

**LA COMMISSION D'ENQUÊTE SUR LES RELATIONS
ENTRE LES AUTOCHTONES
ET CERTAINS SERVICES PUBLICS**

**SOUS LA PRÉSIDENCE DE
L'HONORABLE JACQUES VIENS,
COMMISSAIRE**

**AUDIENCE TENUE AU
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OUVERTURE DE LA SÉANCE

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LA GREFFIÈRE:

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Silence et veuillez vous lever. Veuillez vous asseoir. La Commission d'enquête sur les relations entre les Autochtones et certains services publics au Québec est maintenant ouverte.

7

L'HONORABLE JACQUES VIENS (LE COMMISSAIRE):

8

Donc, bonjour. Good morning. Me Boileau, je comprends que vous représentez la Commission aujourd'hui?

11

Me MARIE-ANDRÉE DENIS-BOILEAU,

12

PROCUREURE DE LA COMMISSION:

13

Oui, absolument. Bonjour.

14

LE COMMISSAIRE:

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Et pour les journées à venir?

16

Me MARIE-ANDRÉE DENIS-BOILEAU:

17

Voilà.

18

LE COMMISSAIRE:

19

Et nous avons la présence de Me Boucher qui représente le Procureur général?

21

Me MARIE-PAULE BOUCHER

22

POUR LA PROCUREURE GÉNÉRALE DU QUÉBEC:

23

Bonjour.

24

LE COMMISSAIRE:

25

Alors bienvenue à vous. Welcome. Me Boileau,

1 pouvez-vous nous donner un portrait des activités
2 de la semaine ou des prochaines journées?

3 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

4 Oui. So I will switch to English as our witnesses
5 will present in English today.

6 So we have two (2) witnesses who will testify
7 today, tomorrow and Wednesday. It's Professor Val
8 NAPOLÉON and Professor Hadley Friedland. So, just a
9 brief bio of our two (2) professors.

10 So Val NAPOLÉON, on the right, is a professor
11 at the Faculty of Law of the University of Victoria,
12 where she holds the Law Foundation Chair of
13 Aboriginal Justice and Governance. She's a member
14 of Saulteau First Nations and also an adopted member
15 of the Gitksan House of Luuxhon, Ganada Clan.

16 Her current research focuses on Indigenous
17 legal traditions, Indigenous feminism, citizenship,
18 self-determination and governance. She developed
19 the proposed JID program at the University of
20 Victoria, which is a dual degree program in Canadian
21 common law and Indigenous legal orders, at the end
22 of which students will have two (2) professional
23 degrees: a Juris Doctor - a JD - and a JID - a Juris
24 Indigenarum Doctor.

25 She is the founder and Director of the

1 Indigenous Law Research Unit, which is committed to
2 the recovery and renaissance of Indigenous laws.
3 And she has taught and published in Aboriginal legal
4 issues, Indigenous laws and legal theories,
5 Indigenous feminism, governance, critical
6 restorative justice, oral traditions and Indigenous
7 law legal research methodologies. She also teaches
8 property law.

9 On the left side, we had professor Hadley
10 Friedland. She is an assistant professor at the
11 Faculty of Law of the University of Alberta. Her
12 search focuses on Indigenous laws, legal
13 methodologies and pedagogies, Aboriginal law,
14 criminal justice, family and child welfare law,
15 dispute resolution and therapeutic jurisprudence.
16 She has published numerous articles and collaborated
17 to produce accessible Indigenous legal resources for
18 Indigenous communities for legal, professional and
19 the general public. She also provided experimental
20 community-based training and continuing legal
21 education in this area.

22 She was the first Research Director of the
23 Indigenous Law Research Unit where she co-created
24 with Dr. NAPOLÉON the Indigenous Law Research Unit
25 Methodology - that they will both be presenting

1 today. And although she already published multiple
2 articles, she will be publishing her first book in
3 January, which will be called "The Wetiko Legal
4 Principles: Cree and Anishinabek Responses to
5 Violence and Victimization".

6 So, as you will see, both our witnesses will be
7 testifying for three days. So, today, they will
8 talk about Indigenous laws. They will provide us
9 some theoretical background. They will explain some
10 challenges surrounding Indigenous laws, sources of
11 these laws, resources and methods. They will also
12 provide us with a gendered and critical analysis,
13 and they will address the spectrum of violence
14 against Indigenous women.

15 Tomorrow, they will talk about the
16 implementation of Indigenous laws and more
17 specifically how can Indigenous laws be applied in
18 the case of violent crimes. And on the last day,
19 they will follow up with some recommendations for
20 the inquiry and some examples of legal education.

21 So Madame NAPOLÉON and Mrs. Friedland, thank
22 you.

23 **LE COMMISSAIRE:**

24 So, welcome, Dr. NAPOLÉON and Dr. Friedland.
25 Welcome in Val-d'Or. Thank you for having accepted

1 our invitation to testify and help us in our
2 mandate. I will now ask the clerk to proceed with
3 the oath.

4 **LA GREFFIÈRE:**

5 Yes. So...

6 **LE COMMISSAIRE:**

7 And then we'll listen to you.

8 -----

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1 Dr. Hadley Friedland
2 Assistant professor at the Faculty of Law
3 University of Alberta
4 Sworn in

5 -----

6 Dr. Valerie NAPOLÉON
7 Law professor
8 University of Victoria
9 Sworn in

10 -----

11 **LA GREFFIÈRE:**

12 Thank you. Your witness.

13 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

14 So, I will both let you do make your presentations.

15 **DR. VALERIE NAPOLÉON:**

16 So, I'd like to begin by expressing my gratitude
17 for being on Algonquin land, historic and present
18 day Algonquin land. And my introduction said I'm
19 from Saulteau First Nation, which is in the North-
20 East British Columbia. It's in Treaty 8. Their
21 Treaty 8 part of British Columbia. And just by way
22 of additional information, we've had, in my family
23 and in my community, a number of women who... my
24 relatives and friends, who've gone missing or who
25 have been murdered. So the issues here, there's

1

2 the issues of our work and the things that we care
3 about very deeply that we're working on through
4 education and then every other means possible. And
5 they're connected very broadly to the rest of what
6 life is about and what our experiences are.

7 I would also like to introduce the grandmother
8 ravens. In Cree, "kookum" is grandmother and
9 they're tricksters. They're born of national and
10 international Indigenous feminist consciousness.
11 And I understand tricksters to be those first law
12 teachers for many Indigenous peoples, and so, these
13 are my paintings and some of them will accompany us
14 as we go through our presentation here today.

15 **DR. HADLEY FREIDLAND:**

16 And I wanted to thank the Commission for inviting
17 us here to speak today. And I also want to
18 acknowledge being here on Algonquin territory. And
19 I commit to walking gently while I'm here, and do
20 my best to do no harm.

21 And when we were reflecting on this inquiry,
22 looking at the relationships with Indigenous people
23 and public services, I felt this was very important
24 and it took humility, honesty and courage. I think
25 about Iris Marion Young, who's a political theorist,

1 who talked about public services as being the core
2 of nationhood and citizenship, and just how
3 important these services are. And I thought also
4 about just whenever someone reaches out for help or
5 accepts help from public services, such as police or
6 social services, they're citizens in a vulnerable
7 state, whether that's being hungry or hurt or
8 terrified, whether that's having made a terrible
9 mistake on taking actions we can't take back.

10 There may be fear for our own life or for the
11 life of a loved one. It is (in) these moments our
12 common humanity is revealed most clearly. And our
13 vulnerability is part of the human condition and a
14 lot of my work, engaging with Indigenous laws, looks
15 at that human vulnerability in our human condition.

16 So, I look at public services as about
17 nationhood and citizenship, and our human condition.
18 And it's now said we live and interact with the
19 issues across Canada and everywhere, Indigenous
20 people and non-Indigenous people interact. And I
21 thought I would start with a story from when I was
22 much younger, that happened in Northern Alberta.
23 And this happened, I was living in a little Cree
24 community in Northern Alberta, where now I am a
25 wife, I'm a mother, I'm a auntie, I'm a grandma in

1 the Cree tradition. But at that time I was a teen-
2 ager, I was sixteen (16).

3 And one night, somebody woke me up passed
4 midnight and they asked me to call the police. And
5 what had happened is, an intoxicated Caucasian
6 stranger had gotten off a truck on the side of the
7 highway, and he had broken into an elder's house.
8 And that elder lived alone and she spoke no English.
9 So she fled her house and ran to the next house.

10 She didn't want to call the police herself
11 because she only spoke Cree. So she asked her
12 fourty-year-old niece to phone. The police said
13 they would not come. So, her fourty-year-old niece
14 woke up her twenty-five-year-old nephew - I think
15 she thought maybe a male voice would make a
16 difference. So he phoned the police, and the police
17 said they would not come.

18 They then thought of me, and woke me up to
19 phone the police. That's when I was woken up. I
20 was just a teenager, but I had no Cree accent. The
21 police came when I called. They removed the man, he
22 spent the night in the cells.

23 Luckily there was a very good police sergeant.
24 When he found out what had happened the next
25 morning, he woke up the officers - they had already

1 gone to bed, they had worked the night shift - and
2 he woke up the officers and made them go door to
3 door, around the small Cree community, and apologize
4 to every single person.

5 So, I tell that little story and I hope to
6 start every day with a little story, because in the
7 next few days, we will talk a lot about the hard
8 work being done by Indigenous peoples, to rebuild
9 and strengthen Indigenous laws. But this story and
10 many others remind me that there is equally
11 important work for non-Indigenous people, and that
12 is the hard work of learning to listen, to what we,
13 without realizing it, have been taught our whole
14 lives not to hear.

15 **Dr. VALERIE NAPOLÉON:**

16 So this is the overview that we're going to go
17 through. You can see that what we're... the way
18 that we structured our time with you is to have the
19 larger ideas, and then the number of working ideas
20 that flow from the ideas. And then we have lots of
21 examples, and then we have short videos and we have
22 different kinds of things that will speak to the
23 larger issues as well as to the actual application
24 issues that are part of Indigenous law.

25 And I want to refer to you some materials, that

1 we're going to be drawing from, which we will leave
2 here for the Inquiry.

3 The first is a work that we've done on
4 Indigenous law and gender. And so, the tool kit
5 contains resources, lessons, plans, a series of
6 other kinds of ways that people can work with
7 Indigenous law in different settings. And
8 accompanying it are the different legal traditions
9 that we're using for this particular production.
10 And so there's Cree, there's Dene, and there's
11 Secwepemc stories and analysis of those stories in
12 the casebook. So, we will be drawing on that this
13 afternoon in our work here.

14 This second piece is a report, one of our
15 reports. It's an example... we're gonna be going
16 through our methodologies, and this is an example of
17 what the methodologies produce when we work in
18 partnership with Indigenous communities, to
19 substantively articulate and restate their laws on
20 particular questions that they want to explore.

21 So, this sets out the Secwepemc peoples laws in
22 relation to land and resources, and it contains the
23 precedent or the oral histories that are analyzed to
24 inform the body of laws that have been set out here.
25 So, we have many of these reports that take about

1 eight (8) to twelve (12) months to complete, and
2 this is one example.

3 I also bring here one of our projects, which is
4 available online as well, and it's a tool kit for
5 matrimonial property on reserve, and it sets out the
6 options ranging from Courts and tribunals to dispute
7 resolution processes, to Indigenous law, in order to
8 deal with dispute, having to deal with matrimonial
9 property on reserves, and provides examples from
10 across Canada, the kinds of things that people are
11 already doing in that area.

12 This is a graphic narrative on Cree criminal
13 law. This is used in pretty well... I think in most
14 law schools at this point, as well as other
15 faculties. So this draws on Hadley's work and...
16 also from actual Court cases from Northern Alberta
17 being summarized. And then, accompanying that, we
18 have a teaching guide. And this teaching guide sets
19 out different approaches to the graphic narrative
20 and is designed for different audiences - for young
21 audiences, for law students and so on - and it also
22 has lesson plans and resources that people can
23 follow along with. So those are some of the
24 materials that we're drawing from in our work here
25 today.

1 And so, it's quite a... it will be quite
2 helpful in our... and... but we want to make sure
3 that there's time for questions as well.

4 So the first part of this that we want to get
5 into are just asking the questions about "what are
6 Indigenous legal traditions", and to look at the
7 Truth and Reconciliation Commission's Calls to
8 Action for Indigenous laws, and then to reframe
9 what we've experienced in the work that we're doing
10 in articulating and restating Indigenous law.

11 And so the first question there, about what are
12 Indigenous legal traditions. We draw on the work of
13 John Merriman and other Western legal theorists, who
14 talk about Indigenous legal traditions or any legal
15 traditions, as including pedagogy, as including the
16 normative order, as including ways that people
17 imagine the ordering of their lives, as well as the
18 practicalities of law that are contained in the
19 traditions. So, the... it's a comprehensive term
20 that we use and it... you know, within that, there's
21 the order, the legal order, the structure of the
22 legal traditions, which, for Indigenous peoples, are
23 decentralized, non-State legal orders.

24 And then, as part of that of course, are the
25 full scope of Indigenous laws, which are necessary

1 to manage the human life when human beings live
2 together.

3 There's a full scope of different kinds of
4 conflicts and issues and vulnerabilities and so on,
5 that law is a part of, and Indigenous legal
6 traditions, Indigenous law were just as
7 comprehensive as any other system of law.

8 So... and to clarify here, just because it's
9 increasingly the case that when people are talking
10 about Canadian jurisprudence, they're sometimes
11 referring to... they now refer to Indigenous law,
12 but, in this case here, very very specifically, what
13 we're referring to is people's own law deriving from
14 our societies, from Indigenous people societies. So
15 it's not about state laws, treatment of issues of
16 Indigenous people. So we're very clearly talking
17 from Indigenous societal perspectives here.

18 **DR. HADLEY FRIEDLAND:**

19 So there was a video we are going to show, to talk
20 about... to introduce the concept of Indigenous
21 laws. Can we show that now?

22 [Watching the video]

23 -----

24 **DR. VALERIE NAPOLÉON:**

25 So, that's juste a... we produced a number of short

1 videos like that to introduce different concepts
2 into the work regulating and also to provide
3 resources that are not just academic texts, but are
4 capable of reaching different groups of people in
5 different times of their lives wherever they are,
6 so, that's just to get the conversation going.

7 I want to refer to some of the Calls to action
8 for Indigenous law, and these are, again, the Truth
9 and Reconciliation Commission of Canada, it's a
10 wonderful resource, historical and wide-ranging
11 resource for the work going forward. And the ones
12 that specifically speak to Indigenous legal
13 traditions include... the first reference here are
14 to page 206, that:

15 "Aboriginal people must be able to
16 recover, learn and practice their own
17 distinct legal traditions."

18 So the processes of recovery, it's of
19 relearning and it's about building bodies of
20 practice, communities of practice of Indigenous law.

21 The work is also about revitalizing Indigenous
22 law and establishing respectful relations within,
23 between Indigenous peoples but also with Canada.
24 And what the TRC calls for, is for law schools and
25 for law societies to take up this challenge in

1 different ways. They also call for implementation
2 of an aboriginal justice system and that's
3 recommended... or Call to Action number 42.

4 And the last one, I'm really proud to say,
5 is based directly on our work at the Indigenous Law
6 Research Unit in Victoria, and this Calls for the
7 establishment of Indigenous law institutes for the
8 development, use and understanding of Indigenous law
9 and access to justice.

10 So, we'll speak to the initiative that was
11 referred to earlier with Indigenous law degree
12 program, but one of the examples that we've been
13 supporting has been that the Federation of law
14 societies has been asking about what does a
15 competent lawyer need to know today about Indigenous
16 law.

17 And there are different law societies across
18 Canada, we've been providing them with support, to
19 understand what the issues are, but also how might
20 people be able to take up, in a very practical way,
21 the Calls to Action that have been set out.

22 So there's... a sense that, these are places
23 where Indigenous law haven't been talked about
24 before, like the Federation of law societies for
25 example, and so it's a very... it's a new time, and

1 new conversations at some of those levels.

2 **DR. HADLEY FRIEDLAND:**

3 I think one of the things with the TRC final report
4 is that, it's the first government-sponsored report
5 that has talked about Indigenous laws as laws, and
6 named that as a recommendation. So it does
7 represent a possible turning point, in our
8 understanding of Indigenous law and the
9 relationship between Indigenous laws and state
10 laws.

11 So, as more and more people are interested in
12 learning about Indigenous laws, there are challenges
13 that come up, again and again. And we thought to
14 begin, we would put two of them on the table.
15 Because there's a difference between learning
16 Indigenous laws and other sorts of laws. And the
17 two most profound differences are that there is a
18 myth of lawlessness. And sometimes there's an
19 appearance of lawlessness, that is not always as
20 present when people are studying or engaging with
21 other laws.

