

# An Inside Job: Engaging with Indigenous Legal Traditions through Stories

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Article abstract

There has been a growing momentum toward a greater recognition and explicit use of Indigenous laws in the past several years. According to the Truth and Reconciliation Commission's final report, the revitalization and recognition of Indigenous laws are essential to reconciliation in Canada. How, then, do we go about doing this? In this article, we introduce one method, which we believe has great potential for working respectfully and productively with Indigenous laws today. We engage with Indigenous legal traditions by carefully and consciously applying adapted common law tools, such as legal analysis and synthesis, to existing and often publicly available Indigenous resources: stories, narratives, and oral histories. By bringing common pedagogical approaches from many Indigenous legal traditions together with standard common law legal education, we hope to help people learn Indigenous laws from an internal point of view. We share experiences that reveal that this method holds great potential as a pedagogical bridge "into" respectful engagement with Indigenous laws and legal thought, within and across Indigenous, academic, and professional communities. In conclusion, we argue that, while this method is a useful tool, it is not intended to *supplant* existing learning and teaching methods, but rather to *supplement* them. In practice, we have seen that this method can be complementary to learning deeply through other means. There are many methods to engage with Indigenous laws, and there needs to be critical reflection and conversations about them all.

## AN INSIDE JOB: ENGAGING WITH INDIGENOUS LEGAL TRADITIONS THROUGH STORIES

*Val Napoleon and Hadley Friedland\**

There has been a growing momentum toward a greater recognition and explicit use of Indigenous laws in the past several years. According to the Truth and Reconciliation Commission's final report, the revitalization and recognition of Indigenous laws are essential to reconciliation in Canada. How, then, do we go about doing this? In this article, we introduce one method, which we believe has great potential for working respectfully and productively with Indigenous laws today. We engage with Indigenous legal traditions by carefully and consciously applying adapted common law tools, such as legal analysis and synthesis, to existing and often publicly available Indigenous resources: stories, narratives, and oral histories. By bringing common pedagogical approaches from many Indigenous legal traditions together with standard common law legal education, we hope to help people learn Indigenous laws from an internal point of view. We share experiences that reveal that this method holds great potential as a pedagogical bridge "into" respectful engagement with Indigenous laws and legal thought, within and across Indigenous, academic, and professional communities. In conclusion, we argue that, while this method is a useful tool, it is not intended to *supplant* existing learning and teaching methods, but rather to *supplement* them. In practice, we have seen that this method can be complementary to learning deeply through other means. There are many methods to engage with Indigenous laws, and there needs to be critical reflection and conversations about them all.

Depuis plusieurs années, on assiste à un enthousiasme croissant en faveur d'une plus grande reconnaissance des lois autochtones et d'un recours explicite à celles-ci. Selon le rapport final de la Commission de vérité et réconciliation, la revitalisation et la reconnaissance des lois autochtones sont essentielles à la réconciliation au Canada. Comment, alors, allons-nous nous faire cela? Dans cet article, nous présentons une méthode qui, selon nous, promet de travailler respectueusement et de façon productive avec les lois autochtones. Nous abordons les traditions juridiques autochtones en appliquant soigneusement et consciemment des outils adaptés de la common law, tels que l'étude de cas et l'analyse juridique, aux ressources autochtones existantes, qui sont souvent publiques : des histoires, des récits et des traditions orales. En rassemblant des méthodes pédagogiques communes à de nombreuses traditions juridiques autochtones et des méthodes d'éducation juridique classiques de common law nous espérons aider l'apprentissage des lois autochtones d'un point de vue interne. Nous partageons des expériences qui démontrent le grand potentiel de cette méthode et son rôle de pont pédagogique « vers » une discussion respectueuse au sujet des lois et de la pensée juridique autochtone au sein et entre les communautés autochtones, universitaires et professionnelles. Bien que nous croyions que cette méthode constitue un outil utile, nous argumentons en conclusion qu'elle ne vise pas à *remplacer* les méthodes d'apprentissages et d'enseignement existantes, mais vise plutôt à les *compléter*. En pratique, nous avons vu que cette méthode est complémentaire dans la mesure qu'elle permet un apprentissage plus profond par d'autres moyens. Il existe, plusieurs méthodes permettant d'aborder les lois autochtones, de même que les conversations et la réflexion critique à leur sujet.

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It used to be that every family with a living grandfather or grandmother possessed a storyteller from another time. The duty of storytellers was to tell stories every day. That is why Dene tradition is so complete, as far back as the days when [Naá]cho—giant now-extinct animals—roamed the world. Since it's difficult to keep track of things if you try to tell a long story from one day to the next, each day's story was complete in itself. These short tales, put together, made up complete stories.<sup>1</sup>

## Introduction

Many Indigenous and non-Indigenous scholars have effectively resisted the seemingly unstoppable and annihilating colonialism that has attempted to stamp out even the possibility of imagining Indigenous legal thought. We appreciate those scholars who have examined and challenged the relationship between Canadian state law and Indigenous legal traditions, and who have developed theoretical frameworks within which new or renewed relationships of mutual respect are possible between Indigenous and non-Indigenous peoples.<sup>2</sup> We appreciate the groundbreaking philosophical and descriptive treatments of Indigenous legal traditions in some of this scholarship.<sup>3</sup>

Now we want more. It is time. It is essential for the present and future health of Indigenous societies that we keep moving. Indigenous legal traditions are fundamentally about Indigenous citizenry, self-determination, and governance. They contain the intellectual resources and tools for public reason and deliberation that are essential for addressing both the internal and external challenges that Indigenous communities face today. These challenges are varied, involving questions of authority and legitimacy, community safety, and lands and resources. Interest in serious and systematic engagement with Indigenous legal traditions is building in Canada across professional, academic, and Indigenous communities. If this movement is going to be sustained and cultivated, we need shared frameworks for engaging with Indigenous legal traditions within and across Indigenous, professional, and academic fields. The international and domestic discourse of Indigenous self-determination is in need of critical and grounded scholarship on Indigenous legal traditions—

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<sup>1</sup> George Blondin, *When the World Was New: Stories of the Sahtú Dene* (Yellowknife: Outcrop, 1990) at i.

<sup>2</sup> See generally the works of scholars such as Emily Snyder, James Tully, Jeremy Webber, Catherine Bell, Nigel Bankes, Kent McNeil, Andrée Boisselle, and Patrick Macklem. Of course, the danger of listing only some scholars is that many others are missed.

<sup>3</sup> See generally the works of Tracey Lindberg, John Borrows, Gordon Christie, Antonio Peña Jumpa, Darlene Johnston, Chuma Himonga, Johnny Mack, Robert A Williams Jr, Larry Chartrand, Christine Zuni Cruz, Sákéj Henderson, and Matthew LM Fletcher. Again, this is not a comprehensive list.

comprehensive traditions that are inclusive of “deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught.”<sup>4</sup>

Indigenous law, like other aspects of Indigenous peoples’ lives, has been impacted by colonization. At the Truth and Reconciliation Commission’s Knowledge Keepers Forum in 2014, Mi’kmaq scholar and elder, Stephen Augustine, explained the Mi’kmaq concept for “making things right”, a wise and insightful way to conceptualize changes in Indigenous law. He provided a metaphor of an overturned canoe in the river. He said:

We’ll make the canoe right and ... keep it in water so it does not bump on rocks or hit the shore. ... [When we tip a canoe] we may lose some of our possessions. ... Eventually we will regain our possessions [but] they will not be the same as the old ones.<sup>5</sup>

Metaphorically, we are regaining our possessions and, in this article, we set out one method for doing this. Our Indigenous legal research method brings common pedagogical methods from many Indigenous legal traditions (oral histories, narratives, and stories) together with standard common law legal education (legal analysis and synthesis). This method is one simple, teachable, and transparent way of engaging with Indigenous laws within and across communities, and within and across legal orders. From our experience with Indigenous communities across Canada, we see its foundational potential for the kind of robust and respectful engagement needed to work critically and usefully with Indigenous legal traditions today—thereby bringing them into their “rightful place among the world’s dispute resolution systems” in the future.<sup>6</sup>

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<sup>4</sup> John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, 2nd ed (Stanford: Stanford University Press, 1985) at 2.

<sup>5</sup> Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: TRC, 2015) at 206, online: <[www.trc.ca/websites/trcinstitution/File/2015/Honouring\\_the\\_Truth\\_Reconciling\\_for\\_the\\_Future\\_July\\_23\\_2015.pdf](http://www.trc.ca/websites/trcinstitution/File/2015/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf)> [TRC, *Summary*].

<sup>6</sup> Raymond D Austin, *Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Governance* (Minneapolis: University of Minnesota Press, 2009) at xv (pointing out that this aspiration is one goal for establishing a solid foundation for the Navajo courts).

