

# 1

## The Political and Cultural Context

Changing relations between the First Nations and the Canadian state have resulted in a new awareness of customary legal orders. Our primary concern is to report on the development of the laws of the Lake Babine Nation of central British Columbia (see Map 1). We hope that this study will offer information that is useful to the Babine Nation and to members of the Canadian state in applying customary law to judicial processes. Within this context, customary law is held to be the principles and practices of the social order that have emerged through “historical struggles between native elites and their colonial or postcolonial overlords” (Starr and Collier 1989, 9). Legal scholars and anthropologists distinguish customary law from “formal,” or “general,” systems of promulgated laws and state legal institutions by virtue of their foundation in social customs (as opposed to written codes), their holistic appeal to social etiquette and spirituality, and their use in the adjudication of disputes (Molokomme 1990, 8; Angelo 1996, 25). The terms “customary law” and “customary legal order” are used interchangeably with the terms “traditional law” and “traditional legal order” to refer to those principles and practices of Babine society that function in a parallel fashion to those of the Canadian legal order.<sup>1</sup> We keep our definition broad so that we can offer a descriptive account of principles and practices – one that is neither a prescription for an autonomous justice system that would be recognized by the Canadian state nor a prescription for a framework upon which to build an alternative justice order that would operate in conjunction with the Canadian criminal justice system. Our purpose is more limited and less intrusive.

Our goal is twofold: first, to provide a descriptive account of the customary legal practices that constitute “the way of the Lake Babine Nation” and, second, to provide an interpretation of the changing relations between the Lake Babine Nation and the Canadian state – relations that have had an impact upon the former’s understanding of what constitutes just relations between itself and the state as well as upon the position of

its legal order within these relations. In doing so, we consider dynamic relations within the state as multiple sites of power (Foucault 1980, 93) and as “an institutionalized political order” (Comaroff and Comaroff 1991, 5). We do this with a view to directing attention to the varied forms of institutional power that exist in and through “a pattern of relationships” that “produce compelling situations” (Perry 1997, 7). We see the need to understand the institutionalized power relations from the Babine standpoint, which considers how Babine lives are caught up in historical, political, and economic processes.

These patterns of relationships are important because Aboriginal peoples generally have less access to power, in terms of funding, numbers, and strength of association, than do the interest groups who compete with them for resources and who challenge their political goals regarding greater autonomy from the state. As McDonnell (1992, 3) has pointed out, custom must be understood in the contemporary context of state powers “because the simple fact is that as relationships to the state are perceived to change so too do the customs and traditions that an ethnic community or cultural group will stress.” It is because these relationships are shaped



Map 1 Location of Lake Babine Nation

by the reactions and responses of other interest groups that it is useful to follow Poulantzas' (1980) lead and to consider the state as a nexus of power that mediates competing interests. These interests are often marked by a "structure of cathexis – that is, the pattern of emotional attachments and antagonisms" (Franzway et al. 1989, 37) that arises with expressions of difference and the perceived legitimacy underlying claims that are based on difference. While the power of the state constrains First Nations capacity for self-governance, the state itself is limited by the power residing in interlocking social processes that seek to maintain the status quo. Nowhere is this more clear than in (1) emotional expressions of resistance to the settlement of Aboriginal entitlements that would see shifts in power over coveted lands and resources and (2) the denunciation of alternative justice systems as a violation of the principle of "one law for all."

Given the dynamic matrix of intersecting interests within which the Lake Babine First Nation defines itself and its traditions, it is not possible to capture the entirety of its legal order in one study. Just as the Canadian legal order is complex, so is the Babine legal order. Our study, therefore, is not intended to cover all aspects of customary law and their application but, rather, to reflect the traditions emphasized by hereditary chiefs and elders at the time of our research.

We began our research in the summer of 1993, at a critical moment in Canadian history. Canadian citizens had recently defeated the efforts of the federal and provincial governments to reform the Canadian Constitution by means of a general referendum. The Charlottetown Accord of 1992, which had the support of the Assembly of First Nations (an association representing the majority of First Nations of Canada), was not supported by the First Nations as a whole. In the succeeding months, the First Nations turned their attention to the implications of the defeat of the accord and to the possibilities of finding other routes to greater autonomy. At the same time, a new possibility had been advanced in British Columbia – the making of trilateral modern-day treaties. The First Nations and state governments agreed upon the protocol of such treaty making, and the British Columbia Treaty Commission, with representatives from the federal, provincial, and First Nations governments, emerged to monitor and aid the process.