22 And I want to talk about those and then we want
23 to switch and look at it in a different way, of how
24 we could see opportunities for restoring respectful
25 relations, by looking at these differently, by

1 taking a more logical starting point in our inquiry,
2 and also, in just reframing some of the issues that
3 are going on in a more productive way.

4 So, the first core challenge is this myth of
5 lawlessness, and it has three (3) parts and it goes
6 like this.

7 So you have European theorists, political and
8 legal theorists, many who have never... who never
9 met an Indigenous person, many who, in fact, had not
10 crossed the pond, had not come to North America, and
11 they wrote about Indigenous people as "lawless" or
12 "primitive" or in a "state of nature". They use
13 Indigenous peoples as a trope, as in some ways a
14 myth of origins for Western society.

15 As this has become background in legal and
16 political discussions, and in universities we're
17 teaching this very young... in a way that is usually
18 completely unquestioned.

19 The result of these myths that are, again, not
20 grounded in personal experience or an understanding
21 in interaction with Indigenous people, real
22 Indigenous people, have enduring practical and legal
23 consequences.

24 So, for example, the doctrine of discovery, the
25 concept of *Terra nullis*, while the Supreme Court has

1 been clear, these are not good law in Canada. They
2 have had a profound influence on the lives of
3 Indigenous people in a very practical way.

4 The other piece of the myth of lawlessness is
5 that, through the last four hundred (400), five
6 hundred (500) years in Europe, there was increasing
7 centralization and legal positivism for traditions.
8 So looking at law, only as, law as a rule, matched
9 with the sanctions.

10 And this can make it very hard if we can only
11 see law as something... an authority figure writes
12 down or proclaims, and then uses force to enforce.
13 If that's all we can see law as, it's very difficult
14 to even begin to imagine a fluid decentralized
15 horizontal legal order; which as Dr.NAPOLÉON said, is
16 more of a realistic description of most Indigenous
17 legal orders, so, not all.

18 So it's possible to see these in another way,
19 but... and we have legal theorists that do talk
20 about law in a different way, but, this legal
21 positivism tradition is a challenge.

22 And the third challenge that supports this myth
23 of lawlessness, is what James Waldram describes as a
24 primitivist discourse. And the way this works is...
25 and we see this again and again, when we talk about

1 Indigenous laws, I would say, often half the
2 questions fall into the third category, where pre-
3 contact is imagined as either utopia, things were
4 absolutely perfect before European people came here,
5 Indigenous people had no problems, people...
6 everything was perfect, people just frolicked all
7 day I suppose. Or, as barbaria, and that's to use
8 the word Waldram uses, as complete chaos, as Thomas
9 Hobbes state of nature, war of all against all,
10 discomplete lack of any law or any order.

11 So, when you have only these two things that
12 can be imagined, you really end up in a bit of a
13 mug's game, where, if you either are arguing for
14 protection... - sorry - perfection, or there's no
15 law at all. And if you think about it, often we'll
16 ask our student, "tell us one legal order across
17 history, around the world, that could pass this
18 test." If we can find one imperfection in state
19 law, in Canadian law, in Quebec law, in English law
20 and Australian law, then there is no law. No legal
21 system would pass such a test and yet, this is
22 always what Indigenous peoples are facing when
23 asked about Indigenous law.

24 So, those are the three (3) sort of
25 interconnected challenges that keep this myth of

1 lawlessness alive.

2 And what we're suggesting is, we need to think
3 more logically. We can't go back into the past, we
4 have no time machine. Neither Indigenous or non-
5 Indigenous peoples can't go back and see what life
6 was like, prior to European people coming here, but
7 we can start more logically. We can look at the
8 myths and say, "these are myths, these are tropes
9 used by academics, not reality-based."

10 So the logical starting point we're proposing
11 goes like this.

12 For thousand of years, prior to European
13 contact, Indigenous peoples lived here, in this
14 place, in groups. We know this.

15 We know that when groups of human beings live
16 together, they have ways of managing themselves and
17 all their affairs. This is a... most common of
18 common denominators in law. This is what law does.

19 We know that Indigenous societies must have
20 faced the universal issues of human violence and
21 human vulnerabilities. So they must,... if you know
22 nothing about Indigenous laws, if you've never
23 interacted with an Indigenous society, you would
24 know that there must be that core aspect of any
25 legal order, and Hart writes about this. For

1 millennia, there must have been a way to deal with
2 violence and vulnerability. That's not all there is
3 to human beings living in group, but we would have
4 to, in every society, we have to address this or
5 else, things would fall apart.

6 So, as a matter of logic alone, we don't need a
7 time machine and we don't need exhaustive research
8 to try to find something that is difficult
9 sometimes, because there aren't written records,
10 perhaps, for example. It's a matter of logic that
11 we can start this way and say: at some point and for
12 a very long time, there were self-complete legal
13 orders, here in this place, that sustained civil
14 societies. We can start from that point, we can
15 say: Indigenous people are reasoning people in
16 reasonable legal orders. That could be our starting
17 logical point, which is, if you think about it, then
18 we start to feel a bit silly, which is much more
19 logical, not perfect legal orders, but it's much
20 more logical than imagining absolute perfection or
21 complete chaos constantly for millennia, right? So,
22 that's our first... Switch.

23 This leads to more logical working assumptions.
24 If we're starting from that logical starting point,
25 we get to more logical working assumptions. We can

1 accept that decentralized horizontal legal orders
2 are possible. And we can draw on... sometimes I say
3 the most... the best book about Indigenous legal
4 orders isn't actually about Indigenous law at all,
5 it's about international law, it's by Steven... by
6 Jutta Brunnee and Steven Toupe, where they write
7 about international law as a horizontal system of
8 law and talk about how that might work.

9 We can also just start from the working
10 assumptions that there are Indigenous legal
11 principles for reasoning through universal human and
12 social issues. And that there are Indigenous
13 processes and procedures that legitimate public
14 reasoned decisions. This is not going to look like
15 the European model, obviously, but we can assume
16 that there are... we can start asking questions of
17 how do we access this, how do we understand this,
18 how do we apply these today. It's a different
19 question.

20 So the other core challenges. We can dispose
21 of that myth of lawlessness, we can have a more
22 logical starting point, we can have more logical
23 working assumptions. I think if we can ask better
24 questions, we get better answers, right?

25 But there's another issue that we have to

1 address head on. We can't proceed without talking
2 about this. And that is, there's sometimes today an
3 appearance of lawlessness, and we hear this from
4 both non-Indigenous people and Indigenous people.
5 So we have a lack of books, we have a lack of
6 scholarly articles, legal databases, continuing
7 legal education. We are in very early days for any
8 of this. If somebody wants to learn about Court
9 law, if somebody wants to learn about criminal law,
10 we can go to a law library and we have endless
11 resources

12 If somebody wants to learn about how Cree
13 people approach harm and violence, it's not that
14 simple. And that can perpetuate the myth of
15 lawlessness, because we have this appearance of this
16 readily available resources on one side, books and
17 book and databases and information overload, and on
18 the other side, we have sparse tangible resources.

19 We have a real invisibility of decision-making
20 and decision-making processes. We'll talk about
21 this later on, but decision-making is going on. You
22 can see processes going on within communities. But
23 often, even people that work very closely with
24 communities can't necessarily put their finger on
25 this and this is not written up, this is not

1 formalized where people can look at it and say,
2 "okay: step 1, step 2, step 3."

3 The other reality is, Indigenous laws are not
4 publicly and formally taught. With some exceptions
5 that we'll talk about, they're... - we're starting -
6 they're not resourced. They're not enforced, like
7 the Civil law and the Common-law are. So this
8 creates a serious issue. You could have a
9 legitimate decision, you could have people agreeing
10 that this is an appropriate response, but if there's
11 no resources to implement, if there's no mechanism
12 for enforcement, what do you do if somebody simply
13 refuses or disagrees. That's going to affect the
14 legitimacy of that entire process.

15 And we also have, at this point in history,
16 Mary Ellen Turpel-Lafond has written about this
17 eloquently, as have others

18 We have social disorder, we have social
19 suffering, and in some Indigenous communities we
20 have unprecedented levels of violence and
21 victimization. And we can't proceed without
22 acknowledging that lived reality for many Indigenous
23 peoples.

24 And we have Boaventura D'Sousa Santos, talks
25 about law and he'll say, "the only way to really

1 understand a legal system is to look at spaces of
2 lawlessness within the society." Where is their
3 lawlessness happening. And this is in every legal
4 system. But I think in a much more profound way,
5 linked to colonialism - and we'll talk about this
6 later on, the erosion of Indigenous laws - there are
7 sometimes spaces of lawlessness we need to look at.
8 And I wanted to just read a quote from a really wise
9 Reconciliation Project who was reflecting on this,
10 because we went into that community and we're
11 talking about, in this case, [KWetnat] law. And
12 right away, the elders wanted to talk about a space
13 of time where they said, "you know, I think there
14 was actually a space in that community, the elders
15 said, I think there was a space of time for about
16 forty (40) to fifty (50) years, where horrors
17 happened, again and again, and there was simply no
18 law that was working, and they said, we can't do
19 this work without acknowledging that." And so, this
20 very wise younger man reflected on that and I'll
21 just... I'll read his words, where he said...
22 "I..."... Because there was a fear from the elders,
23 "does this mean maybe we don't have law," when
24 you've been told that so often and so violently.
25 It's a question that arises. And he said, "I think

1 there was always law, but probably a period where
2 people just didn't regard it anymore and didn't
3 care, and a lot of it came when they stopped fearing
4 and stopped respecting the leadership and the Chief.
5 And it seemed lawless. But there is law. But all
6 of a sudden, it is not being enforced anymore."

7 So, what do we do about this. How do we
8 proceed with the appearance of lawlessness. And I
9 think the switch is... again relooking, reframing
10 this in a way that is more conducive to moving
11 forward and making sense. And what it comes down to
12 is switching from looking at... often, people will
13 talk about social suffering or rates of violence and
14 they'll say, "this is about intergenerational
15 trauma." And what we're suggesting is, this...
16 actually, it's more productive to think of this as
17 intergenerational injustice. Something that's not
18 completely located inside individuals, something
19 that needs to be healed, but rather external factors
20 that continue to create trauma, intergenerationally,
21 through injustice, through that not being heard.

22 Sowhat you're looking at here is you have
23 reasonable Indigenous people reasoning through
24 Indigenous legal principles, who are often facing
25 tragic choices, where there is often only

1 unreasonable alternatives available. So in legal
2 literature, we call this "a tragic choice", when it
3 doesn't matter how reasonably you are, you must
4 choose between two (2) terrible things, and you're
5 stuck with that. And this is something I don't
6 think we talk about enough, that Indigenous people
7 are often facing this on a day-to-day basis, because
8 of the systems they're interacting with.

9 I think sometimes too - and we talked about
10 intergenerational trauma, we... people tend to think
11 of it as something in the past or historic.
12 Sometimes people will talk about, let's say, the
13 residential schools or the sixties (60s) scoop, and
14 they'll say, "you know, and now we're in a different
15 era, so we need to look at things that happened in
16 the past."

17 But I think we need to look more closely at
18 that, and acknowledge that they are continuing
19 injustices, they are continuing multi-issues on many
20 fronts, that are being faced today. We need to take
21 into account the cumulative impacts of
22 intergenerational injustice. How many times would
23 we return to Court if, every time, no matter what
24 the judge ruled, there was no effect of it? We
25 could not get it enforced. Somebody ridiculed what

1 was being decided, even if we did everything
2 completely legitimately. How many times would we
3 keep returning to Court and how... what does that
4 create when you build up generations of that.

5 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

6 Excuse me, Professor Friedland,...

7 **DR. HADLEY FRIEDLAND:**

8 Um-hum.

9 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

10 ... could you just make an example of what would be
11 a tragic choice, that you were talking about?

12 **DR. HADLEY FRIEDLAND:**

13 A tragic choice. So, Alan Dershowitz - and I
14 certainly don't agree with everything he writes,
15 but he gives an example. So, Alan Dershowitz was
16 raised an orthodox Jewish and he talks about saying
17 - it's a funny example - he says, "when I was a
18 little boy, we used to talk about, what would you
19 do if you had to come home and you had to tell your
20 parents that you had trichinosis, you were
21 diagnosed with trichinosis - which is something...
22 a disease you can only get from eating pork - or if
23 you had... - I'm trying to think - something else
24 where you do something terribly wrong. Which one
25 would you tell your parent. Because you're going

1 to get in terrible trouble, no matter which one...
2 you say happened. So that would be a sort of funny
3 child example.

4 Sometimes, there are much more serious examples
5 in, for instance health systems, or in child welfare
6 systems, where people are forced to chose between...
7 saying, "well, there's no good answers here" or the
8 patient, "we have a resource issue and we have a
9 patient that is palliative and we have to make a
10 decision one way or the other." Does that...?

11 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

12 Yes, but you're referring it... reasoning in a
13 maybe an Indigenous people type of situation.

14 **DR. HADLEY FRIEDLAND:**

15 Um.

16 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

17 If that's possible.

18 **DR. HADLEY FRIEDLAND:**

19 Yes. Well, the one that comes to mind and I think
20 it's sometimes a hard one to talk about, but I
21 often think about this, in cases that I have
22 interacted with of domestic violence, where the
23 violence is escalated, and someone is scared for
24 their life. And the question is: do they try to
25 deal with that or somehow escape, or do they call

1 the police. And unfortunately, sometimes, the fear
2 of calling the police, as a story I said, it's not
3 for sure the police will come, but there's
4 sometimes also cases where it means bringing,
5 risking violence, not from all police, but from
6 some police. So that person or their loved ones
7 are sitting facing with: do we try to deal with
8 this life and death situation ourselves, without
9 the force the police can bring, or do we risk the
10 possibility of no response or... a violent or a
11 dangerous response. So that's... I think
12 unfortunately an issue I've heard and witnessed.

13 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

14 Okay. Thank you.

15 **DR. HADLEY FRIEDLAND:**

16 Often. So the other piece of this is just talking
17 about deep absences. One of the things Dr. NAPOLÉON
18 talks about is... is one of the first [array
19 shirts] is engagement with Indigenous people as
20 intellectual beings.

21 And the reality is, is that, on many levels,
22 in Canadian society, Indigenous peoples, moral
23 agency and intellectual capacity, and legal
24 reasoning have been systemically devalued or
25 dismissed for a very long time, to the extent that

1 people cannot imagine. I... sometimes I will talk
2 to a non-Indigenous person about Indigenous law and
3 they start talking and I realize that where we're
4 stuck is... they aren't conscious that they are not
5 able to imagine Indigenous people thinking through
6 these things. And bringing it up sometimes is to
7 no avail, because it's so deep, it's so deeply...
8 there, and then we have these deep absences where
9 again, because we haven't done the research, we
10 haven't written books, we haven't engaged with
11 Indigenous laws, we continue to perpetuate these
12 deep absences, right?

13 People that believe that find proof, because
14 they look at the absences within the literature,
15 they look at the absences within schools, within
16 Courts, etc., and they think they found proof of
17 their original belief.

18 We have generations of damage. We can't
19 pretend we don't... We have sometimes almost
20 complete destruction of Indigenous legal
21 institutions, the ways of learning and Indigenous
22 legal resources, we'll talk later on about
23 Indigenous legal resources, but that... it requires
24 acknowledging that we're not starting from a place
25 where Indigenous law is magically intact, despite

1 three hundred (300), four hundred (400) years of
2 battering. Of course, starting from where we're
3 actually at.

4 Again, there's a lack of access to resources
5 for education and enforcement mechanisms.

6 Sometimes we ask people to imagine, so what
7 would... what does state law depend on to be
8 efficient, to be legitimate. What would happen if
9 all the ways we educate people, actually long before
10 law school and people that don't even go to law
11 schools, all the ways we educate people about our
12 law were gone or made illegal. What would state law
13 look like. And similarly, with enforcement
14 mechanisms, what would it mean - and I referred to
15 that a little earlier - what would it mean if, no
16 matter how legitimate the judgment, there was no way
17 to enforce it. What would happen to law. What
18 would happen to our trust in our law.

19 And I think what this leads to is: silence and
20 virtually impunity. And the reality is, these are
21 conditions where abuse and abusers flourish. Where
22 laws lack effectiveness and legitimacy, lawlessness
23 does flourish. It is the perfect conditions for
24 people that are going to commit violence, are going
25 to prey on vulnerability, to do very well.

1 So what we're wanting to do is restate this
2 issue and, instead of looking at this idea of
3 disappearance of lawlessness, where would we start,
4 is to again say: Indigenous people are reasoning
5 people, in reasonable legal orders, who are
6 struggling with impacts of intergenerational
7 injustices and lack of resources. It's reframing
8 the problem to make... sense of people's experience.