## I. Creating Space for Indigenous Legal Traditions: Building Momentum in Canada

Of course there are real issues at stake—jurisdiction, economic development opportunities, federal funding, but these things are not necessarily assured even if tribes mirror external law. The idea of creating law that is uniquely our own, based on our values should encourage dialogue, ignite debate, and be tested and explored in practice. I believe the threat to our cultural survival as distinct [I]ndigenous people is real, and we have survived in the face of this threat, but we must do what we can when we see the opportunity to reinforce our way of life.<sup>7</sup>

The Truth and Reconciliation Commission of Canada (TRC) released its final report on 2 June 2015. The report contains ninety-four calls to action, including specific measures to support the recognition, revitalization, and implementation of Indigenous legal traditions.<sup>8</sup> For example, the TRC calls on the federal government to recognize and implement “Aboriginal justice systems”,<sup>9</sup> to integrate Indigenous laws into treaty and land claim negotiation and implementation processes,<sup>10</sup> and to establish “Indigenous law institutes for the development, use, and understanding of Indigenous laws.”<sup>11</sup> Law schools are encouraged to create mandatory courses that include Indigenous laws,<sup>12</sup> whereas law societies are summoned to ensure that lawyers receive training in Indigenous laws.<sup>13</sup> In the *Summary of the Final Report*, the TRC strongly advocates for Indigenous peoples to have greater control over their own laws and legal mechanisms:

Aboriginal peoples must be recognized as possessing the responsibility, authority, and capability to address their disagreements by making laws within their communities. This is necessary to facilitating truth and reconciliation within Aboriginal societies.<sup>14</sup>

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<sup>7</sup> Christine Zuni Cruz, “Tribal Law as Indigenous Social Reality and Separate Consciousness: [Re]Incorporating Customs and Traditions into Tribal Law” (2000) 1 Tribal LJ 1 at the end of Part V (“Of Cultural Integrity and Self-Determination”), online: <lawschool.unm.edu/tlj/tribal-law-journal/articles/volume\_1/zuni\_cruz/index.php>.

<sup>8</sup> See Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: TRC, 2015), online: <www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls\_to\_Action\_English2.pdf> [TRC, *Calls to Action*].

<sup>9</sup> *Ibid.*, no 42.

<sup>10</sup> *Ibid.*, no 45(iv).

<sup>11</sup> *Ibid.*, no 50.

<sup>12</sup> *Ibid.*, no 28.

<sup>13</sup> *Ibid.*, no 27.

<sup>14</sup> TRC, *Summary*, *supra* note 5 at 205.

According to the TRC, “the revitalization and application of Indigenous law” would not only benefit Aboriginal communities, but also improve relations between Aboriginal peoples and governments, “and the nation as a whole.”<sup>15</sup> To achieve such reconciliation, “Aboriginal peoples must be able to recover, learn, and practise their own, distinct, legal traditions.”<sup>16</sup> These far-reaching calls to action concerning the greater recognition and implementation of Indigenous laws in Canada are, to the best of our knowledge, the first time a major government-funded report has used the terminology of Indigenous laws. The report calls on not only governments, but also the legal profession and legal academy to contribute to revitalizing Indigenous laws.

Even prior to the TRC’s compelling calls to action, there has been a growing momentum toward a greater recognition and public use of Indigenous legal traditions in Canada. We see this momentous change occurring within and across academic, legal, professional, and Indigenous communities. For example, the Canadian Bar Association recently passed a resolution “to recognize and advance Indigenous legal traditions in Canada.”<sup>17</sup> This resolution was followed closely by a national Aboriginal Law conference entitled, *Working with and within Indigenous Legal Traditions*, which examined how lawyers are currently engaging with Indigenous laws in legal practice.<sup>18</sup> At the Continuing Legal Education Society of British Columbia conference, *Indigenous Legal Orders and the Common Law*, former Chief Justice of the British Columbia Court of Appeal, Lance S.G. Finch, stated that, since Canadian courts have recognized pre-existing Indigenous legal orders, it is no longer possible to ignore Indigenous legal perspectives in Canadian legal decision making. Among other suggestions, he recommended that every Canadian law school have a course focusing not only on Aboriginal law (i.e., Canadian state law about Aboriginal issues), but also on actual Indigenous laws.<sup>19</sup> More recently, Indigenous law has featured in a range of legal educational activities for

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<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> Canadian Bar Association, Resolution 13-03-M (carried by the Council of the Canadian Bar Association at the Mid-Winter Meeting, Mont-Tremblant, Que, 16–17 February 2013), online: <[www.cba.org/Our-Work/Resolutions/Resolutions/2013/Indigenous-Legal-Traditions](http://www.cba.org/Our-Work/Resolutions/Resolutions/2013/Indigenous-Legal-Traditions)>.

<sup>18</sup> For a description of the conference, see Canadian Bar Association, 2013 National Aboriginal Law Conference, *Working with and within Indigenous Legal Traditions* (Victoria, BC, 11–12 April 2013), online: <[cbapd.org/details\\_en.aspx?id=na\\_abl13](http://cbapd.org/details_en.aspx?id=na_abl13)>.

<sup>19</sup> For a description of the conference, see Continuing Legal Education Society of British Columbia, *Indigenous Legal Orders and the Common Law* (Vancouver, BC, 15–16 November 2012), online: <[www.cle.bc.ca/onlinestore/productdetails.aspx?cid=648](http://www.cle.bc.ca/onlinestore/productdetails.aspx?cid=648)>.

Canadian judges, law faculties, and government sectors.<sup>20</sup> Perhaps most significantly, Chief Justice Beverley McLachlin has called for “all members of the judiciary” to have access to education and materials about Indigenous legal traditions.<sup>21</sup> The Chief Justice framed her call as a critical, national “access to justice” measure, which must necessarily mean having concepts of Indigenous justice and the legal processes of achieving justice at the “Canadian justice table”.<sup>22</sup>

There have been extensive efforts to include Indigenous legal traditions within law schools across Canada. Perhaps the most innovative and ambitious is the proposed development of a joint common law and Indigenous law degree at the University of Victoria. Initially conceived in 2005 by John Borrows, following his study of Indigenous legal traditions,<sup>23</sup> this professional dual degree program will be the first of its kind in the world. The University of Victoria has offered three summer programs devoted to Indigenous legal studies, the first in 2005, the second in 2009, and the third in May 2016. Beyond this, courses specifically focused on Indigenous legal traditions are now offered in many other North American law schools, including the University of British Columbia, McGill University, the University of Ottawa, Lakehead University, Osgoode Hall, and the University of New Mexico School of Law.<sup>24</sup>

There is also exciting collaborative research and work being done within and across professional, academic, and Indigenous communities. For example, from January 2012 to July 2014, the authors collaborated with the TRC and the Indigenous Bar Association on the “Accessing Justice and Reconciliation Project,” a major research initiative funded by the

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<sup>20</sup> For example, the 2015 annual conference of the Canadian Institute for the Administration of Justice held in Saskatoon focused on Indigenous legal traditions; the National Judicial Institute’s upcoming 2017 symposium will feature Indigenous legal perspectives; and Indigenous law sessions have been organized at several law faculties, including at the University of Windsor, McGill University, and the University of Ottawa.

<sup>21</sup> Chief Justice Beverley McLachlin, Keynote Address (delivered at the Canadian Institute for the Administration of Justice 2015 Annual Conference, *Aboriginal Peoples and Law: “We Are All Here to Stay”*, Saskatoon, 16 October 2015) [unpublished].

<sup>22</sup> *Ibid.*

<sup>23</sup> See John Borrows & Law Commission of Canada, *Justice Within: Indigenous Legal Traditions*, DVD (Ottawa: Law Commission of Canada, 2006) [*Justice Within*]. See also John Borrows, “Creating an Indigenous Legal Community” (2005) 50:1 McGill LJ 153 at 171.

<sup>24</sup> Some of the law professors offering these focused courses include Val Napoleon, one of the authors, at the University of Victoria; Gordon Christie and Darlene Johnston at the University of British Columbia; Larry Chartrand, Tracey Lindberg, Darren O’Toole, and Sarah Morales at the University of Ottawa; Andrée Boisselle at Osgoode Hall; Kirsten Anker at McGill University; John Borrows at the University of Victoria; and Christine Zuni Cruz at the University of New Mexico.



Ontario Law Foundation.<sup>25</sup> In this groundbreaking project, we partnered with seven Indigenous communities across six distinct Indigenous legal traditions. The focus of this initiative was the identification of legal responses and resolutions to harms and conflicts within Indigenous societies.<sup>26</sup>

We are continuing to partner with a number of other Indigenous communities to research other areas of law, such as civil procedure, lands and resources, marine management, adjudication, justice, family law, and water law. At the request of Indigenous communities, we have also delivered many workshops on engaging with Indigenous legal traditions and developing research initiatives.<sup>27</sup> Over the past several years, there have been numerous national conferences and symposia in Canada and elsewhere to explore various Indigenous law themes and concerns.

