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Etuaptmumk: A Means to Advance Indigenous Economic Development “in a Good Way”

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A reckoning is required on how Eurocentric laws and economic systems are biased toward Western worldviews while not accounting for Indigenous realities, legal orders, or economic perspectives. Most notably, Eurocentric laws have been instrumental in advancing non-Indigenous economic interests to the detriment of Indigenous interests, largely because Indigenous laws have not been respected. The strengthening of certain Eurocentric property and contract laws have limited Indigenous peoples' legal and economic interests and continues to constrain positive economic outcomes and advancement for Indigenous nations. This article argues that re-centering Indigenous legal traditions is a means to advance Indigenous economic interests. The principle of Two-Eyed Seeing can assist by encouraging legal actors to draw from the best of both Western and Indigenous laws and economic perspectives in Indigenous economic development initiatives and processes. This is necessary, not only to promote inclusivity, but to honor Nation-to-Nation building and to promote Indigenous self-determination and sovereignty.

Il est nécessaire de faire le point sur la façon dont les lois et les systèmes économiques eurocentriques sont biaisés en faveur des visions du monde occidentales et ne tiennent pas compte des réalités, des ordres juridiques ou des perspectives économiques des autochtones. Plus particulièrement, les lois eurocentriques ont contribué à promouvoir les intérêts économiques non autochtones au détriment des intérêts de ces derniers, en grande partie parce que les lois autochtones n'ont pas été respectées. Le renforcement de certaines lois eurocentriques sur le droit de la propriété et des contrats a limité les intérêts juridiques et économiques des peuples autochtones et continue d'entraver les résultats économiques positifs et le progrès des nations autochtones. Cet article soutient que le recentrage des traditions juridiques autochtones est un moyen de faire progresser les intérêts économiques autochtones. Le principe du « regard des deux yeux » peut être utile en encourageant les acteurs juridiques à tirer le meilleur des lois et des perspectives économiques occidentales et autochtones dans les initiatives et les processus de développement économique autochtone. Cela est nécessaire, non seulement pour promouvoir l'inclusion, mais aussi pour honorer la construction de Nation à Nation et pour promouvoir l'autodétermination et la souveraineté autochtones.

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> *Etuaptmumk or Two-Eyed Seeing is the gift of multiple perspectives treasured by many Aboriginal peoples. We believe it is the requisite Guiding Principle for the new consciousness needed to enable Integrative Science work, as well as other integrative or transcultural or transdisciplinary or collaborative work.*
>
> Elder Albert Marshall, Eskasoni First Nation[1]

Introduction

Western laws have been instrumental in advancing non-Indigenous people's economic interests to the detriment of Indigenous peoples' interests. Indeed, the iniquitous impact certain laws, including contract and property laws, have on Indigenous peoples' legal and economic interests has limited and continues to limit positive economic outcomes and advancement for Indigenous communities. That the rule of law has

1. Elder Albert Marshall is a respected Mi'kmaw elder from Eskasoni First Nation in Unama'ki (Cape Breton) in Nova Scotia, the Traditional Territory of Mi'kma'ki. He is from the Moose Clan. He was conferred the Doctor of Letters honoris causa degree by Cape Breton University for his tireless efforts to help promote Mi'kmaw culture and language in conjunction with cross-cultural understandings, reconciliation, and healing. Both he and his spouse, Murdena, helped develop KECCA (Knowledge Education & Culture Consultant Associates) to better enable and encourage a strong future for the Mi'kmaw Nation. Elder Marshall coined the phrase *Etuaptmumk*/Two-Eyed Seeing for the gift of multiple perspectives as a guiding principle for the co-learning journey of different cultural knowledges working together.

played a significant role in creating barriers to Indigenous prosperity and economic development opportunities is exacerbated because Indigenous living legal traditions have not been historically recognized by the greater Canadian legal system. Arguably, a reckoning is required by the Canadian state to recognize how Eurocentric systems and laws are biased toward Western worldviews while not accounting for *Indigenous realities, legal orders, or economic perspectives*. This article therefore challenges the ways that Canadian legal and economic structures were and are designed to disenfranchise Indigenous communities from their sources of power by strengthening Western law to advance economic development. This continues to benefit non-Indigenous peoples to the detriment of Indigenous people's economies and laws.

Indigenous economic prosperity requires that law, a source of power in any society, must also be considered from Indigenous worldviews. This article analyzes the purpose for which certain legal orders are developed and creates intended beneficiaries. It reveals that in the Canadian state, the purpose to advance and strengthen the economic power of non-Indigenous governments simultaneously de-legitimized the power and legal orders of Indigenous governments who occupied the same spaces. Because the connection between economic development and the rule of law is often taken for granted in the common law legal tradition, this article illustrates that challenging Canadian legal sovereignty is the biggest barrier to Indigenous self-determination.

This article asserts that when Canadian governments and citizens value the inclusion of Indigenous worldviews, they are respecting the Mi'kmaw principle of *Etuaptmumk* (Two-Eyed Seeing), which means being willing to see the world through "two eyes"—both a Western lens as well as an Indigenous lens and combining them for the benefit of all. According to Albert Marshall, an Elder from Eskasoni First Nation,[2] respecting shared and divergent values requires a weaving back and forth between worldviews.[3] Searching for ways of weaving between Indigenous worldviews and knowledge systems, and Western worldviews and knowledge systems to create a new approach to "Indigenous economic

2. *Ibid.*

3. Cheryl Bartlett, Murdena Marshall & Albert Marshall, "Two-Eyed Seeing and Other Lessons Learned with a Co-learning Journey of Bringing Together Indigenous and Mainstream Knowledges and Ways of Knowing" (2012) 2:4 J Environmental Studies & Sciences 331 at 331, DOI: <10.1007/s13412-012-0086-8> [Bartlett et al, "Two-Eyed Seeing"]. Certainly, the term "worldview" is very broad in nature. As such, one should not make generalizations about all Indigenous cultures sharing the same worldviews or all Western cultures sharing the same worldviews. Indeed, there are unique nuances within individual cultures under the broader category of one "worldview" or another.

development" requires one to ask baseline critical questions. What is a worldview? Why hold on to Eurocentric worldviews? Is Eurocentrism the same as colonial worldviews or Western-sourced knowledge? If a worldview is a society's shared philosophy, values, and customs, indeed it is important to grapple with these critical questions. Western-sourced knowledge is often equated with Eurocentrism, a philosophy that regards European culture and history as preeminent to the exclusion of other worldviews, which in its most vitriolic form, results in colonialism and white supremacy. Therefore, it should be rejected. However, Elder Marshall offers another way, one which draws from but does not privilege Western-sourced knowledge and laws at the exclusion of all other sources. This approach can be inclusive of Indigenous-based knowledge and laws, and leaves room for the already existing multi-juridical legal system and diverse economy in Canada.

The long, historically complex, intricate, and intertwining nature of relationships between Indigenous governments and citizens and non-Indigenous governments and citizens, make Two-Eyed Seeing a suitable lens from which to examine Indigenous economic development. Carol Anne Hilton asserts that Indigenous peoples ought to be given a "seat at the economic table."[4] But, to participate at the "economic table," there must be a willingness to consider, assess, and articulate both shared and divergent values and knowledges that inform economic and legal practice. This is because Western economic systems and laws continue to dominate the ways that business is conducted in Canada.

This article first examines how the connection between law and economic development has had deleterious impacts on Indigenous peoples' economic outcomes. It argues that Western laws have worked to increase wealth for non-Indigenous governments and third parties, and have historically aided in the dispossession of lands, and the decimation of Indigenous legal traditions and economic values. It then considers the views of several scholars on whether the dichotomy between Indigenous economic values (such as sustainability, stewardship, and accountability, etc.) and Western economic values (such as capitalism, competition, externalization, etc.) are reconcilable. Understanding the divergent views provides context for determining whether and how different views can be reconciled to advance "economic reconciliation," a term that stresses how providing *equal economic opportunity* for all members of Canadian society is a key part of reconciliation. To advance Indigenous economic

4. Carol Anne Hilton, *Indigenomics: Taking a Seat at the Economic Table* (Gabrioloa Island: New Society, 2021) at 94.

development "in a good way," a phrase often used by Indigenous peoples to reflect wellness-centred choices that respect local needs, traditions, cultures, and resources, Indigenous laws are instrumental. Therefore, the article discusses the valuable contribution Indigenous laws make to legal pluralism, while emphasizing that to date, Indigenous laws have been under-recognized in the greater Canadian legal system to the detriment of Indigenous peoples and their economies.