9 So again, this logic, so if we start from
10 there, if that's the issue, then, this leads to:
11 where do we go, what are the opportunities for
12 restoring respectful relations.

13 And I think it leads us to different
14 opportunities. I think the first part is
15 recognizing that, sometimes, when people talk about
16 truth and reconciliation, they think of truth as the
17 truth of the bad things that happened, and we can't
18 proceed without knowing the truth of those. But
19 sometimes we miss the truth of the strength and
20 resiliency, and the existence of Indigenous laws.
21 And that truth is equally important to restoring
22 respectful relations.

23 When we're looking at social suffering, looking
24 at rectifying continuing injustices, as opposed to
25 imagining all injustice in the past, can make a

1 difference.

2 And it also leads us to recognize that
3 revitalizing Indigenous laws are going to require
4 serious and sustained resources. So, as Dr.NAPOLEON
5 talked about the TRC Call to Action number 50 calls
6 for Indigenous law institutes. And I think that
7 (that) particular Call to Action was the recognition
8 that, when you have three hundred (300) and four
9 hundred (400) years of laws that haven't been
10 publicly learned, haven't been public taught or
11 practiced or enforced, there needs to be a
12 concentrated and sustained effort, including
13 resources, to do some of that rebuilding.

14 And again, what this leads us to, we're not
15 going back to that primitivist discourse, we're not
16 saying, "we're going to get to a utopia somewhere in
17 the future." And we're not saying, "we're going to
18 get back to a utopia in the past."

19 What we're saying is: we can get to a place
20 where there are more respectful relations, within
21 and between legal communities and legal traditions.
22 And that's our goal. Not perfection, but, more
23 respectful and symmetrical relations.

24 **DR. VALERIE NAPOLEON:**

25 S the starting places that we have is: Indigenous

1 law in Canada has not gone anywhere, but it's been
2 damaged and undermined as Dr.Friedland has set out,
3 and that the work is about rebuilding Indigenous
4 law.

5 And another important aspect here is that, we
6 can understand law as being a distinct mode of
7 governance that is... it's societally determined,
8 every society has a system of law that will reflect
9 that society that it's a part of, but the kinds of
10 problems that law deals with are universal. So,
11 Indigenous peoples have always had to deal with
12 vulnerabilities and violence and conflict, the same
13 as every other society, but the way that we've done
14 it has been through laws that reflect our society,
15 so... And I also want to be clear that Indigenous
16 peoples were not any more violent than any other
17 peoples around the world. It's human beings living
18 together is a messy affair and often conflicted.

19 So... and Dr.Friedland gave the example of
20 imagining what would happen if legal education
21 disappeared or law enforcement disappeared. I'd
22 like to invite you to take that a little bit
23 further. I had the occasion recently to talk with
24 the Senate Committee about Indigenous law and I
25 invited them to imagine that, the laws that they

1 knew in their world completely disappeared. So
2 legal education, the roads that we drive on, the
3 marriages, our work, all the ways that laws are a
4 part of our lives, to imagine that disappearing.
5 And then to imagine what a profound sense of
6 disorientation that would create for everyone, a
7 disorientation that is... not just about the world,
8 but our understanding of our place in the world and
9 our understanding of ourselves, as part of a... as a
10 citizen, how that would be completely changed, if
11 the terms of reference or the grid of
12 intelligibility - which law is in our worlds - was
13 taken away.

14 So, there's... it's useful to look at that in
15 terms of societal loss in the work of rebuilding for
16 Indigenous peoples.

17 So we want to move to Part II, which is the
18 moving from a "why" to a "how".

19 So, you've now had some background, some
20 grounding in the issues and the challenges. And so,
21 how do we move forward. So it's... you know,
22 there's so much work and there's complicated issues
23 and, so where do people find traction in doing this
24 work.

25 And I wonder, do you want... you mentioned you

1 wanted to take a break when... Do you want to take
2 a break now or...?

3 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

4 Well, if you want to take it now, we could take it
5 now but can you... are you... we're trying to look
6 at the time...

7 **DR. VALERIE NAPOLÉON:**

8 We can keep going.

9 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

10 You can keep going a bit?

11 **DR. VALERIE NAPOLÉON:**

12 Oh yes.

13 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

14 Okay. Great.

15 **LE COMMISSAIRE:**

16 When you'll like to take a break...

17 **DR. VALERIE NAPOLÉON:**

18 Yes.

19 **LE COMMISSAIRE:**

20 ... just let me know.

21 **DR. VALERIE NAPOLÉON:**

22 Sure. No, I'm okay. We're okay.

23 **LE COMMISSAIRE:**

24 Yes. Okay. As you wish. When you'll be ready for
25 that, let us know.

1 **DR. VALERIE NAPOLÉON:**

2 Okay. So in this section, we're going to talk
3 about historical... historic legal institutions and
4 laws and contemporary legal institutions and laws,
5 about what it means to engage with Indigenous laws,
6 and we're going to give an example of that with one
7 very short story, and then we're going to talk
8 about the Meta-Principles that are... the
9 organizing logical principles within one legal
10 order.

11 So the example that I'm going to give... so,
12 my... lots of my work was with Gitksan legal
13 traditions. And the Gitksan are... they were one of
14 the plaintiff groups in a title Court action of
15 Delgamuukw and they're in North Western British
16 Columbia. And this really short example from
17 Xhliimlaxha - that's her hereditary Chief's name,
18 her English name is Martha Brown - this very short
19 paragraph is useful to look at in terms that the
20 internal disputes within Indigenous peoples, about
21 law, because of different experiences and different
22 generations. And so Xhliimlaxha, she was very old
23 here - she:

24 "Why not ask if you can do... use it? I
25 said to them. They said, but their

1 grandmother used it. Yes, I said, lots of
2 people have used it, but we own it. If
3 you just ask me, you can use it. I will
4 even tell you where you can set your net.
5 By marrying into our House, they had the
6 right to use it in the past. But those
7 marriage ties died out long ago and they
8 were told, right in the feast, that they
9 could not use it anymore."

10 So, Martha Brown, or Xhliimlaxha - sorry -
11 said, "what can we learn from this really short
12 clip."

13 We can learn that there's land with boundaries
14 and fishing sites with boundaries, that there are
15 authorities which allow access and use, that there's
16 inheritance for use of fishing sites and for land,
17 and that here, the access and use of the territories
18 follows the mother's side - it's a matrilineal
19 system. And so she, as a Chief, in her House group
20 or matrilineal kinship group, she has the ability
21 to... the authority to provide access and use.

22 You can also learn that some of the use and
23 access rights or privileges are derived through
24 marriage, and that marriage... you always marry
25 outside of your clan, which provides... creates a

1 duality around every single person in terms of
2 rights and privileges and protections, and that
3 terms of use are tied to the lengths of a marriage
4 and that they can end, and that the feast is a
5 public process, where this information is given
6 publicly and there are witnesses there, whose job it
7 is to remember.

8 So from that short clip, you can get an insight
9 into a complicated decentralized legal order,
10 through which this is... the fishing site and land
11 is governed, and you can see who's doing the
12 governing.

13 So if we then look a little further, a lack of
14 understanding of what Xhliimlaxha is talking about
15 and the breaking of the laws by the younger Gitksan
16 and by non-Gitksan people in Gitksan territory, that
17 continues to undermine the integrity of Gitksan law
18 and their land ownership.

19 And so the law through its continual breaking,
20 it begins to lose credibility. And through the loss
21 of people like Xhliimlaxha, you lose some of the law
22 teachers that have the historic understanding of the
23 laws and the legal institutions.

24 And from different situations - like this was
25 one tiny example - you can see why conflicts are

1 created, because there's... the pedagogy has not
2 been... people haven't been able to maintain the
3 pedagogy of lands, as well as other aspects of their
4 legal orders, and so this is Xhliimlaxha, so
5 that's... the name "Xhliimlaxha"... every name is
6 tied to a territory. It's like a trust that people
7 have for the territory with boundaries and
8 attendant, land laws having to do with inheritance
9 and access and everything else. So there's huge
10 bodies of law for every aspect of Gitksan life. And
11 I want to give an example here.

12 So, if we take Xhliimlaxha's perspective, she's
13 speaking from historic perspective - which is on the
14 left here.

15 She's... her understanding of the legal order,
16 the Gitksan legal order, it's non-state, it's
17 horizontal, the authority is horizontal, insofar as
18 political and economic and legal orders. So that
19 the relationships that matter for Xhliimlaxha are
20 horizontal relationships. The relationships within
21 the community and between the community, those are
22 the relationships that matter.

23 And leaders then, the expectations and so on of
24 leaders are within that particular order.

25 So, if we skip over to the other side, on the

1 right, in terms of contemporary legal institutions
2 and law, new legal institutions and law have been
3 created through several authorities with the Indian
4 Act and with Canadian legal benchmarks. And there's
5 been a reorientation from the horizontal, political,
6 economic and legal relationships, to vertical talk
7 down legal relationships, with small geographically
8 pinned communities, so that the relationships that
9 matter now are vertical, less, so the horizontal
10 relationships that maintain the legal order.

11 So the authorities historically that
12 Xhliimlaxha is talking about are allocated through
13 its institutional forms that comprise Gitksan law.
14 There's the kinship lineages, the Chief's names of
15 themselves, the feasts, all of the different
16 institutions that are a part of... that comprise
17 Gitksan legal order, where horizontal.

18 Contemporary forms, again that the younger
19 people that she's talking to, what their experiences
20 are comprised of are vertical - with elected band
21 councils, centralized decision-making - and in this,
22 there's a representative democratic model, which is
23 incorporated into that as well, but it's a command
24 and control model for the most part.

25 So, from Xhliimlaxha's perspective, this is the

1 legal order she's talking about. She's... drawing
2 from that legal order. The young people she's
3 talking to are from the other... their experiences
4 from the other column.

5 We can look, and we can break down the
6 different aspects here, a little further, we can
7 look at how historically Indigenous societies were
8 not homogenous.

9 Gitksan society, for instance, if you look at
10 the oral histories - which go back ten (10), twenty
11 thousand (20,000) years - they incorporated other
12 peoples. There were other languages brought in. So
13 they were a society that had languages and had, over
14 time - thousands of years - different political and
15 economic relations with the people around them.

16 There were also the land based that they're
17 speaking from, that was... historically, they had
18 fifty-five thousand square kilometers (55,000 km²) .

19 The reserves that were set up are forty-four
20 square miles (44 mi²), or about a hundred square
21 kilometers (~ 100 km²) - I'm not sure what that
22 works out to.

23 So, historically, there were Gitksan non-
24 homogenous peoples, and part of what happened
25 through history, colonial history, was the freeze

1 drying of different categories of Indigenous
2 peoples.

3 So first we were Indians, we were Metis and
4 Inuit or Eskimo. Now we're Cree or Gitksan or Dene
5 or Secwepemc or whatever, but the concept is as if
6 those categories have never changed or as if they're
7 homogenous. There's a different kind of
8 understanding that informs how people think about
9 Indigenous societies. And the communities are
10 small, so the bands have fragmented the larger legal
11 orders, so, Xhliimlaxha, she's talking about a legal
12 order that extends over fifty-five thousand square
13 kilometers (55,000 km²).

14 The political orientation for lots of young
15 people is just the reserve, not the larger legal
16 order with the cross-cutting... the systems of
17 accountability that exist between the communities.
18 And so, Xhliimlaxha, she's talking about the public
19 legal archives of oral histories and different kinds
20 of oral histories: the ways that people were
21 educated in the law, the authority to enforce the
22 law, the public memory created through the feast and
23 through the deliberate witnessing, all of the
24 different kinds of institutions, that's what she's
25 speaking from.

1 And today, the realities, there are fewer
2 feasts, and some people have an incomplete
3 understanding of their legal orders.

4 So the kind of comprehensive legal order,
5 again, Xhliimlaxha is speaking to is that there's...
6 it has... it includes different sources of law: law
7 deriving from human interaction through time,
8 through an understanding of natural law, sacred law,
9 customary law, deliberative and positive law. And
10 we'll speak to all of these things a little later.

11 So there's a... the deliberative aspect of law
12 and there are lots and lots and lots of examples of
13 how major disputes were reasoned through and acted
14 on... disputes involving all aspects of human life.
15 And so, Xhliimlaxha is informed, for her authority
16 and for her legal decisions, she has that deep
17 scaffolding drawn from a lifetime of being a
18 hereditary Chief in her... for the Gitksan. And
19 she's frustrated with... by what's happening with
20 the young people, who are claiming use of the
21 territory, but it's on an incomplete understanding
22 of how they're... how they got used. And so, that
23 incomplete understanding of Gitksan land law and
24 access and so on, have... you can see the kinds of
25 conflicts that are generated when there's... when

1 that's incomplete.

2 So it's not a matter of going back in time, but
3 it's a matter of... the work of rebuilding is to
4 look at the different logics historically of a
5 complete legal system. And then to look at what are
6 the realities of today, in the contemporary legal
7 institutions and law, and how might we understand
8 the changes and how might we reconcile the changes,
9 so that the full understanding of what's encompassed
10 through the changes insofar as authority, the kinds
11 of decisions, the consequences and so on, are a part
12 of the deliberations and the reasoning that people
13 are undertaking today. So that's an example of one
14 aspect of the rebuilding is that, we have to do the
15 groundwork so that we have a comprehensive
16 understanding of passed and present legal
17 institutions in law, and we have to understand what
18 the changes are and we have to figure out how, what
19 we're going to do with those changes in a conscious,
20 explicit, thoughtful way.

21 So, Xhliimlaxha is no longer with us. They
22 young people she's talking about here, are probably
23 elders now. And may... and likely, if they were
24 given any authority in that system, others would
25 have come and educated them. There is a process of

1 educating people into the feasting, into the legal
2 order. And so, this is a dynamic process. The name
3 of Xhliimlaxha, like, well, the person that held it
4 here, is deceased. That name continues and the
5 territory continues, and the feasts, which set up
6 the political and economic responsibilities for the
7 protection of those territories, still exist and
8 other people will be acting on them. So the work of
9 rebuilding is bringing all of those pieces together,
10 but it's doing the hard work of law, really hard
11 work of making sure that we can comprehend and
12 understand and rebuild in a thoughtful way.

13 So, maybe now would be a good time to break,
14 it's eleven (11:00) .

15 **LE COMMISSAIRE:**

16 Okay. So we'll take a fifteen minutes break?

17 SUSPENSION

18 -----

19 REPRISE

20 **LA GREFFIÈRE:**

21 You may be seated. La Commission reprend ses
22 audiences.

23 **LE COMMISSAIRE:**

24 So, welcome back.

25 **DR. VALERIE NAPOLÉON:**

1 So we'll continue with engaging in Indigenous laws
2 as law, and finding ways to enable that engagement
3 through the different ways that we've been working
4 across Canada. We've worked with over forty (40)
5 communities up this point, to articulate Indigenous
6 law, working with Indigenous communities as
7 partners and creating materials that have been...
8 from which people can look at, application of law,
9 but also look at the relationships with Canadian
10 laws.

11 We also looked around the world and we've been
12 approached by others from elsewhere in the world
13 too, about the challenges of working with Indigenous
14 law in a way that actually comprehend law as law.

15 In... south of the border, in the US, there
16 were three (3) American tribal court judges that...
17 - whose folks we have here for you. And they're
18 talking about what are the challenges of recovering
19 and learning and practicing Indigenous law in their
20 Courts.

21 And Mathew Fletcher, here, said that there's a
22 need to "locate methods of finding, analyzing, and
23 applying Indigenous law."

24 So looking for, not idealization, not
25 philosophy, not generalizations, but actual law that

1 can be applied to real-life human problems, if we
2 take the view that law is about solving human
3 problems.

4 We also have Pat Sekaquaptewa, and here the...
5 there's a call for "useful theories or at least
6 guidelines" for how to work with Indigenous law.

7 Like, people need a way in. People need a
8 framework and some scaffolding and some questions
9 and tools, to actually begin this work. And
10 Christine Zuni Cruz, she talks about... she's
11 calling for an approach that actually "represents a
12 serious respect for Indigenous law", so that in the
13 courtrooms, when they have legal problems before
14 them, whatever subject areas those legal problems
15 touch, that there be resources, but also the
16 processes, the legal processes themselves within the
17 courtroom, allow for a serious reflection and
18 drawing on Indigenous law.

19 **DR. HADLEY FRIEDLAND:**

20 So, what we're going to do... - maybe I'll just go
21 back to that site for one minute.

22 What we're going to do when we talk about
23 engaging with Indigenous laws as laws, is sort of,
24 is walk through what we often do with communities,
25 when Indigenous communities want to work on a

1 project with Indigenous Law Research Unit.