Within the context of failed constitutional reform and preparations for treaty negotiations, issues of customary law took on new significance. One area under consideration was the establishment of "alternative justice systems," which would have delegated to First Nations judicial powers that had hitherto been held by federal and provincial authorities. Therefore a study of customary legal orders was particularly important with regard to three areas: (1) the distinct culture and history of each First Nation,<sup>2</sup> (2) the facilitation of treaty negotiations, and (3) the immediate need to

address critical problems in the areas of civil and criminal law. With regard to issues of civil and criminal law, several government reports highlighted the biases, inefficiencies, and systemic racism of the criminal justice system. From Nova Scotia (1989) a royal commission released the Marshall Report, which exposed the racial biases that had led to the unjust conviction and eleven-year imprisonment of Donald Marshall Junior of the Micmac Nation. Extended study of this particularly horrendous miscarriage of justice, in the context of broader issues of relations between the justice system and First Nations, led to recommendations for greater integration of customary legal orders within the criminal justice system and for a series of reforms that would provide more community control over crime prevention, policing, and criminal sentencing.

An extensive inquiry in Manitoba (1991) had revealed similar findings of systemic racism as well as the depths of sexism directed against First Nations women. The murder of teenaged Helen Betty Osborne in The Pas was the most tragic case to receive country-wide attention. The four murderers of this young secondary school student were known to many persons of authority, yet for sixteen years they went free, untroubled by any effort on the part of state powers to effect justice for the victim, her family, or her nation. These reports (among others of a similar vein), along with a general awareness of the critical failure of the criminal justice system in responding to First Nations needs, influenced our study by directing us to consider and reconsider the ways in which the Babine Nation might evoke traditional practices either to prevent crime or to influence the criminal justice system and, thereby, to ameliorate systemic biases.

Finally, the federal government conducted a massive royal commission on Aboriginal peoples, which culminated in a series of publications on justice issues and self-government in addition to a six-volume report of its findings. First Nations legal scholars debated the cause and possible resolution of the critical situations in which First Nations women find themselves, ranging from the general poverty of reserve life to marital property rights through to the application of customary practices and government delegations of judicial authority in areas of sexual violence and women's rights (LaRocque 1993, 1997; Monture-Okanee 1993; Nahanee 1993).

At this juncture the Lake Babine Nation was not only preparing to negotiate new relations with the federal and provincial governments with respect to self-governance, it was also setting a new course in its internal organization and in its relationships with neighbouring First Nations. In search of greater control over its internal affairs, in 1991 the Babine Nation withdrew from a regional "tribal association" (i.e., the Carrier Sekani Tribal Council). Given the federal and provincial governments' new interest in delegating their powers to First Nations governments, the Babine

administration was facing new challenges, including the establishment of a child welfare system, the expansion of family and social services, preparations for the transfer of health services, and research into questions of social crises and their possible remedy. At the same moment, efforts were being made to have the state recognize broader rights to resource management and commercial harvesting. Each of these circumstances came to influence the scope and direction of our study.

### **Scope of the Research**

From the outset, we recognized that we would be reporting to more than one audience. Our first responsibility was to report to the Babine communities through general meetings, information brochures, and a detailed account of our initial findings. We soon became aware of the strong historical interests of hereditary chiefs and elders, who, in their visits to our research office, expressed their appreciation when we shared what had been recorded by fur traders, missionaries, and anthropologists. As we pored over archival documents, we discovered a range of photographs, letters, and other items that were of personal interest to community members. We also found sparse but interesting accounts of legal decision making. With this in mind, we embarked on a relatively wide-ranging search for historical knowledge of traditional law. We sought evidence that customary legal principles were continuous throughout the period of colonization and that colonial observers recognized the integrity of the Babine legal order. And so we began with a study of early archival documents, of which the most important were fur traders' reports.

As always, using written documents to study an oral culture and its customary legal order created problems. We discuss these in detail later, but it is useful to note here why we carefully critiqued them and why we chose to include summations of texts purporting to describe traditional law. First, as we suggested above, at each historic moment outside observers and Babine leaders have different reasons for emphasizing particular aspects of the legal order. Where these reasons have changed or disappeared, the interest in certain legal principles may have declined. The historic texts, therefore, guided our discussions with hereditary chiefs and elders as we sought to confirm the written word and to develop an understanding of changing interpretations of customary law as they were linked to changes in power relations with the state and settler society and within Babine society itself. Second, we realize that the written record contributes important information regarding the history of colonial relations – information that can be vital to contemporary needs such as preparing for various land claims and treaty negotiations. Making this information more easily accessible to the community will, it is hoped, spark further discussions regarding its interpretation and veracity.

Third, we recognize that scholars, policy makers, and lawyers will consult the written history. As we discuss later, a number of issues that require the interpretation of customary law have been taken before the Supreme Court of British Columbia and the Supreme Court of Canada by neighbouring First Nations. These cases refer to an ethnographic and historic record that is equally pertinent to the Lake Babine Nation. We believe it is important to direct attention to differences between the oral and written history; to identify differences between, and similarities with, the legal orders of the neighbouring nations (which others have overlooked); to correct written errors; and to affirm accurate description – particularly where legal practices may have altered with changing social and economic circumstances. Here our goal is to bring descriptions of these practices forward so that they may be openly discussed.

