation,"[72] but also because it evokes a vital organic entity. The dynamic "living tree" of the Canadian constitution provides a vivid contrast to the static "dead trees" on which constitutional texts are conventionally preserved.[73] It presents an image of rootedness and growth, of budding and blossoming, as well as of a certain indomitable wildness. It also reminds us of our interconnectedness with the natural world.

Moreover, Lord Sankey's original use of the living tree metaphor was not merely a matter of clever word play.[74] It drew on the longstanding political and legal symbolism of trees in Western culture.[75] Trees not only served as a model for the judicial and political system in Britain, but also as sites for administering justice and ordering society. A stately oak or yew tree provided a time-honoured meeting place for a court or council.[76] Such traditions were grounded in the sacred values associated with trees in premodernity, when they were often deemed to be the dwelling-places of spirits.[77]

While tree metaphors in Western law do not carry the same meaning or weight as tree metaphors in Indigenous law, they do convey a sense of law as capable of change and growth, as interrelated with the natural world, and as rooted in culture. Western tree metaphors are undoubtedly further removed from traditional tree lore than Indigenous ones and more hedged in by institutionalized formalities. However, if one can still find the sap of living trees in Lord Sankey's metaphor, and if this arboreal image remains evocative today, then this should encourage a greater

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[72] See Vicki C Jackson, "Constitutions as 'Living Trees'? Comparative Constitutional Law and Interpretive Metaphors" (2006) 75 Fordham L Rev 921 at 926.

[73] See the comparison between a "living tree" and a "dead tree" approach to the Constitution by former Supreme Court Justice Ian Binnie in "Interpreting the Constitution: The Living Tree vs. Original Meaning" (October 1, 2007) online: *Policy Options* <perma.cc/MTK6-LWSN>.

[74] For a discussion of the role of metaphors in Western legal traditions see Isabelle Richard, "Metaphors in English for Law" (2014) 8 Lexis – Journal in English Lexicology 1; See also the section on legal metaphors in Maksymilian Del Mar, *Artefacts of Legal Inquiry: The Value of Imagination in Adjudication* (London: Hart Publishing, 2020).

[75] These metaphors also continued to be used after Lord Sankey's statement. See, for example, Lord Denning's comparison of the common law to an English oak in 1955: *Nyali Ltd v Attorney-General*, [1956] 1 QB 1 (CA per Lord Denning) at 1.

[76] See James Wayland Joyce, *England's Sacred Synods* (London: Rivington, 1855) at 101.

[77] See Michael DJ Bintley, *Trees in the Religions of Early Medieval England* (Woodbridge, UK: The Boydell Press, 2015) at ch 2.

openness to the ways in which the varied trees of Indigenous cultures might infuse meaning into the living tree of the Canadian constitution.

V. GRAFTING LEGAL TRADITIONS

Applying the living tree doctrine in Aboriginal rights and title cases would likely lead to more of these claims being recognized and would promote the process of reconciliation.[78] Indeed, beyond allowing for the recognition of more Aboriginal rights, the living tree approach could also lead to the recognition of certain Indigenous laws within or alongside Canadian state law.[79] To those arguing that such legal pluralism is unworkable, there are a number of counterarguments. Canadian courts have already upheld the validity of Indigenous community-based justice on a number of occasions,[80] and have recognized that Indigenous law must take precedence over Canadian law in certain cases.[81] Furthermore, Canada seemingly provides a promising ground for the development of legal pluralism insofar as it embraces the common law and civil law traditions, and promotes multiculturalism as an essential part of the Canadian identity.[82] As Will Kymlicka notes, the international movement towards

[78] See Borrows, "Challenging Historical Frameworks," *supra* note 5 at 115–116, 125–126 & 130–133. Although reconciliation is the standard term for this initiative, it could be argued that "conciliation" better describes the process. See David Garneau, "Imaginary Spaces of Conciliation and Reconciliation: Art, Curation, and Healing" in Dylan Robinson & Keavy Martin, eds, *Arts of Engagement: Taking Aesthetic Action In and Beyond the Truth and Reconciliation Commission of Canada* (Waterloo: Wilfrid Laurier University Press, 2016) at 23–25.

[79] See Harland, *supra* note 6 at 47–50; For an example of the form this might take, one can look at the constitutional recognition of Indigenous law in Ecuador, that "recognizes the competence of indigenous authorities to apply their own norms and procedures that are appropriate for resolving internal conflicts and not contrary to the Constitution or human rights"; See Luis Ángel Saavedra, "Indigenous Justice in Ecuador" (2012) NotiSur - Latin America Data Base 1 at 1 <perma.cc/8DJ6-BRQG>.

[80] See Elizabeth Elliott & Robert Gordon, eds, *New Directions in Restorative Justice* (London: Taylor & Francis, 2013).

[81] *Ibid* at 48; See, for example, *R v Moses* (1992), 71 CCC (3d) 347, [1992] YJ No 50 (Yukon Territorial Court); See also Gary Bell, "Multiculturalism in Law Is Legal Pluralism—Lessons from Indonesia, Singapore and Canada" (2006) Sing JLS 315 at 328 n 47.