2 The first step is usually a two (2) or three-
3 day (3) workshop, where we go through some of these
4 concepts and, of course in a community, the
5 community members are doing little activities and
6 trying things out, applying things. And we have a
7 lot of time, so we're going to present sort of a
8 condensed version of what we do there; and now
9 we've both taught it in law schools as a semester-
10 long course as well, where you really pull it each
11 of these issues, but, of course, again, we're going
12 to really condense it, so. But there... these are
13 the steps that we've sort of identified after a
14 certain number of communities, we realized that
15 these steps were... seemed really important, sort
16 of the building blocks, to getting to the place
17 where that serious engagement could happen in a
18 really productive way. So, just so to explain
19 where we're going.

20 So the first step is we usually talk about
21 shifts, and we talk about two (2) types of shifts:
22 we talk about shifts in beliefs and we talk about
23 shifts in questions and assumptions. And that these
24 sorts of intellectual shifts are necessary to
25 approach Indigenous laws as *laws* in a productive

1 way.

2 So, I talked about this earlier, but there are
3 some common beliefs about Indigenous laws that are
4 out there, that again, aren't necessarily out there
5 about other types of laws, and it can... inhibit
6 people from really engaging with Indigenous laws. So
7 the first one, I think, was discussed at length
8 already, but that idea of Indigenous peoples are
9 lawless, because of that myth of lawlessness, that
10 appearance of lawlessness; and we sort of already
11 talked about the shifts needed for that.

12 The other one is, often people talk about
13 Indigenous laws as customary law or custom, and
14 that's something Patrick Glenn from McGill had
15 written about this sort of move, where custom or
16 customary is somehow seen as lower or less lawlike
17 than state law. There's kind of a move of lowering
18 it somehow. So it's not quite the complete
19 lawlessness, but there's still that aspect of
20 erasing the reasons and the intellectual life behind
21 law, and simply describing it as custom. Again, all
22 law has custom, all law has customary law wrapped up
23 in it, but it can be reduced to just that. And
24 we're seeing that can be quite common.

25 Then, the other common belief is something that

1 sometimes we see when we're working with Indigenous
2 communities but also with good-hearted non-
3 Indigenous people that are wanting to engage with
4 Indigenous law, and that is this idea that
5 Indigenous laws are somehow perfect or sacred. And
6 there are some sacred Indigenous laws, but not,...
7 we're saying there's an expanse of law. Not
8 everything is spiritually based or based in the
9 sacred, although it's an important component.

10 And I think the best way to look at these
11 [disbeliefs] is it's possible that this is a
12 reaction, a pendulum swing, because of all the
13 degradation. When things are sacred or perfect,
14 they seem more untouchable. And again, if people
15 have been forced into that primitivist argument,
16 where everything has to be perfect or else it
17 doesn't exist, people can sometimes be pushed into
18 saying there's complete perfection here.

19 And again, this... and the sacred can sometimes
20 feel as if it will be untouchable, it will be
21 protected, in a way that Indigenous laws haven't
22 been in the past.

23 So this comes from, I think, different places,
24 but there are times that this can stop a
25 conversation, where, if Indigenous laws are seen as

1 something untouchable, they... it's difficult for
2 people to imagine how to use them and how to develop
3 them and apply them, because that then becomes messy
4 and it feels less sacred.

5 **DR. VALERIE NAPOLÉON:**

6 So, when we first started doing this work with
7 communities in two thousand and eleven (2011), one
8 of the... sometimes, communities would say to us:
9 we don't have law here. We have other things, we
10 have ways to get along, we have other kinds of ways
11 of managing ourselves, but we don't have law. And
12 part of what was going on was, sometimes, people
13 would have such a negative experience with Canadian
14 law, as a colonial tool, that they... or as
15 something that was oppressive, that they didn't
16 recognize that as something that was a part of
17 their own societies.

18 And the reality is that, lots of Indigenous
19 peoples, as well as other Canadians, have a very
20 impoverished view of what law is. And when we look
21 at understanding Indigenous laws as *laws*, if we
22 understand them like, in their best sense, about
23 being about social ordering and problem solving and
24 dispute resolution, all of these things that enable
25 us to live together effectively as human beings,

1 are... like Indigenous legal orders, just as
2 other... every other legal order, has aspirations,
3 things that people want to adopt to, justice and
4 other equality, other kinds of aspirations that the
5 law aspires to. And we never live up to those
6 aspirations, but it's important that we have the
7 opportunity to try, all of us.

8 And so, for Indigenous peoples, when we started
9 working with Indigenous law as having to do the hard
10 work of law, the complicated work of law, we also
11 saw aspirations right across Canada, and some of
12 them were similar. So we saw aspirations for
13 community safety, we saw aspirations for inclusion
14 and for fairness. These are things that... the big
15 ideas, the big goals, social goals, for Indigenous
16 law.

17 And the other kinds of things that we saw in
18 the work across Canada, is that, it's important to
19 think about Indigenous law and legal orders as
20 operating on the societal scale, because there are
21 small communities as I've mentioned earlier. So,
22 for instance, there's... in the Tsimshian legal
23 order, there are seven (7) Tsimshiana bands, under
24 the Indian Act, but it's one legal order. And with
25 the Dunne za, there's spread across the North and

1 many of the provinces, so we can think about
2 alliances and regions of law. So, what's important
3 is not to think about the tiny communities, as legal
4 order with tiny communities, but a broader with...
5 thinking about it.

6 And those larger societies, they're diverse and
7 they've adapted through time. So the... across
8 Canada we have different linguistic groups and we
9 also have different legal orders, depending on
10 people's perspectives, probably about fifty-five
11 (55) or whatever.

12 The importance of that is sometimes, people get
13 completely stopped, but there are over six hundred
14 (600) bands, and they start to think that... they're
15 talking about six hundred (600) legal orders. And
16 that's not the case. It's really important that we
17 think at a larger scale.

18 The legal orders themselves, as I've said
19 earlier, they're complex, because they are systems
20 of law, they take just as much hard work as any
21 other legal system, and they're imperfect, the same
22 as all of our systems of law are imperfect. They
23 don't... they enable people to manage themselves
24 effectively through time. And they're
25 collaborative. Law is not what one person says it

1 is, but it's a societal process, and there are
2 collective processes within each legal order, that
3 allow the determination of authorities and
4 processes.

5 And in practice, law can look messy, but
6 there's also meaning, ways that people create
7 meaning in the work that they do. So, in looking at
8 Indigenous law in Canada, it hasn't gone anywhere.
9 It still exists. But it's been undermined, it's not
10 completely intact. There is no intact legal order
11 that hasn't been affected by recent history. But
12 there are different ways that people have continued
13 to fulfill their historic legal obligations,
14 wherever they can, and so it's making those kinds of
15 practices and obligations and aspects of law, making
16 those visible.

17 And what we can see, and we can say, from our
18 work, thus far, is that, Indigenous law is capable
19 of being articulated, it's capable of being
20 restated, including legal processes and legal
21 institutions, and it's capable of being recovered
22 and revitalized, despite the loss and damages of
23 recent history. But again, it's very hard work, and
24 there has to be sustained engagement in order to
25 recover and to learn and to practice Indigenous law.

1 Those are the kinds of positive shifts that we
2 have to make, in all of the different ways that we
3 talk about law, whether it's in law schools or in
4 government, or in government agents, those are
5 the... there's a number of shifts that we have to
6 make.

7 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

8 Uh-hum.

9 **DR. HADLEY FRIEDLAND:**

10 I was just going to comment. Often... often this
11 comes up and it's very helpful. Sometimes, with
12 government, sometimes we'll hear people say, "well,
13 we can't legislate a vacuum." So, this community
14 wants an Aboriginal justice project, they want to
15 take over justice in their community, but they have
16 to show us something, and what they're looking for
17 is something that looks like the Criminal Code or
18 something like that. And those... I think this
19 highlights that need of saying well, "it may not
20 ever look like that", but we also need to
21 acknowledge that you can't... the analogy is
22 sometimes, you can't break people's legs over and
23 over again, and then say, "get up and walk", like,
24 sure, we'll give you funding for a justice project
25 if you can walk across the room the way we can walk

1 across the room. There needs to be support and
2 help, to rebuild and to work on that development.
3 That's a piece of it. So...

4 **DR. VALERIE NAPOLÉON:**

5 Oups, we'll skip on...

6 **DR. HADLEY FRIEDLAND:**

7 We're going to skip on...

8 **DR. VALERIE NAPOLÉON:**

9 Okay. So there's a number of shifts that we have
10 to make. Just in our starting place is in the way
11 that we think and the assumptions that we make.
12 And one... Dr. Friedland has already referred to is
13 that, Indigenous peoples were and are reasoning and
14 reasonable peoples, with reasonable social and
15 legal orders. We were, and are, intellectual
16 beings, with intellectual traditions that are
17 capable of being applied today.

18 The second shift, in moving us past our
19 stereotypes, is to talk in the present [tense] and
20 not to talk about Indigenous law as only having
21 happened in the past, but rather that, it's today
22 and it's again, it needs to be a part of Indigenous
23 political and social and economic life.

24 And this is one of the reasons that I resist
25 using the language of traditions, because tradition

1 is often retrospectively oriented, and to always...
2 if we mean "historic", then we say "historic", but
3 if we use traditions, sometimes, that just gets us
4 into a way of thinking about Indigenous peoples as
5 having been lawful in the past, but not today.

6 And to be specific, when thinking about
7 Indigenous laws, we have different responses to
8 universal human issues. Again, the human issues
9 that we have dealt with a through time are human
10 issues the world overed. And when we think about
11 law, any law, whatever our legal traditions,
12 wherever we come from, we have to think specifically
13 in terms of the legal problems that we're going to
14 deal with as well as what other particular laws that
15 apply, what are the particular precedents that
16 apply, what are the particular processes and
17 institutions and decision-makers, so that we don't
18 talk generally about the applications of law, we
19 have to be able to get down into its actual
20 operation.

21 So we have to have both the external view of
22 the law and the internal view, that enables its
23 operation and its logics.

24 **DR. HADLEY FRIEDLAND:**

25 So the second shift is moving... is looking at our

1 questions. Again, it's the old adage: if you ask
2 better questions, you get better answers.

3 So, this is something that we saw, exactly
4 what Dr. NAPOLÉON was talking about, how to move
5 from the General to the Specific. Because part of
6 what is happened is, after so many years of
7 repression, and even criminalization of Indigenous
8 laws, there are small spaces that have opened up,
9 for Indigenous peoples to craft Indigenous
10 solutions to some of these universal problems. But
11 they're always very small, and they're always very
12 prescribed. And so, what can end up happening is,
13 if things go a little bit but... but not further
14 than that. And we're advocating to start to push
15 that a bit, and move beyond, because I think what
16 ends up happening often is the State system opens
17 up a little space, and they say, "okay, this is the
18 space and it will be called "Aboriginal justice".
19 This will be the space that you can operate in."

20 And then the moment things are more
21 complicated than the space the system allows,
22 there's a reaction saying, "it doesn't work. It's
23 not capable of handling serious crimes. We're not
24 going to expand it, because we're not seeing
25 reduced recidivism rates, we're not seeing the

1 numbers comes down. It's too costly."

2 So you get this sort of constant feedback loop
3 that things can't grow, or that, when you have
4 mistakes or complications, it's a failure. And I
5 think that, that is something we're really wanting
6 to push, push out against, and say, "we need to
7 have a broader conception of Indigenous law as
8 something that's actually workable."

9 And so, these are the shifts that we try to get
10 at that. So the major shifts, so Aboriginal
11 justice, you hear that, and it can become this huge
12 concept, it's pan-Indigenous, often people assume,
13 when you talk about Aboriginal justice, you're
14 talking about restorative justice. There's nothing
15 past that.

16 And we're suggesting a better question to ask,
17 would be to say: what are the legal concepts in
18 categories within this legal tradition. So, be
19 specific if you're working with a Gitksan, if the
20 Gitksan are developing a project that's a Gitksan
21 justice project. If the Cree are developing a
22 justice project, it's a Cree justice project. So,
23 being specific about that and looking at what are
24 the concepts and categories that address that within
25 that legal tradition, rather than this broad pan-

1 Indigenous concept.

2 The other shift is talking... is switching from
3 talking about what are the cultural values, to
4 talking about what are the legal principles.

5 So when we talk about values, we often get, "of
6 course every legal tradition has values", but often,
7 when we talk about values, people tend to get stuck
8 in absolutes, or really reductionist discussions of
9 values.

10 An example I think we sometimes use is: when
11 people talk about respect - and this comes up in
12 restorative justice circles - you can say: "okay,
13 how many people here value respect?" And everyone
14 will pull up their hand. No one is going to argue
15 against that value.

16 But when it comes down to what does respect
17 mean, what does it look like, how is it applied,
18 that's when differences start emerging.

19 So, switching to saying what are the legal
20 principles, principals we can discuss, we can argue,
21 we can balance, it becomes... more engaged, and it
22 does more work than talking about cultural values.

23 It's not dismissing cultural values, it's just what
24 it's sort of become, stuck in.

25 And then, similarly, switching from, again the

1 space that's opened up, is often to say, what are
2 culturally appropriate or traditional dispute
3 resolution forms, so, where the focus is on coming
4 up with an Indigenous dispute resolution form is
5 important because it's traditional, it's important
6 because it's culturally appropriate.

7 We're not saying there's anything wrong with
8 that. We're saying that, it doesn't ever seem to
9 get past that. And we're suggesting flipping it and
10 saying: well, what are the legitimate procedures for
11 collective decision-making. We could sit and look
12 at state legal systems and say, "well, you know, why
13 do we sit in a courtroom? Well, it's culturally
14 appropriate, you know, it's sort of the traditional
15 way that we do this." But we don't talk like that.
16 We don't look at that that way.

17 Instead, we would say: "this is the important
18 procedure, this is how, even... if someone does not
19 agree with this decision, they will abide by it
20 because it's been done in a legitimate way." That's
21 why this procedure is important. So it's asking the
22 same question of Indigenous laws.

23 **DR. VALERIE NAPOLÉON:**

24 Just a... one example. Two years ago, or perhaps
25 three (3) years ago now, the attorney general of

1 British Columbia organized a provincial meeting
2 and... with representatives from a lot of different
3 government's departments as well as different
4 communities and groups. And one of the issues
5 talked about in the full-day meeting was violence
6 against women. And one of the things that I talked
7 about through the different small groups
8 discussions that we were to write on flipped
9 charts. I talked about Indigenous law, I talked
10 about different aspects of Indigenous law having to
11 do with communities and responsibilities and so on.
12 And every time I said, "Indigenous law", the
13 facilitator, the gentleman from the police
14 department, wrote down "cultural practices." And
15 at the... as the day went on, I found... I got the
16 felt pen away from him, and I wrote down
17 "Indigenous law" on the flip chart. And then I
18 went and sat down, and then he got back up and he
19 put it backets "cultural practices". (laughter)
20 Because he just... he wasn't able to... he wasn't
21 ready, at that point, to entertain the fact that
22 the kinds of issues that Indigenous peoples were
23 talking about were issues of law. He saw them as
24 something else, and he... and so, it was an example
25 of why we need to walk people through the kinds of

1 ways of thinking and where our thinking gets stuck,
2 and how we need to open that up in order to... that
3 we don't foreclose the discussions that we need to
4 have on these very serious issues.

5 **DR. HADLEY FRIEDLAND:**

6 I think that it also goes to, when you're talking
7 about cultural practices, it sounds in the
8 emotional, it sounds in... "well, you know, it's a
9 making people feel good", as opposed to talking
10 about legitimate procedures where you're saying,
11 "you know, there's legitimacy, there's something
12 collective here, there's something... there's an
13 intergenerational conversation going on, there's
14 something much bigger than the individuals right
15 there, at that moment, right."

16 The overall shift is switching from... we can't
17 tell you how many times we've been asked to speak
18 places and they'll say, "can you come tell us about
19 Indigenous laws in fifteen (15) minutes?"

20 Uh... we think... we wouldn't ask someone to
21 come tell us about Canadian law, or Quebec law, or
22 Alberta law, in fifteen (15) minutes.

23 So... but often, from outside of a legal
24 tradition, people do come and they just say, "well,
25 what are the rules? Just tell me the answers", you

1 know. When we talk to law students, we'll say, "so,
2 by the end of first year law, what have you learned,
3 what's the answer a lawyer gives when anybody asks
4 anything for a legal answer?" And you'll hear back
5 a chorus from law students saying, "it depends."
6 And we'll say, "yes, you've gotten through first
7 year law." That shift, from saying... there's
8 rarely a clear immediate answer that applies to
9 every situation. What we learned are legal
10 principles and legal processes for reasoning through
11 the issues. Yes, we rely on text, we rely on Codes,
12 but... it never stops there, that application and
13 interpretation, in a procedures, is the work of law.

14 And that's what we're saying the overall shift
15 is that, that's a shift from that external view to
16 the internal view. Watching the law move, develop
17 as it's applied, and that's what the overall shift
18 that we think is necessary for that serious and
19 sustained engagement with Indigenous laws.