This burgeoning interest in and momentum around seriously engaging with Indigenous legal traditions raises questions about how this current momentum might be continued and constructively built on. How do

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<sup>25</sup> See Indigenous Law Research Unit, University of Victoria, Indigenous Bar Association & Truth and Reconciliation Commission of Canada, “Accessing Justice and Reconciliation Project” (2014), online: <[www.indigenousbar.ca/indigenoulaw](http://www.indigenousbar.ca/indigenoulaw)> [“AJR Project”]. The AJR Project was the founding research project of the Indigenous Law Research Unit (ILRU) at the University of Victoria, Faculty of Law. Val Napoleon is the ILRU Academic Lead and Director, whereas Hadley Friedland is the ILRU Research Coordinator. See University of Victoria, “Indigenous Law Research Unit” (2015), online: <[www.uvic.ca/law/about/indigenous/indigenoulawresearchunit](http://www.uvic.ca/law/about/indigenous/indigenoulawresearchunit)>. We discuss the method and findings from the AJR Project in Hadley Friedland & Val Napoleon, “Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions” (2015) 1:1 *Lakehead LJ* 16 [Friedland & Napoleon, “Gathering the Threads”]. For an example of ILRU collaboration with a community partner, see Val Napoleon, “Tsilhqot’in Law of Consent” (2015) 48:3 *UBC L Rev* 873. This article draws on the ILRU’s research into Tsilhqot’in law to reimagine the Supreme Court of Canada’s decision in *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 from a Tsilhqot’in legal perspective.

<sup>26</sup> See “AJR Project”, *supra* note 25.

<sup>27</sup> The ILRU has notably collaborated with the Shuswap Nation Tribal Council, the Central Coast and North Coast First Nations, the Gitanyow, the Sauteau First Nations, the West Moberly First Nations, and the Neskonlith (British Columbia); the Treaty 8 Tribal Association (British Columbia and Alberta); and the Sahtu Dene and Metis Land Comprehensive Land Claim Agreement Arbitration Panel (Northwest Territories). For examples of our workshops, see e.g. Central Coast Indigenous Resource Alliance, “Revitalizing Our Traditional Laws”, *CCIRA Newsletter* (December 2014), online: <[ccira.ca/media/documents/pdf/ccira-newsletter-2014-04-v07-web.pdf](http://ccira.ca/media/documents/pdf/ccira-newsletter-2014-04-v07-web.pdf)> at 2; Coastal First Nations, “Revitalizing Indigenous Laws to Support Land and Marine Stewardship” (1 March 2015), online: <[coastalguardianwatchmen.ca/news/revitalizing-indigenous-laws-support-land-and-marine-stewardship](http://coastalguardianwatchmen.ca/news/revitalizing-indigenous-laws-support-land-and-marine-stewardship)>; “An Exploratory Workshop: Thinking About and Practicing with Indigenous Legal Traditions” (September 2011), online: <[sites.google.com/site/indigenoulawconference/program](http://sites.google.com/site/indigenoulawconference/program)>.

state governments, judges, law societies, and law schools respectfully engage with Indigenous laws? What would Indigenous legal institutes look like? How do Indigenous communities recover, rebuild, and practise their own Indigenous legal traditions?

Some of the questions that arise are normative or philosophical: Who should be engaging with and articulating Indigenous legal principles? How should Indigenous laws be taught and learned? What are the potential risks of engaging with Indigenous laws in state or non-Indigenous environments such as law schools or courtrooms? What is potentially lost or altered when doing so? Some questions are practical: How do we start treating Indigenous law seriously as law so that we are able to discuss it, debate it, and work with it across communities and in classrooms? How do we develop and uphold appropriate standards for academic and professional integrity? How do we begin to access and explicitly articulate Indigenous laws in a way that supports Indigenous communities' goals and responsibilities of management in today's world? How do we do so without romanticizing the past or avoiding the tough issues of violence and internal oppressions on the ground? What are the legal processes that signal legitimate decisions in specific legal traditions? How do we work with and apply Indigenous legal principles to contemporary issues and problems?

It is these normative or philosophical questions that we seek to explore in this article. Today, the growing acceptance of and interest in Indigenous laws in Canada indicate that we are moving past the stage of needing to spend all of our energy on asserting the existence of Indigenous laws and exhorting state actors to recognize their existence. We now need legal scholarship that goes beyond this and moves us from "why" to "how", so we can build on the current momentum to revitalize and fully realize the potential application of Indigenous law in the world today. For this, we need legal scholarship that translates from the theoretical and the philosophical to the practical and the concrete—and then back again. We need scholarship that supports the practical application of specific Indigenous legal principles to the real issues that Indigenous peoples grapple with today, while recognizing how these principles form one part of a larger, coherent whole. Future scholarship requires a deeper and sustained engagement with Indigenous legal traditions in order to accomplish these goals.

How, then, do we go about doing this? In this article, we introduce one method, which we believe has great potential to develop into the kind of robust and respectful engagement needed to work critically and usefully with Indigenous legal traditions now. We are working with Indigenous legal traditions by carefully and consciously applying adapted common law

tools, such as the case method and legal analysis, to existing and often publicly available Indigenous resources: *stories, narratives, and oral histories*.<sup>28</sup>

Though it requires much thought and discussion, this method is simple, straightforward, and useful. Our approach stems from our re-examination of three conceptual strands of thought: The first strand explores how we hear, see, and experience Indigenous elders using stories as tools for thinking—in their lives, in their talk, and in their written work. The second strand reflects the felt need to shift the discussions about Indigenous legal traditions from broad, generalized, descriptive, or philosophical accounts to discussions about specific principles and legal practices. The third and final strand assesses how effective legal scholarship is for accessing, understanding, and actually being able to apply any law in practice, from an internal and embedded perspective. These strands converge for us in the simple thought experiment of applying adapted common law tools, developed from an internal view of the common law tradition, to Indigenous stories, in order to begin articulating an internal perspective of Indigenous legal traditions.

Our experiences suggest that this method holds great potential as a pedagogical bridge “into” respectful engagement with Indigenous laws and legal thought, within and across Indigenous, academic, and professional communities. In the final part of this article, we describe a national conference where we introduced this method to a large group of academics, professionals and practitioners, and Indigenous community members. All participants worked collaboratively throughout the conference to engage with Indigenous laws through stories. This conference illustrates the potential of this method as a shared framework for respectful and productive engagement with Indigenous legal traditions, for communities, and between legal orders. It can be taught and used both in communities and in law schools. While the conference was just a small start, we believe that facilitating this kind of engagement, in a serious and sustained way, is exactly what is needed to build on the current momentum advancing Indigenous legal traditions in Canada.

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<sup>28</sup> This method explains and expands on John Borrows’ innovative work, in which he approaches Indigenous stories as normative resources, analyzing a single Anishinabek story by retelling it in a case brief form (see John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 16–20). For the case method that one of us (Napoleon) developed to engage with Gitksan laws, with groundbreaking results, see Valerie Ruth Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (PhD Dissertation, University of Victoria Faculty of Law, 2009) [unpublished] [Napoleon, *Ayook*].

## II. Stories as Tools for Thinking in Indigenous Societies

They used to teach us with stories  
 They teach us what is good, what is bad, things like that...  
 Those days they told stories mouth to mouth.  
 That's how they educate people.<sup>29</sup>

An anecdote we often relate is about a non-Indigenous school principal who was working in a northern Alberta Cree community with its own local school board. For some time, many people in the community were concerned about certain things the principal was doing. Finally, after much discussion, three elders showed up at a regular local school board meeting. Each elder told a story about something they had seen, or something that had occurred in the past. One of the school board members (all of whom were Cree) translated the stories to the school principal. When the elders were finished, the school principal politely thanked them for sharing their stories and, slightly puzzled, began to move on to the next order of business. Fortunately, one of the school board members interrupted and explained to the principal that the elders had actually just raised serious and pressing concerns about his behaviour that needed to be addressed. But for this intervention, the principal would have completely missed the significance of the stories and how they related to him.

While there was a satisfactory resolution in this instance, it strikes us how contingent the outcome was on the particular dynamics of power and personality. It soberes us to think of how often such miscommunication occurs, especially in circumstances where the consequences lay heavy on the lives of the Indigenous people involved. Take, for instance, Indigenous oral histories, which are finally accepted as evidence in Canadian courts.<sup>30</sup> While Indigenous oral histories are now told in court, we have yet to see them actually make their way into judicial reasoning or into the written ratios in Canadian jurisprudence. It is one thing to simply listen to the stories and quite another thing to think with and through them, to identify the law they contain, and to apply them to pressing practical problems—thereby effecting practical consequences.<sup>31</sup> What, indeed, is a judge

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<sup>29</sup> Angela Sidney quoted in Julie Cruikshank in collaboration with Angela Sidney, Kitty Smith & Annie Ned, *Life Lived Like a Story: Life Stories of Three Yukon Native Elders* (Vancouver: University of British Columbia Press, 1990) at 73 [Cruikshank, *Story*].

<sup>30</sup> See *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at paras 87, 106–07, 153 DLR (4th) 193.