[82] For a discussion of how bijuridicalism can support legal pluralism, see Borrows, *Canada's Indigenous Constitution*, *supra* note 16 at ch 4; See also Harland, *supra* note 6 at 49; Gary Bell points out, however, that the importance given to multiculturalism by the Canadian state does not necessarily extend to an openness towards legal pluralism; See Bell, *supra* note 81 at 328.

multiculturalism and increased rights for ethnic minorities means that "[t]hose states that are prepared to consider adopting models of multicultural citizenship will find an array of international organizations willing to provide support, expertise, and funding."[83] Social and legal reforms rarely come easily, or without complications. Does this mean we should never seek to alter conventional, but problematic systems? Should we not rather look ahead to the *benefits* that might come from change; in this case, from granting constitutional support to Indigenous legal traditions?

Although the idea of Indigenous legal traditions becoming a branch of the Canadian constitution has attractions, such grafting nonetheless poses significant risks to the integrity of Indigenous culture. The Persons Case, discussed at the beginning of this essay, illustrates the danger. Lord Sankey stated that he paid no heed to the use of the masculine pronoun in the *BNA Act* because "the masculine gender shall include females."[84] Although this point played a role in granting women the right to be senators, it also symbolically transformed "shes" into "hes" and suggested that women entering politics needed to conform to masculine political models. Similar concerns arise with regard to the integration of Indigenous legal traditions into Canadian law by means of the living tree doctrine: this integration might result in Indigenous law being reshaped within Canadian formal law to conform to the latter's pre-existing modalities. Aaron Mills warns that uprooting Indigenous law from its own lifeworld and expecting it to thrive in a "liberal" tradition devoid of connections with nature could be immensely problematic.[85] Furthermore, notions of "grafting" Indigenous traditions ignore the fact that the *BNA Act* is an alien introduction to Canada, as discussed earlier in this essay.[86] Perhaps, indeed, we should rather speak of grafting *Western* law onto Indigenous legal systems—the forest of traditions already growing here long before the imposition of this highly-invasive species of law.

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[83] Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford, UK: Oxford University Press, 2007) at 1.
[84] See *Edwards* 1930, *supra* note 1 at para 81.
[85] See Mills, "Lifeworlds of Law," *supra* note 13 at 860–874. See also Borrows, *Canada's Indigenous Constitution*, *supra* note 16 at 167.
[86] Indeed, Mills, for one, considers the Canadian Constitution to be too foreign to Indigenous legal traditions to provide a useful encompassing framework; See Mills, "Miinigowiziwin," *supra* note 15.

CONCLUSION

The living tree doctrine has received significant attention in Canadian jurisprudence as a model for taking a broad and versatile approach to constitutional principles.[87] This essay has explored possible counterparts to this doctrine within various Indigenous legal traditions of Canada. Significantly, such Indigenous living tree paradigms are not merely figures of speech but are intrinsically related to Indigenous peoples' long-standing relationships with actual trees as mediated through culture. This cultural and environmental understanding is key to ensuring that the living tree model maintains its full vital import. It can hardly be overemphasized that the indispensable ground of tree symbolism—and, indeed, of life—is the natural world, which demands to be respected and cherished for its own sake and not simply as a source of metaphors or exploitable resources.[88]

This essay has also examined how the application of the living tree doctrine to the Canadian constitution may provide an opening for the greater recognition of Indigenous legal traditions within Canadian law. In this regard, it could play a significant role in supporting a move away from originalist approaches in cases dealing with Indigenous rights due to this method's emphasis on the capacity of and need for cultures to change and adapt over time. The *BNA Act*—and the common law and civil law traditions—invasive as they are, have become an omnipresent and

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[87] It has also received increasing attention outside Canada; See Leonardo Pierdominici, "The Canadian Living Tree Doctrine as a Comparative Model of Evolutionary Constitutional Interpretation" (2017) 9:3 Perspectives on Federalism 85; See, for example, Diniz Araújo & Luiz Henrique, "The Canadian Living Tree Doctrine: A Reconcilement Between the Past and the Present in Constitutional Interpretation" (2020) 25:3 Revista de Direitos Fundamentais & Democracia 160; Jayanta Boruah, "Living Tree Doctrine: Role of Indian Judiciary against Constitutional Silence in India" (2021) 5:1 Rajiv Gandhi Nat U of L Student L Rev 50; Warren J Newman, "Constitutional Chronometry, Legal Continuity, Stability and the Rule of Law: A Canadian Perspective on Aspects of Richard Kay's Scholarship" (2021) 52:5 Conn L Rev 1433; Paul T Babie, "Ancestor Worship, Living Trees, and Free Exercise in the Australian Constitution" (2021) 55 Adelaide L School Legal Studies Research Paper Series.

[88] On this matter, Bolivia and Ecuador have notably enacted laws upholding the rights of Mother Earth based on Indigenous spiritual values; See, for example, David R Boyd, "Pachamama and Ecuador's Pioneering Constitution" and "Bolivia and the Rights of Mother Earth" in *The Rights of Nature: A Legal Revolution That Could Save the World* (Toronto: ECW Press, 2017).

irrevocable part of the Canadian legal landscape. In view of this, the living tree doctrine of the constitution might provide the best available means for ensuring that Indigenous "lifeworlds" of laws, customs, and ecologies are not marginalized and disregarded by what have become mainstream social, legal, and economic interests. Rather than speak of "grafting" Indigenous traditions onto the dominant legal system, however, it might be more equitable and more fruitful to consider the process to be one of finding "common ground." This metaphor suggests the possibility of working together to prepare a space in which Indigenous and introduced legal systems can co-exist and interact, with the former maintaining their own roots and undergoing their own development within the life-giving forest of Indigenous traditions.