There are critical limits to our study. We were unable to include a comprehensive account of traditional narratives within which Babine legal principles are embedded; instead, we relied on a collection of fifteen narratives that had been recorded and transcribed by community researchers over a twenty-year period prior to our study. In 1924, Diamond Jenness collected traditional stories from Witsuwit'en and Yinkadinee (Carrier)<sup>3</sup> communities and published them in 1934. However, it was beyond our resources either to confirm these narratives by recording alternative versions with the elders or to record and transcribe additional stories. This task is now being addressed by Babine researchers and will complement the contents of our volume.

Our limited resources also prevented us from conducting a thorough study of traditional land-use patterns, territorial boundaries, and the specific history of stewardship over distinct resource territories administered and utilized by specific hereditary chiefs on behalf of kin and clan groups. We did, however, study the general principles of territorial boundaries as related in interviews and in the chiefs' speeches at the balhats and public meetings. In this way we were able to confirm James Hackler's (1958) record of clan territories as they stood in 1956.

Our study is also limited in its use of the Babine language. Our elder advisors and research assistants identified critical terms and idioms used to name cultural artefacts, social positions, and balhats protocol, and we have included these in our text. Phonetic spellings are provided by community members with the assistance Hank Hildebrant, a linguist who has worked with the language for over twenty-five years. Several linguists, notably Sharon Hargus and James Kari, have studied the Babine language or are currently doing so. Each has made considerable contributions to the analysis of the Babine language as it is spoken in the neighbouring Witsuwit'en communities, and this has created very recent changes in orthography. However, few members of the Babine communities have had any

involvement in these studies and so find these spellings difficult to decipher. We therefore decided to rely on the system with which they are familiar. Our translation of terms derives from our interviews with elders and hereditary chiefs and is provided for us by members of our research team.

In recognizing the diversity of our audience we became aware of the difficulties of presenting the concepts of the balhats to a reader unfamiliar with the contemporary legal order of First Nations in general and of the complex subtleties of the Babine legal order in particular. Without understanding this complexity, a reader may underestimate the potential of the customary legal order to serve either as the basis of an autonomous justice system or as an auxiliary to the Canadian criminal justice system.<sup>4</sup> Our introduction to Chapter 3, which deals with symbolic and ritual parallels between the Canadian and Babine legal orders, is intended to alert the reader to these complexities and subtleties.

### **Organization of the Study**

Keeping in mind our diverse audience, we have organized our study as follows. We begin with an introduction to issues of social research. This is addressed primarily to a professional audience rather than to community members. We offer an overview of extant written accounts and primary sources and then turn to a discussion of the social and judicial contexts that shaped our research. This discussion focuses on conceptual issues as well as on the dynamics of the colonial legacy that shapes relations between First Nations and the Canadian state. We end Chapter 2 with an explanation of our research strategy.

Chapter 3 is also primarily addressed to an external audience. We describe the contemporary social order of the Lake Babine Nation as well as the historical transformation of their communities and economic order, and we introduce our readers to the cultural significance of the clan system. Chapter 4 is written with a community audience in mind, and we offer a detailed account of the ceremonial and legal aspects of the balhats. Here we expand upon our earlier description of the clan system and the role of the hereditary chiefs as well as the processes by which the latter succeed to their positions of obligation and authority. Chapter 5 charts the origin and history of the balhats. Explanations from community members are contrasted to those from outside observers. Our goal here is to account for continuity and change within the balhats system and within the Babine social order in general.

In Chapter 6 we turn to the formulation of traditional law, offering an account of legal principles as provided by the community and by ethnographers. Here we hope to offer community members a clear account of what outsiders have understood (or misunderstood) of their traditional law as well as some insights into how the traditional law of neighbouring

nations has been viewed as consistent with or applicable to the Babine legal order. The intrusion of colonialism upon traditional law is taken up in Chapter 7, which traces the historical unfolding of successive legal orders that continue to influence the community.

Chapter 8 is written primarily with a professional audience in mind. We take up current issues of law and justice from an analytical standpoint, addressing contemporary justice issues routinely confronted by the community. Here we attempt to delineate the social and cultural processes that underlie crises in criminal justice (e.g., domestic violence, inequity between the Lake Babine Nation and the Canadian state, etc.). We address ourselves to issues of gender relations and to the complexities women and men face in resolving the tensions that have led some community members to view their communities as being “under siege.” Finally, we present our conclusions in Chapter 9, which offers a summation of what we have learned from our research and a brief statement concerning the potential of the traditional legal order to resolve contemporary justice issues.