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# GATHERING THE THREADS: DEVELOPING A METHODOLOGY FOR RESEARCHING AND REBUILDING INDIGENOUS LEGAL TRADITIONS

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*I take the thread from the fingers that are weary, and go on with the work.*<sup>1</sup>

## I INTRODUCTION

State law is not the only source of relevant or effective legal order in Indigenous people's lives. Law matters to all societies and Indigenous societies are no different in this regard—and so, it stands to reason that for Indigenous communities, Indigenous laws continue to matter today. The question that arises out of this logical starting point has become our primary research concern: “How do we begin to engage constructively with Indigenous legal traditions to substantively identify and articulate these Indigenous laws?”

The existence and ongoing meaningful presence of living Indigenous legal traditions in many Indigenous people's lives and communities is a fundamental premise that underlies the research methodology and the major research project that we will discuss in this paper.<sup>2</sup> Still, it would be misleading to suggest that all Indigenous laws are completely intact, employed formally, or even in conscious or explicit use. We are not suggesting that here. Rather, when we talk about Indigenous legal traditions at this point in history we are necessarily talking about an undertaking that requires not just articulation and recognition, but also mindful, intentional acts of recovery and revitalization. The research methodology we have developed is one approach to this essential rebuilding work. The themes and principles that emerge from the preliminary results of the research project we are sharing in this paper demonstrate the kind of results our Indigenous law methodology is capable of producing. At bottom, the methodology we will describe here reflects our unwavering commitment to engaging with Indigenous laws seriously as *laws*.

Law is not fruit: it is not something waiting to be plucked from branches, nor can it be “preserved.” All law, by its nature, is actually made and remade through people seriously applying themselves to deeply engage with it and struggling to make it their own.<sup>3</sup> Any judge, lawyer, legal academic, or law student tasked with understanding and applying state laws knows only too well that “the hard work of...law is never done.”<sup>4</sup> All law moves. Indeed, most of us in the legal field would be out of a job if it didn't. No living tradition remains in some pristine state over centuries of inevitable internal and external changes.<sup>5</sup> However, the comprehensive denial, disregard, and impairment of Indigenous legal traditions through the concerted efforts and wilful blindness of colonialism magnify the challenges to accessing,

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<sup>1</sup> Edward Carpenter, “By the Shore” in Theo Dorgan, ed, *A Book of Uncommon Prayer* (Toronto: Penguin Books, 2008) at 107.

<sup>2</sup> John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 23 [Borrows, *Indigenous Constitution*].

<sup>3</sup> Katharine T Bartlett, “Tradition, Change, and the Idea of Progress in Feminist Legal Thought” (1995) *Wisconsin Law Review* 303 at 330.

<sup>4</sup> Jutta Brunnée & Stephen J Toope, *Legitimacy and Legality in International Law* (Cambridge: Cambridge University Press, 2010) at 8, discussing law in an international law context. We see their insight as applicable to all law, and particularly germane to Indigenous laws, which are similar to international law in that they are typically more “horizontal” than state law.

<sup>5</sup> There is extensive work arguing this point, but see e.g. James Clifford, “Dialogue” (2001) 13:2 *The Contemporary Pacific* 468 at 480; David Luban, “Legal Traditionalism” (1991) 43:5 *Stan L Rev* 1035 at 1046; Alisdair MacIntyre, *After Virtue: A Study in Moral Virtue*, 3d ed (Indiana: University of Notre Dame Press, 2007) at 221.

understanding, and applying them today.<sup>6</sup> Indigenous legal scholar Gordon Christie cautions us not to underestimate the immense damage and losses to Indigenous laws over years of colonialism, and he describes our work as one way of “gathering up the threads.”<sup>7</sup> We agree that the ground of Indigenous legal traditions is uneven and that “gathering up the threads” is the most honest, hard-headed way to describe the research methodology we have developed during the course of our work.

In this paper, we will describe this research methodology through a research project we applied it in, the “Accessing Justice and Reconciliation Project” (AJR Project). This extraordinary national and collaborative research project was launched in 2012<sup>8</sup> by the University of Victoria Faculty of Law’s Indigenous Law Research Unit, the Indigenous Bar Association, and the Truth and Reconciliation Commission. It was funded by the Ontario Law Foundation.<sup>9</sup> The vision for the AJR Project was to honour the internal strengths and resiliencies present in Indigenous societies, specifically the rich resources within these societies’ own legal traditions. The overarching goal of the AJR Project was to identify how Indigenous societies used their own legal traditions to successfully manage harms and conflicts between and within groups, and to identify and articulate the Indigenous legal principles that could be accessed and applied today for the work of building strong, healthy communities now and in the future. The AJR Project reflects only a small sample of the diversity of Indigenous societies across Canada. There were six legal traditions and seven partner communities represented in the AJR Project. From west to east, they were: Coast Salish (Snuneymuxw First Nation and Tsleil-Waututh First Nation); Tsilhqot’in (Tsilhqot’in National Government); Northern Secwepemc (T’exelc Williams Lake Indian Band); Cree (Aseniwuche Winewak Nation); Anishinabek (Chippewas of Nawash Unceded First Nation #27); and Mi’kmaq (Mi’kmaq Legal Services Network - Eskasoni).<sup>10</sup>

The AJR Project served as the catalyst to crystallize the research methodology we had already been developing over several years to substantively engage with Indigenous legal

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<sup>6</sup> We note this appears to be an equal challenge for tribal courts in the United States. See Mathew Fletcher, “Rethinking Customary Law in Tribal Court Jurisprudence” (2007) 13 Mich J of Race & L 57.

<sup>7</sup> Gordon Christie, Guest Lecture, IBA AJR Project Intensive Orientation, May 2012.

<sup>8</sup> The AJR Project duration was from January 2012 to May 2014. In addition to the work described in paper, the project produced a graphic narrative on Cree law, discussion, and teaching guides, three posters, a website, three national conferences, a one-month intensive methodology course on working with Indigenous legal traditions, and three commissioned papers (“Inuit Stories and Law” by Lori Groft and Rebecca Johnson, “Gender and Indigenous Law” by Emily Snyder, and “International Indigenous Law Developments” by Kerry Sloan).

<sup>9</sup> See the AJR Project website, online: <<http://indigenousbar.ca/indigenoulaw/>>.

<sup>10</sup> Partner communities were required to submit an expression of interest, have a community justice or wellness program in current operation, and have a number of elders or knowledgeable people willing to participate in focus group interviews for the project. In addition, the Indigenous Research Unit was able to connect this larger project to three other related and parallel community research projects from other Indigenous societies. We recognize the term “community” is contested, and we are using it here to describe groups of people from the different Indigenous societies we worked with in this project.

traditions through our respective academic work<sup>11</sup> and in active conversations with interested Indigenous communities.<sup>12</sup> In this earlier work and from our longstanding community connections, we consistently observed that Indigenous communities do not need any more idealized, romanticized, or simplified representations of Indigenous law. Given this, we committed to conducting the research for the AJR Project in a way that started where community members were actually at and responding to what they actually needed to fulfill their aspirations to use Indigenous laws today. This required that we not underestimate the impact of colonialism on Indigenous legal traditions. This also required that we directly acknowledge the fact that Indigenous communities do not exist or operate in complete isolation from non-Indigenous people, the justice system, or the Canadian state generally. Interconnections and interdependence exist at many levels, and it is artificial and impractical to ignore the extent of this reality.<sup>13</sup>

Obviously, general, simplistic, or pan-Indigenous accounts of Indigenous laws are insufficient to form a realistic basis for their potential use and application. We needed an approach that would enable us to begin capturing the depth, nuance, scope, and complexity of Indigenous laws, and which would communicate these laws in a more accessible way within and *across* communities. We believe we have developed one promising framework for the ongoing work of recovering and rebuilding Indigenous law. In this paper, we first describe the four-phase research methodology we developed and employed in the AJR Project. Second, we discuss some of the themes that have emerged from our research results thus far. Finally, we provide some reflections about future research that is necessary to support Indigenous law being in the world today as a pivotal aspect of Indigenous peoples managing the everyday legal challenges of being self-governing.

## II WHAT ARE WE DOING ANYWAY? ARTICULATING THE RESEARCH METHODOLOGY AND APPLYING IT THROUGH THE AJR PROJECT

So, what is it that we are doing anyway? This is the question we have been asked time and time again. It is also a question that we have repeatedly asked ourselves over these past several years in our work with a number of Indigenous legal traditions across Canada. It is almost more challenging for us to pull out and describe the legal practices, pedagogies, and theory we

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<sup>11</sup> See e.g., Val Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (PhD Dissertation, University of Victoria, Faculty of Law, 2009) [unpublished] [Napoleon, *Ayook*]; and Hadley Friedland, *The Wetiko (Windigo) Legal Principles: Responding to Harmful People in Cree, Anishinabek and Saulteaux Societies—Past, Present and Future Uses, with a Focus on Contemporary Violence and Child Victimization Concerns* (LLM Thesis, University of Alberta, 2009) [unpublished] [Friedland, *Wetiko Legal Principles*].

<sup>12</sup> This active conversation included actual workshops for Indigenous leadership and community members delivered over the past three years in Indigenous communities at their request. For example, The Splitsin-Sek'emaws Tribal Council hosted an “Indigenous Legal Traditions Workshop at Neskonlith” in the community of Neskonlith, British Columbia, on July 28–29, 2011, online: <<http://www.splitsin.ca/indigenous-legal-traditions>>.

<sup>13</sup> We are not arguing isolation is preferable. See Clifford, *supra* note 5 at 482, where he argues for tradition as a political act, but against the frightening implications of an “absolute indigenism”, cautioning: “we cannot lose sight of ordinary people sustaining relational communities and cosmologies: composite ‘worlds’ that share the planet with others, overlapping and translating.”

are developing and employing than it would be to just use and apply them. Because we were (and are) so deeply immersed in them, they have become the waters we swim in. With the AJR Project, we realized the time had come to begin articulating our approach more explicitly as a transparent and rigorous methodology for engaging with Indigenous legal traditions. In this section, we set out the four phases (elements) of our research methodology: (1) Starting with a Specific Research Question, (2) Case Analysis, (3) Creating a Framework— Primer, Synthesis, and Legal Theory, and (4) Implementation, Application, and Critical Evaluation. These phases will be illustrated through brief descriptions of how we applied each one in the context of the AJR Project.