Consequently, the article concludes that while there is no doubt a complex history between Indigenous and non-Indigenous governments and peoples in Canada, respecting the principle of Two-Eyed Seeing could provide a pathway for promoting diverse legal traditions and advancing economic reconciliation. This is because advancing economic development in contemporary times means that certain Western legal and economic structures and processes are used by Indigenous communities to further the economic and social well-being of their citizens. However, in keeping with the principle of Two-Eyed Seeing, these structures and processes should be established with Indigenous legal traditions and cultural values intact and flourishing.

I. *Economic development and the rule of law*

In its simplest form, economic development involves those activities engaged to acquire material wealth.[5] The idea that a country's economic and social development is directly affected by its legal system can be traced as far back as the eighteenth century.[6] Nevertheless, because the core elements of the rule of law and how one might measure the efficacy of strategies in legal reform are dubious,[7] this article is not meant to provide an in-depth analysis of the history of the field of law and economic development.[8]

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5. Robert Hamilton et al, eds, *Wise Practices: Exploring Indigenous Economic Justice and Self-Determination* (Toronto: University of Toronto Press, 2021) at 4.

6. David Trubek, "Law and Development: Forty Years after "Scholars in Self-Estrangement" (2016) 66:3 UTLJ 301 at 303, DOI: <10.3138/UTLJ.3671> [Trubek, "Scholars in Self-Estrangement"].

7. Michael Trebilcock, "Between Universalism and Relativism: Reflections on the Evolution of Law and Development Studies" (2016) 66:3 UTLJ 330 at 331, DOI: <10.3138/UTLJ.3622> [Trebilcock, "Universalism"]. For a more in-depth discussion see Brian Tamanaha, *On the Rule of I.aw: History, Politics, Theory* (Cambridge, UK: Cambridge University Press, 2004). On the efficacy of legal reform see Thomas Carothers, ed, *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington, DC: Carnegie Endowment for International Peace, 2006); Michael J Trebilcock & Ronald J Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Cheltenham, UK: Edward Elgar, 2008); Lindsey Carson & Ronald Daniels, "The Persistent Dilemma of Development: The Next Fifty Years" (2010) 60:2 UTLJ 491, DOI: <10.3138/utlj.60.2.491>.

8. For comprehensive overviews see Liliana Lizarazo-Rodriguez, "Mapping Law and Development" (2017) 4:4 Indonesian J Intl & Comparative L 761, online: <worldcat.org/title/1306588365> [perma.cc/3YD5-W8QK] and Trebilcock, "Universalism," *supra* note 7 at 332-333. Trebilcock, in particular, notes that themes around law and development evolved from various versions of modernization, state-led theories of development that persisted through the first three post-war decades. This was

Rather, pertinent foundational ideas and subsequent contemporary understandings are reviewed to illustrate that the characterization and enactment of law has strengthened Euro-economic development while negatively impacting Indigenous peoples' sovereignty and prosperity.

As far back as the late 1800s, after the first theories of law and economic development emerged, German sociologist Max Weber asserted that industrialization and the rise of capitalism—an economic and political system focused on *private trade and industry for profit*—was significantly influenced by Western (Occidental) law. This was because of the legal security found in a legal system that has been rationalized and systematized.[9] Weber believed that the "calculability of the functioning of the legal process in particular, constituted one of the most important conditions for the existence of economic enterprise intended to function with stability."[10] He posited that because capitalism was most conducive to a legal order grounded in a high degree of rationality, the progression of rational law enabled the advancement of modern, industrial capitalism.[11] Some scholars' views that legal institutions themselves determine the boundaries of economic activity,[12] supports Weber's assertion.

While capitalism can take many forms of economic organization,[13] including free market, state and welfare capitalism, a capitalist economy is

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followed by the antithetical neo-liberal policies that emphasized the role of markets and limited capacity of governments. In the late twentieth century it was believed that development prospects were determined by the role and quality of institutions in developing regions. It has ultimately come to be accepted that there is no general blueprint for the design of political, bureaucratic, and legal institutions in developing regions.

9. Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, ed by Guenther Roth & Claus Wittich, translated by Ephraim Fischoff et al (Berkeley, CA: University of California Press, 1978) vol 2 at 883. See also David M Trubek, "Max Weber on Law and the Rise of Capitalism" (1972) 1972:3 Wis L Rev 720 at 721. Numerous scholars have addressed this view: Marc Galanter, "The Modernization of Law" in Myron Weiner, ed, *Modernization: The Dynamics of Growth* (New York: Basic Books, 1966) 153; Lawrence M Friedman, "Legal Culture and Social Development" (1969) 4:1 Law & Soc'y Rev 29, DOI: <10.2307/3052760>; Lawrence M Friedman, "On Legal Development" (1969) 24:1 Rutgers L Rev 11; Kenneth L Karst, "Law in Developing Countries" (1967) 60:1 L Library J 13; Peider Könz, Clive Parry & Wagih Shindy, "Legal Development in Developing Countries" (1969) 63 Proceedings American Society Intl L at Its Annual Meeting (1921–1969) 91, online: <www.jstor.org/stable/25657779> [perma.cc/8SGD-R7GF]; Wallace Mendelson, "Law and the Development of Nations" (1970) 32:2 J Politics 223, DOI: <10.2307/2128652>; Robert B Seidman, "Law and Development: A General Model" (1972) 6:3 Law & Soc'y Rev 311, DOI: <10.2307/3052987>; David I Steinberg, "Law, Development, and Korean Society" (1971) 3:2 J Comparative Administration 215, DOI: <10.1177/009539977100300204>; Henry Steiner, "Legal Education and Socio-Economic Change: Brazilian Perspectives" (1971) 19:1 Am J Comp L 39, DOI: <10.2307/839148>.

10. Weber, *supra* note 9 at 883.

11. *Ibid* at 882-884.

12. Jackie Vandermeulen & Philippe Perron-Savard, "Law and Capitalism: A Book Review" (2009) 67:2 UT Fac L Rev 327 at 328 citing Douglass C North, *Institutions, Institutional Change and Economic Performance* (New York: Cambridge University Press, 1990) at 3-4.

13. William J Baumol, Robert E Litan & Carl J Schramm, *Good Capitalism, Bad Capitalism, and*

mainly distinguished by its relentless focus on constant growth and profit maximization.[14] Although capitalism is fluid and adaptive, Clifford Gordon Atleo believes that these core tenets of constant growth and profit remain consistent.[15] If legal institutions are indeed instrumental in creating the boundaries of economic activity, the systematic nature of Western legal institutions and the formal features of the legal process play a critical role in advancing economic development.

Notably, Weber contended that an element of physical or psychological *coercion,* intended to ensure compliance, is built into the system of Western laws.[16] He also alleged that any structured source of guidelines for conduct that is sanctioned by society is a form of legitimate legal order.[17] Assumptions about legitimate legal orders, and concepts such as coercive influence are significant as they relate to Indigenous peoples' sovereignty. John Borrows, an Anishinaabe legal scholar, asserts that at the time the common law was being adopted in various regions in Canada, many Indigenous people wondered how the common law could be applied when those regions were already subject to living Indigenous legal traditions.[18] The common law was nonetheless thrust upon Indigenous peoples who were forced to conform to non-Indigenous laws. This element of coerciveness and legitimacy clarifies some of the longstanding conflicts between Indigenous peoples and the Canadian state. An assault on Indigenous sovereignty resulted when the more pervasive and dominant Western "rational" laws were centred in Canada, while at the same time subjugating Indigenous living "relational" laws.

For Indigenous economic development, it is problematic that law and economic development are largely linked to Western notions of the protection of property rights and the ability to enforce contracts.[19] Ostensibly, this protection was meant to provide investors with the assurance that if they invest, the law will facilitate predictability, enforceability, and market

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the Economics of Growth and Prosperity (New Haven: Yale University Press, 2007) at vii.

14. Clifford Gordon Atleo, "Aboriginal Capitalism: Is Resistance Futile or Fertile?" (2015) 9:2 J Aboriginal Economic Development 41 at 42.

15. *Ibid* at 42.

16. Weber, *supra* note 9 at 34.

17. *Ibid* at 31-36.