20 **DR. VALERIE NAPOLÉON:**

21 It's also moving from an under... from an
22 assumption about Indigenous peoples as just
23 following rules, and it's moving away from
24 conflating norms with behaviour. And it's... and
25 basically it's understanding Indigenous peoples as

1 with other peoples, as being intellectual beings,
2 thinking through the kinds of decisions that they
3 have to make through time.

4 So one of the things that we've found really
5 important to do in our work - and we drawn John
6 Borrows here, for a lot of this, but there are also
7 other sources of law. And so, in order to push the
8 thinking about Indigenous legal orders and
9 Indigenous legal traditions as being comprehensive
10 in scope, as having depth and breadth, it's also
11 important to look at where does law come from, what
12 are the different ways, sources of law that we
13 understand in different legal traditions.

14 So for whether this is Gitksan or Cree, there
15 are different sources of law, and similarly, with
16 Canadian law, with common law - which is the one I'm
17 more familiar with than the law here with... in
18 Quebec. So we can understand, according to Borrows,
19 we can say that there's law that does come from the
20 sacred. And what's important here is to understand
21 that, there's a difference between the laws
22 themselves being sacred, as opposed to laws being
23 founded on an understanding of the sacred.

24 And so, every system of law, arguably, has a...
25 it's founded on a cosmology of that society. It's

1 founded on peoples' understanding of life and death,
2 so whether we're talking about Canadian common law
3 or Cree law or Gitksan law, there's implicit
4 understandings of the world, and all aspects of the
5 world.

6 And we can understand this as informing the
7 sacred.

8 There's learning about law from the natural
9 world, and we emphasize here, it's not just about
10 idealizing the natural world, there are also very
11 hard things, in the natural world, that we can also
12 learn from. But this,... what's important here is
13 observation and interpretation and pedagogy and so
14 on. So it's not... it's important not to idealize
15 any of these sources.

16 We also have positive law, that is law which is
17 authoritative and it's the authority that enables
18 law to be created and passed on; there are different
19 processes for positive law in Indigenous societies
20 as well as others. And... we've already spoken to
21 law as having... deriving from custom through times.

22 And then there's deliberative law, that law
23 which is the result of human collective legal
24 processes. And arguably, all of the sources of law,
25 the proxy of all of the sources with law, is

1 deliberation, because it's humans that interpret it.

2 Law does not interpret itself, it's always
3 interpreted by human beings.

4 And there's a... and it's a human process, and
5 so, in our work, we focus on the human
6 responsibilities insofar as determining what law is
7 and how to respond to problems.

8 The... there are other... the other sources I
9 was mentioning earlier, as a source of law, is human
10 interaction through time, and formal and informal
11 law.

12 So there's a lot more than what one could get
13 into here, but this is a basic starting place, to
14 illustrate the depths and scope of different
15 Indigenous legal orders, and what we mean by
16 legitimacy, which we're going to get into a little
17 later.

18 **DR. HADLEY FRIEDLAND:**

19 So, even when we see sources, we come back again,
20 we talked about sort of those core challenges, but
21 there are also challenges that, again Mat Fletcher,
22 who's a professor and a Court of appeal Tribal
23 judge, in the States John Borrows, Dr. NAPOLÉON
24 write about and talk about, saying, when we're
25 engaging with Indigenous laws today, we have to

1 take a hard-headed look at some of the challenges
2 for engaging and applying Indigenous laws.

3 And we have seven (7) listed here, and this is
4 again John Borrows' work, I mean, Canada's
5 Indigenous Constitution, where he goes through five
6 (5) of these and talks about how to address them and
7 how to grapple with them. So we won't spend a huge
8 amount of time, but just to highlight.

9 There are issues of accessibility as we talked
10 about. We have law libraries and databases, and not
11 the same thing with Indigenous laws. So that can be
12 challenging and we'll pick that up and talk
13 specifically about the issue of Indigenous legal
14 resources, where to start again.

15 Sometimes people talk about issues of
16 intelligibility. So, there are... people can say,
17 you know,... people are saying Indigenous laws are
18 sacredly sourced and, somebody told me a story and I
19 can't make, you know, head nor tail out of it, and I
20 can't begin to imagine how to apply it. So,
21 something needs to be done to make this more
22 intelligible, so we can actually apply it, so it can
23 be transparent.

24 And Borrows talks about this, he has quite a
25 good section on this where he said, "first of all,

1 let's be cautious we don't have double standards. A
2 lot of Canadian law is not quite as intelligible as
3 we wish it could be for the general public. And we
4 know that the Courts have set a standard for
5 intelligibility and we shouldn't necessarily say
6 Indigenous laws need to hit a higher standard than
7 Canadian law. All law can work on becoming more
8 intelligible.

9 And he said... and there may be, and I think
10 this goes to Dr. NAPOLÉON talking about that
11 internal reconciliation, there may be Indigenous
12 laws that made a lot of sense, in a historic
13 context, where that legal education had taken place,
14 and where that legal education is not taking place
15 in the same way today or there are different
16 institutions, it may be some work needs to be done
17 to make laws that were set in a way that wasn't...
18 was very intelligible in the past or still is
19 intelligible to some elders. It may not be
20 intelligible to the youths, so, some work may need
21 to be done.

22 There's the issue of legitimacy.

23 Again, we talked about the fact that where laws
24 aren't resourced or enforced, there can be real
25 questions of legitimacy. Similarly, where people

1 have been taught that Indigenous laws don't exist,
2 there can be real challenges of... on really... of
3 again, Borrows writes about almost an emotional
4 level of not being able to imagine Indigenous laws
5 being legitimate.

6 And there's also legitimacy where we have
7 increasingly highly educated societies that demand
8 reasons and demand answers. And that's part of
9 legitimacy too. It's making sure that law can be
10 explained and transparent, and make sense. And
11 we're going to get into that a little bit further
12 this afternoon or tomorrow to talk a little bit
13 about legitimacy specifically. Uh...

14 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

15 To sort things...

16 **DR. HADLEY FRIEDLAND:**

17 Yes.

18 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

19 Have you have been mentioning,... maybe I can just
20 show it, because you've been both mentioning this
21 book,...

22 **DR. HADLEY FRIEDLAND:**

23 Yes.

24 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

25 ... from John Borrows, "Canada's Indigenous

1 Constitution". It will be filed into evidence, but
2 as you've been just both mentioning it,...

3 **DR. HADLEY FRIEDLAND:**

4 Thank you.

5 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

6 ... that will be useful to show it.

7 **DR. VALERIE NAPOLÉON:**

8 The... yes. The sources of law is Chapter 2. It's
9 drawn for Chapter 2.

10 **DR. HADLEY FRIEDLAND:**

11 Yes. Yes.

12 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

13 Thank you.

14 **DR. HADLEY FRIEDLAND:**

15 So, Borrows also talks about equality and human
16 rights. And we're going to, again, take this up
17 more this afternoon or tomorrow, and talk
18 specifically about these issues that arise and
19 people have questions about this.

20 Another issue that comes up is talking about
21 distorting stereotypes.

22 So, Borrows sees this as the single biggest
23 issue, our barrier, our challenge to engaging and
24 applying Indigenous laws, our negative stereotypes
25 about this. And often, when you have a conversation

1 about Indigenous laws, the first thing is you'll
2 hear four (4) horror stories, many of which are
3 based on negative stereotypes.

4 There's also a caution though, to not... that
5 distortions can go the other way, where positive
6 stereotypes can be equally disturbing... uh,
7 distorting, where there can be assumptions again
8 that, Indigenous laws will be a panacea, that they
9 are always about harmonies, that they're always
10 about healing, that there's a standard that we would
11 never expect from any other law and that's somehow,
12 Indigenous laws can do this.

13 So there's a caution about that too, of taking
14 care to make sure we're not going to, again, either
15 extreme of that pendulum swing of that primitivist
16 discourse and making sure we're focused on saying
17 "well, real people, real reasoning reasonable
18 people, you know, big, bad abd ugly."

19 There's issues of accessibility, jurisdiction,
20 who does Indigenous law apply to, where does it
21 apply, what laws do we... This is issues all laws
22 face: what laws do we carry with us, as citizens,
23 when we go places, what laws are land-based, based
24 on the jurisdiction you're in, what happens when a
25 non-Indigenous person lives within an Indigenous

1 community, what happens when an Indigenous person
2 lives within a largely non-Indigenous community,
3 these are issues that have to be sorted and, they
4 have been sorted out. Not perfectly, but they've
5 been sorted out in the South Pacific, they've been
6 sorted out in South Africa, they've been sorted out
7 in American tribal courts, so we have precedents, we
8 have things we can turn to, and figure this out in
9 Canada as well. It's going to take figuring out.

10 And the last one is talking about relevance and
11 utility.

12 So I will quote my colleague here. One of my
13 favourite lines, from Dr. NAPOLÉON's work is where
14 she says:

15 "Indigenous laws have to be relevant and
16 useful to life, or else why bother?"

17 And I think that's an accurate quote. And I
18 think that's important, that's a reality, and Mathew
19 Fletcher talks about that too, because he sits in
20 the tribal court, he says, "when people come before
21 me, they have real problems in real time, with real
22 consequences. I need something that is relevant and
23 I need something that's going to be useful to them
24 to solve their real problem, with real
25 consequences."

1 So I think that's a reality too, that, that has
2 to be sorted out, again on a case-by-case of what's
3 relevant, what's not relevant, what's useful, what's
4 not useful and under what circumstances.

5 **DR. VALERIE NAPOLÉON:**

6 What's key here, is what Dr. Friedland has said
7 about being hard-headed and it is the case. I
8 think that Indigenous law isn't always going to be
9 the best thing to do, and it is going to be also be
10 the case where, we had oppressive practices in some
11 of our traditions in the past, and today, we need
12 to look at the contemporary normative order and
13 contemporary instruments, such as the UN
14 declaration of Indigenous peoples or the Charter or
15 different kinds of things to draw on and inform
16 that... how law has changed or should change over
17 time. So there's being hard-headed about exactly
18 what it is that we expect of Indigenous law, and
19 the work that... the real work that it has to do in
20 its application.

21 There are critiques that come up about
22 Indigenous law, including, you know, like that...
23 the legal precedents, there's no... that the
24 interpretation can just go on forever and one could
25 just get lost in one's interpretation of Indigenous

1 law. There's all kinds of critiques, and what
2 we've found is that, justice for other areas of
3 law, whether it's Canadian Constitution law or
4 property law or any other area of law, there are
5 interpretative bounds around how interpretation
6 happens. You wouldn't use Constitutional theory
7 for tort law, for instance, of family law. Unless
8 those... they had a constitutional aspect to the
9 case.

10 So there are common sense ways to think
11 through some of those critiques and it's really
12 important to do so.

13 The other thing that I found, in teaching this,
14 and you know, we've had a number of experiences as
15 Dr. Friedland has set out, it's that, when I teach
16 Dene law or when I teach, you know, I'm looking
17 forward to teaching Gitksan property law or other
18 areas of law, we have to provide enough background
19 material on who the people are that... who the
20 society is that the law comes from, so that the
21 overall logics of how the law is a part of that
22 society can be seen and appreciative by the
23 students, and so, we, for all of the work, every
24 report, including the ones that I submitted on the
25 Secwepemc, and the other ones that you have on the

1 Cree legal traditions and Anishinabek legal
2 traditions, they all have a small primer, because
3 you have to have some sense of the society that the
4 law comes from. So, there's work to do, but it's
5 not insurmountable, it's absolutely doable and we
6 are doing that work now.

7 **DR. HADLEY FRIEDLAND:**

8 So this comes back to talking about accessibility.
9 And again, the reality that now I've mentioned a
10 few times about how easy it is to do legal
11 research, comparatively if you have questions on
12 extra-contractual obligations; you know exactly
13 where to start, you have ample resources. And the
14 reality is, because of three hundred (300) to four
15 hundred (400) years of colonialism and the
16 suppression of Indigenous laws, and the lack of
17 resourcing of Indigenous laws, we haven't had the
18 same development of written materials of easily
19 accessible resources.

20 So where do you begin. What do you do. And
21 we've gone through and looked at and identified many
22 different sort of resources, as Indigenous legal
23 scholars are increasing and growing and writing
24 prolifically, we can start to identify different
25 sort of resources that people are drawing on. But

1 we have it... sort of narrowed down it into three
2 (3) categories, and I think this is the reality of
3 today, because of all those circumstances we talked
4 about.

5 Some resources that people talk about, when
6 they talk about engaging with Indigenous laws, are
7 sources that are going to require a really deep
8 cultural knowledge or even a full cultural
9 emergence. So there are people that will say, "you
10 can learn Cree law, you can Anishinabek law, through
11 ceremony, through certain songs, through a lifetime
12 of mentoring; with an elder or with somebody who
13 practices traditional medicine.

14 And these resources, when people talk about
15 this, it's often perceived as the most ideal and the
16 most legitimate. So there are people that have
17 said, "you know, I can't even begin to talk about...
18 - and I'll just use Cree because that's been my main
19 focus - I can't even begin to talk about Cree law
20 without spending twenty (20) years learning, from
21 some specific people that carry this great
22 knowledge. And that is true and it's important, and
23 it's considered very ideal and legitimate.

24 Another example of this would be a deep
25 knowledge of the language, of people saying, "you

1 know, if you grow up speaking Cree, if you speak
2 Cree from your entire life, there are certain things
3 in the Cree language, it shapes your world view and
4 it shapes your conception of law, and there are
5 concepts with... embedded in that language, that you
6 will just simply not get if you have grown up only
7 learning French, only learning English, and not
8 Cree." So that would be another example.

9 And the reality is, is today, these sorts of
10 resources are the least available and the least
11 accessible. So, we sort of have an inverse issue
12 happening here, where we know this would be ideal
13 and we know it's worth working for it, but we also
14 know that, for non-Indigenous and many Indigenous
15 peoples, these sort of resources aren't available or
16 accessible.

17 The second category of resources are resources
18 that require some community connection or access.

19 And these are sort of perceived as the next
20 best ideal or the next most legitimate.

21 And again, this is... there's going to be
22 limited availability and accessibility. There's
23 going to be challenges to these, but not... they're
24 little more accessible. So for example,
25 interviewing elders: bgoing into a community or

1 within one's own community, conducting interviews
2 with elders and asking elders to talk about stories
3 and ways of doing things, and recording that, would
4 be an example of a resource that requires some of
5 that community connection access, but not
6 necessarily that very deep level.

7 And there can be challenges with this too.

8 There can be challenges... people disagree, and
9 people have to figure out how to deal with those
10 disagreements.

11 Sometimes elders don't want to share.

12 Sometimes... elders have had life experiences
13 that cause them to doubt or distrust themselves and
14 that needs to be sorted through and addressed some
15 way.

16 And then, we have the resources that are
17 publically available.

18 These examples of these would be collections of
19 stories, that are written down as folk tales, or
20 descriptive accounts that are written by non-
21 Indigenous historians or anthropologists, sometimes
22 government documents. So these are resources that
23 aren't considered, for many obvious reasons, aren't
24 considered ideal or particularly legitimate. And
25 often, in these writings are imported the worse sort

1 of stereotypes, and just incomplete accounts,
2 descriptive accounts.

3 So there's lots of reasons these are going to
4 be perceived as the least ideal and the least
5 legitimate. And the reality is, they're the most
6 available and they're the most accessible. You can
7 go to a library and find some of these.

8 And Mat Fletcher writes about this in the
9 American context. I think I'll send the Fletcher
10 article. I realize I'm referring to him a lot and,
11 I didn't include it, but, just as a note, I'll send
12 that, and include it.

13 But he talks about this and he said the reality
14 is, in his opinion, there are likely some
15 communities where this may be the only resource they
16 have left. So there needs to be some way to address
17 this.

18 Which leads us to our next step, it's the just
19 saying how... here we are, in a non-ideal present,
20 we have what we have, we can't change that
21 immediately, so how do we productively and
22 legitimately engage and do this work, given this
23 issue of resources.

24 **DR. VALERIE NAPOLÉON:**

25 So, these issues that Hadley has... or

1 Dr. Friedland has spoken to, are... they come up in
2 doing the actual work of Indigenous law research
3 and articulation, at a local level, so... but they
4 come up elsewhere, so, these similar issues are
5 discussed at international conferences on legal
6 pluralism, where there are arguments from some
7 legal theorists that, you can't write about a
8 practice German law unless you've been for twenty
9 (20) years. Like there are similar kinds of
10 expectations and disagreements about what (does) it
11 actually mean, for somebody, to become proficient
12 in another's legal order, and what's the legitimacy
13 of that anyway. So there's... those are ongoing
14 debates that take place not just in Indigenous
15 communities, they're going on elsewhere in academia
16 and in the practice of law in other countries.