## A. Phase One: Starting with a Specific Research Question

The logical first step to achieving more specific research outcomes from our engagement with Indigenous laws is to ask more specific research questions of Indigenous laws. This is both practical and in keeping with our commitment to approaching Indigenous laws as *laws*. When researching Canadian state laws, we bring questions to it that we need answers to.<sup>14</sup> For the most part, these are practical questions about managing or solving problems. Why would we not do the same with Indigenous laws? After all, if these laws are not relevant and useful to real life, why bother?<sup>15</sup> All law has to be capable of being specific, responsive, and applied to the real and messy life of human communities. For instance, general statements about equality in Canada reflect normative commitments and provide us with very important aspirations, but at some point, what equality means can only be determined when it is applied to the mundane and to the everyday where it can actually help to solve problems in real relationships between people. Indigenous law needs this specificity too, and to seriously engage with it requires critically reaching into its depths, scope, and complexity. Otherwise, there is a danger that Indigenous law will just become a collection of philosophical generalities and the very resources that we desperately need today will be too stunted and overly simplified to use.

At the broadest level, the research objective of the AJR Project is demonstrated in its name: “Accessing Justice and Reconciliation.” If we wanted to make justice and reconciliation realistically accessible through Indigenous laws today, we knew we needed to move the work beyond the broad descriptive and philosophical accounts of these laws to more specific outcomes that communities could access, understand, and use on the ground. To do this, we needed to break down the broad research objective of accessing justice and reconciliation into more focused and grounded research questions in order to generate more focused answers that communities could potentially use, for example, to respond to the residential-school legacy and impacts and to build toward stronger, healthier futures.

This initial focusing exercise ended up looking like this:

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<sup>14</sup> We note from our personal observations and experiences in Indigenous communities that when approaching an elder or medicine person, people also bring questions they need answers to, or requests for help to deal with a specific ailment or problem.

<sup>15</sup> Napoleon, *Ayook*, *supra* note 11 at 70.

## AJR Project Research Questions

Residential Schools: External	Residential Schools: Internal
Harm caused by the state and residential schools to Indigenous students, their families, and their communities	Residential school legacy and intergenerational trauma: Indigenous people harming other people within communities today
↓	↓
Inter-group harms and conflict	Intra-group harms and conflicts
↓	↓
<b>Research Question:</b>	<b>Research Question:</b>
How did and does this Indigenous group respond to harms and conflicts <i>between</i> groups?	How did and does this Indigenous group respond to harms and conflicts <i>within</i> the group?

We note that, while these research questions flow from the fact and impact of the residential schools within Indigenous communities, they are also core questions that any functional social or legal order must minimally be able to address.<sup>16</sup> Thus they form a vital part of a future vision of reconciliation that sees Indigenous societies and communities as strong, self-governing, vibrant, and healthy places for present and future generations. As the research proceeded, it became apparent that there were far more internal “threads” in both published materials and oral traditions (*i.e.*, drawn from interviews and focus groups) that pertained to the research question about responses to harms and conflicts within groups. In other words, the majority of community respondents focused on the internal harms and conflicts and their responses. Given these factors, and in reply to strong community interest, the initial research shifted to become more specifically focused on “how did and does this Indigenous group respond to harms and conflicts within the group?”<sup>17</sup>

## B. Phase Two: Case Analysis—Bringing the Research Question to the Stories

Of course, when one brings a question to Canadian state laws, there is a broad variety of relatively accessible legal resources. One of the consequences of the colonial damage to Indigenous laws is that access to Indigenous legal resources is not so simple. This creates real challenges to Indigenous legal research at this point in history.<sup>18</sup> Where exactly were we to bring our legal questions to? In considering the available Indigenous law resources, we saw formal and informal law recorded in many different kinds of stories, in songs, dances and art, in kinship relationships, in place names, and in the structures and aims of the institutions

<sup>16</sup> HLA Hart, *The Concept of Law*, 2d ed (New York: Oxford University Press, 1994) at 194.

<sup>17</sup> We note the crucial distinction between harms and violence and conflict. Care must be taken not to conflate these two issues. See Alan Edwards & Jennifer Haslett, “Violence is not Conflict: Why it Matters in Restorative Justice Practice” (2011) 48:4 *Alta L Rev* 893.

<sup>18</sup> For a more extensive discussion on this point, see Hadley Friedland, “Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws” 11:1 *Indigenous LJ* 1 at 8–12 [Friedland, “Reflective Frameworks”].

of each society.<sup>19</sup> We decided to concentrate primarily on identifying and articulating legal principles from stories. In part, this is based on the historic and continuing centrality of stories within many Indigenous societies, as well as their availability. There are longstanding traditions of employing stories as tools for thinking and teaching within most Indigenous societies.<sup>20</sup>

In the legal field, John Borrows's innovative work took this pedagogy one step further when he explicitly retold stories as cases and used the common-law "case method" to identify legal principles within single stories.<sup>21</sup> We decided that connecting these legal pedagogies seemed sensible and effective. After all, cases or written decisions in Canadian law are also stories, albeit stories told and structured in a very stylized fashion and containing particular information. All cases are stories in that they always represent someone's version of events and someone's opinions, and they are collectively deliberated and legitimized in the Canadian legal system. We built on Borrows' approach by developing and applying an adapted common-law analysis to ask specific research questions of multiple published stories and oral traditions within the legal orders of our partner communities.<sup>22</sup> This just made sense to us.<sup>23</sup> We would not expect to adequately understand an area of Canadian law from just one case, so why would we think we could learn Indigenous law from one story? Indigenous laws deserve the same respect and demand the same rigorous analysis if they are going to be understood in their full sophistication and complexity. (In Phase Three we will discuss how we then synthesized the results).

For each legal tradition represented in the AJR Project, student researchers first sought out and analyzed publicly available stories and materials with the research question in mind. We deliberately chose to work with publicly available and published stories for two reasons: First, we did not want to go to our partner communities empty handed and say, "Tell us about your law." We wanted to avoid, or at least lessen, the whole extractive dynamic that can happen with community research and that can simplify findings into descriptive accounts of rules. Second, we wanted to have serious conversations with people and get critical feedback on what we were doing. This meant that we intentionally worked with focus groups when possible and we aimed to conduct the interviews with more than one person at a time.<sup>24</sup> Our concern was to build in, from the ground up, the recognition that law is ultimately a collaborative enterprise. In this way, talking with elders and others in groups served to intentionally situate them in their own community and also helped to avoid the notion that there is one elder or community

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<sup>19</sup> For further examples, see Napoleon, *Ayook*, *supra* note 11 at 264–72; Law Commission of Canada, *Justice Within: Indigenous Legal Traditions*, DVD (Ottawa: Minister of Supply and Services Canada, 2006).

<sup>20</sup> See e.g. the discussion of the importance and multiple uses of stories in Louis Bird, *Telling Our Stories: Omushkego Legends & Histories From Hudson Bay* (Toronto: University of Toronto, 2005); Louis Bird, *The Spirit Lives in the Mind: Omushkego Stories, Lives, and Dreams* (Montreal: McGill-Queens, 2007) [Bird, *The Spirit*].

<sup>21</sup> See e.g. John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 16–20.

<sup>22</sup> Every society has different kinds of oral traditions that fulfill different purposes. For example, there are formal collectively owned oral histories, origin stories, and recent stories or reminiscences of legal cases, conflicts, and events. For a more in-depth discussion of this, see Val Napoleon and Hadley Friedland, "Legal Pluralism and Indigenous Law" 61 McGill LJ [forthcoming in 2016].

<sup>23</sup> We have both worked through the case method to analyze several stories on the same subject in our own work. See Napoleon, *Ayook*, *supra* note 11; Friedland, *Wetiko Legal Principles*, *supra* note 11.

<sup>24</sup> This was not always possible for a variety of scheduling reasons.

member with all the right answers. This was a way to support the larger collectivity and systems of shared accountability that are an essential aspect of decentralized societies. After all, there are currencies of power in every community and within every group, so we sought to minimize these in the way that we structured our interactions.

Each student analyzed between twenty and forty stories that addressed the issue of harm or conflict in some way. They analyzed each story, using the following case brief model:

### Case Brief Model

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**Case Brief:** *Name of story, with full citation(s)*

**Issue/Problem:** *What is the main human problem we are looking at within the story?*

- What is it that the story is trying to tell you (*i.e.*, the issue)? It is more effective to frame this as a question that one can then answer through the analysis.

**Facts:** *What facts in the story matter to this particular issue?*

- The issue determines the relevant facts. Different facts will matter depending on the issue identified.

**Decision/Resolution:** *What is decided that resolves the problem? If there is no clear human decision, what action resolves the problem?*

- It is important that this be symmetrical with the identified issue. Most stories have many decisions, and the key is discerning what decision or action leads to the resolution to the particular identified issue.

**Reason (Ground/Ratio):** *What is the reason behind the decision or resolution? Is there a stated explanation in the story? If not, what can be inferred as the unstated reason?*

- It is the shared and collective reasoning that makes this a legal analysis.<sup>25</sup> Sometimes the stories state the reasons explicitly, and at other times the reasons are implicit. In either case, the task is to consider the *why* behind the decision or response.

**Bracket:** *What do you need to bracket for yourself in this story? Some things may be beyond your current frame of reference but are not necessary for the case analysis.*

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<sup>25</sup> For a more in-depth discussion of legal reasoning in Indigenous societies, see Val Napoleon, “Living Together: Gitksan Legal Reasoning as a Foundation for Consent” in Jeremy Webber & Colin McLeod, eds, *Challenges of Consent: Consent as the Foundation of Political Community in Indigenous/Non-Indigenous Contexts* (Vancouver: UBC Press, 2009).