18. John Borrows, "Indigenous Legal Traditions in Canada" (2005) 19:1 Wash UJL & Pol'y 167 at 188, online: <journals.library.wustl.edu/lawpolicy/article/id/1608/>, [perma.cc/MT26-WMK7] [Borrows, "Indigenous Legal Traditions"]. Depending upon the region in question, English governors arrived in various parts of Canada and asserted common law. As such, the dates for the common law's reception varies across the country, anywhere from 1763 to 1870.

19. Stephan Haggard, Andrew MacIntyre & Lydia Tiede, "The Rule of Law and Economic Development" (2008) 11:1 Annual Rev Political Science 205 at 206, DOI: <10.1146/annurev.polisci.10.081205.100244>.

activity, barring which transaction costs would be largely excessive.[20] As Stephan Haggard, Andrew MacIntyre, and Lydia Tiede note, at its most fundamental level, economic growth and development is fueled by investment and trade, from which the legal effect given to property rights and the ability to contract is key.[21] In fact, the billions of dollars spent by institutional policymakers to strengthen the rule of law around property rights and contract law[22] reveals that Western laws have been largely revered and privileged in this regard.

Nevertheless, for many Indigenous peoples the concept of a "property right" is not viewed as a right at all, but rather as a *responsibility to* and a reciprocal *relationship with* land and resources. As such, "ownership" or access rights through contract have traditionally been foreign values for some Indigenous peoples.[23] Atleo asserts that the prioritizing of legal rights associated with property advances and celebrates individual accumulation of wealth, which often leads to inequality.[24] He argues that the protection of private property for profit, and the commodification of all things being prioritized over life forms, requires a radical re-orientation of Indigenous worldviews.[25]

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20. Vandermeulen & Perron-Savard, *supra* note 12 at 328. See also Curtis J Milhaupt & Katharina Pistor, *Law and Capitalism: What Corporate Crises Reveal about Legal Systems and Economic Development around the World* (Chicago: University of Chicago Press, 2008) at 17.

21. Haggard et al*, supra* note 19 at 205.

22. David M Trubek, "The 'Rule of Law' in Development Assistance: Past, Present, and Future" in David M Trubek & Alvaro Santos, eds, *The New Law and Economic Development: A Critical Appraisal* (Cambridge, UK: Cambridge University Press, 2006) 74 at 74; Lisa Bhansali, "Defining our Path to the 'Rule of Law'" (17 April 2012), online (blog): *World Bank Blogs* <blogs.worldbank.org/governance/defining-our-path-to-the-rule-of-law?cid=SHR_BlogSiteEmail_EN_EXT> [perma.cc/CZ2X-S9S5]. Given the massive investment in strengthening the rule of law, the recent announcement by the Department of Justice in Canada that an investment of $500,000 would be provided to assist in the revitalization of Indigenous laws hardly seems notable. See announcements made by the Justice Minister David Lametti on the support provided for the revitalization of Indigenous laws: CPAC, "Federal justice minister makes announcement on revitalization of Katzie laws" (10 August 2021), online (video): *YouTube* <www.youtube.com/watch?v=P3maKESNYsg> <www.youtube.com/watch?v=P3maKESNYsg>; APTN News, "Announcement regarding the revitalization of Indigenous laws" (9 August 2021), online (video): *YouTube* <www.youtube.com/watch?v=BX5gD7nMgzc> [perma.cc/9C5P-V9SY].

23. Although, Michael McDonald, a lawyer and part-time historian from Sipekne'katik First Nation in Nova Scotia, has begun the process of compiling research that disputes the long-held understanding that the Mi'kmaq did not view themselves as having ownership of land or having "title" to the land. In examining historical documents, he provides examples of how the Mi'kmaq leaders of the day asserted their claims to land ownership. See Cassidy Chisholm, "How a part-time historian is dismantling misconceptions about Mi'kmaw culture" (22 January 2022), online: *CBC Radio-Canada* <www.cbc.ca/news/canada/nova-scotia/amateur-historian-misconceptions-mikmaw-culture-1.6323133> [perma.cc/7D6R-F9EY].

24. Atleo*, supra* note 14 at 42.

25. *Ibid.*

A legal system that protects property rights and enforces contracts is connected to a larger political system that promotes underlying political bargains and institutions,[26] further exacerbating the need for a radical re-orientation of Indigenous worldviews. Atleo claims that "ambitions for riches, the transformation of Indigenous lands into private property, and all life into commodities" has been at the heart of Western approaches to wealth.[27] This is evident in how laws, used as levers to facilitate the dispossession of Indigenous lands, historically reinforced state governmental and third-party interests, while diminishing Indigenous sovereignty in traditional territories. This is problematic because, as Borrows notes, laws created from the dominant perspective mean that judicial power "often cascades from the dominant group's *ideological headwaters*" from which "bias spills onto the pages of legal decisions from a contextualized, politically hued stream."[28]

To this end, the privilege given to Western laws has resulted in Indigenous peoples having to contend and adapt to non-Indigenous legal interpretations. This is apparent in the historically discriminatory and paternalistic legislation and legal decisions rendered from a dominant Western perspective that limit and erode Indigenous sovereignty and traditional land rights.[29] For instance, since its creation in 1876 as a

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26. Haggard et al, *sup*ra note 19 at 206.

27. Atleo*, supra* note 14 at 49. Inevitably resulting in a loss of economic livelihood and dependency on the state for Indigenous peoples. See Hamilton et al, *supra* note 5 at 19; Tyler A Shipley, *Canada in the World: Settler Capitalism and the Colonial Imagination* (Halifax & Winnipeg: Fernwood, 2020) at 86-88; Darwin Hanna, *Legal Issues on Indigenous Economic Development* (Toronto: LexisNexis, 2017) at 1; Hilton, *supra* note 4 at 21;"Cash Back: A Yellowhead Institute Red Paper" (May 2021), online: *Yellowhead Institute* ≤cashback.yellowheadinstitute.org> [perma.cc/Q9NS-VXF5]; "Land Back: A Yellowhead Institute Red Paper" (October 2019), online: *Yellowhead Institute* <redpaper.yellowheadinstitute.org/> [perma.cc/JR73-3JNC]; Michael Torrance, *Equator Principles and Performance Standards on Environmental and Social Sustainability*, 2nded (Toronto: LexisNexis, 2021) at 337-338; Atleo*, supra* note 14 at 42.

28. John Borrows, "Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28:1 UBC L Rev 1 at 2 [Borrows, "Constitutional Law"] (emphasis added).

29. See e.g. George R, Proclamation, 7 October 1763,, reprinted in RSC 1985, App II, No 1; *An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury*, SC 1850, c 74; *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, SC 1868, c 42; *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42*, SC 1869 c 6; *Indian Act*, RSC 1985, c I-5. See also *St Catherine's Milling and Lumber Co v R* (1887), 13 SCR 577, 13 OAR 148 [*St Catherine's Milling*]. For a comprehensive discussion of this case see Kent McNeil, *Flawed Precedent: The St Catherine's Case and Aboriginal Title* (Vancouver & Toronto: UBC Press, 2019) where McNeil discusses how the Doctrine of Discovery—a Western legal principle that surmises that European countries upon 'discovering' Indigenous peoples, extinguished their sovereignty and acquired the underlying title to Indigenous lands—was validated in 1887 in the first major Canadian court decision to address Indigenous land rights, *St Catherine's Milling*. This

consolidation of previous statutes, the paternalistic *Indian Act* has severely limited First Nations sovereignty and legal and economic rights.[30] In 1996, the Royal Commission on Aboriginal Peoples found that the *Indian Act*'s paternalistic approach has worked to "interfere profoundly in the lives, cultures and communities of First Nation peoples," and is unlikely to provide emancipatory legal protection for First Nation peoples.[31] Canada's Department of the Interior's Annual Report in 1876 not only concedes the *Indian Act*'s complete disregard for Indigenous sovereignty, but expressed a racist view of Indigenous peoples' ability to be self-determined:

> Our Indian legislation generally rests on the principle, that the aborigines are to be kept in a condition of tutelage and treated as wards or children of the state... [T]he true interests of the aborigines and of the State alike require that every effort should be made to aid the Red man in lifting himself out of his condition of tutelage and dependence, and that is clearly our wisdom and our duty, through education and every other means, to prepare him for a higher civilization by encouraging him to assume the privileges and responsibilities of full citizenship.[32]

The effect of the *Indian Act* is that Indigenous sovereignty has been disrupted and Indigenous peoples' territorial rights have been oppressed.