<sup>31</sup> See generally Bruce Granville Miller, *Oral History on Trial: Recognizing Aboriginal Narratives in the Courts* (Vancouver: UBC Press, 2011). Miller examined over thirty cases and concluded that “Aboriginal oral narratives ... are understood very differently by the various practitioners of law, anthropology, and history, as well as oral historians”

or lawyer to do with stories that often combine historical fact with mythological or supernatural elements and personal reflections?<sup>32</sup> Listening alone is clearly not enough. Yet, these stories are not enigmas to those who tell them; rather, they have a logic, purpose, structure, and methodology. As John Borrows has observed, “[t]he transmission of oral traditions in these societies is bound up with the configuration of language, political structures, economic systems, social relations, intellectual methodologies, morality, ideology, and the physical world.”<sup>33</sup>

The published works of Indigenous elders from across Canada demonstrate that, within most, if not all, Indigenous societies, stories are understood to be tools for thought and intellectual resources for reasoning. To give a few examples, the various works of George Blondin (Dene),<sup>34</sup> Louis Bird (Cree),<sup>35</sup> François Mandeville (Dene),<sup>36</sup> Basil Johnston (Anishinabek),<sup>37</sup> Angela Sidney (Tagish),<sup>38</sup> and the Cree elders from Sweetgrass<sup>39</sup> all illustrate how the telling of stories is a necessary, integral, and lively part of the thought processes of both the tellers and the listeners.

To take but one example, Louis Bird is a Cree elder who has devoted many years of his life to recording and retelling stories from elders in Omushkego (Swampy Cree) communities along the western shores of

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(*ibid* at 163). Canadian legal engagement with oral narratives in the courts reflects this diversity of expectations and understandings.

<sup>32</sup> See John Borrows, “Listening for a Change: The Courts and Oral Traditions” (2001) 39:1 Osgoode Hall LJ 1 at 21–24.

<sup>33</sup> *Ibid* at 8.

<sup>34</sup> See e.g. George Blondin, *Yamoria the Lawmaker: Stories of the Dene* (Edmonton: NeWest Press, 1997); George Blondin, *Trail of the Spirit: The Mysteries of Medicine Power Revealed* (Edmonton: NeWest Press, 2006).

<sup>35</sup> See e.g. Louis Bird, *Telling Our Stories: Omushkego Legends and Histories from Hudson Bay*, ed by Jennifer SH Brown, Paul W DePasquale & Mark F Ruml (Peterborough, Ont: Broadview Press, 2005); Louis Bird, *The Spirit Lives in the Mind: Omushkego Stories, Lives, and Dreams*, ed by Susan Elaine Gray (Montreal: McGill-Queen’s University Press, 2007) [Bird, *The Spirit*].

<sup>36</sup> See e.g. François Mandeville, *This Is What They Say*, ed and translated by Ron Scollon (Vancouver: Douglas & McIntyre, 2009).

<sup>37</sup> See e.g. Basil H Johnston, *Tales of the Anishinaubaek* (Toronto: Royal Ontario Museum, 1993).

<sup>38</sup> See e.g. Cruikshank, *Story*, *supra* note 29 at 5.

<sup>39</sup> See e.g. Canada, Department of Mines, *Sacred Stories of the Sweet Grass Cree*, by L Bloomfield, Bulletin No 60, Anthropological Series No 11 (Ottawa: National Museum of Canada, 1930).

Hudson Bay and James Bay.<sup>40</sup> In the introduction to his book, Bird explains the importance of storytelling:

We take the stories that have actually been brought down for generations because they have a value. Even though some of them sound horrible and terrible to different cultures, for the Omushkego culture it is a necessary type of teaching system. It saves lives. It saves the families. It saves the children. It allows people to have a serious understanding about where they live.<sup>41</sup>

Bird goes on to explain that “exciting” stories about “horrible” things aid people to “remember them vividly” and to fix the lessons from the stories in their minds. He likens many Omushkego stories to “other nationalities’ moral teaching,” taught in a way “that will imprint on our mind.”<sup>42</sup> Bird explains that the purpose of his book is not only to repeat stories, but also “to teach us the teaching system of the Omushkego people.”<sup>43</sup> Bird emphasizes that the book is “not just horrible stories to entertain you. All these stories have a definition, an explanation—they are there to open the subject, or to melt the ice—whatever you want to call it.”<sup>44</sup>

Bird’s explanation of and approach to stories emphasizes that, in Cree society, the tasks of both telling and *listening to* stories are highly intellectual and demanding. First, he describes storytelling as a teaching method that gives life-saving lessons, imprints morality, and deepens peoples’ understanding of their lives. He then goes on to invite readers to attend to the stories beyond mere “entertainment”, and instead look for the definition, explanation, or subject that the story is addressing. Bird suggests that, while the memorable details of the story can serve as a mnemonic device, the listeners or readers must think beyond the surface details in order for the teaching system to be effective. Bird dictated the many stories in the book, and he constantly challenges the reader to keep thinking by interrupting a story to ask, “So ... why does the story say that?”<sup>45</sup> or, “So that is the mystery put into this story to make you think.”<sup>46</sup> In one story, he asks whether a central character was “using [power] properly[.]”<sup>47</sup> Both directly and through his artfully woven narra-

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<sup>40</sup> See Susan Elaine Gray, “Preface” in Bird, *The Spirit*, *supra* note 35, xi at xi.

<sup>41</sup> Bird, *The Spirit*, *supra* note 35 at 4.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid* at 35.

<sup>46</sup> *Ibid* at 16.

<sup>47</sup> *Ibid* at 48.

tive technique, Bird stresses that the effectiveness of the stories as a teaching method requires not only astute telling but also *active* listening.

One of the authors (Friedland) noticed a similar emphasis on active listening when she was conducting interviews with Cree elders in northern Alberta. Attempts to be a mere recorder or cipher were frequently thwarted. After one elder related a story about an animal that spoke, he stopped to ask, “What do you think? Do you believe me?” Attempts to waffle on an answer were immediately countered by much laughter and a more direct question: “Well, you’ve heard the story, what do you think now?”<sup>48</sup> On a different level, another elder, after telling several stories and patiently discussing the Indigenous law subject matter of the interviews for several hours, brought up a current community situation and asked whether it fit within the legal subject. In order to seriously answer this question, the interviewer was required to not only passively listen or record, but also to actually integrate and apply the knowledge being shared by the elder.<sup>49</sup>

We believe that these examples reveal another key idea—stories are not preserved by being passively passed on by infallible elders in some immaculate, if increasingly mysterious or obscure, form. Rather, stories are part of a serious public intellectual and interactive dialogue involving listeners and learners, and elders and other storytellers—as they have been for generations. When the first elder asked the interviewer whether she actually believed an animal spoke to him, he was demanding the respect that comes with real intellectual engagement, rather than polite nodding or simple memorizing. And when the second elder asked the interviewer to respond seriously to a current example based on the subject matter discussed, she was reinforcing a mutually respectful relationship, which recognized the elder and the interviewer as reasoning people who could analyze issues based on a newly shared framework. Being reminded to think about and through the stories moves us to a deeper level of respect (and humility, given all we do not know) for both the storytellers and the stories themselves.

Indigenous stories are rich and complex intellectual resources. As both Bird and Borrows point out, many purposes and lessons are often embedded in each story. Our starting place is that some Indigenous stories embed law, legal principles, and legal processes. Stories can be or contain a deliberate form of precedent or shared memory. Important principles, pro-

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<sup>48</sup> Interview of anonymous elder in Wanyandie Flats, Alberta by Hadley Friedland (May 2009). The interview was conducted as part of the author’s LLM thesis research.

<sup>49</sup> Interview of anonymous elder in Susa Creek, Alberta by Hadley Friedland (April 2009). The interview was conducted as part of the author’s LLM thesis research.

cesses, and consequences can be taught and learned through them. As Bird teaches, stories represent a way to record information for future recall, and they contain lessons that are important enough to have been passed down for thousands of years. Each Indigenous society has its own political and legal order, and the oral traditions will reflect those overall structures and find meaning within them. As most Indigenous societies are characterized by the absence of centralized, state authorities, they require decentralized and accessible forms of public memory (i.e., oral histories and stories, among other tools). Stories are forms of legal precedent that can be drawn on in order to legitimately resolve issues in decentralized legal orders. Some stories are formal and collectively owned (e.g., Gitksan *adaawk*), others are in the form of ancient and recent legal cases (e.g., Gitksan and Cree law cases), and others record relationships and obligations, decision making and resolutions, legal norms, authorities, and legal processes. Still others record violations and abuses of power, as well as responses to and consequences of these breaches of law. All of these stories provide an architecture that enables reasoning by analogy and metaphor as a form of collaborative problem solving.<sup>50</sup>

### III. Legal Scholarship: Moving from a Philosophical Treatment of Indigenous Laws to a Practical, Problem-Solving Level

We believe that, for respectful and useful engagement to occur, the law in Indigenous legal traditions must be treated substantively as *law*—to be debated, applied, interpreted, argued, analyzed, criticized, and changed. As with other law, Indigenous law may be approached philosophically. Unlike many other laws, there has been precious little space for any other kinds of approaches for a very long time, due to the pervasive and destructive myths of colonialism and the forcible invalidation of Indigenous laws by colonial actors. While space to consider Indigenous laws within the colonial state has expanded in recent years, it remains extremely limited beyond descriptive accounts of isolated practices or oversimplified pan-Indigenous explanations, often couched in terms of “values” or “worldviews”.<sup>51</sup> This creates an intellectual and pedagogical deficit that can stymie even the most well-intended work. If Indigenous law is going to find traction in today’s world, it has to have user-friendly “han-

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<sup>50</sup> See John Borrows’ rich discussion of some of this internal architecture in his article from this special issue, “Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education” (2016) 61:4 McGill LJ 795.