<sup>26</sup> Although we see implicit bracketing in John Borrows’s analysis of Indigenous laws, we also must give credit and thanks for this idea to Rebecca Johnson, Faculty of Law, University of Victoria. When teaching Canadian law, Johnson acknowledges there are often premises that students may deeply disagree with or question, and suggested bracketing these questions, which recognizes their validity without preventing the analysis necessary to master the area of law being studied (personal conversation, December 2005).



- We will always encounter things that are beyond our own terms of reference or that bother us, but which are not immediately apparent or germane to the analysis at hand. Rather than becoming stymied, we suggest bracketing these aspects, at least until we have looked at many stories.<sup>28</sup> We can always reflect on the kinds of conversations the bracketed content generates—and often, these conversations are another productive engagement with the stories.
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This case brief model will look familiar to most people who have gone through a common-law law school.

Applying this method to stories, rather than to court judgments, led to a number of significant outcomes. First, we found more freedom to explore issues that are not usually included in the standard Canadian legal case analysis. For example, in several of the community workshops, we asked people to imagine the stories with the main characters switching gender.<sup>27</sup> We asked people to think about how this affected the stories and whether they still worked with this change. We found that, to some extent, this created spaces to discuss power, sexism, and internal oppressions.<sup>28</sup> Second, we observed that stories varied. Some stories were less complete than others, almost fragments, while others contained more procedural information. This confirmed how important it is to work with many stories for each area of legal research. Dené elder George Blondin writes that each story could stand alone or could be considered a segment of a bigger story.<sup>29</sup> According to Blondin, sometimes one only has time to tell one story, but each is part of a whole.<sup>30</sup>

The different parts of the case brief also deserve some explanation. The first parts, “Issues” and “Facts,” are quite comparable to the elements of a common-law case brief of a court judgment. The “Decision” and “Ratio” parts require more adaptation. When case-briefing court judgments, the actual decision(s) is fairly easy to identify. In contrast, when case-briefing stories, almost all students found it challenging to identify the relevant decision(s). A common mistake was to identify every decision any character made, even those that were clearly creating or escalating the problem rather than resolving it. This was made more challenging because often stories would include more than one attempt at resolution, some of which would not work or fully resolve matters. In law school, when case-briefing court judgments, first-year law students usually find it challenging to discern the difference between the ratio and obiter. However, when case-briefing stories, an explicit reason for decisions or actions was often absent. This meant students had to make inferences about what the unsaid reason was in the

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<sup>27</sup> See Emily Snyder, Val Napoleon & John Borrows, “Gender and Violence: Drawing on Indigenous Legal Resources” (2015) 48:2 UBC L Rev 593; Val Napoleon, “Aboriginal Discourse: Gender, Identity, and Community” in Ben Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Hart Publishing, 2009) 233–55 [Napoleon, “Aboriginal Discourse”].

<sup>28</sup> Much more is necessary, however, to enable people to challenge internal oppressions and abuses of power, and to be inclusive of transgender and sexual orientation. For a longer discussion on this point, see Napoleon, “Aboriginal Discourse”, *ibid* at 233.

<sup>29</sup> George Blondin, *When the World Was New: Stories of the Sahtú Dene* (Yellowknife, Canada: Outcrop, 1990).

<sup>30</sup> *Ibid.*

actions or responses.<sup>31</sup> This required starting from a base assumption that the story was related by, or contained, reasoning people who were part of a reasonable legal order, and therefore that it must be possible to discern the rationality behind their actions in context.<sup>32</sup>

Finally, the “bracket” part of the model is used to file narrative elements and prevent the creation of insurmountable, paralyzing barriers.<sup>33</sup> Bracketing the potential red herrings is especially important for people raised outside of a specific Indigenous cosmology or epistemology as they attempt to identify legal principles within Indigenous stories. If stories contain “supernatural” or other elements that a particular reader does not understand or has questions about, the bracket section is where he or she can consign their uncertainties—for as long as they need to. In this way, they can acknowledge that they do not understand everything without erasing anything or stopping the analysis of the legal principles related to the universal human problems within the story.<sup>34</sup> Generally, our observation is that, in practice, these challenges did not pose any great difficulties for the participants in the various community or academic/community workshops held prior and during to the AJR Project.

Bringing a question to Indigenous stories and analyzing them this way to identify legal principles that respond to that specific question does not mean those stories are frozen or forever reduced to only one simplistic and immutable “answer” or rule. Nor does it mean the stories can no longer be interpreted in different ways or accessed as a resource for different social needs. As with Canadian law, the question one brings to Indigenous legal resources will determine both the area of law (*e.g.*, governance, trade, land, kinship) and the particular responses to one’s question. This is clearly illustrated in *Delgamuukw v British Columbia*.<sup>35</sup> When one types “Delgamuukw” into the search function of the *Canadian Abridgement Digest*, one finds that thirty-one distinct subject areas of law are identified in this single case. In other words, *Delgamuukw* provides answers to at least thirty-one questions that have been brought to it, ranging from civil practice and procedure, to constitutional questions, to federal-provincial jurisdiction, and to Aboriginal rights and title. Yet no one worries that using *Delgamuukw* to answer a question about civil procedure will prevent it from being used to answer a question about Aboriginal title in some later instance. We take what we need in a principled way according to the rules that protect and maintain law’s coherence.

We contend that many Indigenous stories are equally rich and complex sources of normative material. That is, we can bring a variety of questions to Indigenous stories and we will then draw a variety of legal principles, processes, and procedures from them, depending on what we need to learn or argue at a certain point in time. In addition, there can and should be a variety of interpretations of each story. The key here is that interpretation must be part of a collaborative process (as all law is), and must also be transparent and accountable to the legal tradition one is working within. This is not simply about individual engagement

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<sup>31</sup> We can see this as fitting very nicely with Indigenous pedagogies, where stories require astute telling and active listening, and the listener or reader is constantly encouraged to think about what the story means to them and why certain things are happening. For examples of Louis Bird using this pedagogy, see Bird, *The Spirit*, *supra* note 20 at 16, 34, 48.

<sup>32</sup> Friedland, “Reflective Frameworks”, *supra* note 18 at 34.

<sup>33</sup> John Borrows, “Listening for A Change: The Courts and Oral Traditions” (2001) 39:1 Osgoode Hall LJ 1 at 21.

<sup>34</sup> For a longer discussion about this, see Friedland, *Wetiko Legal Principles*, *supra* note 11 at 49–53.

<sup>35</sup> *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193 [*Delgamuukw*].

or one authority, however thoughtful. Rather, it is the collective enterprise that serves as a legitimizing factor—as is the case with other systems of law. These legal processes of collective engagement comprise individual and collective agency operating within the form through which law is constituted in each Indigenous society.<sup>36</sup> Again, it is also important to remember that all law moves. Identifying the issues that “preoccupy public life” and recognizing the scope for interpretive choices that fit within the “distinctive structure of the fundamental debates” over time within Indigenous societies is more useful than trying to identify some “authentic” or “pure” core meaning from stories or, for that matter, relying exclusively on the authority of one elder.<sup>37</sup>

Finally, we note that, while we focused on stories and used case analysis, we believe there are many other resources that could be accessed and other forms of analysis that could be employed for this phase of the research. There are, and should be, many ways to work with stories and many ways to engage with and articulate Indigenous laws. For example, there are linguistic processes of identifying legal meanings,<sup>38</sup> there are relational processes of identifying legal obligations in kinship relationships,<sup>39</sup> and there is learning law from the land.<sup>40</sup> This is not an either/or proposition. Indeed, through 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.

The bottom line for us is that, however we choose to engage with Indigenous legal traditions, we need to be rigorous, transparent, and consistent. This means we cite our sources, whether this is a certain elder, a ceremony, a story, a historical account from anthropological literature, or all of the above. This means we do not simply describe behaviours or ideals or make unsupported assertions about law, and we consider actual decisions or responses. We deliberately make our own thinking explicit, including experiences, interpretation, and inferences. The next methodology phase involves synthesizing the areas of work in such a manner as to demonstrate patterns and variations, and to invite respectful debate.

### C. Phase Three: Creating a Framework—Primer, Synthesis, and Preliminary Legal Theory

The third phase in our research methodology is primarily a framework for organizing information regarding a legal subject area in an accessible, convenient way so that it can be

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<sup>36</sup> Kirsten Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Oxford: Hart Publishing, 2012) at 9–10.

<sup>37</sup> Jeremy Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (Montreal: McGill-Queens University Press, 1994) at 186.

<sup>38</sup> See e.g. the Inuit legal glossary, online: <<http://www.tradition-orale.ca/english/perspectives-traditional-law-b26.html>> and the Maori legal glossary, online: <http://maorilawreview.co.nz/2012/09/the-legal-maori-dictionary-treading-a-careful-path/>.

<sup>39</sup> See e.g. Harold Cardinal & Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000).

<sup>40</sup> See e.g. CF Black, *The Land is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (New York: Routledge, 2011); Tracey Lindberg, *Critical Indigenous Legal Theory* (PhD Dissertation, University of Ottawa, 2007) [unpublished] at 41–51.

readily analyzed and applied, and so that there is a definite body of law on which to build as the law moves. There are three concurrent parts to this third phase. We will describe each of these, but we encourage the reader to see them as simultaneous endeavours rather than sequential steps. While the synthesis is key here, we found that it needed to be consciously bounded and directly informed by some societal context and at least a preliminary legal theory.