Likewise, a narrowly constructed framework established by the Supreme Court of Canada whereby laws intended to recognize Aboriginal and treaty rights affirmed in the Constitution (which, in turn, assist Nations in becoming self-sustaining) focuses on historical contact, assertions of

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Doctrine established an erroneous foundation for the Supreme Court of Canada's interpretation of section 35 of the Constitution. See also John Borrows, "The Durability of *Terra Nullius*: *Tsilhqot'in Nation v British Columbia*" (2015) 48:3 UBC L Rev 701; Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 113-131; Wendy Moss & Elaine Gardner-O'Toole, "Law and Government Division "Aboriginal People: History of Discriminatory Laws" (last modified November 1991), online: *Government of Canada Publications* <publications.gc.ca/Collection-R/LoPBdP/BP/bp175-e.htm> [perma.cc/DG3E-E8ML]; Bob Joseph, *21 Things You May Not Know About the Indian Act* (Port Coquitlam, BC: Indigenous Relations Press, 2018) at 7 (discussion of the *Bagot Report 1844*).

30. See e.g. John Borrows, "Unextinguished: Rights and the Indian Act" (2016) 67 UNBLJ 3 <journals.lib.unb.ca/index.php/unblj/article/view/29071/1882524256> [perma.cc/6CSR-KW48]; Richard H Bartlett, "The Indian Act of Canada" (1978) 27:4 Buff L Rev 581; Richard Bartlett, "Indian Act of Canada: An Unyielding Barrier" (1980) 6:4 American Indian J 11; Robert G Moore, *The Historical Development of the Indian Act*, 2nd ed (Canada: Treaties and Historical Research Centre, Indian and Northern Affairs, 1978); Wayne Daugherty & Dennis Madill, *Indian Government under Indian Act Legislation: 1868-1951* (Ottawa: Department of Indian and Northern Affairs Research Branch, 1980).

31. Indian and Northern Affairs Canada, *Looking Forward, Looking Back: Report of the Royal Commission on Aboriginal Peoples*, (Ottawa: Canada Communication Group, 1996) vol 1 at 601.

32. Canada, Department of the Interior, "Annual Report for the Year Ended 30th June 1876" by David Mills, *Sessional Papers,* 1877, vol 7, no 11, at xiv.

Crown sovereignty, and negotiated agreements.[33] Particularly problematic is the fallacy that as a political act the Crown asserted sovereignty over Indigenous peoples (also known as the doctrine of discovery), a premise in which the Aboriginal and treaty rights framework is grounded. This doctrine is based on the view that the Crown also asserted supreme law-making authority over Indigenous peoples and their lands.[34] While Indigenous peoples declare that their sovereignty has never been relinquished, to date the Canadian courts have been unwilling to challenge the legality of the Crown's assertion of sovereignty. While the Pope repudiated this Doctrine in March 2023 it remains to be seen how this will play out in the courts. The persisting result has been that non-Indigenous people have directly prospered from Canada's act of claiming sovereignty, using European land-based value systems to justify economic development, and using Euro-centric legal orders to legitimize their sovereignty claims.

Furthermore, Borrows contends that the Aboriginal and treaty rights framework equates law with history such that the past is a large determinant of present legal reasoning; the effect is that Indigenous peoples are severely disadvantaged because they cannot prove connections to past practices.[35] Being unable to meet the Canadian legal tests has severely limited Nations' abilities to engage economically in their traditional territories. The limitations are augmented by the fact that Canadian courts have struggled to give effect to Indigenous laws,[36] which has had significant impacts on Indigenous sovereignty and economic outcomes.

1. *More inclusive law and development realities*

Seemingly incompatible values exist between Indigenous societies, with their distinct laws and economic values,[37] and Western societies, where

33. John Borrows, "Challenging Historical Frameworks: Aboriginal Rights, The Trickster, and Originalism" (2017) 98:1 Canadian Historical Rev 114 at 115[[Borrows, "Originalism"].

34. For example, the British asserted sovereignty over much of eastern North America through the Royal Proclamation of 1763 following its defeat of France in the Seven Years War. The courts have also identified the Treaty of Oregon of 1846, which established the south-western boundary between British North America and the United States, as the date of the assertion of Crown sovereignty on the west coast. See *ibid*.

35. Borrows, "Originalism," *supra* note 33 at 116.

36. And, in fact, rather than give effect to Indigenous laws, the courts have treated them as evidence and fact. See *R v Van der Peet* [1996] 2 SCR 507 at paras 84-89, 137 DLR (4th) 289; Minnawaanagogiizhigook (Dawnis Kennedy), "Reconciliation Without Respect? Section 35 and Indigenous Legal Orders" in Law Commission of Canada, ed, *Indigenous Legal Traditions* (Vancouver & Toronto: UBC Press, 2007) 77 at 87-89; Val Napoleon & Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions through Stories" (2016) 61:4 McGill LJ 725 at 735 DOI: <10.7202/1038487ar>; Karen Drake, "Indigenous Oral Traditions in Court: Hearsay or Foreign Law?" in Karen Drake & Brenda L Gunn, eds, *Renewing Relationships: Indigenous Peoples and Canada* (Saskatoon: Native Law Centre, 2019) 17 at 17-21.

37. Robert B Anderson, Leo Paul Dana & Teresa E Dana, "Indigenous Land Rights, Entrepreneurship,

colonial laws and the capitalist market economy are significant driving forces.[38] In these circumstances, how law impacts economic development requires interpretive skill. This is because law is more than a set of legal conventions and can therefore mean different things depending upon the legal tradition at hand and local realities. To this end, David Trubek and Marc Galanter note that policymakers' efforts to indiscriminately strengthen the rule of law should be rejected in favour of a more relativistic approach.[39] If the local realities are that which gives law its legitimacy, it should be created and interpreted based on local realities (in this case Indigenous local realities).

Trubek suggests that more inclusive ways exist to consider law and economic development: change through cultural reform; constant experimentation in economic development; recognizing that capitalism can take many forms and therefore law can and will vary depending upon the form of economic system; and appreciating that legal rights are a part of economic development rather than simply a means to an end.[40] Kevin Davis and Michael Trebilcock emphasize that the field of law and development is evolving to promote and respect a broader range of social outcomes—including respect for human rights, gender equality, and distributive justice—as a means to advocate for legal reform.[41]

Similarly, Curtis Milhaupt and Katharina Pistor argue that strengthening property rights and contract law to advance economic development are not the only ways law can promote market activity.[42] Market development requires other factors beyond law to be considered, including social norms and values, best practices, self-regulation, and certain principles and values not necessarily legally enforceable.[43] To this end, how market proponents participate in the shaping of the law is critical because legal

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and Economic Development in Canada: 'Opting-in' to the Global Economy" (2006) 41:1 J World Business 45 at 46 DOI <10.1016/j.jwb.2005.10.005>.

38. Rauna Kuokkanen, "Indigenous Economies, Theories of Subsistence, and Women: Exploring the Social Economy Model for Indigenous Governance" (2011) 35:2 *American Indian Q* 215 at 215 DOI: <10.5250/amerindiquar.35.2.0215>; David R Newhouse, "Resistance is Futile: Aboriginal Peoples Meet the Borg of Capitalism" in John Douglas, ed, *Ethics and Capitalism*,(Toronto: University of Toronto Press, 2000) 141 at 145 [Newhouse, "Borg of Capitalism"].

39. David Trubek & Marc Galanter, "Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States" [1974] 4 Wis L Rev 1062 at 1080-1081.

40. Trubek, "Scholars in Self-Estrangement," *supra* note 6 at 318-320.

41. Kevin E Davis & Michael J Trebilcock, "The Relationship Between Law and Development: Optimists Versus Skeptics" (2008) 56:4 Am J Comp L 895 at 899 DOI <10.5131/ajcl.2007.0031>.

42. Milhaupt & Pistor, *supra* note 20 at 20-21.

43. *Ibid* at 21.

systems should have the capacity to balance competing interests beyond the private ordering generated by property and contractual rights.[44]

How law is implicated in Indigenous economic development closely aligns with the views of Milhaupt and Pistor. Indigenous peoples' rights have often been narrowly defined, and to support Indigenous sovereignty and promote self-determination, legal actors and governments will need to establish a Canadian legal system that is more inclusive of Indigenous legal orders. That is, for Indigenous economic development initiatives and processes to be inclusive and impactful, rather than a sole focus on Western laws, the contribution of local Indigenous laws, environments, cultures, and histories is required to meet local requirements and capabilities. As Trebilcock asserts, law and economic development scholars have come to recognize that the unique idiosyncrasies of various regions—including their history, culture, geography, politics, economics, ethnics, religions, demographics, and other features—shape the regions' economic development initiatives and processes.[45] As is argued in the next section, one must look at the larger legal system that privileges Western laws to advance economic development, rather than solely focusing on the differences in economic perspectives (i.e. Western values/Indigenous values). By recognizing that the integration of Indigenous legal perspectives plays a critical role, economic reconciliation can be achieved.