17 The other thing here, which we're going to get
18 into, but, in the production of the Secwepemc lands
19 and resources document, there were all kinds of
20 arguments about language, and that would give the
21 legitimate way to talk about Secwepemc law is
22 through the Secwepemc language.

23 And Bonnie Leonard, the Director of the Shuswap
24 Nation Tribal Council, one the things that she said
25 at a public meeting was that if, in fact, this had

1 been produced in Secwepemc, that very few people in
2 the audience would be able to understand it. And so
3 that the reality is that there's a lot of work to
4 rebuild languages and that is going on, but right
5 now, if resources are going to be accessible, at
6 least in some areas - it changes as you go further
7 north, but - at least in some areas, you have to
8 write in English, because that's what... that is the
9 language now, of many people.

10 So, it's not saying it should never be written
11 in Secwepemc, but it's an ongoing,... these are
12 live, ongoing issues that people care about very
13 deeply.

14 One of the reasons we started incorporating the
15 medicine wheel into our work is that, there's a
16 tendency - again, as Dr. Friedland has referred to -
17 of thinking of Indigenous peoples as only belonging
18 in the spiritual or the emotional realm, and the
19 emphasis on healing sometimes reinforces Indigenous
20 peoples as not being intellectual, as not being
21 capable of having a public intellectual life and
22 public intellectual traditions. And so, what we've
23 started to include is this holistic way of looking
24 at human beings, and suggesting that we need to
25 spend just as much time, in our rebuilding work

1 of... in focusing on intellectual resources, like
2 so, recovering those, along with spiritual and
3 emotional and physical, so that there's a holistic
4 way of thinking about human beings and communities
5 and, that over the longer term, these are all parts
6 of the work.

7 But our focus right now is with the
8 intellectual, and that's informed by the other work
9 that is also necessary with spiritual and emotional.
10 So, we're not saying they're not important, but
11 we're saying just as much time and energy has to be
12 spent on the intellectual.

13 **DR. HADLEY FRIEDLAND:**

14 And this is... I'm just want to add something to
15 this, which is just to say... So, I will talk
16 about this in my classes, and one of the things
17 that can end up happening with Indigenous law, is
18 it becomes a repository for everyone's critique of
19 state law.

20 **DR. VALERIE NAPOLÉON:**

21 Hm.

22 **DR. HADLEY FRIEDLAND:**

23 So, people will sometimes critique state law and
24 say it's too intellectual. When I introduce this
25 to my law students - and I have amazing law

1 students - I'll say to them, "okay, we're... if
2 this is our whole self, how do we engage from all
3 four (4) of these quadrants with the common law or
4 the civil law that you're learning in law school?"
5 And every class, my students will tell me, "oh, we
6 don't, we don't, it's all intellectual. We're
7 taught not to show emotion, we're taught not to
8 feel emotion, we're... there's... we..."... They
9 can't identify anything physical, they can't
10 identify anything spiritual about their learning of
11 state law.

12 Again, when we have a semester, I can usually
13 draw that out and say, "ah, let's look at that more
14 carefully." Even if we're not talking about it
15 explicitly in law school, there actually are
16 elements of the spiritual, of the emotional, of the
17 physical, they're just not named in quite the same
18 way. And that's the caution to, of saying, well,
19 we're... we want to approach methods, and saying we
20 want really rigorous, transparent methods for
21 engaging with Indigenous laws, and we want this
22 balance, we don't want to say, "oh, the way we
23 learned state laws is too intellectual so therefore,
24 we can only learn Indigenous law through the other
25 three (3) quadrants."

1 We want to maintain that space of people being
2 whole... their whole selves, and inviting both
3 Indigenous and non-Indigenous students and
4 communities to do that rigorous work.

5 **DR. VALERIE NAPOLÉON:**

6 So, there's lots and lots and lots of work going on
7 with Indigenous law, by a lot of different people
8 and it's an exciting time to be a part of this, a
9 part of the scholarship, to see what's happening,
10 not just in academia but beyond. And so there's...
11 there are different methods, which are being used
12 by Indigenous peoples.

13 **DR. HADLEY FRIEDLAND:**

14 Uh-hum. And one of the reasons we really wanted to
15 identify method is to say again, when we're facing
16 what we're facing today and the issue of resources
17 and the tasks of rebuilding and revitalizing and
18 making things more formal and public at times,
19 method is a serious issue.

20 When we work with communities or students or
21 governments, we challenge... or community
22 governments as well, we challenge people to think
23 seriously about what method they... to think
24 seriously and critically about what methods they
25 are going to pick and what they are going to use to

1 engage with Indigenous laws.

2 So, there is a variety and... that are out
3 there, that people use. We're not going to go
4 through each one, but we're going to select a couple
5 and... but we can speak to... we can speak to any of
6 them if you want to, speak specifically. But the
7 ones we wanted to focus on were the... was the
8 linguistic method, the community-embedded method,
9 and then we want to talk about the ILRU method, the
10 Indigenous law researching a method that was co-
11 developed by Dr. NAPOLÉON and myself, to sort of
12 walk through the way we've approached this work, but
13 again, we can speak to any of these if there's
14 more...

15 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

16 You said - sorry - that you will talk about the
17 IL... the Indigenous Story Search Unit, the
18 linguistic method, and what was the other one?

19 **DR. HADLEY FRIEDLAND:**

20 The Community Embedded...

21 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

22 Okay.

23 **DR. HADLEY FRIEDLAND:**

24 ... method.

25 **DR. VALERIE NAPOLÉON:**

1 And also, this afternoon, we'll speak about the
2 critical gendered analysis approach.

3 **DR. HADLEY FRIEDLAND:**

4 Yes.

5 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

6 Thank you.

7 **DR. HADLEY FRIEDLAND:**

8 And one thing that would be obvious, even if you
9 just look at all the... were all the names are
10 here, none of these methods are mutually exclusive.
11 In fact, they work best in tandem. So...

12 **DR. VALERIE NAPOLÉON:**

13 So, the first method here, Mathew Fletcher again,
14 the tribal court judge, and... So this ends up
15 being one of the... sometimes a default method in
16 the actual practice. And so, according to Mathew
17 Fletcher, what the tribal court must first do is
18 identify something that's really important, a
19 fundamental value, as can be seen in a word or in a
20 phrase, and an example is given there.

21 And then the next step is to look at... how
22 does that relate to the inter-tribal secondary rule
23 or to the Anglo-American courts. And so there's
24 looking at what's the basic element, and as seen
25 through as... through the language, and then

1 looking at how does that compare, with the other
2 legal orders that the tribal court has to deal with
3 in its actual decision making.

4 We're incorporating this method with one of
5 our current projects that we're undertaking on
6 self-government and this with Secwepemc. And the
7 way that we're approaching governance is we start
8 with the Secwepemc language of citizenship and we
9 take the words for citizenship and expand outwards
10 in terms the responsibilities of the individual,
11 and then the collective responsibilities, and then
12 legitimacy and so on that's built around
13 citizenship. Sso... but we're starting with the
14 language, which brings with it ways of
15 understanding human relationships that don't exist
16 explicitly outside the language through which it's
17 talked about.

18 So, this is something that we are
19 incorporating into the work, and it's an important
20 way of thinking about law, along with other methods
21 as Dr. Friedland has said. They work in tandem.

22 **DR. HADLEY FRIEDLAND:**

23 Uh-hum. There's a challenge to relying solely on
24 this. So, Mat Fletcher likes his method. And one
25 thing that he likes about is he says, "you know,

1 this is fitting with judicial economy: somebody's
2 in front of you, carefully moving the law along, no
3 one judge can cause too much damage, if they're
4 causing damage, we can slowly move the law along
5 this way", which makes sense in that tribal court.

6 And it is also, again, reaching into those
7 ideals resources, right? And being part of that
8 revitalization.

9 It works really well, I was going to say too,
10 there's a Constitution project, where the elders
11 Council, in a Cree community, simply announced, you
12 know, "we're restarting here and here are the four
13 (4) Cree legal principles - wakhotowin,
14 [wicihitowin]", and there are two (2) more. That's
15 our starting points.

16 So where there's at... where people are
17 speaking the language, here are a lot of language
18 speakers, it makes sense.

19 There's some challenges to it, and the one
20 that I use, Mat Fletcher talks about hazho'ogo,
21 which is a Navajo word referring to roughly... - of
22 course it's not going to translate perfectly but -
23 roughly into sort of a harmony or respect, and he
24 said... "you know, but this is a complex concept,
25 and it can mean different things in different

1 contexts."

2 And we can understand that. If you think of
3 the word "equality". My first language is English,
4 I know of the word "equality", but, we never
5 stopped there, right? Sometimes I'll get my
6 students to open up a legal database and type in
7 "equality", to a search engine, and see if it shuts
8 down, because there's sometimes sixty thousand
9 (60,000), seventy thousand (70,000) hits. Or if
10 they actually can get that many hits, it often
11 shuts down, the database, it's just too much.

12 So we know there's a complexity within language
13 that still needs to be sorted out. We can start
14 there, but there's... any word that has a deep
15 meaning is going to require further work in sorting
16 out.

17 **DR. VALERIE NAPOLÉON:**

18 So this is the... what we're calling the Community
19 Embedded method and it's making the implicits of
20 every day life explicits.

21 So, it's a way of looking at human behaviours
22 and relationships and finding how people are
23 creating meaning, but also finding what are the
24 legal obligations that people are attempting to
25 fulfill. And one of the... you know, there's...

1 we've said that Indigenous law hasn't gone
2 anywhere, but it's been undermined, it's been
3 changed. The institutions have been undermined and
4 so, pragmatically, what people have done is found
5 ways to act on legal institutions in new forms, new
6 institutional forms.

7 So sometimes it's the justice Council.
8 Sometimes it's other kinds of things. And it's
9 when you ask people why they're doing things that
10 they will talk about the obligations that they...
11 the kinds of things that they're trying to fulfill.

12 And so it's looking at how people treat one
13 another, what's underneath those treatments as a...
14 at an informal level, it's looking at how people
15 talk about a way of life and the way things are.
16 All of the different ways that people are self-
17 governing individually and collectively, how
18 decisions are made. So the day-to-day expressions
19 of local law. So it's learning from local stories.

20 So, when looking at legal precedent, we don't
21 just look at historic legal or oral histories as
22 legal precedent as public memory, we can also look
23 at stories of today and analyze those in terms of
24 what are the legal principles, what are the
25 obligations, what are the rights and so on, that

1 are at play in the contemporary stories. And so,
2 there's very interesting work going on, with this
3 in Ottawa, looking at life stories of... of Inuit
4 women there, and so it's being employed in other
5 places.

6 And so, when we think about making the
7 implicit explicit, we can think about informal law
8 and we can think about that which enables us to
9 generally predict what's going to happen in the
10 world around us and in the communities that we
11 know. And it's a way to generate critical,
12 internal discussions about what law is and how it
13 operates, and how it's already operating in
14 different places. And, it's also a way to deal
15 with oppressive practices in that, one, you're able
16 to look at what are the underlying purposes of the
17 practices, and then to find ways to fulfill the
18 purposes in a way that is not oppressive.

19 So there's a number of ways that this is a
20 useful methodology, and again, along with other
21 methodologies, it's a way of making clear in
22 articulating Indigenous law at a different level.

23 **DR. HADLEY FRIEDLAND:**

24 I was thinking in the AJR Project, an example, a
25 sort of concrete example of this, would be when our

1 students went into that community and started
2 interviewing people, saying, "so what do you do?
3 What happens when there's an issue?"

4 Elders and other people would say, "well, we
5 find the family, and we find out what house group
6 the person belongs to."

7 So, as they talked to more and more people,
8 they also were able to ask critical questions
9 around that, you know? So, "what is the purpose of
10 that", "when would that happen", "what might be an
11 exception." So they were able to identify that as
12 a really important procedural step, which again,
13 affects the legitimacy of the final decision, if
14 that had been done, if...

15 So, they were also able to say, "well, oh, we
16 can see where there's a real problem when there's a
17 problem and people who aren't familiar with this go
18 ahead and address the problem without identifying
19 who the family is, without identifying who the
20 house group is." Because they're missing these
21 really important steps that signal: this is
22 legitimate and makes sense so...

23 So that's, I think, a good example of where we
24 really saw that come out, you know, once people
25 started talking about something they just took for

1 granted, right? They just assumed it should be
2 obvious. But it took that sort of extra
3 conversation to unpack it.

4 **DR. VALERIE NAPOLÉON:**

5 So it... to processes our lives, it's not just
6 following rules, it's people, every person being a
7 legal agent and interpreting and creating space for
8 respectful debate or figuring out the differences
9 of approaches. So it's the kind of processes that
10 would help Xhliimlaxha and the young people with
11 the fishing site, sitting down and working through
12 this kind of process as well as the other
13 methodologies that we'll go through.

14 There's one example, from a community called
15 Gitanyow, which is where I'm adopted into, is... We
16 were working with the oral histories, and one of the
17 oral histories had to do with the kidnapping of a
18 Haida Chief, and that Haida Chief died while in
19 captivity with the Gitksan. And so, we were talking
20 about the story and looking at who the authority
21 decision-makers were, and other things that were
22 going on in the international relations of the
23 story, and a young woman, very young - maybe in her
24 twenty (20) - said, "wait a minute. I don't get it.
25 Like, so, why kidnap him and then, bury him as a

1 Chief - which is what they had done - like, I don't
2 understand." And so, this is... there is a room
3 full of people, all very familiar with their own
4 oral histories, who were able then, to take her
5 questions up, and it was an example of pedagogy and
6 live issues, and talking through a particular legal
7 resource in a way that mattered, that then she could
8 apply to her own house group and her own, you know,
9 relations in the community and her obligations and
10 so on. So, it was just... it was a wonderful
11 example of pedagogy in the every day. And those are
12 the kinds of things that have to be discovered and
13 supported, wherever possible, because they... it has
14 to start with kids and with young people and...
15 everyone else.

16 **DR. HADLEY FRIEDLAND:**

17 We're just noticing the time and we're wondering if
18 we should stop here, because this is sort of moving
19 to a new piece. If you want, I...

20 **LE COMMISSAIRE:**

21 If you wish to stop now and continue later, it's
22 your choice. But we will take... I think we should
23 take about an hour...

24 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

25 An hour?

1 **LE COMMISSAIRE:**

2 ... and a half for...

3 **ME MARIE-ANDRÉE DENIS-BOILEAU:**

4 An hour?

5 **LE COMMISSAIRE:**

6 ... for lunch.

7 **DR. VALERIE NAPOLÉON:**

8 Yes.

9 **LE COMMISSAIRE:**

10 ... so if we take a break now, we will start at two
11 (02:00 p.m.). If it's a bit later, (inaudible).

12 You're, I will say, working, since early in the
13 morning. So, it's as you wish.

14 **DR. VALERIE NAPOLÉON:**

15 Yes.

16 **LE COMMISSAIRE:**

17 If you want to go for lunch now, we can be back at
18 two (02:00).

19 **DR. VALERIE NAPOLÉON:**

20 I think we should go for lunch now.

21 **LE COMMISSAIRE:**

22 Yes? Okay.

23 **DR. VALERIE NAPOLÉON:**

24 Yes.

25 **LE COMMISSAIRE:**

1 So we'll be back at two (02:00).

2 **LA GREFFIÈRE:**

3 Yes.

4 **LE COMMISSAIRE:**

5 Okay?

6 **LA GREFFIÈRE:**

7 So, all rise. The Commission recesses for lunch
8 time.

9 SUSPENSION

10 -----

11 REPRISE

12 **LA GREFFIÈRE:**

13 Silence, please. You may be seated. The
14 commission is back in session.

15 **LE COMMISSAIRE:**

16 So good afternoon . Welcome.

17 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

18 Thank you.

19 **LE COMMISSAIRE:**

20 You're ready to continue this afternoon...

21 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

22 Yes, Mr. Commissaire.

23 **LE COMMISSAIRE:**

24 ... with your witnesses?

25 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

1 Yes.

2 **LE COMMISSAIRE:**

3 Okay.

4 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

5 ... with Dr. Val NAPOLÉON and Dr. Hadley Friedland,
6 still. We just come back on a couple of PowerPoint
7 before, because I have a question to ask to
8 Professor Fredland... - I never say your name
9 correctly I think, I'm sorry. Friedlen?

10 **DR. HADLEY FRIEDLAND:**

11 Friedland.

12 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

13 Friedlands (sic). Okay. You're saying that, when
14 you're teaching law in... like, we can use and we
15 are actually experiencing all of these emotions of
16 the.. well, all the teachings of the medicine wheel
17 as well as... common law student as well. And I
18 was just curious about that, how do students in
19 common law as well can experience all of these
20 teachings.