## 1. Primer

The analytical work with the stories of a particular Indigenous society must be contextualized by basic information about that society if we are going to be committed to communicating this work within and across communities today. All stories are cut from and reflect the political structure (*e.g.*, decentralized), the legal order (*e.g.*, non-hierarchical or kinship based), and the history of a people and this entire context informs the legal analysis. The societal context enables one to see the story's internal logic and get a sense of the ambitions of law as illustrated by the norms contained in the patterns and, very importantly, the incongruities that the stories create. A basic societal primer can provide sufficient background context to enable a deeper reflection about the stories and their place in the intellectual life of that society—past, present, and future.<sup>41</sup>

## 2. Synthesis

The key part of this phase is synthesizing all the information from the individual story analyses into one consistent structured analytical framework, the parts of which we will describe below. On a broad level, this analytical framework serves two important functions. First, it focuses our attention on the specifics and the working details of Indigenous legal traditions, rather than remaining at the level of broad generalities that can flatten the complexity of these traditions into oversimplified or pan-Indigenous stereotypes that are impossible to imagine applying to concrete issues.<sup>42</sup> Second, while focusing on specific details, it reminds us that, just as in other legal traditions, specific principles, practices, and aspirations within Indigenous legal traditions do not stand alone but are all interconnected aspects of a comprehensive whole.<sup>43</sup>

On a practical level, we see legal synthesis as key because taking Indigenous legal research to this level is precisely what will enable us to move beyond external descriptive, historical, or sociological accounts of Indigenous legal traditions. This approach also enables us to develop an internal view—that is, figure out the practical nuts and bolts of “how arguments

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<sup>41</sup> For an example of a Gitksan Primer, see Napoleon, *Ayook*, *supra* note 11 at 4–9.

<sup>42</sup> Hadley Friedland has discussed the practical need for moving past generalities and generalizations elsewhere: see Hadley Friedland, “Practical Engagement with Indigenous Legal Traditions on Environmental Issues: Some Questions” in *Environmental Education for Judges and Court Practitioners* (Calgary: Canadian Institute of Resources Law, 2012), online: <[http://cirf.ca/files/cirf/hadley\\_friedland-en.pdf](http://cirf.ca/files/cirf/hadley_friedland-en.pdf)> at 5–8.

<sup>43</sup> Val Napoleon has argued elsewhere that it is reasonable, and crucial, to contextualize individual legal concepts as one aspect of a “comprehensive whole”, a broader, functioning Indigenous legal tradition “(1) that was large enough to avoid conflicts of interest and which ensured accountability, (2) that had collective processes to change law as necessary with changing times and changing norms, (3) that was able to deal with internal oppressions, (4) that was legitimate and the outcomes collectively owned, and (5) that had collective legal reasoning processes”: Napoleon, *Ayook*, *supra* note 11 at 47–48.

are fashioned and deployed within legal practices”.<sup>44</sup> It is this internal perspective of law that is necessary to applying and practising Indigenous law.<sup>45</sup> Legal analysis and synthesis is how we develop an internal perspective of Canadian state law in law school in order to be able to understand it and apply it, first in law exams and then in legal practice. Minimally, contemporary legal scholarship from an internal view in North American law schools continues to consist of legal analysis, whereby cases are summarized and interpreted,<sup>46</sup> and legal synthesis, whereby disparate elements of cases and statutes are synthesized together to develop coherent and useful general legal standards that explain, justify, or are consistent with a group of particular legal decisions.<sup>47</sup>

Legal synthesis is what we do in law school to prepare outlines for law exams, and what we do in legal practice when preparing a legal memo or legal opinion on a specific question in an area of law. This is hard work, but we contend we should be working at least as hard to understand specific areas of Indigenous laws as we do to understand torts or contracts in first-year law. If we want people to be able to apply Indigenous law to real-life issues effectively, we should aim at providing them with at least as much detail as we do in a legal memo or opinion letter in legal practice. A good legal synthesis reveals the terms of legal argumentation that are central to the practical operation of the legal traditions of each society. Given this, recognizing the variations and divergences is just as important as identifying patterns within a specific area in order to answer practical questions and facilitate debate, principled disagreement, and productive agreement. Furthermore, an initial legal synthesis is capable of providing a means of communication across Indigenous legal orders—between Indigenous legal orders, and between Indigenous legal orders and Canadian state legal orders (*i.e.*, civil and common law), and can continually be built on and updated as the law changes over time.

In the AJR Project, all students brought together and synthesized their case analyses using the following analytical framework:<sup>48</sup>

#### Analytical Framework

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1. **Legal Processes:** *Characteristics of legitimate decision-making/problem-solving processes, including:*
    - a. *Who are authoritative decision-makers?*
    - b. *What procedural steps are involved in determining a legitimate response or resolution?*

<sup>44</sup> Jeremy Webber, “The Past and Foreign Countries” (2006) 10 Legal Hist 1 at 2.

<sup>45</sup> For further discussion on this point, see Friedland, “Reflective Frameworks”, *supra* note 18 at 29–31.

<sup>46</sup> Philip C Kissam, “The Evaluation of Legal Scholarship” (1988) 63 Wash L Rev 221 at 231.

<sup>47</sup> *Ibid* at 232. This method was developed by Christopher Langdell, Dean of Harvard Law School in 1870, and continues as the central methodology within legal scholarship and legal education: see Jack M Balkin and Sanford Levinson, “Law and the Humanities: An Uneasy Relationship” (2006) 18 Yale JL & Human 155 at 159–60.

<sup>48</sup> This framework emerged, for the first time, rather organically, in Friedland, *Wetiko Legal Principles*, *supra* note 11 at 82–122. For a shorter summary of the wetiko legal principles through this analytical framework, see Friedland, “Reflective Frameworks”, *supra* note 18 at 36.

2. **Legal Responses and Resolutions:** *What principles govern appropriate responses and resolutions to harms and conflicts between people?*
  3. **Legal Obligations:** *What principles govern individual and collective responsibilities? Where are the “shoulds”?*
  4. **Legal Rights:** *What should people be able to expect from others?*
    - a. *Procedural rights*
    - b. *Substantive rights*
  5. **General Underlying Principles:** *What underlying or recurrent themes emerge in the stories and interviews that might not be captured above? What are the principles that guide the expression and application of the law?*
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This analytical framework is transparent. Anyone disagreeing with an interpretation or statement of principle within the analytical framework should be able to track down the source, assess for themselves, and criticize or re-interpret accordingly. In the AJR Project, our student researchers had to cite their sources, whether that source is a published story, an elder, or a song. Synthesizing many sources together also ensured the work was not solely reliant on the authority of one elder (however knowledgeable), a bald assertion, a story, or historical resources for its legitimacy. Rather, the process of synthesizing the principles from many sources validated the results. It was interesting to note that there were gaps in many of the analytical frameworks developed through the AJR Project—not every category in the analytical framework was filled in every instance. This may indicate missing pieces within a legal tradition and demonstrate the damage done by colonialism. On the other hand, it may demonstrate the opposite—some pieces may be so deeply internalized and intact that people do not even think of explaining them. Further research is needed to determine what pieces are damaged, what needs rebuilding, and what just needs finer focus.

Employing this analytical framework is not about altering information. Rather, it is about organizing information in an accessible, convenient way so it can be more readily analyzed, applied, added to, and adapted to present circumstances in a principled manner. In the AJR Project, once the student researchers organized their information from their case analyses within this framework, they presented this work to elders and other knowledgeable people including leaders and community members within our partner communities who in turn graciously shared their knowledge, opinions, and stories. This helped our student researchers to clarify, correct, expand, and enrich their initial understandings. After these conversations within communities, the student researchers returned to their initial analytical framework and added to it and edited it on the basis of their expanded understandings. The final integrated analytical frameworks were anywhere from 30 to 70 pages in length. The evident richness and complexity in each of the seven syntheses developed for the AJR Project were significant—and this was just barely scratching the surface of one area of law!

### 3. Preliminary Legal Theory

As Jeremy Webber has noted, law does not interpret itself.<sup>49</sup> We learned early on how absolutely necessary it is to be explicit and transparent about the interpretive choices we are continually making when working with Indigenous legal traditions. Laying bare the interpretive choices we make in a transparent fashion is one way of resisting the assertion of unquestionable, privileged truths that can contribute to fundamentalist trends within societies or communities.<sup>50</sup> It also helps facilitate respectful and robust discussion between communities, because where reasoning and interpretative choices are made explicit, the credibility and legitimacy of a particular statement of law or legal decision is less dependent on the uncritical acceptance of authority of a single person, be it an elder or a judge. This is absolutely crucial because the legitimacy of someone's authority may well be taken for granted within one society, but resonate less within another for a variety of reasons. It also reminds us that, at bottom, in any society where a person or group has the power to declare law or make binding decisions, "such power flows from a leader's or group's claim or endowment of reason and responsibility".<sup>51</sup> Considering the bigger questions about how law works and how law should work contributes to the overall health of all legal traditions and societies.

Engaging in the act of articulating Indigenous legal principles, however humbly and tentatively we do it, requires us to be conscious about the enduring tensions, critical questions, intellectual processes, and interpretive bounds in the larger surrounding legal order. After all, the goal of this methodology is to supplement Indigenous legal traditions and pedagogies, not to supplant them. While law, by its nature, is dynamic, it is also always informed and bounded by the particular histories, social realities, needs, norms, and aspirations of the societies from which it emerges.<sup>52</sup> Theorizing about law requires us to think about and explain how law works, and is one way to be accountable for upholding and respecting the self-determination, agency, and shared vision of justice of each distinct Indigenous society we work with. As Christie points out:

Indigenous peoples not only have distinct ways of understanding their worlds, but these distinct understandings reflect and rest upon the existence of distinct, self-contained collectives with shared histories and visions.... These collective visions reflect the lives of peoples who have lived forever on their lands, and these visions express collective wills to continue, to maintain the vast social connections that interweave past and present into plans for movement into the future.<sup>53</sup>

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<sup>49</sup> Jeremy Webber, class presentation for the Intensive Orientation and Methodology course, Indigenous Law Research Unit, Faculty of Law, University of Victoria, May 2012.

<sup>50</sup> Borrows, *Indigenous Constitution*, *supra* note 2 at 36.

<sup>51</sup> *Ibid* at 49. See also Borrows's discussion about positivistic sources of law, *ibid* at 48–50.

<sup>52</sup> For a discussion of the importance and practicalities of acknowledging and exploring this reality through trans-systemic legal education, see generally Rosalie Jukier, "Where Law and Pedagogy Meet in the Transsystemic Contracts Classroom" (2005) 50 McGill LJ 789. See also Roderick A MacDonald and Jason MacLean, "Navigating the Transsystemic: No Toilets in the Park" (2005) 50 McGill LJ 721.

<sup>53</sup> Gordon Christie, "Indigenous Legal Theory: Some Initial Considerations" in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Hart Publishing, 2009) at 208 [Christie, *Indigenous Legal Theory*].