<sup>51</sup> We discuss this reality at greater length in Val Napoleon & Hadley Friedland, “Indigenous Legal Traditions: Roots to Renaissance” in Markus D Dubber & Tatjana Hörnle, eds, *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014) 225 at 235–36 [Napoleon & Friedland, “Roots to Renaissance”].



dles”. These handles, or ways in, will enable Indigenous peoples to grapple with their legal norms and principles, in order to lawfully solve problems and collectively manage themselves. Law is actually created through serious and sustained engagement with it.<sup>52</sup> By the same token, arguably, a lack of serious and sustained engagement will cause law to lose its legality and legitimacy.<sup>53</sup>

Indigenous people themselves may have had to use language other than law to describe what are, in fact, legal practices, when operating in the small spaces permitted by state actors who were unable or unwilling to recognize their legality.<sup>54</sup> Indigenous law, however, is not just belief, behaviour, morality, or a way of being—rather, it is a public, reasoned, and transparent process that people can actually use in real life. Indigenous law is much more than just aspirational or philosophical. Consider the broad aspirational principles that are enshrined in the *Canadian Charter of Rights and Freedoms*, such as freedom of expression or equality.<sup>55</sup> These broad principles may sound great, but they are not terribly useful without the established legal reasoning process in Canadian law to determine whether and how the *Charter*’s broad legal principles might be applied to specific human relationships or conflicts in real life. Similarly, while there are certainly broad aspirational legal principles in Indigenous legal traditions, these principles demand legal reasoning processes to determine how they apply to the ongoing “struggles of social practice”<sup>56</sup> and how we treat one another. This kind of substantive work has been absent, and must be undertaken today—articulating and strengthening those legal processes that are the very conditions of law.

This is a crucial point, because, while there is no question that Indigenous laws have been passed on through generations, we are not starting from a neutral spot, where Indigenous legal traditions are completely intact, left magically untouched by hundreds of years of colonialism. The task of greater recognition and use of Indigenous laws in Canada requires more than simply uncovering pristine laws in protective bubbles to isolate them from the damages of colonization. It is not an exercise in legal archaeology. Colonialism has disrupted Indigenous laws, legal pedagogies, and historic means of legitimization and promulgation. Today’s work is

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<sup>52</sup> Cf Jutta Brunnée & Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010) at 355.

<sup>53</sup> Cf *ibid.*

<sup>54</sup> See e.g. Napoleon & Friedland, “Roots to Renaissance”, *supra* note 51 at 235.

<sup>55</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, ss 2(b), 15.

<sup>56</sup> Brunnée & Toope, *supra* note 52 at 22.

about recovering and then taking up an interrupted, intergenerational conversation, with all its complexities and tensions. For many reasons, Indigenous people, as well as non-Indigenous people, are now seeking ways to better access and understand Indigenous laws.<sup>57</sup> We would do a disservice by ignoring this expressed need. If Indigenous people cannot use Indigenous law, that is, if people cannot reason with it and apply it to the messy and mundane, then it will continue to be talked about only in an idealized way or as a rhetorical critique of Canadian law—arguably a backhanded twist of colonization that would render Indigenous law useless. As long as Indigenous laws are not accessible or usable, in a crunch, by default, both Indigenous and non-Indigenous people in Canada will turn to state law to resolve disputes. This inaccessibility perpetuates the colonial process of undermining and obscuring Indigenous legal traditions.

#### IV. Bringing Home the Method: Using Law School Tools to Learn Indigenous Laws from an Internal Point of View

As H.L.A. Hart eloquently argued, unless one understands the internal perspective of law, then one only sees the

observable regularities of conduct, predictions, probabilities, and signs. ... In so doing he will miss out a whole dimension of the social life of those whom he is watching. ... To mention this is to bring into the account the way in which the group regards its own behaviour. It is to refer to the internal aspect of rules seen from their internal point of view.<sup>58</sup>

Each year, in law schools across Canada, many people learn the internal aspects of the common law and the civil law traditions. They do not become experts in any particular area, but they develop a foundation that

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<sup>57</sup> The groups who have expressed the most interest to us in learning and applying the methodology we are describing in this article have actually been Indigenous communities wanting to revitalize, formalize, and publicly apply their own laws. In the American context, tribal judge and legal scholar Pat Sekaquaptewa stresses that, although it may surprise outsiders, “tribal leaders and judges find themselves looking for law as well,” for good reasons, including the existence of multiple legal levels within any group (Pat Sekaquaptewa, “Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal Lawmaking” (2007) 32:2 *Am Indian L Rev* 319 at 330, n 31). There are also a great number of Indigenous individuals who may be alienated from their own communities or legal traditions, due to the colonial “socio-economic dislocation amongst Indigenous peoples in Canada” (John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 143 [Borrows, *Indigenous Constitution*]).

<sup>58</sup> HLA Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961) at 87–88. Whereas Hart was discussing the internal view of legal officials, we are extending this internal view to citizens, as is fitting for non-state legal orders without designated legal officials.

enables them to work with and apply legal principles to factual situations in legal practice. It makes sense that learning the internal aspects of Indigenous legal traditions could enable them to build a similar foundation for practical application within these traditions.

One theme that runs through many ancient Indigenous stories (e.g., Gitksan,<sup>59</sup> Cree,<sup>60</sup> Tagish,<sup>61</sup> or Secwepemc) is about a member of one group spending some time with another people—human or animal—and returning with new knowledge that is incorporated into the practices and intellectual frameworks of his or her own people. While there are many variations of this theme, it is a brilliant intellectual device for adaptive management. These stories effectively enable people to bring in and act on new information from outside their group in a way that can be reconciled with the familiar. The stories also enable people to reinforce or develop deeply held group normative commitments.

For example, in the Yukon, Angela Sidney tells the story of Moldy Head, or *Shaatláax*, about a young boy who fell into the water and was rescued by the fish people:

And here right away the fish spirit grabbed him—they saved him.

And when the fish went back to the ocean, they took him.

But for that boy, it seemed like right away he was amongst people.<sup>62</sup>

While living with the fish people, the boy learns about them, and about humility and respect. When he is returned to his family and the Tagish people, the boy teaches them about the fish people and about the proper and respectful way that humans must relate to them. In Sidney's words, "[t]hat's how they know about fish. / That's why kids are told not to insult fish."<sup>63</sup> Sidney's story demonstrates how a group synthesizes new experiences and information and develops the constructive aspects of these into tools to support vital aspects of their own legal practices, norms, and obligations.

Another theme that runs through many of the stories is prophecy. Prophecy can be viewed as a cognitive structure "for explaining unprece-

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<sup>59</sup> See e.g. M Jane Smith, *Placing Gitksan Stories in Text: Returning the Feathers*. *Guuxs Mak'am Mik'aaax* (PhD Thesis, University of British Columbia Faculty of Graduate Studies, 2004) [unpublished] at 84–85.

<sup>60</sup> See e.g. Deanna Christensen, *Ahtahkakoop: The Epic Account of a Plains Cree Head Chief, His People, and Their Struggle for Survival, 1816-1896* (Shell Lake, Sask: Ahtahkakoop, 2000) at 34–46.

<sup>61</sup> See e.g. Cruikshank, *Story*, *supra* note 29 at 75–78.

<sup>62</sup> *Ibid* at 75.

<sup>63</sup> *Ibid* at 78.

mented events.”<sup>64</sup> In other words, prophecy stories enable people to “maintain intellectual consistency” when explaining major events or “dramatic contradictions”.<sup>65</sup> Julie Cruikshank suggests that such a “customary cognitive model helped make strange events seem more comprehensible.”<sup>66</sup> Intellectual devices such as prophecies demonstrate how Indigenous people have always reasoned, individually and collectively, in order to find meaning and interpret the events in their worlds. As with the adaptive management stories, prophecies enable people to respond to new situations, and to bring in useful new knowledge and practices in a way that is understandable, and thus reconcilable, with familiar normative commitments. For example, Cruikshank argues that the power of “prophecy narratives” is that they demonstrate people’s ability to “successful[ly] engage[e] with changing ideas” as an “adaptive strateg[y]”.<sup>67</sup> Similarly, there are Gitksan stories about people who journey elsewhere and return, bringing what they have learned back to their communities. For example, Gitksan teacher and scholar Jane Smith recounts a complex story of *Guuxs witxw* (reincarnation) in which a man died in a fire and was later reborn.<sup>68</sup> Into his new life, he brought with him memories that contained information about obligations, proper behaviour, respect, and healing. Other communities have similar types of stories with structures that enable their members to reason through and deal with change and new information, and provide them with ways to integrate these helpful new resources into their existing normative frameworks.