II. *The limitations of solely focusing on economic perspectives in contemporary Indigenous economic development*

Whether the values inherent to the market economy can be reconciled with Indigenous economic values has been the subject of much debate. Atleo asserts that capitalism and Indigenous economic values are incompatible in that capitalism cannot be Indigenized without either radically altering its core tenets, or by radically changing Indigenous core values and principles.[46] He asserts that there could be viable alternatives to capitalism to achieve Indigenous well-being, however, he acknowledges that finding alternatives that do not involve compromise is challenging.[47] Atleo is firm in his stance that the two worldviews are diametrically opposed and he does not believe that Indigenous peoples need to succumb to the lure of capitalism to engage in economic development. He asserts that an Indigenous renaissance of sorts, where cultural and traditional values

44. *Ibid* at 21.
45. Trebilcock, "Universalism," *supra* note 7 at 333.
46. Atleo, *supra* note 14 at 42.
47. *Ibid* at 50.

are reclaimed and affirmed, is one way to resist the negative impacts of capitalism on Indigenous peoplehood.[48]

In contrast, Robert J Miller contends that Indigenous peoples should indeed participate in market-based activities, which he calls "reservation capitalism," on the same level as non-Indigenous peoples. In his view, participating in market-based business activities is a way to attain the same level of prosperity as non-Indigenous people.[49] Miller is not so much concerned with how distinct Indigenous conceptions of prosperity and economic well-being depart from the principles generally espoused in capitalism. Rather, he argues that the negative impacts of Indigenous poverty on cultural integrity overshadow any effects of capitalism.[50] Reconciling Indigenous and European capitalist values in economic ventures does not appear to be of consequence to Miller. He asserts that Indigenous peoples have always incorporated free market economic principles in economic development. According to him, the values championed in capitalism can be and are embraced by Indigenous peoples.[51] Overall, Miller encourages economic investment, both in fiscal and human capital, as a way to increase economic development in Indigenous territories.[52]

Undoubtedly, engaging in economic development has the potential to untether Indigenous peoples from historical cycles of poverty; however, "freedom from poverty" is distinct from sovereignty and the wholistic nature of Indigenous well-being. Overcoming poverty can certainly contribute to Indigenous well-being, yet Miller overlooks that Indigenous poverty has largely been caused by capitalism. In advocating for "reserve capitalism," Miller does not seem to contemplate that historically, Indigenous peoples engaged in economic development in distinct, non-capitalist ways, mainly through operating in subsistence economies.

David Newhouse also considers how Indigenous peoples engage in capitalism, which he calls "capitalism with a red face."[53] Unlike Miller, Newhouse believes the two worldviews are entirely distinct and it would be naïve to believe Indigenous peoples can engage with capitalism and

48. *Ibid* at 50.
49. Robert J Miller, *Reservation "Capitalism": Economic Development in Indian Country* (Lincoln: University of Nebraska Press, 2013) at 3.
50. *Ibid* at 3.
51. *Ibid* at 11.
52. *Ibid* at 93.
53. David Newhouse, "Modern Aboriginal Economies: Capitalism with a Red Face" (2000) 1:2 J Aboriginal Economic Development 55, online: <iportal.usask.ca/docs/Journal%20of%20Aboriginal%20Economic%20Development/JAED_v1no2/JAED_v1no2_Article_pg55-61.pdf> [perma.cc/XFV8-MLDF] [Newhouse, "Capitalism with a Red Face"].

not be changed by it.[54] Newhouse's views align with Atleo in that he too is critical of the negative impacts of capitalism on Indigenous well-being. Newhouse nonetheless is more optimistic that capitalism and Indigenous values can be reconciled provided Indigenous values and realities are centred in economic development initiatives and processes.[55]

Likewise, Duane Champagne asserts that Indigenous peoples' involvement in what he calls "tribal capitalism," is necessary to advance broader economic development initiatives that promote Indigenous self-determination.[56] He concedes that Indigenous values do not align with capitalist values. Champagne nonetheless asserts that maintaining connections to land and culture provides balance and traditional values in contemporary Indigenous economic development initiatives, ensuring Indigenous nationhood and cultures remain intact.[57]

Similarly, Anderson et al assert that Indigenous economic participation should be grounded in traditional values. They advocate for the principles of social entrepreneurship, which align economic engagement with a defined social purpose. Social entrepreneurship takes into account certain socially defined limits on economic activity. As wealth increases and communities are able to provide targeted access to education, housing, social programs, and health care, to name a few, the well-being of community members also increases.[58] Through social entrepreneurship, Indigenous peoples can benefit from long-term economic growth, not as an end in itself, but rather as a means to promote the control of traditional lands and local activities.[59] While this is an effective means for Indigenous entrepreneurs, models of social entrepreneurship developed by non-Indigenous peoples do not consider Indigenous sovereignty and the role of Indigenous legal traditions and values in shaping business, including in social enterprises.

Each of the above authors make a valuable contribution to the scholarship on Indigenous economic development. In expanding upon these scholarly contributions, this article is concerned with *the role law has played, and can play,* in shaping Indigenous economic development. Given the impact law has had in advancing capitalism and adversely impacting Indigenous sovereignty, one cannot consider solutions exclusive

54. Newhouse, "Borg of Capitalism," *supra* note 38 at 152.
55. Newhouse, "Capitalism with a Red Face," *supra* note 53 at 57. See also Newhouse, "Capitalism with a Red Face" *supra* note 53 at 59-60 (Newhouse offers ten points that demonstrate how "capitalism with a red face" is set apart).
56. Duane Champagne, *Social Change and Cultural Continuity Among Native Nations* (Lanham: Altamira Press, 2007) at 5661.
57. *Ibid* at 56-61.
58. Anderson et al, *supra* note 37 at 46.
59. *Ibid* at 46.

of the law. It is not enough to say that capitalism and Indigenous economic values diverge, or that the core tenets of capitalism are so dominant that they will lessen the value of Indigenous traditions.[60] Rather, examining the legal system that was, and remains, instrumental in advancing capitalism may assist in dismantling its effects. This requires a reckoning with how one economic system became *the* most pervasive and dominant system for conducting business and engaging in economic activity in the Western world.

Arguably, just as strengthening Western law played a critical role in advancing capitalism, strengthening Indigenous law can play a profoundly critical role in advancing Indigenous sovereignty, self-determination, and prosperity. One cannot so easily get away from the way law materially shapes the lives of individuals in the particular societies in which they live. Western law has been, and is, a powerful accomplice in the dispossession of Indigenous sovereignty and lands which has resulted in substantial economic inequity. However, *reclaiming and incorporating* Indigenous laws, rooted in Indigenous knowledge and social systems, into Indigenous economic development initiatives and processes is a way to counter these effects.

While Newhouse did not specifically implicate the law, he alluded to the ways that capitalism could be countered by incorporating Indigenous values in economic development. Likewise, Atleo concedes that a resurgence of Indigenous knowledges, traditions, culture, and values may counter the impacts of capitalism on Indigenous economic development. However, there needs to be something more. That "something more" is the way in which law is understood in Canada. Because Indigenous laws have largely been ignored and, more importantly, *overruled* by Western law within the greater Canadian legal system, their authority has been significantly eroded.[61] The ways Western law has been applied to determine the significant legal, economic, political, and social outcomes of Indigenous peoples should no longer be reinforced by the Canadian state. Arguably, seeking solutions solely through the same system of law that disrupted Indigenous sovereignty, and, in turn, economic prosperity, is an exercise in futility.

It is in redefining legal identity that the law has the potential to have an emancipatory effect for Indigenous peoples, and a positive impact on Indigenous prosperity. Specifically, the function of *Indigenous legal orders* can lead to this emancipatory effect. That is, the solution lies in

60. Atleo, *supra* note 14 at 50.
61. Law Commission, *supra* note 36 at ix.

Indigenous peoples' meaningful contribution to shaping legal pluralism in Canada, and in this instance, how Indigenous law can shape economic development. Indigenous legal traditions have a long history in Canada and many communities have developed complex systems of law based on traditional knowledge and stories. As discussed in the following section, by respecting the principle of Two-Eyed Seeing, these laws can not only be recognized within the Canadian legal system but legally validated in the same manner as the common and civil law systems.