When working with Canadian law, we can take for granted the interpretive tensions and principles for different areas of law, however novel the presenting legal issue is. We know, for instance, that the common law generally presumes people are individual atomistic units and rational actors. We know that one does not usually apply principles of tort law to interpreting constitutional law, or apply principles from Chinese law to a Canadian legal question. Similarly, then, a critical piece of this work is to articulate the intellectual tools and processes from within each Indigenous society that enable that society to deal with the inevitability of novelty and change in a legitimate, bounded way, and so maintain its integrity.<sup>54</sup>

Working toward preliminary legal theories encourages us to constantly ask whether our understanding and articulation of any law remains responsive to, and respectful of, the integrity of the Indigenous legal tradition. We are often questioned about whether applying adapted common-law methods to Indigenous laws could end up inadvertently distorting these laws. We do think the risk needs to be taken seriously.<sup>55</sup> We also think there is an equal danger of distortion when an extreme cautionary approach paralyzes us from engaging in any substantive work with Indigenous law, leading to the current “dire lack of clear-minded theorizing and useful theory”,<sup>56</sup> and perpetuating the colonial myth of an absence of Indigenous legal thought.<sup>57</sup> Similarly, the potential for distortion is high where the discussion of Indigenous laws or legal theory is “built entirely on rhetoric or historical idealism”<sup>58</sup> or completely “shaped by and constrained within the shallow space created by a dichotomous relationship with the Canadian State.”<sup>59</sup>

One way of avoiding the danger of these distortions is to work toward developing preliminary Indigenous legal theories that are rooted in the “lived actuality and dynamic functioning” of particular Indigenous legal traditions, and grounded in empirical research on substantive legal principles and practices.<sup>60</sup> While there needs to be many legal theories, one possible framework for developing a useful preliminary legal theory draws on the scholarship of William Twining, and includes identifying the following elements: (i) a coherent total picture of the Indigenous legal traditions, (ii) general concepts, (iii) general normative principles, (iv) general working theories, (v) an intellectual history of law, and (vi) critical examinations of assumptions.<sup>61</sup>

Like the analytical framework above, perhaps the biggest benefit of using this framework for a legal theory is that it is a framework. Indigenous legal theories are not dependent on Western legal theory frameworks for their validity, but we have seen that, when used

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<sup>54</sup> For further discussion in the context of Gitksan legal theory, see Napoleon, *Ayook*, *supra* note 11 at 289–90.

<sup>55</sup> For a similar discussion about using non-Indigenous legal theorists for theorizing about Indigenous laws, see Christie, *Indigenous Legal Theory*, *supra* note 53 at 211–18.

<sup>56</sup> *Ibid* at 213.

<sup>57</sup> Friedland, “Reflective Frameworks”, *supra* note 18 at 5–6.

<sup>58</sup> Napoleon, *Ayook*, *supra* note 11 at 240.

<sup>59</sup> *Ibid* at 241.

<sup>60</sup> *Ibid* at 240.

<sup>61</sup> For an application of this framework to develop a Gitksan legal theory, built on the substantive results of applying the case method to 20 Gitksan cases, see *ibid* at 294–309.



with appropriate care, these frameworks can be drawn upon as useful resources and analytical lenses.<sup>62</sup>

While realistically time may not always allow for a comprehensive and thorough Indigenous legal theory to be completed as part of this methodology, the work toward the start of one, however preliminary it may be, provides a valuable grounding for the principles in the analytical framework. More broadly, ongoing Indigenous legal theorizing is part of the work needed to create a solid foundation for Indigenous legal traditions to “eventually assume their rightful place among the world’s dispute resolution systems.”<sup>63</sup> As more Indigenous legal theories develop, Indigenous legal thought will contribute to general legal theory and global jurisprudence.<sup>64</sup> It will also help people to “think through questions, contradictions and conflicts” on the ground and thus contribute to the overall health of Indigenous legal orders.<sup>65</sup>

#### D. Phase Four: Implementation, Application, and Critical Evaluation

The themes and principles that emerged from the AJR Project are threads right now. They were pulled out of published stories, oral traditions, lived experiences, opinions, and aspirations shared by the generous and thoughtful respondents interviewed in each partner community. What is perhaps most unique or innovative about this research project is that we synthesized all of these different strands together into one analytical framework focused on one slice of law within each Indigenous legal tradition. In turn, this slice or body of law was bounded by the basic primer and preliminary legal theory. We can take the metaphor one step further and invite people to imagine the framework as a loom. Many more threads are needed, and some may not fit and may need to be removed later, but in each case, we believe there is enough substance there to allow us to see the faint outline of the complete fabric the threads come from. From this, we can further envision the rich, textured material that future careful and deliberate research could produce. Of course, the vital limit to our metaphor is that, with law, unlike fabric, there is never a completely finished product. In all living legal traditions, statements of law are always provisional, not unchanging truths.<sup>66</sup> Indigenous legal principles are no exception to this. They can and should develop, adapt, and transform through time.<sup>67</sup>

The final phase of our research methodology is not fully realized at the time of writing. It involves applying the principles, law, processes, and procedures from the synthesis to current human and social issues. Several of the groups we worked with prior to, and as part of, the

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<sup>62</sup> *Ibid* at 311. For a longer discussion regarding necessary caution with respect to the use of Western legal theorists when developing Indigenous legal theory, see Christie, *Indigenous Legal Theory*, *supra* note 53 at 213–218.

<sup>63</sup> Robert A Williams Jr, “Foreword: The Tribal Law Revolution in Indian Country Today” in Raymond D Austin, *Navaho Courts and Navaho Common Law: A Tradition of Tribal Self-Governance* (Minneapolis: University of Minnesota Press, 2009) at xv (pointing this out as an aspiration for writing more explicitly about the Navaho common law).

<sup>64</sup> Napoleon, *Ayook*, *supra* note 11 at 311.

<sup>65</sup> *Ibid* at 312.

<sup>66</sup> See generally Jeremy Webber, “Legal Pluralism and Human Agency” (2006) 44:1 Osgoode Hall LJ 167.

<sup>67</sup> For an eloquent argument regarding Indigenous peoples’ right to this, see generally John Borrows, “Chapter 15: Physical Philosophy: Mobility and the Future of Indigenous Rights” in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Hart Publishing, 2009) at 403.

AJR Project have taken the completed research and are developing ways to apply it to issues such as child welfare, family law, and criminal court proceedings. Others have expressed interest in using it to develop their own constitutions and governance institutions. There is more potential for this application and testing, of course, and part of what will be important is the critical reflection about the application, how that application is evaluated, whether this process is legitimate or not, and the engagement of collective validation processes. The results and reflections must be fed back into the synthesis on an ongoing basis so the entire process (and Indigenous law, too) is live, tested and challenged, critically legitimized and validated, and where necessary, changed.

This transparent and critical stance has been informed, in part, by the international human rights arena. For example, the International Human Rights Council (IHRC) recently wrote that “[n]on-state law is not always ‘traditional’, but is subject to contemporary influences and may be created by processes that are internally and externally facilitated.”<sup>68</sup> Furthermore, “non-state legal orders are not always quicker, cheaper, more accessible, more inclusive, focused on restorative justice, or more effective in resolving local disputes.”<sup>69</sup> It is this iterative process of application and evaluation that will serve to ensure that Indigenous law does not separate from everyday life (albeit the messy and mundane) and does not exist only within idealized and academic forms.

We can imagine this work having the potential to form a solid base for a more symmetrical and respectful engagement with, and public use of, Indigenous laws within Canada. We can imagine Canada more fully recognizing its potential as a multi-juridical country by recognizing and integrating the use of Indigenous legal traditions.<sup>70</sup> We cannot imagine this potential being realized without a great deal of thought, honesty, communication, and hard intellectual work. Among other practical issues, the IHRC points out that

recognition, incorporation, and decentralisation are ways by which a non-state legal order may become part of a pluralized state legal order. All involve questions of: jurisdiction (over territory, issues and persons); authority (who has it, who bestows it, and how); adjudicatory process (procedure); and enforcement of decisions. If a plural legal order is to operate smoothly, all these elements need to be defined clearly—but this is rarely achieved.<sup>71</sup>

The devil is always in the details. We believe that how well we are able to answer the big questions, such as jurisdiction, authority, adjudication, and enforcement will depend on how well we first do the hard intellectual work needed within Indigenous legal traditions. This research method provides one way to engage with Indigenous laws with enough rigour and specificity that many essential details can be discerned, sorted out, and crucially—continually built on as the law develops. We see it as conducive to striking the necessary balance between the need for clear legal definitions at any point in time and the need for ongoing growth and development of Indigenous laws. We believe it has the potential to do so in a transparent, bounded, flexible, and ongoing way, within and across communities.

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<sup>68</sup> International Council on Human Rights, *When Legal Worlds Overlap: Human Rights, State and Non-State Law* (Geneva, Switzerland: ATAR Roto Press, 2009) at vi [ICHR Report].

<sup>69</sup> *Ibid.*

<sup>70</sup> Borrows, *Indigenous Constitution*, *supra* note 2 at 23.

<sup>71</sup> ICHR Report, *supra* note 68 at vii.

### III LESSONS—THEMES IN THE AJR PROJECT FINDINGS

Our main goal in this paper is to explain the research methodology we developed and used in the AJR Project. It is impossible in this paper to list all the findings from the syntheses developed from engaging with six legal traditions and seven partner communities.<sup>72</sup> Rather than focusing on the detailed findings within each legal tradition, we will instead highlight two predominant themes that arose from our analysis of the individual syntheses within the project as a whole. The first theme is diversity—there is a wide variety of principled legal responses and resolutions to harm and conflict in each Indigenous legal tradition. The second theme is consistency, continuity, and adaptability—there is remarkable consistency and continuity in legal principles through time, but how they are implemented demonstrates their durability, adaptability, and responsiveness to changing contexts. We include examples to help illustrate these themes:

#### A. Diversity

**There is no “one size fits all” approach within or among Indigenous legal traditions. There is a wide variety of principled legal responses and resolutions to harm and conflict available within each legal tradition.**

Often, “Aboriginal justice” is uncritically conflated with “restorative justice” and described idealistically in terms of the values of healing, reconciliation, harmony, and forgiveness. One clear finding of this project is that, while there is often a strong emphasis on some of these concepts, they are not idealized, simple, or standalone responses to harms and conflicts. Every Indigenous legal tradition represented had nuanced and robust understandings of what implementation of these principles entails. Each legal order has a much broader repertoire of principled legal responses and resolutions to harm and conflict to draw as factual situations warrant.