21 **DR. HADLEY FRIEDLAND:**

22 Yes. It's a really good question. And I think...
23 I think the way to look at it is to say, "if we all
24 have these four (4) elements, it's not necessarily
25 culturally mediated." If this is what a human

1 being is... all human beings learn through all of
2 these parts. And some of it is what we ignore, in
3 common law or perhaps also civil law, law
4 faculties.

5 So, I will sometimes say to my students, "what
6 emotions are you learning?" And they'll say, "no,
7 no emotions. We learn to shut off all our
8 emotions" and I'll say, "well, how do you feel when
9 you shut off all emotions, like what is the feeling
10 that's left and...?"

11 They can come up with saying, "well, calm",
12 "well, reasonable", you know, "unbiased", "fair"...
13 They can start thinking of feelings that they
14 actually feel, when they... think they have shut
15 off all feelings.

16 So I think we're not just drawing attention to
17 that in the same way. In law school, we're not
18 asking our students to be alert to what feelings
19 we're asking them to feel; often law students feel
20 paralyzed to make a mistake. So they feel anxious
21 or worried. So they... that is part of them that's
22 engaged in their legal education. It's just
23 something we don't tend to acknowledge or unpack,
24 or explicitly include as part of learning, so
25 that's what I was referring to, if that clarifies

1 it.

2 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

3 And you feel it's part of the learning process of
4 learning common law as well, in a way?

5 **DR. HADLEY FRIEDLAND:**

6 I think we do. We just don't visibilise it we
7 don't talk about it, but I think we learn to carry
8 ourselves in a certain way physically. We... We
9 know... When we think about when students moved in
10 law school, we are asking them and expecting them
11 to move physically, but we don't necessarily talk
12 about what that means or looks like the difference
13 bases that signal legitimacy to a law student that
14 maybe wouldn't... they wouldn't realize before. So
15 we do teach these skills, we've just don't... talk
16 about it in this way, using the medicine wheel.

17 But...

18 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

19 Thank you. We can just move forward to the next...
20 to the next PowerPoint, because I want to ask both
21 our expert to make some explanation on two (2)
22 other ways of... well, finding indigenous laws, the
23 one... the land-based learning and the art, beading
24 and shawls, if that's...

25 **DR. VALERIE NAPOLEON:**

1 Alright. I can speak to the art and the beading
2 one first.

3 So, Kinwa Bluesky, currently, she's a
4 anishinabek legal scholar - she's doing her work
5 right now, at University of Victoria, her PhD in
6 law. And Dawnis Kennedy is another anishinabek
7 legal scholar, and her work is anishinabek law, and
8 then I also use art.

9 So part of what we are looking at here with
10 different kinds of expressions of law, is how is
11 law recorded. And one of the ways that law can be
12 recorded and is... for the Gitksan for instance,
13 it's recorded on the... in the crests, it's
14 recorded in the polls, it's the recorded in the
15 sounds, in the dances and other forms of expression
16 of law and authorities, and... So there's... So
17 art is a way... it's a pedagogy of law, and art can
18 be understood as a pedagogy on its own as a way of
19 teaching about law as well. It's another form of
20 recording an expression.

21 There's... So those, Kinwa Bluesky and Dawnis
22 Kennedy, are a couple of examples of legal scholars
23 who are engaged in that, but there are a number of
24 others. There's currently a national installation
25 that involves artists and people with a legal

1 education, and the way that it works is that, a
2 lawyer or legal scholar is teamed up with an artist
3 - sometimes the artist is also the legal person -,
4 but between them, with the different forms or
5 expression available to them, they create
6 another... either theatre or art or different kinds
7 of expression that they then perform.

8 So, looking at law as performance, the
9 different ways that we perform law in different
10 spaces. And so they're taking that in creating a
11 very creative pedagogy out of... working with art.

12 The ravens that I paint, we use in the same
13 way, in different settings. Like there's one of a
14 little girl Raven, and we can talk about why she's
15 alone and who should be responsible for her. We
16 can use those kinds of images to generate
17 conversations about legal responsibilities that we
18 have to one another from within our own... within
19 indigenous law.

20 So there's... There's different that can be
21 played out.

22 **DR. HADLEY FRIEDLAND:**

23 And I can speak to land-based.

24 So, land-based learning... There's a huge
25 push right now, to look at land-based learning, not

1 just for law, but through all disciplines in
2 University and high school and elementary. And I
3 think essentially, what's behind it is saying that
4 this is a really core way that, historically,
5 indigenous people educated children, adults, taught
6 law and other things through the land. So, it can
7 be looked at... There's different angles to
8 approach it in.

9 So... John Borrows writes about land-based
10 learning and he'll talk... "he'll say sometimes the
11 law is literally written on the earth." And there
12 is a picture, back, when we looked at sources of
13 law and there's a picture of a mountain, and
14 sometimes I'll show that picture and I'll say, I'll
15 ask students, "well, what do you see?" And often
16 students will see a mountain. But there are
17 indigenous people living in that same area, that
18 see a very important landmark that stands for
19 important legal principles: the grounds... the
20 grounds stories and narratives and legal theories
21 in that... mountain face.

22 So... and Sarah... I think I've included that
23 Sarah Morales has a piece where she talks about
24 this, and she talks about... pardon my
25 pronunciation, but Hul'qumi'num laws and

1 traditions, and she'll talk about parts of the
2 landscape where there's a Hul'qumi'num belief that
3 ancestors felt earth in those spots, and that
4 orients people to their names, to their clans, to
5 their responsibilities on the land. So that's one
6 way of engaging with land-based learning.

7 Another way Borrows will talk about through
8 analogy, observation, watching what animals do and
9 don't do, and making decisions and drawing
10 interpretations of whether and how that should
11 apply to human behaviour. But there are deeply
12 rooted... it is a deeply rooted pedagogical method
13 and it's a method that people find incredibly
14 meaningful to engage with.

15 My caution with it is that I think I have...
16 I think very few people have what I would call
17 "land-based literacy", I think often... I know
18 people, my partner grew up on a trap line and, when
19 he explains things and he... it often looks like
20 he's actually reading the land. He can explain
21 things about that place that I can't understand,
22 I'm not literate to understand that, and... So, I
23 think we're at different stages with land-based
24 learning, I think like language it's really
25 important and there's lots of important work doing

1 to reclaim it, and it's back to one of these ideal
2 resources, but I think there... a lot of people are
3 learning how to learn that way, and I often say I
4 can't teach land-based learning, because I'm a baby
5 learning it, I'm much better at teaching from
6 books, because that's what I've learnt.

7 So it's powerful... We'll talk a little bit
8 later on about different courses but, John Borrows
9 has run, I think now eight (8) or nine (9)
10 indigenous law camps, with various law faculty,
11 and... and I was part of a Wahkohtowin project
12 where we... we looked at the Cree concept of
13 Wahkohtowin, which we'll talk about through making
14 a moose hide with elders. So, these immersive
15 experiences are important and I think there's a lot
16 of learning and work do to get to the application
17 stage.

18 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

19 Thank you.

20 **DR. VALERIE NAPOLÉON:**

21 Just on a closing note here. I think that it's
22 important to keep in mind the overall functions of
23 law, with any of these methods. So we can find
24 teachings and learning through all different
25 activities, but, we have to keep in mind what the

1 overall function of law is, so that we can see it
2 in different places, including recorded in place
3 names or recorded in land marks or mountains or
4 places where there were... landslides, like all the
5 different ways that people use in order to record
6 history, but the functions of law in terms of the
7 human problem and deliberation and authoritative
8 decision makers in all of that, the argumentation
9 and so on, that... all of that needs to be a part
10 of the whole understanding within which these are a
11 part.

12 So the indigenous law research unit.

13 We have several methods, this is one of them.
14 This is our initial one, largely envisioned and
15 developed by Dr. Friedland.

16 And so... And I mentioned that we've worked
17 with over forty (40) communities, so we've
18 developed a number of those reports, based on
19 different legal questions. And the overall phases
20 of work involved working with communities only on n
21 invitation basis, starting with a workshop so that
22 we teach local people what our methodology is - a
23 two (2) to three-day (3) workshop. We ask people
24 what specific things they want to learn about their
25 legal order, so we start with a legal research

1 question.

2 So... In Canadian law, Canadian common law,
3 you can learn different things from... from case...
4 from the cases. And you can ask different kinds of
5 questions. Say Delgamuukw, for instance,
6 there's... you can ask at least thirty (30)
7 different legal questions of Delgamuukw. And it's
8 similar with the precedents that we're using here,
9 which is the stories or the oral histories. You
10 can ask different questions and you will learn
11 different areas of law.

12 So we start with a research question, we bring
13 the research question that the community cares
14 about to the analysis of the available resources,
15 the stories, other kinds of accounts, interviews,
16 discussions, practices... So we bring... We have
17 a specific way that we conduct that analysis
18 - which we will explain - and then we pull it all
19 together into a framework - and we'll give more
20 detail on all of this - and then, that's the point
21 at phase IV, where we actually get to being able to
22 implement the... the law, and we can start looking
23 at questions of application and ways to evaluate
24 it.

25 **DR. HADLEY FRIEDLAND:**

1 Um-hum. So when we're talking about this method, I
2 think the origins of developing it was looking at
3 some of those challenges that we're talking about,
4 for engaging with indigenous laws, productively and
5 respectfully. And we wanted to come up with a
6 method that would be transparent and replicable.

7 So... Somebody could check our work behind us,
8 people were able to do it without necessarily a
9 huge deep knowledge that many... both non-
10 indigenous and indigenous peoples don't necessarily
11 have.

12 So it's something that... people could do and
13 work as a team and... work through with really
14 clear identified steps and a transparent way of
15 doing it.

16 So, this was... these are the four (4) phases,
17 and part of this as we... as Val said it, we've
18 only ever done this by invitation with community
19 and each of these phases involves interaction with
20 community when it's a ILRU or somebody outside of
21 community doing this work.

22 We've had actually the great honor of at least
23 two (2) communities, just taking this method and
24 applying it themselves, without us being involved,
25 so that's why we hesitate to say, "well, it always

1 needs to be between the researcher and the
2 community", because we're finding that, there's
3 researchers within communities that are using this
4 without the outsider, and producing things that
5 they're happy with and are able to apply. But that
6 conversational part is really important with this.

7 So... and this is a method that takes
8 typically... one project takes between eight (8)
9 and ten (10) months, and that's... it's pretty
10 rigorous. It's going at a fairly good clip I would
11 say, to complete a project within eight (8) to ten
12 (10) months. So it's a lot of hard work, it does
13 take significant resources, but it's also possible
14 and produces something that we believe can be
15 applied, and that's that framework and synthesis to
16 actually apply.

17 So we just wanted to give the examples of a
18 couple of the faces here. So... - oh, I'm clicking
19 the wrong link, I apologize.

20 When we talk about the case analysis phase of
21 this method, we actually have researchers using the
22 common law case brief method to really engage
23 deeply with the reasoning in stories... in oral
24 histories, in written anthropological accounts, so
25 it's addressing that issue of resources and saying,

1 "well, how can we do this in a transparent and
2 legitimate way?"

3 So it's talking something that most law
4 students learn, in Canadian law schools, and...
5 And I actually understand that, even in several
6 schools, the case brief is taught, which I didn't
7 realize. So it means that law students have some
8 familiarity. And what we find is when we do this
9 with... this work with indigenous communities,
10 most, if not all of the indigenous communities are
11 extremely good at case briefing stories.

12 There is... just as we were talking about,
13 with the Community Embedded method, like
14 recognizing that people are doing things that they
15 might not talk about, but they just take as a way
16 of life, many indigenous communities are using
17 stories to think with and apply, but haven't
18 necessarily pulled things out in such a... precise
19 and possibly aggravating way as using a case brief.

20 So this is a first step is gathering as many
21 resources as possible and looking at each one and
22 doing this case brief. And this, of course... John
23 Borrows is the first legal academic who did this.
24 He said, "I think you always tell a story for a
25 purpose, and I think I can retell an Anishnaabek

1 story in a case brief form, and the purpose is to
2 draw out and articulate the law in a way that...
3 not just non-indigenous, but indigenous youth
4 can... can understand in a different way.

5 So, we actually walk through story by story,
6 source by source, using the case brief method,
7 identifying what is the issue or the problem,
8 looking at what facts matter, considering what is a
9 decision. That's not as obvious as case law,
10 because it's usually easier to identify who's
11 making the decision and how some things resolved in
12 a case than a story. But it is possible to
13 identify where the problem is being solved or
14 resolved.

15 And then I think the most important part of
16 this is asking students what is the reason behind
17 the decision or resolution, why is the narrator
18 telling the story, what's the point. Does somebody
19 within the story give a reason for what's
20 happening. If it's not said or explicit, can it be
21 inferred, and then we ask them to just be
22 completely transparent about... about how they do
23 that.

24 And I think that's probably the most important
25 part, which I think is picking up from that

1 Community Embedded method, which is saying, we need
2 to start recognizing the intellectual life again,
3 and we need to identify the reasoning behind what's
4 happening in each story, or again, sometimes you
5 have a descriptive account...

6 And then we have a bracket where we'll say,
7 well, what do you need to bracket for yourself in
8 the case.

9 Sometimes there are things, in stories,
10 especially older stories, that are beyond people's
11 terms of reference. They don't understand.

12 So we've talked about the Witiko stories. Do
13 people need to understand every spiritual thing
14 about that, in order to engage and pull out the
15 principles. Our argument is: not necessarily.

16 You can bracket that and say, "I don't really
17 understand the spiritual elements of this, there's
18 something supernatural happening here that I've..."
19 I don't know about or"..." Maybe, sometimes from
20 community people are uncomfortable speaking out
21 loud about certain parts, and you can bracket those
22 parts and say, "well, we'll continue with the
23 analysis"; because we're not just doing one, we're
24 doing many. So... with the AJR reports, where
25 we... with the first major research project where

1 we applied this method, students looked at between
2 twenty (20) and seventy (70) stories, historical
3 accounts, anthropological accounts, and did a case
4 brief for each one, and then they brought them
5 together in the next step. But this was the first
6 step, that very deep analysis of identifying the
7 reasoning.

8 **DR. VALERIE NAPOLÉON:**

9 So, what's important here is that you look at lots
10 and lots of stories or oral histories, because you
11 can't learn Canadian law from one story or one
12 case, and it's sometimes helpful to think about
13 Canadian cases as also a type of story. They
14 record information for future recall. Because our
15 minds work better with oral histories and stories
16 than they do with lists.

17 So, lots of stories and... lots of different
18 versions of the same stories as well, so we're not
19 looking for the... authentic story, it's all the
20 different ways that people have recorded
21 information.

22 What makes the process legal is the reasoning.
23 And the reason for that, is that they're not
24 personal reasons, they're collectively-owned
25 reasons. They're beyond the person who's the

1 decision-maker. They are owned and can be applied
2 beyond that decision-maker. And so... that's what
3 makes this process legal. And so, reasons for
4 every decision have to be made. You have to say
5 why something is happened in all aspects of
6 indigenous law, the same as you do with Canadian
7 law.

8 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

9 If I can ask just one question or comment. I'm
10 reading in your Lakehead Law journal, "Gathering
11 the Threads: Developing a Methodology for
12 Researching and Rebuilding Indigenous Tradition"
13 paper, you're saying that when you were doing that
14 method, you wanted to get critical feedback from
15 what you were doing, so you were working with focus
16 groups, and... with all of people at one time, and
17 you wanted to have... [(technical sound problem)
18 from this recognition that law is in a way
19 collaborative with the press], and as law, you
20 wanted to avoid this notion that, some people, like
21 there's one elder or one committee in particular
22 that can have all the right answers, so. I was
23 just reading this as you were speaking of that. So
24 if you could just clarify or comment on that,
25 please.

1 **DR. HADLEY FRIEDLAND:**

2 Well, one of the things I think we found, working
3 with communities... I can actually think of an
4 example of working with a community, and there was
5 a young woman - we got to this part because we do
6 this with communities, we do this as sort of a
7 workshop - and we got to this part and they were
8 working with stories, published stories - again,
9 the most accessible resource - and this young lady
10 would not... would not do this. She had been
11 completely... It was not her fault, it was not her
12 choice, she had been raised away from her
13 community, like so many indigenous children are,
14 and she had come back as a young adult, and she
15 felt as if she... had nothing to say, she couldn't
16 engage, and there was actually two (2) elders in
17 her group who really pushed her to do this work,
18 and said, "of course you can, of course you can."
19 So it gave her a way... it gave her a way in to
20 that conversation that was respectful, and that
21 was... That's what we hear overwhelmingly from
22 especially, I think, elders, when we do this. We
23 hear... it's respectful. This is... This is what
24 the stories... often their opinion assesses what
25 these stories were made for, was to engage, was to

1 grapple with it, was the spark conversations and
2 it's that conversational process that we're working
3 towards. We're not saying anyone of these stories,
4 one difference would be is... is sometimes court
5 cases would be authoritative. And we're not saying
6 that anyone of these stories are... are the same
7 type of authority, but we're saying they're
8 learning tools, and that the conversation they
9 spark in that discussion of reasoning is what
10 starts to rebuild that law and develop the law.