Indigenous peoples also apply intellectual traditions of strengthening groups through integrating helpful outside knowledge in contemporary times. For example, from 1969 to 1981, during a time when many Indigenous plains peoples were suffering terribly from the hammer blows of colonization, Raymond Harris, an Arapaho healer from Wyoming, taught many Cree, Dene, and Saulteaux people the Arapaho traditions from the sweat lodge. In this way, Harris ensured that ancient healing practices were not lost, and they continue today, albeit in an adapted form.<sup>69</sup> This was a practical, on-the-ground, and highly effective intellectual device that enabled people to deal with change and resistance by renewing and

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<sup>64</sup> Catharine McClellan, cited in Julie Cruikshank, *The Social Life of Stories: Narrative and Knowledge in the Yukon Territory* (Vancouver: UBC Press, 1998) at 78.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> Julie Cruikshank, “Claiming Legitimacy: Prophecy Narratives from Northern Aboriginal Women” (1994) 18:2 *Am Indian Q* 147 at 163.

<sup>68</sup> See Smith, *supra* note 59 at 74–77.

<sup>69</sup> See Ross Hoffman, *Rekindling the Fire: The Impact of Raymond Harris’s Work with the Plains Cree* (PhD Thesis, Trent University, 2005) [unpublished] at 90–105.

revitalizing ancient practices. People were able to deliberately seek out and integrate new resources into existing traditions. We can apply these same intellectual processes for revitalization to carefully integrate useful new tools into familiar ways of learning and teaching Indigenous legal traditions.

Legal analysis and synthesis were among the core set of skills we both learned in a Canadian common law degree program. Bringing an adaptation of this skill set to Indigenous legal traditions is both very traditional and explicitly innovative. It is traditional because when we bring back what we have learned to our communities, we are doing exactly what people in the stories have been doing for thousands of years. We think legal scholarship engaging with Indigenous legal traditions from an internal viewpoint is, quite simply, one valuable intellectual tool to bring home and integrate into Indigenous legal traditions. By applying these adapted tools to stories, we also continue the rich traditional practices of active listening and lively thinking through stories. Yet, while our approach is very traditional, it is also distinctly innovative in that it constitutes a new method for engaging deeply with Indigenous legal traditions. Our method offers an alternative access to Indigenous law that community members and members of the broader legal community can consciously apply in order to draw on intellectual resources for framing and resolving contemporary issues.

Most (if not all) people who have attended a North American law school in the last century are familiar with the tool of legal analysis first developed by Christopher Langdell, Dean of Harvard Law School, in 1870.<sup>70</sup> While there is an ongoing and fertile debate about the need for and use of other methods and interdisciplinary influences in the study of law, “Langdell’s original program of analyzing legal materials and cases (albeit now suitably leavened by a sprinkling of non-legal sources)” continues to be a central methodology within legal scholarship and legal education.<sup>71</sup> From our perspective, legal cases in Western law are a particular form of story—a way of recording information for future recall.<sup>72</sup> Legal analysis is a method of legal scholarship that starts from an internal view of a particular legal system and produces “embedded” legal scholarship:

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<sup>70</sup> See Jack M Balkin & Sanford Levinson, “Law and the Humanities: An Uneasy Relationship” (2006) 18:2 Yale JL & Human 155 at 159–60.

<sup>71</sup> *Ibid* at 160.

<sup>72</sup> Peter Vale goes so far as to argue that all we do in universities is tell stories—many stories, old, big, complex—but stories nonetheless (see Peter Vale, “The Humanities in All of Us”, *Mail & Guardian* (3 December 2010), online: <mg.co.za/article/2010-12-03-the-humanities-in-all-of-us>).

extended discussions based on “the authoritative artifacts of the law.”<sup>73</sup> The knowledge gained through legal analysis is not “scientific,”<sup>74</sup> nor necessarily about a broad “understanding” or “critique” of the legal order;<sup>75</sup> rather, it is knowledge of the “language” of law<sup>76</sup>—the practical nuts and bolts of “how arguments are fashioned and deployed within legal practice.”<sup>77</sup> This can be contrasted with legal scholarship from an external viewpoint, which focuses on “historical and sociological accounts of the very same body of law.”<sup>78</sup> Minimally, contemporary legal scholarship from an internal view continues to consist of legal analysis, whereby cases are summarized and interpreted.<sup>79</sup> It also encompasses legal synthesis, which strives “to fuse the disparate elements of cases and statutes together into coherent or useful legal standards or general rules” or to develop “a standard that is consistent with, explains, or justifies a group of specific legal decisions.”<sup>80</sup>

There are those who will be cautious about such an innovative supplement to Indigenous legal traditions. This is perhaps more universal than one would first assume, but it is understandable. For example, it is worth noting that the role of legal scholarship and law schools within the common law tradition itself is a relatively recent phenomenon.<sup>81</sup> The common law did not always incorporate legal scholarship and even now,

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<sup>73</sup> Todd D Rakoff, “Introduction” (2002) 115:5 Harv L Rev 1278 at 1279. For a discussion of the “internalist” approach to studying law, see also Balkin & Levinson, *supra* note 70 at 162.

<sup>74</sup> Balkin & Levinson, *supra* note 70 at 160. Balkin and Levinson point out that, while Langdell originally touted legal analysis as a scientific method of studying law, “only the most foolhardy academic today would describe doctrinal analysis as ‘scientific.’ The preferred term today is ‘craft’” (*ibid.*).

<sup>75</sup> Philip C Kissam, “The Evaluation of Legal Scholarship” (1988) 63:2 Wash L Rev 221 at 236.

<sup>76</sup> James Boyd White, “Legal Knowledge” (2002) 115:5 Harv L Rev 1396 at 1397. White argues that “knowledge of the law is like knowledge of a language: you never know all of it, you never know it perfectly, you cannot reduce your knowledge of it to a set of directions or descriptions or rules; rather, your competence consists of being able to use it more or less well, in one set of situations or another” (*ibid.*).

<sup>77</sup> Jeremy Webber, “The Past and Foreign Countries” (2006) 10:1 LH 1 at 2.

<sup>78</sup> *Ibid.*

<sup>79</sup> See Kissam, *supra* note 75 at 231.

<sup>80</sup> *Ibid.* at 232.

<sup>81</sup> See PBH Birks, “Editor’s Preface” in PBH Birks, ed, *Pressing Problems in the Law*, vol 2 (Oxford: Oxford University Press, 1996) v (“[a]t the beginning of [the twentieth] century the common law had barely begun to acknowledge the existence, much less the importance, of jurists, and the notion that university law schools might be essential to the education of lawyers was still novel” at v).

common law scholarship is not always accepted or used in practice.<sup>82</sup> Nevertheless, it is now generally recognized that legal scholarship from an internal viewpoint holds obvious benefits to practitioners and to a legal tradition as a whole. “Traditional legal research and scholarship” within the common law tradition “criticizes, explains, corrects and directs legal doctrine.”<sup>83</sup> At minimum, it can be used to resolve “doctrinal issues”, such as inconsistent or conflicting decisions of different courts, and to produce teaching materials for law students.<sup>84</sup>

We contend that using tools such as legal analysis and synthesis to engage with Indigenous legal traditions may likewise allow legal scholars to summarize and interpret decisions, articulate coherent legal principles and standards, reconcile seemingly disparate decisions, and develop teaching tools within these traditions. Developing legal resources and teaching tools is an essential part of effectively implementing the TRC’s calls to action within government, law societies, and law schools. It is necessary to teach Indigenous laws in law schools, whether in courses or as part of a law degree, such as the proposed joint JD and Indigenous law degree program at the University of Victoria. Legal analysis and synthesis are tremendously useful to law students and legal practitioners alike, because they clarify and explain legal themes while identifying internal tensions. It does not make the law, but it provides a useful starting point for the inevitable research required to adequately address any legal issue. We believe it can be similarly useful for learning and teaching Indigenous laws in these settings, as well as in communities. For both of us, a happy result of our research employing this method with Indigenous legal traditions was that our questions—to elders and within communities—have become much more focused and relevant than before. When using written materials, we find that we are better able to distinguish between accounts that likely demonstrate principled exceptions to a general rule, and incongruities that are more likely due to gaps in an outsider account.

As mentioned above, Indigenous groups also express a need for robust and transparent methods for engaging with Indigenous laws. From a

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<sup>82</sup> Obviously, Indigenous legal traditions continue to be practised without the benefits of legal scholarship. However, concerning the common law tradition, Birks points out the role of legal scholars in

shaping the raw case law was destined to remain largely unrecognized for the best part a century after it might first have been observed. Even now neither the image of the common law nor formal accounts of its operation have fully adjusted to the necessity of law schools and the law-making and law-shaping role of the juristic literature which flows from them (*ibid*).