For example, in our engagement with the Mi’kmaq legal tradition, one elder stated that the Mi’kmaq concept of *abeksikdawaebegik* (reconciliation) was one of the “biggest concepts” in Mi’kmaq society. However, he explained this carefully: “You can tell when reconciliation is done in our community...it’s not just forgiveness, it’s if that person has taken *abeksikdewapan*, that responsibility.”<sup>73</sup> Indeed, this project’s engagement with the Mi’kmaq legal traditions suggested the predominant legal response to harm is the principle of encouraging offenders to take responsibility. The two main ways respondents described promoting responsibility for the offender were, (1) to provide restitution to his or her victims,<sup>74</sup> and (2) to develop empathy for his or her victims.<sup>75</sup> In both published stories and interviews, rehabilitation

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<sup>72</sup> This does not include the work we have done with other legal traditions that we have not yet consulted with communities about, nor does it include the communities that are currently drawing on our methodology to work on their specific areas of concern.

<sup>73</sup> *Assessing Justice and Reconciliation Project: The Mi’kmaq Legal Traditions Report* (2013) [unpublished, on file with authors] [footnotes omitted] at 23 [*Mi’kmaq Legal Traditions Report*].

<sup>74</sup> *Ibid* at 23–25.

<sup>75</sup> *Ibid* at 26–27.

or personal transformation of offenders emerged as an important principle,<sup>76</sup> as did the principle of healing, support, and rehabilitation of victims.<sup>77</sup> Importantly, both historically and currently, there were also other principled legal responses to harm and conflict. These include either temporary or permanent separation of an offender<sup>78</sup> and specific deterrence, including, historically, physical punishment, and currently, temporary loss of freedom.<sup>79</sup> In the published stories, responses also included incapacitation in extreme circumstances where there was cruel and malicious ongoing harm.<sup>80</sup>

In our engagement with the Cree legal tradition, respondents made it very clear they see healing of the offender as the predominant and preferred legal response to even extreme harms. For example, when one researcher asked about published stories in which people who became *wetikos* (windigos)—a Cree legal concept describing a very harmful or dangerous person<sup>81</sup>—were killed, one elder, who practices traditional medicine, exclaimed: “probably someone who didn’t know nothing and had no compassion would just go kill someone.”<sup>82</sup> She went on to state emphatically that instead, the proper response is to try to help and heal the person turning *wetiko*. She stressed that these people should not be seen as faceless dangers, but rather, “these are our family members.”<sup>83</sup>

However, while healing was a preferred response for Cree peoples, it was not implemented in isolation nor was it blind to ongoing risks of harm. When someone was waiting for or not willing to accept healing, the principle of avoidance or separation was often employed in order to keep others safe.<sup>84</sup> Avoidance or temporary separations were also principled ways of de-escalating conflict and expressing disagreement.<sup>85</sup> Other principles guiding responses to harm and conflict included acknowledging responsibility as a remedy,<sup>86</sup> re-integration,<sup>87</sup> learning from natural or spiritual consequences,<sup>88</sup> and, historically, in published stories, incapacitation in cases of extreme and ongoing harm.<sup>89</sup> Re-integration followed healing or taking responsibility.<sup>90</sup> The same elder quoted above pointed out that re-integration might

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<sup>76.</sup> *Ibid* at 27–29.

<sup>77.</sup> *Ibid* at 29–31.

<sup>78.</sup> *Ibid* at 31–33.

<sup>79.</sup> *Ibid* at 33–34.

<sup>80.</sup> *Ibid* at 34.

<sup>81.</sup> For a more in-depth exploration of the *wetiko* as a legal concept or category, see Friedland, *Wetiko Legal Principles*, *supra* note 11 at 21–53.

<sup>82.</sup> *Accessing Justice and Reconciliation Project: The Cree Legal Traditions Report* (2013) [unpublished, on file with authors] [footnotes omitted] at 30 [*Cree Legal Traditions Report*].

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

<sup>84.</sup> *Ibid* at 31.

<sup>85.</sup> *Ibid* at 31–32.

<sup>86.</sup> *Ibid* at 33–34.

<sup>87.</sup> *Ibid* at 34–35.

<sup>88.</sup> *Ibid* at 35–37.

<sup>89.</sup> *Ibid* at 37–38. See also Val Napoleon et al, *Cree Law: Mikomosis and the Wetiko* (Victoria, BC: University of Victoria, 2013). For a discussion of the consequences of states criminalizing these set of responses see Val Napoleon & Hadley Friedland, “Indigenous Legal Traditions: Roots to Renaissance” in Markus Dubber & Tatjana Hörnle, eds, *Oxford Handbook on Criminal Law* (Oxford: Oxford University Press, 2014).

<sup>90.</sup> *Cree Legal Traditions Report*, *supra* note 82 at 34–35.

require ongoing observation and monitoring, even for life where warranted, as it was in the case of someone helped from turning *wetiko*, as no one can be completely healed from this.<sup>91</sup>

One of the paramount considerations underlying responses and resolutions to harm in the Tsilhqot'in legal tradition is maintaining individual and community safety. Elder Marie Dick stressed that ensuring safety is one of the key benefits of law, along with providing for discipline and taking care of people.<sup>92</sup> In older published stories, this principle was applied in diverse ways, according to different circumstances, from pre-emptive action to stop a war,<sup>93</sup> to providing food to a starving community, despite being abandoned by them earlier.<sup>94</sup> Proportionality was another important principle that stood out in many stories and accounts.<sup>95</sup> Deterrence, both general and specific, was also considered an important principle. Elders gave a historical example of this, where a chronic thief was physically punished to deter him from stealing (specific deterrence). Later in life, he became a teacher, and was spoken of respectfully for using his own deformity to discourage young people from stealing (general deterrence).<sup>96</sup> Obviously physical punishment for deterrence no longer occurs today, but the principle behind this case is still seen as a valid and practical response to behaviour causing a lot of harm to others.

In our engagement with the Tsilhqot'in legal tradition, temporary separation, and, in very rare, extreme cases, permanent separation, were also mentioned as available responses to harm and conflict.<sup>97</sup> Finally, like in many other Indigenous legal traditions, healing was seen as a preferable resolution. However, elders were careful to point out that healing often requires, or occurs after, a period of separation and reflection. According to some of the elders interviewed, the ability to heal the self is a natural consequence of temporary separation.<sup>98</sup> For example, elder Catherine Haller talked about how community members who committed harms might be “locked in a pit house” in the mountains for a while to allow people who committed harms to let their anger subside.<sup>99</sup> Elder Agness Haller noted that people in “bad situations” would go off on their own to “make them think about what they did” and that was a form of healing.<sup>100</sup> Elder Thomas Billyboy talked about how people would come back to a community after a period of separation if they had “smartened up.”<sup>101</sup> The elders' discussion of the value of a period of voluntary or even forced separation demonstrates that healing requires creating space for the wrongdoer to reflect and change the thinking and behaviour that led to the harm in the first place.

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<sup>91</sup> *Ibid* at 34.

<sup>92</sup> *Accessing Justice and Reconciliation Project: The Tsilhqot'in Legal Traditions Report* (2013) [unpublished, on file with authors] [footnotes omitted] at 26.

<sup>93</sup> *Ibid* at 27.

<sup>94</sup> *Ibid*.

<sup>95</sup> *Ibid* at 28–29.

<sup>96</sup> *Ibid* at 29.

<sup>97</sup> *Ibid* at 29–31.

<sup>98</sup> *Ibid* at 31.

<sup>99</sup> *Ibid*.

<sup>100</sup> *Ibid*.

<sup>101</sup> *Ibid*.

In our engagement with the Coast Salish legal tradition, a broad spectrum of principles for responding to or resolving harms and conflicts emerged, including teaching responsibilities,<sup>102</sup> teaching conflict avoidance,<sup>103</sup> providing guidance to wrongdoers,<sup>104</sup> restitution,<sup>105</sup> restoration,<sup>106</sup> providing ongoing support and monitoring,<sup>107</sup> retribution,<sup>108</sup> and punishment for deterrence purposes as a last resort when nothing else works to rectify the harmful behaviour.<sup>109</sup> Elders explained that punishment was only used when the harm was severe and nothing else had worked to help the wrongdoer recognize his or her harmful ways. The wrongdoer would first be provided with guidance and taught responsibilities, and given opportunities to rectify the harms. If the harm continued, after multiple opportunities, or was extremely severe to begin with, then punishment could be an appropriate response.<sup>110</sup> What becomes apparent of course is the corresponding responsibilities of leadership and other decision-makers, and the group as a whole to fulfill arising obligations for dealing with the offender, to ensure that the appropriate legal processes are adhered to and to protect people's respective substantive and procedural rights.

These examples demonstrate that there are nuanced and robust understandings of principles such as healing or reconciliation that may have much to offer other Indigenous communities and the broader Canadian community as well. They also give a sense of the broad variety of legal principles within each Indigenous legal tradition that are available to respond to the unique circumstances of specific situations of harm or conflict.<sup>111</sup> The diversity of existing principles reflects the rich complexity of these legal traditions.

## B. Consistency, Continuity, and Adaptability

### **Indigenous legal traditions reveal both consistency and continuity over time, and responsiveness and adaptability to changing contexts.**

One advantage of analyzing and synthesizing information from multiple resources to answer a specific research question within Indigenous legal traditions is that this method enables us to recognize patterns and themes we might not otherwise spot. The consistency and continuity of certain principles in each legal tradition through history, despite different expressions and disparate resources, was noteworthy and significant. Time and time again, we saw that Indigenous legal principles can and do maintain their core integrity while adapting

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<sup>102</sup>. *Accessing Justice and Reconciliation Project: The Coast Salish Legal Traditions Report—Community Partner: Snuneymux'w* (2013) [unpublished, on file with authors] [footnotes omitted] at 25 [*Coast Salish Legal Traditions Report*].