III. *Whose legal tradition is it anyway?*

The previous section analyzed the drawbacks of narrowly focusing on "economy/capitalism" rather than addressing the way that Western law has been instrumental in entrenching legal and economic systems designed to disenfranchise Indigenous peoples of their sovereignty and legal and economic autonomy. Two fundamental premises are key moving forward: 1) Indigenous laws are sui generis and legitimate and should be embedded in Indigenous economic development processes; 2) respecting the principle of *Etuaptmumk* (Two-Eyed Seeing) is a means to appeal to the best of both Western laws and Indigenous laws in economic development.

1. *Indigenous law and economic development*

Notwithstanding that many Indigenous peoples continue to be guided by their distinct laws within their communities, and others are currently in the process of reclaiming or recentering their distinct laws, the Canadian legal system has only just begun to recognize the importance of Indigenous legal traditions and the value of Indigenous law-making to Canada's pluralistic legal identity.[62] Nonetheless, although Canada has a multi-juridical legal system—comprised of the common law, civil law, and Indigenous legal traditions—the predominant legal traditions given effect by the courts and recognized by parliament and provincial legislatures have been the common law or civil law traditions and the relative enacted legislative provisions. Furthermore, the principally recognized laws that regulate the ability of Indigenous peoples to engage in economic development initiatives—especially in initiatives between Indigenous peoples and

62. Minister of Justice and Attorney General of Canada, "Principles Respecting the Government of Canada's Relationship with Indigenous Peoples" (2018), online: *Department of Justice Canada* <www.justice.gc.ca/eng/csj-sjc/principles-principes.html> [perma.cc/9R7K-FF3M] (Principle 4); Law Commission, *supra* note 36; Truth and Reconciliation Commission of Canada, "Truth and Reconciliation Commission of Canada: Calls to Action" (2015), online: <www2.gov.bc.ca/assets/gov/british-columbians-our-governments/indigenous-people/aboriginal-peoples-documents/calls_to_action_english2.pdf> [perma.cc/YS3J-YEUQ].

other governments or third parties—are largely Canadian laws[63] that do not always recognize or give credence to Indigenous legal traditions. Only considering Canadian laws has the effect of nullifying the ways Indigenous peoples engage in economic activities through the application of their own laws and processes.

Nullifying Indigenous laws negatively impacts Indigenous autonomy and cultures because, as Leroy Little Bear notes, "Indigenous traditions, laws and customs are the practical application of Indigenous values grounded in their particular experience and worldview."[64] That is, the distinguishing features of Indigenous legal traditions cannot be understood separate from Indigenous experiences and worldviews. The *sui generis* nature and strength of Indigenous laws and knowledge systems is that they are guided by a unique connection to place, resources and environments, and focus on collective well-being. This collectivity demonstrates a deep respect for the interrelationships between *all* life forms, which are believed to be in constant motion and instilled with energy and spirit.[65] Little Bear notes that a holistic and cyclical view of the world is integral to Indigenous worldviews in that the constant moving and changing requires one to look at the whole in order to see the connections.[66] These cyclical patterns found in recurring phenomena, such as the seasons of the year, the migration of the animals, renewal ceremonies, songs, and stories, focus on process rather than a particular end product.[67] As such, the distinctiveness of many Indigenous laws is the unique way that process is engaged.

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63. For example, the power of First Nations to enact laws under the *Indian Act*, *supra* note 29 (often distinct from a nations' own traditional laws); see also *First Nations Land Management Act*, SC 1999, c 24; *First Nations Oil and Gas and Moneys Management Act,* SC 2005, c 48; *First Nations Commercial and Industrial Development Act*, SC 2005, c 53; *First Nations Fiscal Management Act*, SC 2005, c 9;*Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11. For selective commentary see Malcolm Lavoie & Moira Lavoie, "Land Regime Choice in Close-Knit Communities: The Case of the First Nations Land Management Act" (2017) 54:2 Osgoode Hall LJ 559, online: <digitalcommons.osgoode.yorku.ca/ohlj/vol54/iss2/15/> [perma.cc/VL3X-C492]; Dwight Newman, "Business Implications from a Public Law Doctrine: Judicial Interpretations of Canada's Indigenous Rights Clause and Their Relationship to Economic Reconciliation" (2018) 83 SCLR (2d) 3; Harold Cardinal, *The Unjust Society: The Tragedy of Canada's Indians* (Edmonton: Hurtig, 1969) at 72; Robert Yalden et al, *Business Organizations: Practice, Theory and Emerging Challenges*, 2nd ed (Toronto: Emond Montgomery, 2018) at 239-342; Ken Coates and Blaine Favel, "Indigenous Business and Canadian Law: Defining Commercial Opportunities for Indigenous Entrepreneurs and Communities" (2018) 83 SCLR (2d) 83; Brian A Crane, Robert Mainville & Martin W Mason, *First Nations Governance Law* (Markham: LexisNexis, 2008); Angela D'Elia Decembrini, Kate Gunn & Bruce McIvor, *Annotated Aboriginal Law: The Constitution, Legislation, Treaties and Supreme Court of Canada Case Summaries* (Toronto: Thomson Reuters, 2021).

64. LL Bear, "Jagged Worldviews Colliding" in Marie Battiste, ed, *Reclaiming Indigenous Voice and Vision* (Vancouver: University of British Columbia Press, 2000) 77 at 79.

65. *Ibid* at 77.

66. *Ibid* at 78.

67. *Ibid* at 78.

The legal norms and protocols that inform process are a critical component of Indigenous economic development. For example, Indigenous protocols privilege the seven-generation principle, wherein communities make economic decisions based on the potential impact on the next seven generations.[68] In stark contrast, Western laws, which promote land tenure and control of resources, encourage and privilege competition between individuals and corporations. For Western laws, individual advancement and wealth accumulation is key, often at the expense of present and future collective well-being.[69] Competition to the exclusion of other values can negatively impact Indigenous peoples' ties to land and resources, which in turn impacts collectivity and connection to place and environments.

Indigenous peoples' connection to land is critical because, as Anderson et al note, traditional lands are where the nation dwells and cannot be considered separate from the people, culture, identity,[70] or law. These are all interconnected and create a stewardship obligation to protect and preserve all life forms, including people, fauna, and flora, in Indigenous traditional territories.[71] While there is diversity in how resources are managed across Indigenous cultures, Borrows and Praud assert that legal principles that include stewardship responsibilities have been at the heart of managing Indigenous wealth and resources since time immemorial:

> For millennia, Indigenous communities have managed collective wealth with a strong sense of stewardship and consideration for future generations. Through shared stories, songs, dances, crests, and land and resources, legal principles and values were created, taught, and integrated into ways of being. Such values have marked peoples' relationship with the land, waters, plants, animals, themselves, and each other.[72]

To this end, as a fundamental principle that guides the relationship Indigenous peoples have with their ecosystems, deliberate and resourceful

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68. Ashley Julian, *Thinking Seven Generations Ahead: Mi'kmaq Language Resurgence in the Face of Settler Colonialism* (Master of Education Thesis, University of New Brunswick, 2016) [unpublished] at 1. See also "What is the Seventh Generation Principle?" (30 May 2020), online: *Indigenous Corporate Training Inc* <www.ictinc.ca/blog/seventh-generation-principle#:~:text=The%20Seventh%20Generation%20Principle%20is,seven%20generations%20into%20the%20future> [perma.cc/J6UP-442A] (the Great Law of the Haudenosaunee (Iroquois) Confederacy).

69. Atleo*, supra* note 14 at 42.

70. Anderson et al, *supra* note 37 at 46.

71. Kuokkanen, *supra* note 38 at 219. For a general discussion see W Wuttunee, *Living Rhythms: Lessons in Aboriginal Economic Resilience and Vision* (Montreal & Kingston: McGill-Queen's University Press, 2004).

72. John Borrows & Shayla Praud, "Teachings of Sustainability, Stewardship, & Responsibility: Indigenous Perspectives on Obligation, Wealth, Trusts, & Fiduciary Duty" (2020) at 3, online: *Reconciliation and Responsible Investment Initiative* <reconciliationandinvestment.ca/wp-content/uploads/2020/09/Sustain-Stewardship-Responsiblity-v3.pdf> [perma.cc/K3Z4-R752].

stewardship is a means to "create and maintain Indigenous thought, languages, stories and ceremony,"[73] which is critical to legal, political and cultural survival, and economic prosperity.