<sup>83</sup> *Ibid* at ix.

<sup>84</sup> Kissam, *supra* note 75 at 234, 236.

community perspective, this approach, while a bit awkward and artificial, is a way to depersonalize issues. The form of analysis encourages us to hold the issues and facts outside ourselves and discuss them within a larger legal framework. It enables us to access existing stories and other resources as legitimate ways to productively discuss, debate, and resolve real problems. Given the state of lateral violence and intractable conflict in many of our communities, a new approach that offers a principled and productive way forward through the many conflicts within which we are embroiled may be very helpful. It may provide tools to reinvigorate respectful deliberation. Arguably, it also builds expertise central to developing and implementing self-governance initiatives. Importantly, developing new teaching tools also reaches out to our youth, and invites them back into conversation within their own legal traditions. The accessibility of these tools may be especially relevant to youth who, for any number of reasons, have grown up outside of their communities.

Indeed, Louis Bird and the elders whom we interviewed are demonstrating exactly this level of intellectual engagement when they demand that the listener think about what is happening in a story. The listener has to consider what is going on, what the issues and questions are, what the responses and resolutions are, and who does what. This moves the listener away from his or her own personal reactions to the story so that he or she can think through and with the story outside of himself or herself. The movement from individual reactions to a story to a collaborative conversation with the story becomes a collective public reasoning process.

Another reason for moving forward with a more robust legal scholarship within Indigenous legal traditions is that it can play a vital role in reasoning “through the questions, contradictions, and conflicts” that arise from the substantive practice of law on the ground, and, by doing so, actually contribute to the law’s legitimacy and authority.<sup>85</sup> Peter Birks argues that legal scholarship is increasingly important within the common law tradition, not only because of convenience, but also because a basis in legal scholarship may be necessary for any legal tradition to have authority and legitimacy within contemporary societies.<sup>86</sup> He points out that

the authority of the law has in modern times been more deeply challenged by changes in the structure of society itself. A democracy the members of which are well-educated, ambitious and articulate will not take the authority of the law for granted. Authority has now to

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<sup>85</sup> Napoleon, *Ayook*, *supra* note 28 at 311–12.

<sup>86</sup> Birks, *supra* note 81 at vii.



be earned as legitimacy, and legitimacy must be grounded in reason.<sup>87</sup>

Indigenous people, overcoming immense oppressions, are increasingly well-educated (i.e., formally), ambitious, and outspoken. It is reasonable to expect that the legitimate authority of Indigenous legal traditions, as much as the legitimate authority of common law and civil law traditions, must also be earned and thus must be clearly grounded in reason. Legal analysis and synthesis is one approach to make legal reasoning conscious and explicit. Such an approach will support the legitimacy of Indigenous laws within Indigenous communities.

Finally, we believe that applying the tools of legal analysis and synthesis to Indigenous stories and oral histories has the potential to increase the accessibility and intelligibility of Indigenous laws. Borrows has described how both these issues are often pointed out as barriers or challenges to the greater recognition of Indigenous legal traditions within Canada.<sup>88</sup> If these issues are not adequately addressed, they may likewise prove a practical barrier to implementing the TRC's calls to action of recognizing and using Indigenous laws,<sup>89</sup> despite good intentions. Recovering and revitalizing Indigenous legal traditions is fundamentally about reclaiming and rebuilding practices of Indigenous citizenry, collective deliberation, and public reasoning processes. If these practices and processes are going to be viewed as effective and legitimate, within and beyond Indigenous communities, Indigenous legal traditions must be tough and resilient and capable of challenge—so much so that they can critically and vigorously interact in a more symmetrical way with other legal traditions, including the common law and civil law in Canada. Active work toward greater accessibility and intelligibility of Indigenous laws is essential, and using legal analysis to synthesize legal principles from stories is one way to do this. The strength of this method is that it provides a transparent, transferable, and shared framework for accessing and understanding Indigenous laws within and across Indigenous and non-Indigenous communities.

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<sup>87</sup> *Ibid.*

<sup>88</sup> See Borrows, *Indigenous Constitution*, *supra* note 57 at 137–49. Of course, there are people who may argue that the attempt to make Indigenous laws more intelligible or accessible is not worthwhile or even wise; however, we proceed on the assumption that there is value in this endeavour. That being said, Borrows himself advises caution in enhancing the accessibility of Indigenous laws: “In making Indigenous tradition more accessible, close attention must be paid to the specific cultural contexts in which it operates, and solutions must be crafted which skillfully address those contexts. Accessibility must be extended in accordance with a respect for the intellectual property of each Indigenous legal tradition” (*ibid* at 149).

<sup>89</sup> See TRC, *Calls to Action*, *supra* note 8, nos 27, 28, 45, 50, 57, 86, 92.

## V. The Fort St. John Workshop: An Example of Respectfully Engaging with Indigenous Legal Traditions across Communities through Legal Analysis of Stories

The best argument for this method's promise for creating a shared framework through which people can respectfully and productively engage with Indigenous legal traditions within and across communities is in our preliminary observations of seeing people do exactly that over the last several years. While we have mentioned several examples above, we want to describe some of the highlights from one specific conference. This conference, *An Exploratory Workshop: Thinking about and Practicing with Indigenous Legal Traditions*, was co-hosted by the Treaty 8 Tribal Association and the Indigenous Peoples Governance Research Group, and was held in Fort St. John in Treaty 8 territory over three days in 2011. Legal and other academics, community members, and professionals from across Canada attended the conference.<sup>90</sup>

We started the gathering with an activity that served as an analogy for the work with Cree and Dene stories—a bannock-making contest. Small groups were made up of community members and academics or professionals. Once people heard what the exercise was, academics were quite relieved to learn that there was at least one knowledgeable community member in each group! Some community members just showed up to watch and laugh. Each group received a bag of materials for making bannock, which had common essential ingredients (some type of flour, baking powder, and some type of liquid), but which varied even in these. For the flour, there was white flour, whole-wheat flour, and, for some poor unfortunate group, brown rice flour. For the liquid, there was water, milk, almond milk, and soy milk. The bags also contained various optional add-in ingredients, such as raisins, cranberries, chocolate chips, nuts, and rainbow sprinkles (no one used the chocolate chips or sprinkles). Groups had instructions to cook their bannock either in a frying pan or in the oven, or else over an open fire, and they were provided with implements to do so. Then the contest was on.

We delighted in walking around the room, observing academics and professionals humbly watching and asking for help from community members of all ages. The community members took over immediately and authoritatively in almost every group, confident in their knowledge and capacity, despite the odd ingredients and new people involved. There was much laughter and teasing, which, as anyone who lives in or has spent time in almost any Indigenous community knows, created a warm and

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<sup>90</sup> The participants included a Maori legal academic and Indigenous speakers from Peru and Mexico.

comfortable atmosphere in a most traditional way. This activity shifted the typical power dynamics. Community members realized the importance of trusting what they did know, and academics and other professionals had to accept what they did not know. It drew community interest from people who might not have otherwise attended, and was, quite frankly, a fun and delicious (well—some, not so much) icebreaker. It set the tone for the work ahead. Everyone was asked to reflect on or dream about how the bannock-making activity was analogous, or the same, as working with law. The next morning found community, academic, and professional participants already chatting and laughing comfortably together.

This active engagement and learning from each other continued throughout the workshop. Unlike a typical conference in which academics deliver papers while the audience sits and listens, in this workshop, academics, professionals, and Indigenous community members worked together in small groups to analyze ten Cree and ten Dene stories using the adapted legal analysis method with the help of a trained facilitator. These small groups then came together in two larger groups to collectively synthesize the principles identified through the legal analysis of the stories. Following this collective synthesis, the participants again divided into small groups and looked at the principles from the perspective of the women in the stories in order to promote consciousness of gender issues. Finally, using the synthesized legal principles and attending to gender and power dynamics, each group developed a new story that explained or applied the legal principles in terms of today's realities.<sup>91</sup> A representative from each group told the new story to the larger group. This was not an easy process and, in many ways, the conversations in the small groups were microcosms of the larger, complex gender dynamics at play in Canada and elsewhere. Not surprisingly, participants' discussions about power, roles, gender, and change mirrored larger political dynamics.

The substantive results of this collective work of analyzing and synthesizing the legal principles from the stories were, of course, nothing more than the smallest foray into the work needed to fully articulate Cree or Dene legal principles. Much more work would be needed to develop resources that could be used, argued, and applied in practice. However, even this small start revealed the richness, complexity, and clarity of Indigenous legal principles in one specific subject area. (In this case, we focused on the issue of resolving intergroup conflicts and the use of generosity and hospitality.) Importantly, almost everyone involved—Indigenous commu-

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<sup>91</sup> For an extensive discussion of gender in Indigenous law, see generally Emily Snyder, Val Napoleon & John Borrows, "Gender and Violence: Drawing on Indigenous Legal Resources" (2015) 48:2 UBC L Rev 593.

nity members, academics, and professionals—found that working through the legal analysis method and seeing the tentative results of their efforts enabled them to see more clearly the legal principles illustrated within the stories, either for the first time, or in a fresh way.