<sup>103</sup>. *Ibid* at 27–28.

<sup>104</sup>. *Ibid* at 28–29.

<sup>105</sup>. *Ibid* at 33–34.

<sup>106</sup>. *Ibid* at 35–37.

<sup>107</sup>. *Ibid* at 37.

<sup>108</sup>. *Ibid* at 30–32.

<sup>109</sup>. *Ibid* at 31–32.

<sup>110</sup>. *Ibid* at 29, 30, 32.

<sup>111</sup>. Again, it is absolutely critical not to conflate harm with conflict here, as with Canadian law: see Edwards and Haslett, *supra* note 17.

to new and changing contexts. There was often remarkable continuity and consistency in legal principles within Indigenous legal traditions from ancient stories to contemporary times. These deep-rooted principles are illustrated and implemented in new ways over time and in changing circumstances.

For example, in our engagement with the Anishinabek legal traditions, an important legal principle that emerged regarding legal processes was that a collective community process was typically required to determine major decisions over how to address serious harms.<sup>112</sup> Collective community processes for determining responses to serious harms were identifiable in a number of stories (*Animosh w'guah izhitchigaet*/What the Dog Did; The Boy Who Defeated a Windigo; The Story of Redfeather; Another Windigo Story) and recorded in historical reports from outsiders to that tradition (the Mayamaking Case).<sup>113</sup> Anishinabek legal responses were also recorded in band council decisions on how to consult and address community concerns regarding contemporary community issues (e.g., pow-wow),<sup>114</sup> and in respondents' lived experiences of responding to contemporary issues of harm.<sup>115</sup> The described harms differed, ranging from a man who had become extremely dangerous to himself and all those around him in 1838,<sup>116</sup> to a 2000 decision about whether a pow-wow should be held in a location that would disturb a delicate alvar bedrock.<sup>117</sup> Those involved in the collective processes differed, ranging from birds in one story to a smaller hunting group in one historical account, a group of jingle dancers in a contemporary lived experience, to the band council with the entire reserve, and several outside experts as consultants.<sup>118</sup> What did not differ was that the decisions addressing the harms were made through a deliberate, collective community process.

Similarly, an important legal right identified in the Anishinabek legal tradition was the right to be treated with dignity and compassion, even after one caused harm. This was evident in several older stories, which included people, animals, and ghosts (Mashos and the Orphans; Paguak; The Story of Redfeather; Marriage II; The Foolish Maidens and the Diver).<sup>119</sup> It was also evident through the thoughtful opinions, reasoning, and actions of elders in the interviews. One elder, who worked as nurse for many years, sometimes would treat sick and dying prisoners from the local jail. She stated that it was her belief that the prisoners were each entitled to care and compassion in their illness, regardless of the crimes they had been convicted of. When one prisoner had his shackles on too tight, she acted on her Anishinabek responsibilities by repeatedly asking the warden to loosen them so he could be more comfortable.<sup>120</sup>

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<sup>112</sup>. *Accessing Justice and Reconciliation Project: The Anishinabek Legal Traditions Report* (2013) [unpublished, on file with authors] [footnotes omitted] at 15.

<sup>113</sup>. *Ibid* at 15–16 and 25–26. Some of these recorded stories were described as myths or folktales and they are housed in different collections.

<sup>114</sup>. *Ibid* at 16.

<sup>115</sup>. *Ibid* at 15.

<sup>116</sup>. *Ibid*.

<sup>117</sup>. *Ibid* at 16.

<sup>118</sup>. *Ibid* at 15–16.

<sup>119</sup>. *Ibid* at 41–43.

<sup>120</sup>. *Ibid* at 43.

Another elder, the renowned author Basil Johnston, gave an articulate opinion about the underlying rationale of this principle. He explained that to treat someone who has committed harm with continued empathy and respect, even when denouncing the harm they have committed, reaffirms that person's basic goodness and capacity for good acts and thereby encourages them to act in a good way in the future. On the other hand, treating someone as if they were fundamentally bad and no longer entitled to respect and compassion may take away their motivation to strive to be a good person capable of making a positive contribution to the community. Thus this principle benefits the individual and the community as a whole.<sup>121</sup> This example is also a good illustration of how many people do consciously act on and think through these deeply rooted principles today—and in the everyday.

In our engagement with the Coast Salish legal tradition, one example of a legal obligation was to take care of and help those in need.<sup>122</sup> This legal obligation was evident in several ancient stories (The Boys who became a Killer Whale; Flea Lady; Wolf and Wren).<sup>123</sup> In the interviews, elders discussed historic examples, such as the whole village gathering up as much food as they could to help a family get through a long winter and the brothers of a man who died looking after his family for life.<sup>124</sup> They talked about learning this obligation and about contemporary ways they and others acted on this Coast Salish responsibility to others.<sup>125</sup> For example, one elder took a couple aside, so it wasn't in front of a group of people, and offered them help and guidance. He explained he had no relationship with them except for being part of the same longhouse and being a close friend of their grandmother; however, he believed "it is the responsibility of the people supposedly in the know to guide the rest that are following".<sup>126</sup>

These responsibilities lead to concrete actions, such as helping people who are injured or hurt, or even opening one's home to a woman whose husband is at home drunk.<sup>127</sup> When discussing the hypothetical example of whether a young couple that didn't know how to take care of their child had an obligation to ask for help, one elder stated that they didn't have that obligation. Rather it was up to the rest of the community "to pull them in."<sup>128</sup> Again, these threads demonstrate that the legal obligation being illustrated in ancient stories, historically acted on, taught, and learned, continue to form part of Coast Salish peoples' principled legal actions and thought processes today.

In our engagement with the Secwepemc legal tradition, a vital procedural step that emerged was public confrontation and witnessing. This procedural step, which ensured facts were confirmed prior to any legal response to wrongdoing, is evident in older published stories (Coyote and his Son, The Young Hunter and his Faithless Wife).<sup>129</sup> Publicly confronting wrongdoers was also seen as a crucial part of the process for resolving harms in the community

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<sup>121</sup>. *Ibid.*

<sup>122</sup>. *Coast Salish Legal Traditions Report*, *supra* note 102 at 40.

<sup>123</sup>. *Ibid.*

<sup>124</sup>. *Ibid* at 40.

<sup>125</sup>. *Ibid* at 40–41.

<sup>126</sup>. *Ibid* at 29.

<sup>127</sup>. *Ibid* at 41.

<sup>128</sup>. *Ibid.*

<sup>129</sup>. *Accessing Justice and Reconciliation Project: The Secwepemc Legal Traditions Report* (2013) [unpublished, on file with authors] [footnotes omitted] at 21.



in the 1940s. Elder Charlie Gilbert said the chief and a tribunal used to publically confront wrongdoers in front of a crowd.<sup>130</sup> One elder said that, in the old days, when someone did something wrong, they would be asked to come to a circle with the chief and council. She said that she “understood it to be more like a public confession...the way I heard it from the old people.”<sup>131</sup> Another community member, Rick Gilbert, explained his understanding that wrongdoers “would have to come before the chief and everybody would be there to witness it for the village.”<sup>132</sup>

In contemporary times, this procedural step of public confrontation and witnessing is still considered valuable and is used sensitively and creatively, depending on the context. One elder gave an example of a medicine person speaking out in a multi-community gathering about youth using drugs and alcohol, to let them know they were noticed, without directly confronting anyone or specifying who was to blame.<sup>133</sup> On the other hand, in another contemporary situation involving a man over-hunting, the community was consulted, and the wrongdoer was “severely reprimanded” at a public meeting.<sup>134</sup> The community nature of the public confrontation can also serve to reinforce the ties of the wrongdoer to the community. For example, in one contemporary sentencing circle, one of the young men being sentenced was from the community but had grown up in Saskatchewan. Elder Lynn Gilbert understood that the young man was affected by the words of one of the elders who “let him know, you know, that he was a member of the hereditary line and he should be behaving with pride and dignity, not bringing shame upon the name.” The young man “really felt that he didn’t...realize at the time that this was his line, so, I’m hoping, haven’t heard anything bad about him since....”<sup>135</sup> The diversity of these examples illustrates the enduring nature of this procedural principle, as well as the Secwepemc people’s ability to adapt it to multiple contexts and apply it flexibly, depending on each unique factual situation.

In our engagement with the Mi’kmaq legal tradition, when we looked at legal responses and resolutions, one principle that stood out was personal transformation or rehabilitation of offenders.<sup>136</sup> This was colourfully illustrated in ancient stories, where people who caused harm to others were sometimes transformed into somebody or something useful to the community. For example, a man using dark magic who wants to live forever is transformed into a cedar tree (The Man Who Wanted to Live Forever) and a *Jenu*, a dangerous cannibal giant, becomes a beloved, and very helpful, member of a family when they treat him with kindness and hospitality (Jenu). In one story, a girl is cured from causing harm when the underlying cause, a curse from an old man, is discovered and dealt with (The Snow Vampire).<sup>137</sup> This principle is evident and implemented in contemporary times through professional initiatives that employ modern therapeutically transforming practices. Today, the Mi’kmaq Legal Services Network (MLSN) delivers programs to help offenders deal with underlying issues

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<sup>130</sup>. *Ibid* at 22.

<sup>131</sup>. *Ibid*.

<sup>132</sup>. *Ibid*.

<sup>133</sup>. *Ibid*.

<sup>134</sup>. *Ibid*.

<sup>135</sup>. *Ibid*.

<sup>136</sup>. *Mi’kmaq Legal Traditions Report*, *supra* note 73 at 27–29.