A place-based existence is integral to how Indigenous laws develop because of the belief that community members share specific spaces or territories with other life forces, such as plants and animals; in turn, the interconnectedness with all aspects of the environment has the effect of energizing the powerful relationships between the different life forms.[74] Building and maintaining these relationships, grounded in "place," is also a part of the very fabric of the principle of sustainability, a legal principle that often guides Indigenous economic development. Through the principle of sustainability, Indigenous peoples can distinguish the ecological limits of economic pursuits. Sustainability is especially significant because when land and resources are the means by which Indigenous peoples can re-establish their rich economies,[75] Indigenous laws are critical to setting those ecological limits.

On the contrary, laws that have focused on strengthening the capitalist economic system reveal a repugnant history of dispossessing Indigenous peoples of place, that is, of lands and resources,[76] which disrupts the principle of sustainability and prevents Indigenous peoples from being self-determined.[77] Indeed, although Indigenous legal traditions do not require validation to survive, there is no doubt that Western laws have forced Indigenous peoples to organize their societies in ways that have impacted Indigenous sovereignty, economic autonomy, and self-determination.[78]

In spite of the impact of Western laws on Indigenous legal sovereignty, Borrows contends that the strength of a legal tradition is not dependent upon how other legal traditions either accept or receive it as a vital legal tradition.[79] Moreover, notwithstanding their lack of prominence

73. Hamilton et al, *supra* note 5 at 4.
74. Tuma Young, "L'nuwita'simk: A Foundational Worldview for a L'nuwey Justice System" (2016) 13:1 Indigenous LJ 75 at 78, online: <ilj.law.utoronto.ca/sites/ilj.law.utoronto.ca/files/users/waslowskij/young.pdf> [perma.cc/YF5R-3A74].
75. Anderson et al *supra* note 37 at 46.
76. Atleo, *supra* note 14 at 41.
77. *Ibid* at 41. Atleo asserts that capitalism has been a major avenue for mainstream society to assail Indigenous peoples of their lands, thus having a key impact on Indigenous sovereignty and well-being.
78. The way in which the elected system under the *Indian Act*, *supra* note 29 was asserted over traditionally governed communities causing a break down in traditional governance, social organization, and respect for Indigenous laws is a notable example. Furthermore, see note 29 for a list of laws that have impacted the way that Indigenous communities organize and function socio-politically, economically, and legally.
79. Borrows, "Indigenous Legal Traditions," *supra* note 18 at 175.

in broader circles,[80] Indigenous legal traditions ought to be recognized for their strength and influence within communities.[81] Borrows also emphasizes that to remain relevant and strong, a legal tradition need not adhere to its original form; rather, it may evolve to withstand changing circumstances.[82] In fact, if provided recognition and the opportunity to evolve, a legal tradition can remain a relevant, authentic, and living tradition in contemporary times.[83]

Nonetheless, while legal traditions can exist simultaneously within legal systems and can therefore invoke diverse rules of law applicable in identical situations,[84] there is ongoing debate about how Indigenous legal traditions can or will be reconciled within the greater Canadian legal system. There are many pragmatic details to be worked out in this regard. However, the willingness to respect the principle of Two-Eyed Seeing in recognizing Indigenous legal orders as being crucial to Canada's multi-juridical legal system, and in this case, crucial to Indigenous economic development initiatives will, in turn, positively impact Indigenous peoples' rights and economic prosperity.

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80. The limited legal decisions that have recognized the validity of Indigenous legal traditions include: *Pastion v Dene Tha' First Nation* [2018] 4 FCR 467, [2019] 1 CNLR 343; *Alderville First Nation v Canada*, 2014 FC 747; *Connolly v Woolrich*, [1867] 17 RJRQ 75 (Qc Sup Ct), 1 CNLC 70; *Re Adoption of Katie* (1961), 32 DLR (2d) 686 (NT Terr Ct), [1961] NWTJ No 2; *Henry v Roseau River Anishinabe First Nation Custom Council*, 2017 FC 1038; *Alexander v Roseau River Anishinabe First Nation*, 2019 FC 125; *Campbell v British Columbia (AG)*, 2000 BCSC 1123; *Casimel v Insurance Corp of British Columbia,* [1993] BCJ No 1834 (BCCA), 82 BCLR (2d) 387; *R v Marshall,* 2005 SCC 43.

81. Borrows, "Indigenous Legal Traditions," *supra* note 18 at 174. See also James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995). See below for an adjudication under *Ǧviḷás*, Heiltsuk traditional law, related to how an oil spill impacted the Heiltsuk's environment and resources. The Heiltsuk assert that *Ǧviḷás*—which has existed since time immemorial—regulates the balance of the health of the water and land with the needs of the people to ensure there will *always be plentiful resources*. The legal analysis of the incident according to Heiltsuk Law informed the legal action taken by the Heiltsuk in the common law courts (statement of claim attached). While clearly the Heiltsuk view their laws as binding on Heiltsuk interests, this case is still pending and will be an important case to follow in terms of whether/how the common law courts consider the role of Heiltsuk traditional law in resolving the claim. See Heiltsuk Tribal Council, "Heiltsuk Adjudication Report" (May 2018), online: *Heiltsuk Tribal Council* (2018): <www.heiltsuknation.ca/wp-content/uploads/2018/10/Heiltsuk_Adjudication_Report.pdf> [perma.cc/3B9K-54G5]. See also Heiltsuk Tribal Council, "Notice of Civil Claim" (9 October 2018), online: <www.heiltsuknation.ca/wp-content/uploads/2018/10/Heiltsuk-Notice-of-Civil-Claim.pdf> [perma.cc/47QT-GQR7].

82. Borrows, "Indigenous Legal Traditions," *supra* note 18 at 175. See also Katharine T.Bartlett, "Tradition, Change, and the Idea of Progress in Feminist Legal Thought" [1995] 2 Wis L Rev 303 at 331.

83. Borrows, "Indigenous Legal Traditions," *supra* note 18 at 175.

84. *Ibid* at 174. See also MB Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Oxford, UK: Oxford University Press, 1975).

2. *The Mi'kmaw principle of* Etuaptmumk *(Two-Eyed Seeing) as a means to appeal to the best of both Western laws and Indigenous laws in economic development*

Historically, the privileging of Western laws in Indigenous economic development, has had deleterious impacts on Indigenous economies because Indigenous laws have gone unrecognized. Yet bringing together the best of both Western and Indigenous legal orders in economic development processes could be a means to provide a more equitable basis from which to promote Indigenous self-determination, community engagement, empowerment, and capacity building,[85] and respect for Indigenous sovereignty. The Mi'kmaw principle of *Etuaptmumk* (Two-Eyed Seeing) is a useful principle that encourages diverse ways of knowing to work together. It is based on the premise that to "see from one eye with the *strengths* of Indigenous knowledges and ways of knowing, and from the other eye with the *strengths* of Western knowledges…and [learning to use] both these eyes together, for the benefit of all"[86] is a more equitable way to view and experience shared spaces. Indeed, the existence of two separate social systems (based in values, legal orders, and economic theories) means Two-Eyed Seeing can be explored, discussed, and positioned as a reconciliation framework for more ethical or just legal and economic development.

Elder Marshall notes that the principle can apply in a range of circumstances and in many areas of society:

> Two-Eyed Seeing…does not fit into any particular subject area or discipline. Rather, it is about life: what you do, what kind of responsibilities you have, how you should live while on earth…i.e., a guiding principle that covers all aspects of our lives: social, economic, environmental, etc. The advantage of Two-Eyed Seeing is that you are always fine tuning your mind into different places at once, you are always looking for another perspective and better way of doing things.[87]

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85. Cindy Pelletier, "An Application of Two-Eyed Seeing: Indigenous Research Methods with Participatory Action Research" (2018) 17:1 Intl J Qualitative Methods at 4, DOI: <10.1177/1609406918812346>.

86. Bartlett et al, "Two-Eyed Seeing," *supra* note 3 at 335. See also Cheryl Bartlett, "Two-Eyed Seeing" (presentation to Public and Indigenous Affairs and Ministerial Services Branch within Environment and Climate Change Canada/Government of Canada, delivered in Dartmouth, NS, 23 August 2017) [Bartlett, "Two-Eyed Seeing" (presentation)]; Pelletier, *supra* note 85; Brady Reid, "Positionality and Research: "Two-Eyed Seeing" With a Rural Ktaqmkuk Mi'kmaw Community" (2020)19:1 *Intl J Qualitative Methods,* DOI: <10.1177/1609406920910841>.