Each group did produce at least a rough start to a new story about a contemporary issue, even in the short time frame. In doing so, they were creatively and collectively practising the performance and re-creation of Cree or Dene law in a way that was both bounded and dynamic. The new stories were bounded, because they were based on the synthesis of legal principles from the stories; they were dynamic, because they were about contemporary issues and reflected the further, albeit brief, gendered analysis. Like the bannock from the first night, there were common core elements between the new stories, but also many forms and variations among them. This was due to the varied resources, interests, and background knowledge each of the members brought to their group, as well as the claims of authority and group dynamics at play.

The feedback from the workshop was overwhelmingly positive, especially from the community participants. Discussing Indigenous laws through this shared framework created the space for all participants to engage with Cree and Dene legal principles in a curious, respectful, symmetrical, and collaborative way. Everyone had something familiar to work with, and everyone had something new to integrate and learn throughout the process, whether this was the use of stories or the use of legal analysis.

At the end of the three days, after the drummers sang a song and everybody danced a short round dance, the Treaty 8 tribal chief and the Indigenous Peoples Governance (IPG)<sup>92</sup> director stood up to thank the conference organizers. Specifically, the IPG director thanked us for the experience that had finally enabled him to engage substantively with Indigenous laws for the first time, and to understand their importance and complexity at a deeper level. The tribal chief thanked us for the experience that had reminded her and the community members present of the value of their stories, and reminded them to continue using them in their lives. For our part, we are deeply indebted to all the people who participated in this and other workshops for being so willing to learn and try out this method, for their openness, active engagement, and encouragement, as well as their insightful feedback.

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<sup>92</sup> This portion of our research was supported in part by funding from the Social Sciences and Humanities Research Council (SSHRC) Major Collaborative Research Initiatives (MCRI) program, “Indigenous Peoples Governance”.

## Conclusion: An Invitation to Full Engagement

So she told those people all about what she had done:  
 how the people had fought,  
 and also how she had stayed with the barren-land enemy.  
 She told about how she had walked across the sea  
 and that she had seen something  
 which was like meat but wasn't meat.  
 She told them everything about that.  
 Then she also showed them the piece of it  
 she had brought with her[.]<sup>93</sup>

Applying adapted legal analysis to stories to synthesize legal principles is a promising shared framework for serious and sustained engagement with Indigenous legal traditions within and across communities. A pragmatic way forward is what is needed to implement the TRC's calls to action and realize the full potential of the momentum gathering around their greater recognition and public use in Canada today. This serious and sustained engagement will also contribute to the future health and vitality of Indigenous legal traditions and Indigenous societies. Law is a part of all self-governing societies. All law requires shared understandings and sustained effort to maintain its legality. This is hard work, plain and simple, and should not be taken for granted in any legal order:

Ultimately, then, law is created, maintained or destroyed through day-to-day interactions in communities of legal practice. Legal obligation cannot be reduced to the existence of formal rules; it is made real in the continuing practice of communities that reason with and communicate through norms.<sup>94</sup>

The application of legal analysis and synthesis to stories is as rigorous as the application of this method to cases in the common law tradition: in both contexts, we construct and interpret the facts to identify, communicate, and engage with the principles that these stories contain.<sup>95</sup>

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<sup>93</sup> Mandeville, *supra* note 36 at 29.

<sup>94</sup> Brunnée & Toope, *supra* note 52 at 356–57.

<sup>95</sup> This method can and has been used successfully by legal scholars trained in the civil law tradition in Canada to engage with Indigenous laws. We delivered a workshop on this method to legal academics trained in the civil law tradition, academics from non-legal disciplines, and Indigenous community members from Ontario and Quebec, as part of the SSHRC-funded “Legitimus Project”. See Indigenous Law Research Unit, University of Victoria, “Methodology Workshop” (held at the University of Ottawa, 14–15 December 2015) [unpublished]. Sébastien Grammond, who generously translated materials from English to French for our francophone audience at this workshop, points out that lawyers trained in the civil law tradition in Canada also learn case analysis because they must use it in constitutional, public law, and criminal law cases (Conversation with Sébastien Grammond, 15 December 2015).

Crucially, while we believe this method is a useful tool, it is not intended to *supplant* existing learning and teaching methods, but rather to *supplement* them. There are and need to be many methods for engaging with Indigenous legal traditions.<sup>96</sup> We have found that, in practice, this method can be complementary or serve as a bridge for Indigenous and non-Indigenous students to learn deeply through other methods.<sup>97</sup> We are not calling for everyone to adopt our approach, but we are challenging scholars to engage fully with Indigenous laws, to be transparent about their methods, and to be rigorous and critical in their own work.<sup>98</sup> We acknowledge that our approach raises many critical questions. These need to be embraced and taken on as an integral part of the work. After all, such questions are a vital part of robust and respectful engagement with Indigenous legal traditions. For example, we need to acknowledge and to address directly the fact that Indigenous laws are influenced by the power dynamics and politics around them (just as Canadian laws are). We need to be open and reflective about our own backgrounds, interests, and influences as we approach this work. We need to be mindful of the questions

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<sup>96</sup> See e.g. *Justice Within*, *supra* note 23, which explained that Indigenous law can be found in dreams, dances, art, the land and nature, and in how people live their lives. Indigenous laws may be interpreted from words or phrases in Indigenous languages (see e.g. Matthew LM Fletcher, “Rethinking Customary Law in Tribal Court Jurisprudence” (2007) 13:1 *Michigan J Race & L* 57 at 94–95). Some people learn Indigenous laws deeply from nature and land (see e.g. Borrows, *Indigenous Constitution*, *supra* note 57 at 29–32; Tracey Lindberg, *Critical Indigenous Legal Theory* (LLD Thesis, University of Ottawa Faculty of Law, 2007) at 44–51; CF Black, *The Land is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (London: Routledge, 2011)). Laws can also be identified in the ways people regulate and manage activities and resources (see e.g. Brenda Parlee, Fikret Berkes & Teet’lit Gwich’in, “Health of the Land, Health of the People: A Case Study on Gwich’in Berry Harvesting in Northern Canada” (2005) 2:2 *EcoHealth* 127 at 131–34).

<sup>97</sup> See our discussion of researchers’ engagement with this method and others in a national research project in Friedland & Napoleon, “Gathering the Threads”, *supra* note 25 at 26, where we note: “[T]hrough the interview transcripts and verbal reports from students about their time spent in the communities for the AJR Project, we were pleased, but not surprised, to hear of how much learning occurred through language, through guided observations and explanations of nature and the land, and through teasing, drumming, and other activities.” See also the Aseniwuche Winewak Nation Youth Council’s TRC Education Day presentation about their engagement with Cree laws related to reconciliation through stories, songs, language, art, and actions in Hadley Friedland & Lindsay Borrows, “Creating New Stories Through Indigenous Law: Indigenous Legal Principles on Reconciliation” (April 2014), online: <keegitah.wordpress.com>.

<sup>98</sup> Some of the weaknesses that have undermined human rights in non-state justice initiatives throughout the world include the “lack [of] a sound research base and ... poor scholarship resulting in inconsistent, incoherent or unrealistic policies” (International Council on Human Rights Policy, *When Legal Worlds Overlap: Human Rights, State and Non-State Law* (Vernier, Switzerland: ATAR Roto Press, 2009) at ix).

around forms creating externally imposed or unexamined transformation of Indigenous legal traditions. What we do not want to do is let these critical questions paralyze us into inaction. Narratives of fragility or incommensurability related to Indigenous laws are narratives of colonialism. The stories, and the elders and communities we have learned from, all teach us that Indigenous laws are made of stronger stuff.

After pondering the sight of ten dead and mangled crows on the snow in the bush near God's Lake in northern Manitoba, Cree elder John Rains made the following remark: "Some story will come along and find those crows, and use them."<sup>99</sup> In response, Howard Norman offered this observation:

To the Cree, stories are animate beings. One could tell a biography of a single Cree story (which would be a story in itself) just as one could tell the natural history of an animal. In this respect, one could ask, What do stories do when they are not being told? *Do they live in villages?* Some Cree say they do. *Do they tell each other to each other?* Some Cree say this is true as well. Certainly stories live out in the world, looking for episodes to add to themselves. Therefore, we can understand John Rains's belief that eventually a story would find the torn crows. Later that story would find a Cree person, inhabit that person awhile, and be told back out into the world again. A symbiotic relationship exists: If people nourish a story properly, it tells them useful things about life.<sup>100</sup>

The adapted legal analysis method is one way for Indigenous stories to be told back into the world again. It is our belief that Indigenous stories should live out in the world with us today—fully and all the time.

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<sup>99</sup> Howard Norman, "Crow Ducks and Other Wandering Talk" in David M Guss, ed, *The Language of the Birds: Tales, Texts, & Poems of Interspecies Communication* (San Francisco: North Point Press, 1985) 18 at 19.

<sup>100</sup> *Ibid* [emphasis in original].