<sup>137</sup>. *Ibid* at 28–29.

that prompted the offending behaviours, including addiction treatment, therapy, and anger management programs.<sup>138</sup>

When discussing the development of a domestic violence court in nearby Sydney, and the process involved, elder Albert Marshall explained in detail:

You focus on the perpetrator first. If the offence he committed stemmed from dysfunctional family, dysfunctional character, loss of language, residential school, alcohol, addictions, or maybe the person was sexually molested in their lives. All those things have to be dealt with first. So there is going to be very little focus on the offence itself, because when all these things are done and the committee is convinced the person is ready to live up to their responsibility, then you can talk about the healing things we have in our language.<sup>139</sup>

The underlying principle is consistent, although the means through which it occurs has changed drastically. Similarly, it should come as no surprise, given the Cree legal tradition's emphasis on healing as a response to harm, that our AJR Project partner community, AWN, responds to the issue of intimate violence by partnering with the Mamowichihitowin Wellness Program to deliver therapeutic services to offenders and families of offenders.<sup>140</sup> These are just two of many examples of Indigenous communities accessing and applying contemporary professional knowledge and resources to implement enduring legal principles in ways that are responsive to the issues they face today.

## IV REFLECTIONS FOR FUTURE WORK

This section presents a few of the reflections that have arisen for us when we pondered the themes that have emerged from the research, the actual experiences of doing the work thus far, and future research that will support Indigenous law being in the world today in robust, accessible, and useful ways.

Our first reflection is that we need much more research to identify and articulate the full breadth of principled legal responses and resolutions within each Indigenous legal tradition. The Canadian justice system and Aboriginal justice are often discussed in starkly dichotomous terms. This oversimplified dichotomy cuts both ways. Flattening the complexity of Indigenous legal traditions can make it appear as if their applicability and utility is limited to minor offences rather than to cases of repeated or serious harms. Within communities, this dichotomy may undercut people's perception of the legitimacy of certain decisions that could, in fact, be principled responses rooted in one's own legal tradition, albeit implemented through new means, with new partners such as justice system actors. While there is no question that important differences do exist at practical, conceptual, and aspirational levels, our research results suggest that when Indigenous legal traditions are considered in their full complexity, there are also points of connection and confluence with Western legal traditions. We hope to see further research more fully explore the full complexity within Indigenous legal traditions

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<sup>138</sup>For more information, see online: <<http://www.eskasoni.ca/Departments/12/>>.

<sup>139</sup>*Mi'kmaq Legal Traditions Report*, *supra* note 73 at 27.

<sup>140</sup>For more information, see online: <[http://www.aseniwuche.com/our\\_people/programs\\_services.html](http://www.aseniwuche.com/our_people/programs_services.html)>.

and to identify points of both divergence and convergence with principles that guide the Canadian justice system.

Our second reflection is that further research is needed to more clearly identify or develop legal processes necessary for a decision to be viewed as legitimate by those impacted by it. More work is also required to articulate the guiding or underlying constitutive principles that form interpretative bounds within specific Indigenous legal traditions. In each synthesis, substantially more threads emerged in the “Legal Responses and Legal Resolutions” section than in the other categories, including “Legal Processes” and “General Underlying Principles.” Whether this is due to damage from colonialism, the focus or expectations of researchers or respondents, or just the deeply internalized, implicit nature of these principles, further explorations are needed in these areas in order to effectively and legitimately apply the identified response principles in explicit and transparent ways today.

The breadth of principled responses available within every Indigenous legal tradition with which we engaged highlights the need to identify legal processes and procedures that are important to signal the legitimacy of any particular decision by those impacted by it and those who have to uphold it, even if they might not agree with the decision itself. In some cases, where the damage from colonialism has been severe, or contexts have changed radically, this may involve partial or full development of new legal processes—and this raises the very important questions regarding collaboration, legitimacy, and validation. The breadth of principles also guides our attention to the importance of understanding, and making more explicit, the background and constitutive themes, aspirations, and beliefs that frame the interpretative boundaries of these principles, as well as influence the balancing and blending required in any particular case.

Our third reflection is that there appears to be real potential in supporting community-based research and engagement processes to enable communities to identify and discuss legal principles so they become more explicit and accessible within communities themselves. While the AJR Project’s findings are conclusive that Indigenous legal principles have great consistency over time while being implemented in adaptive and responsive ways, much of their current use is occurring on an informal or implicit level within communities. Yet it is clear, at least in some communities, that there are people who can discuss these at a practical and philosophical level and who have implemented them within professional justice and wellness programs.<sup>141</sup> Community-based research and engagement processes that work toward making these legal principles more explicit and accessible will serve to strengthen and reinforce their conscious and active use, especially among youth and those who have been dislocated from their community for various reasons.

Our final reflection is that there could be positive benefits to supporting community justice and wellness initiatives to identify and articulate guiding or supporting legal principles as a basis for developing, grounding, and evaluating current practices and programming addressing pressing social issues within their communities. Given both the continuity and adaptability of Indigenous legal principles, a promising direction for further research is to explore the potential for using these principles as a basis for developing, implementing, and evaluating community initiatives and partnerships. In particular, this may provide an alternate or additional method

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<sup>141</sup>For another contemporary example, see Val Napoleon et al, “Where is the Law in Restorative Justice?” in Yale Belanger, ed, *Aboriginal Self-Government in Canada: Current Trends and Issues*, 3d ed (Saskatoon: Purich Publishing Ltd, 2008) at 348–72.

for principled evaluation of these initiatives, rather than simply relying on anecdotal reports or recidivism rates. This work, if carried out in a serious and sustained way, may provide a robust and transparent foundation for strengthening community justice and wellness initiatives, more symmetrical inter-societal partnerships between communities and outside professionals, and practical justice reform rooted in mutual recognition and respect.

The reflections above emerge from the substantive results of the work thus far. Two reflections in particular stand out regarding the actual experiences of doing the work. First, working critically and constructively with Indigenous legal traditions through this method is really hard and demanding work. It is also time consuming. It takes time to work with the stories, learn about a society, develop legal theory, build community relationships, and think through the Indigenous legal principles and processes. It takes even more time to figure out how to apply, implement, and evaluate Indigenous law on the ground—in family law, criminal law, lands and resources, governance, and business. To date, the responses from community members, practitioners, and many judges have been extraordinarily positive. This is hard work, but it is doable. People are able to see Indigenous law as law, and they are able to imagine working with it to solve and manage real problems. However, approaching Indigenous laws through this method is not going to lead to quick results. We do think it will lead to solid, robust results that will sustain the aspirations for engaging with Indigenous laws in the first place. In other words, it may be hard work but it is important work. It is worth pursuing.

Second, it is incredibly important to build in an Indigenous feminist analysis to each aspect of the work. Sexism is so normalized that it is usually invisible even to those experiencing its weight or harms. There is one anecdote that drove this home for us. In one community, a young Indigenous man who was from elsewhere asked two elders about who would be involved in making a particular decision in their legal tradition. The reply was it would be elders. The young man then asked what role, if any, female elders would play. The two elders, who were both women, ignored the question. The young man asked the question again, and again the two women pointedly ignored the question. In considering this interaction, it seemed to us that the elders were just not interested in justifying the question with a response. One wonders whether they heard the question as suggesting the default elder was male, so that the young man was implying they were not elders or had a lesser role because they were women. Whatever the reason for their refusal to answer the question, it was obviously important enough for them to make a point through their deliberate silence. The young man did not appear to realize anything was amiss, and he was treated with kindness.

We need to pay attention to these kinds of interactions, and to what they can teach us about our assumptions and the gender-based diminishment that have become so normalized they go unnoticed. There are many other examples of sexism in Indigenous politics and community life—at every level, not the least of which is the extreme violence and marginalization experienced by Indigenous women in many communities. As Emily Snyder and others have pointed out, while Indigenous men and women have similar experiences, they also have other experiences that are very different.<sup>142</sup> Arguably all law is gendered—be it state law or Indigenous law. It is a real dynamic with serious consequences and this must be factored into the work with Indigenous law.

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<sup>142</sup>See generally Napoleon, “Aboriginal Discourse”, *supra* note 27.

## V CONCLUSION

The only conclusion we can possibly reach at this point is that we are still at the beginning. Accessing and articulating Indigenous laws is challenging at this point in time precisely because we must start in a space of a “deep absence” constructed by colonialism.<sup>143</sup> Yet the hard work of gathering the threads has started. We believe there is much hope. The very process of intentionally and seriously continuing this work will contribute to a truly robust presence of Indigenous law in Canada. The process and the results of this work contain their own threads for more symmetrical inter-societal relationships based on reciprocity and mutual respect.

This work is vital for the future health and strength of Indigenous societies and has much to offer Canadian society as a whole. Robert Cover once famously described law as “not merely a system of rules to be observed, but a world in which we live.” Law is a “resource in signification.”<sup>144</sup> Legal traditions are not only prescriptive, they are descriptive. They ascribe meaning to human events, challenges, and aspirations. They are intellectual resources that we use to frame and interpret information, to reason through and act upon current problems and projects, and to work toward our greatest societal aspirations. Finding ways to support Indigenous communities to access, understand, and apply their own legal principles today is not just about repairing the immense damages from colonialism. As Chief Doug S. White III (Kwulasultun) of the Snuneymuxw First Nation puts it, this is the essential work of our time:

Indigenous law is the great project of Canada and it is the essential work of our time. It is not for the faint of heart, it is hard work. We need to create meaningful opportunities for Indigenous and non-Indigenous people to critically engage in this work because all our futures depend on it.<sup>145</sup>

This work is about recovering normative possibilities for all of Canada. It is about deciding how we will tell the story of our shared future.

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<sup>143</sup>Boaventura de Sousa Santos, “A Critique of Lazy Reason: Against the Waste of Experience” (DemCon Conference Paper, 2006) at 47. Santos argues that there may be “deep absences” that consist of “that which in a given culture has become unpronounceable because of the extreme oppression it was subjected to for long periods.” He believes these absences may not be possible to translate at all. We are willing to at least give it a try.

<sup>144</sup>Robert Cover, “Nomos and Narrative” (1983) 97 Harv L Rev 4 at 5.

<sup>145</sup>Doug S White III (Kwulasultun) Snuneymuxw First Nation, Conference Presentation, Continuing Legal Education of BC, Vancouver, November 16, 2012.