87. Cheryl Bartlett et al, "Integrative Science and Two-Eyed Seeing: Enriching the Discussion Framework for Healthy Communities" in LK Hallström, N Guehlstorf, & M Parkes, eds, *Ecosystems, Society, and Health* (Montreal & Kingston: McGill-Queen's University Press, 2015) 280 at 295-296 [Bartlett et al, "Enriching the Discussion"].

While Two-Eyed Seeing is helpful beyond the law, this article focuses on the law to challenge legal actors to embrace the strengths of Indigenous laws and ways of knowing in combination with the strengths of Western laws and ways of knowing. As such, Two-Eyed Seeing can expand Canadian legal orders to recognize and legitimize Indigenous legal orders.

Moreover, what "Two-Eyed Seeing" can bring to the "economic table" is that Indigenous legal orders not only have the capacity to shape legal pluralism in Canada but can shape Indigenous economic development in a way that supports Indigenous self-determination. To do this, an interdependent relationship must be established where parties are willing to engage in a *co-learning journey*.[88] This is distinguished from the ways that Indigenous laws have been treated as inferior to Canadian laws, rather than as laws that all parties can learn from on a co-learning journey between Indigenous and non-Indigenous legal actors.

Engaging with different legal perspectives—which contain both similarities and differences—is a more inclusive way to formulate complete legal principles in a given area. For instance, Two-Eyed Seeing can be useful to promote diversity in the area of trust law. Indigenous trusts have become an increasingly common means for Indigenous communities to advance economic development. Under Canadian law, trustees have a fiduciary duty to act in the best interests of the beneficiaries in carrying out their duties in relation to the assets of the trust. Likewise, Indigenous peoples across Canada—including the Nisga'a, Gitxsan and Gitanyow, Cree, Anishinaabe, Nlaka'Pamux, Kwanlin Dün, and Mi'kmaq—hold distinct legal orders that set out the multi-faceted responsibilities and obligations for managing wealth and resources.[89]

Nonetheless, Borrows notes that "despite recognition of the plurality of legal orders in Canada, there is a paucity of research on the ways in which various Indigenous legal orders intersect with fiduciary duties."[90] The result is that rather than learning from Indigenous interpretations of law and managing resources, many trustees end up equating the fiduciary duty with a responsibility to focus primarily on fiscal returns. This is not to say that the idea of profit is somehow "outside" or anathema to Indigenous economic principles, but rather that profit should not be the sole focus to the exclusion of other values.

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88. Bartlett et al, "Two-Eyed Seeing," *supra* note 3 at 334. See also Sophie IG Roher et al, "How is Etuaptmumk/Two-Eyed Seeing characterized in Indigenous health research? A scoping review" (2021) 16:7 PloS One, DOI: <10.1371/journal.pone.0254612>.

89. For an overview of each of these sui generis Indigenous legal traditions see Borrows & Praud, *supra* note 72 at 13-35.

90. *Ibid* at 3.

For example, one of the legal principles that guide the Mi'kmaq is *Netukulimk*, which confers the people with a responsibility to respect and steward the land and resources with future generations in mind. The use of all that Creator has provided is intended to support the economic well-being of individuals and the community without endangering the integrity, diversity, or productivity of the environment. Profit should not be the sole focus because the responsibility to use resources in a sustainable way involves spiritual and traditional elements, as well as reciprocity, all intended to connect the people, the flora, the fauna, and the environment.[91] Just as Western laws are established to promote economic development, *Netukulimk* promotes and sets the ecological limits of economic development. In terms of managing trust assets, combining the best of both Western and Indigenous legal orders is a more holistic way to advance Indigenous economic development in a good way.[92]

Certainly, dealing with multiple legal orders within one broader area of law will not be a simple or easy process. In applying what Elder Marshall believes is the spirit of co-existence,[93] a weaving back and forth between Western laws and Indigenous laws in economic development ventures may be required in some instances. To this end, in advocating for Indigenous legal engagement in economic development initiatives and processes, it is clear many of these initiatives involve a market-based accumulation of assets. While there is no denying the devastating impacts of capitalism, the starting point should be where Indigenous peoples are positioned today and not where they were before capitalism became pervasive. The reality is that many communities *are* engaging in the market economy. Accordingly, the question should be about how to engage in a manner that supports Indigenous sovereignty and prosperity. It is necessary to reimagine how Indigenous peoples' economic development opportunities—largely disrupted by Western legal systems that solely focused on recognizing non-Indigenous interests at the expense of Indigenous interests—can be informed by Indigenous legal orders.

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91. L Jane McMillan & Kerry Prosper, "Remobilizing netukulimk: Indigenous cultural and spiritual connections with resource stewardship and fisheries management in Atlantic Canada" (2016) 26:4 Reviews in Fish Biology & Fisheries 629, DOI: <10.1007/s11160-016-9433-2>; L Kerry Prosper et al, "Returning to Netukulimk: Mi'kmaq cultural and spiritual connections with resource stewardship and self-governance" (2011) 2:4 Intl Indigenous Policy J 7;"Netukulimk" (last visited 25 July, 2021), online: *Unama'ki Institute of Natural Resources* <www.uinr.ca/programs/netukulimk/> [perma.cc/76TB-2FE8].

92. See e.g., Frankie Young, "Considering Indigenous Trust Investment Principles Through the Lens of Two-Eyed Seeing" (2020) 40 ETPJ 97.

93. Bartlett et al, "Two-Eyed Seeing," *supra* note 3. Elder Marshall also notes Indigenous peoples and stakeholders must also be open to the possibility that it will not always turn out the way one might envision, which is why revisiting and finetuning will be so critical.

Conclusion

The rule of law has had a detrimental impact on advancing Indigenous economic development.[94] The effects were and are compounded, as Indigenous legal orders have been largely disregarded and not recognized by the Euro-legal systems of law. This prejudice has functioned to dispossess Indigenous peoples of their traditional territories, negatively impacting Indigenous cultures, languages, and legal traditions—all of which are linked to the land.

Conversely, recognizing the richness of distinct Indigenous legal and economic values and taking concrete action to include those values in legal and economic processes is a way to promote economic reconciliation. Applying Two-Eyed Seeing as a multidimensional approach to understanding and experiencing diverse worldviews and realities is a way to address the legal and economic divide in Canada.[95] Elder Marshall emphasizes that one should approach diverse knowledges with an "it's us, together" consciousness.[96] It is about more than looking for another perspective or recognizing the differences in worldviews. Rather, Two-Eyed Seeing emphasizes that embracing relationships, responsibilities, commitments, and accountabilities is necessary.[97] In the process, it may be required to re-examine and re-interpret the various issues under study as circumstances warrant.

In recognizing the effect of legal rules and economic development from a variety of legal norms and values, the normative approaches to economic development and law can be challenged. Notably, the variety of norms and values in law have distinct implications depending upon the community members in question. This article challenges the way in which Western law has been strengthened to advance economic development that benefits non-Indigenous people. It also asserts that Indigenous prosperity lies in the connection between *Indigenous law* and economic development. Therefore, fostering sustainable Indigenous economic development means

94. Doug Sanderson, "Commercial Law and Indigenous Sovereignty: It's a Nice Idea, but How Do You Build it in Canada?" (2012) 53:1 Can Bus LJ 92 at 94; Stephen Cornell & Joseph P Kalt, "Sovereignty and Nation-Building: The Development Challenge in Indian Country Today" (1998) 22:3 American Indian Culture and Research J 187. Sanderson notes that while some scholars deny the correlation between development and the rule of law (see e.g., Stephen Cornell and Joseph P Kalt, "Where's the Glue? Institutional and Cultural Foundations of American Indian Economic Development" (2000) 29:5 J Socio-Economics 443 at 458-461), this has been contradicted by others (see e.g. Martin Mowbray, "Localising Responsibility: The Application of the Harvard Project on American Indian Economic Development to Australia" (2006) 41:1 Australian J Soc Issues 87 at 96).

95. Bartlett et al, "Enriching the Discussion," *supra* note 87 at 296.

96. *Ibid* at 294-295.

97. Bartlett, "Two-Eyed Seeing" (presentation), *supra* note 86.

that Indigenous laws and economic values must be embedded in Canada's legal and economic infrastructures.