11 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

12 Okay.

13 **DR. VALERIE NAPOLÉON:**

14 So, once the individual stories and... or oral
15 histories are analyzed, then they're brought
16 together in an overall framework. And so, part of
17 what's really important is being able to see the
18 patterns, through the oral histories, and it's also
19 just as important to see where there are
20 differences, like where are decisions made
21 differently from the usual patterns and why is that
22 so. Because, we have to understand decisions are
23 distinguished and... what was considered in those
24 particular circumstances.

25 So, the... this pulls it all together. So we

1 go through all of the analysis, and the first step
2 is figuring out what's the... what's the legal
3 process, for determining a legitimate problem-
4 solving way forward. Like... so what is it. And
5 so there's two (2) parts here and one is looking
6 at who has the final say, who are the authoritative
7 decision makers in the different kind of decisions.

8 The procedural steps. What is it that you
9 have to do, in order to figure out the next legal
10 step. And in common law, we... this would be...
11 could be considered similar to several processes
12 where it's the business of figuring out law. So
13 it's the business of... figuring out how law goes
14 forward, who has standing, who can participate,
15 what are the different ways that people can... like
16 what are the first initial steps in determining a
17 legal response.

18 So that's the first element of this. And then
19 the second is what are all of the different ways
20 that human problems are responded to, or what were
21 the different ways that there were... people reach
22 resolutions of those problems.

23 And here, you can see all of the different
24 kinds of principles that govern what an appropriate
25 response to a human issue is.

1 And then, there's the legal obligations. What
2 are the kinds of things that people that govern our
3 collective and individual responsibilities, what
4 are the things that we should do in our society.

5 And the fourth part has to do with legal
6 rights. And here, what should people be able to
7 expect from one another, and... some of these are
8 substantive rights and some are procedural, and...
9 The different kinds of resources that we look at,
10 some of the oral histories have lots of procedure.
11 In fact, that's the main point of some of them.

12 And then other oral histories will have
13 substantive issues within them. So, it's looking
14 at the... the different kinds of things, like
15 whether it's, you know, bodily integrity or whether
16 it's having a right to be heard and being able to
17 set those out from the different analysis.

18 And then, the things that don't fit into those
19 previous categories are the underline principles.
20 And these are the big principles that recur through
21 the stories. And... there ones than can be the
22 actual decisions and responses and approaches can
23 be checked against insofar as how to go forward.

24 So, this is... It's a very dynamic way of
25 working with indigenous law. It's not asking

1 general questions about... about indigenous law,
2 but actually getting into what is... in this legal
3 tradition, what is the appropriate response, the
4 appropriate legal response to this.

5 And you create precedent which then can be
6 applied to future problems. So the... It's not to
7 create a static report of how law should be
8 forever, it's a resource for future decision
9 making, future legal decision making.

10 So we have... This is one analytical
11 framework, we have another that... again, that
12 Hadley has developed, on environmental issues, and
13 in that one, what the focus is, is land and
14 resources, the community and then other peoples.

15 And in each case, we look at roles,
16 responsibilities and rights. And so, it's a
17 different kind of analysis. So, you know, law is
18 dynamic, it requires different tools. We're now
19 developing a different process to think about
20 governance in a more comprehensive kind of way.

21 So it's... a work in progress, and, you know,
22 the intent is to get something that, again, is
23 accessible, that people can use, that people can
24 apply today, drawing on legal history and other
25 things that are part of people societies.

1 **DR. HADLEY FRIEDLAND:**

2 One thing that we often say about this framework is
3 that its greatest strength is that it's a
4 framework. There's not necessarily magic in these
5 exact categories, but it is a common framework
6 that, first of all, takes a look at that idea that,
7 at some point in time, indigenous legal traditions
8 are complete legal orders, right? And so, there
9 are pieces... there are sometimes gaps, and then we
10 go back to the community and say, well we have gaps
11 in our report, and sometimes those gaps might be
12 because, people take it so for granted, a part of
13 it that they didn't even think of telling somebody.

14 And sometimes the gaps maybe because of
15 colonial damage, of it not being used, of it not
16 being resourced for so long, and enforced. So
17 there's rebuilding, and a community can look at
18 this because it's transparent and say, "I don't
19 like this and I can...".... So if we have a report
20 - everything is footnoted, everything is sighted -
21 so they can look and say, "you know, on footnote
22 28, I see that you use this story from this author.
23 We don't like this author, we think you wrote it
24 wrong. We've talked to... you know, three elders,
25 and they've given us a different version of that

1 story. So we've added that in and we've corrected
2 that."

3 Like, they can make... they can amend things,
4 they can change things and say "go along"...

5 Conceivably, if there was an active sort of
6 formal justice process, the community could add to
7 this as well, right, and say, "ok, we made this
8 decision, it's going to fit under resolutions, we
9 used this principle, but we applied it this way in
10 this case, so here's a little nuance" is how it
11 changes, right?

12 So you can start to develop on something that
13 develops and changes and debates... debates the
14 state of... sort of this read statement.

15 So, we just thought we would give a quick
16 example with a very short summary, just to give
17 again a tiniest taste of how this can be applied.

18 So we have this... we have the example of the
19 accessingn Justice and Reconciliation Report. So,
20 this is the... the analytical framework where...

21 Where each part is filled in, based on the
22 research, stories, interviews with elders,
23 corrections by elders and other community members,
24 capturing some nuance, some debate, some ways these
25 principles are applied differently.

1 So the actual report is, I think, about
2 seventy (70) pages; it's fairly typical with these
3 reports, they're somewhere between seventy (70) and
4 a hundred (100) pages. When we first brought
5 back... I'll use the Cree legal traditions report
6 as an example, when we brought it back to the
7 elders to... because once this is complete, you
8 bring it back and go over it, and see what the
9 community thinks, so they can correct things or say
10 "yes, you captured this well, you wrote this down
11 correctly, you missed a little nuance this in."

12 One of my favourite elders, who has passed on
13 now, went through it all with me and he said, "yep,
14 like, this is good, but it's just the tip of the
15 iceberg." And I said, "yes, it's pretty clear,
16 this is just the tip of the iceberg. This is a
17 tiny, tiny taste of a much larger, richer Cree
18 legal tradition", but it is... It's a start. It's
19 something that goes beyond, that starts to show
20 some of the range of... and the complexity and the
21 ability for Cree law to be applied, as opposed to
22 just declaration or just one thing. So I could go
23 through it and I can, but the categories that we
24 talked about are laid out, and I thought I would
25 just really quickly focus on those general

1 underline principles and Meta-Principles, and I'll
2 come back to that and talk about Wahkotowin, and
3 then also just legal response principles.

4 So, summarizing the principles from this
5 report and from another work of the Wetiko legal
6 principles, we could identify eight (8) principles
7 that are used in different ways to respond to harm
8 and violence.

9 So, what it does is that, we talked about
10 earlier this idea that, sometimes the justice
11 system allows for a little bit of space, and we
12 have to be so cautious to not say "oh, the state
13 justice system allows for restorative justice, so
14 that means indigenous law is only about
15 restoration, or only about healing."

16 Healing is a very important principle. It's
17 definitely the preferred and most important
18 response, but it is not the only available Cree
19 legal response to... situations of violence or harm
20 or conflict. And when you think about logically
21 how could it have been, you could never, in any
22 society, have only healing. What would happen if
23 tomorrow we said, "ok, all of the sentencing
24 provisions in the Criminal Code, you can only use
25 rehabilitation, and maybe... - no, just that one -

1 you can only use that." And everyone can go about
2 their business.

3 I think we would very quickly find that, we
4 would often... there would be cases where that
5 would work well, and there would be cases where we
6 would suddenly think, our justice system needs
7 something more temporarily or permanently that
8 rehabilitation is not always... And I mean, to be
9 fair, rehabilitation may be underused a bit, but...
10 if we only had that, we would... I think we would
11 find concerns.

12 So there are more besides healing. We saw
13 that there are... examples of very principled
14 separation or avoidance, sometimes temporarily and
15 sometimes permanently. Supervision of somebody who
16 was becoming harmful or did cause harm. Sometimes,
17 you would see natural or spiritual consequences
18 where... where people would sort... would denounce
19 a behaviour and say, "this was wrong"; often this
20 was in the context of medicine people saying this.

21 But then they would step back and something
22 would happen. That person would sort of be taken
23 care of. And one of the elders explained that
24 saying, "you know, that also helped with
25 retaliation, because if people... if people say,

1 “well, if you do something bad, there can be a bad
2 consequence that doesn’t require a human hand”,
3 that can keep other people from retaliating and
4 having things escalate.

5 Acknowledging responsibility was a big
6 principle, it was a... it was a very important way
7 of sometimes resolving an issue.

8 Reintegration came up a lot. Figuring out a
9 way, even with really severe harms, of how someone
10 could be reintegrated. It was a very sophisticated
11 reasoning, especially with one elder who practices
12 traditional medicine, talking about just the level
13 of supervision and... and watching, and sometimes
14 for life; people who have become very harmful need
15 that level of supervision and just... and that’s
16 part of their reintegration.

17 There are historical stories about
18 incapacitation and in much, much older stories,
19 that is sometimes execution; that would never
20 happen today, nobody is... I’m aware of absolutely
21 no indigenous or other groups, arguing for the
22 return of capital punishment law develops.

23 It was very clear, in most of those accounts,
24 that that was... all the other principles had been
25 tried and failed, sometimes over years, and nothing

1 else worked.

2 It did not appear to be punishment. It
3 appeared to be the only way to keep other people
4 safe.

5 And when there are other resources available,
6 for instance there's historic cases on where
7 someone was becoming extremely dangerous and
8 threatening other people, and there was an RCMP
9 outpost close by, people would take that person to
10 the RCMP outpost rather than an execution and
11 sometimes to missionaries. And they would take
12 that person there, because the purpose was very
13 clearly to... make that person incapable of causing
14 harm.

15 So, you can imagine that that could be... that
16 might be applied today, there... In fact, I'm sure
17 we're all aware of some cases where you might say,
18 >this is a person who will continue to cause harm",
19 will likely continue to cause harm unless they are
20 removed from society. And that may be how
21 incapacitations apply today, right, to not... not
22 execution.

23 And there's a very small, small line of
24 cases... maybe one or two percent of cases, where
25 retribution came up, where there was some explicit

1 ratio around retribution of someone causing great
2 harm and someone deciding to cause something back.
3 Very, very rare. Nothing really came up about
4 denunciation and deturns, which was very
5 interesting to me, I was watching for those, and
6 they did come up in other... this is other thing,
7 there's not Pan-Indigenous reality, there... there
8 definitely were legal traditions we worked with,
9 because we work... we're working with six (6) legal
10 traditions accross Canada, and there were other
11 indigenous legal traditions where, it was very
12 clear, denunciation was a goal. It was very clear
13 that general or specific deterrence was the goal,
14 even if it wasn't necessarily worded that way.

15 In my research with Cree legal traditions,
16 that has not come up and I stand to be corrected.
17 I may be... I may learn more about that at some
18 point, but, those didn't come up.

19 So that's a very, very short summary, which
20 again, is... explained in greater depth and nuance
21 within the report. And that's again just one
22 section of the report, that's a response principle
23 and there's a procedure as Dr. Napoléon said, and
24 the rights and the obligations and the general
25 underline principles.

1 But just... just to have sort of a taste and
2 an idea of the fact that there... there really is a
3 breath of responses, you can see where... you can
4 reason this through and apply it case by case,
5 based on the facts balancing at, like, you would
6 balance to some extent sentencing principles. We
7 have done some judicial education where... generous
8 judges have worked with these principles and
9 applied them to cases that have been decided...
10 recorded cases, so they've applied them and worked
11 with them and found it very possible and... So,
12 that's kind of an example of those principles.

13 **DR. VALERIE NAPOLÉON:**

14 Before we go on, there's... with the reports, like
15 with each legal tradition, there's more than one
16 legal... there's more than one final decision
17 maker. So for the Cree, for instance, there's four
18 (4) different decision-making groups: there's the
19 whole community, there's leaders and medicine
20 people, there's family and there's individuals.
21 And it depends... like, who is responsible depends
22 on the kind of legal problem that they have to
23 solve, and also, the way that people... the way
24 that people act, in those legal processes, also
25 depends on the kind of legal problem that they're

1 grappling with. So, for instance, with elders, if
2 there's an issue of danger, for potential danger
3 for people, their role in decision-making is
4 directive. If it's a lesser danger, something more
5 general, then their role is persuasive and
6 educational.

7 So there's more than... For every legal
8 tradition we looked at, who the decision makers are
9 depends on the kinds of legal problems and the
10 particular role in the way that they fulfill their
11 responsibilities here, again, is determined by the
12 kinds of legal problems that people are working on.

13 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

14 So just a quick question. You said... there are
15 four (4) decision-making groups within the Cree
16 legal traditions and who is responsible will depend
17 of the kind of legal problem. But do you have
18 sometimes, like, I don't know, some... there's a
19 group of decision... some of the group of decision-
20 making group will make a decision and, there could
21 be like a... I'm trying to use a bad comparison,
22 but, kind of an appeal, like if people do not agree
23 and they would ask for someone else for help, like
24 kind of... - hiérarchie - hierarchy sometimes, in
25 these types, or you don't see that?

1 **DR.HADLEY FRIEDLAND:**

2 We didn't examine that question in depth, but there
3 are some cases... like there are some stories or
4 narratives told where that seems to happen.

5 I'm thinking of [Edouard Okinawa], his... he
6 has a story called "Indian Laws", and he has quite
7 a complex plain Cree story, where it starts off
8 with a young man and somebody is asking him for
9 compensation, and they are talking to relatives at
10 first, but things don't go well.

11 And at that point, there is a group that he
12 describes as hunters and protectors who get
13 involved, and hear the case and say, "no, this is
14 not going to fly, so here's what you need to do"
15 and... the young man escalates things and doesn't
16 listen to their ruling and it goes in that
17 something else and there's quite a complicated set
18 of events. And then in the end, one of the Chiefs,
19 who is still related to this young man, resolves
20 the issue, in a quite a beautiful way, with
21 bringing some horses, and it's this very generous
22 way of letting everyone say face and resolve the
23 issue for everybody, but... So that would be a
24 story where I would say, it appears to be an appeal
25 procedure going on, but...

1 **DR. VALERIE NAPOLÉON:**

2 There are other examples within the Cree or within
3 the Gitksan legal tradition where actions were
4 taken by one or two individuals, which were then
5 investigated by a larger group.

6 **DR. HADLEY FRIEDLAND:**

7 Yes.

8 **DR. VALERIE NAPOLÉON:**

9 There are other examples where there's a conflict
10 that involves certain people in different lineages
11 and, then there's efforts than, to find someone
12 who's neutral, like a neutral village or a neutral
13 lineage. So there's... there's a lot of care, in
14 that legal tradition, about who is involved and
15 what their relationship is to the problem. And it
16 isn't just straight up acceptance of what goes on,
17 it's... applying standards and checking and paying
18 attention to what happens as... Because everything
19 has to be recorded publically, like the decisions
20 have to be recorded publically. What happens
21 between groups of people have repercussions for
22 governance, so... and... so there's economic and
23 political and social repercussions for people's
24 behaviours and so, very close attention is paid to
25 the kinds of decisions that are made as a result.

1 **DR.HADLEY FRIEDLAND:**

2 The other question that we raised earlier was the
3 idea of interpretative bounds. Like how... if
4 we're not really having authorities that are really
5 clear and so much of the institutional rebuilding
6 needs to happen, what do we do. How do we put some
7 boundaries around interpretation.

8 So that is something that we found, as we
9 worked through this method, we started to be able
10 to identify that, that last piece of analytical
11 framework, where we were looking at general
12 underline principles, those underlying and
13 recurrent themes that helped make sense of, of a
14 variety of decisions, and Ronald Dworkin writes
15 about this. He writes about this in American Law,
16 where he will say, "there's certain Meta-Principles
17 that we can turn to. So if we're looking at
18 decisions, and possibly it's when they come up to
19 appeal, or possibly it's when our institutions fail
20 us... underlying law or Meta-Principles, or
21 principles we're working towards."

22 So, earlier we talked about equality, that
23 might be an example, Dworkin talks about autonomy.
24 And he would say, you know, our law is structured
25 to protect individual autonomy, so that would be a

1 Meta-Principle we would check our reasoning on a
2 case against.

3 So one of the things we found with this method
4 is we were able to start identifying Meta-
5 Principles within the Cree legal tradition, that we
6 could use as interpretative bounds, to be able to
7 say "okay, these are aspirations, things that are
8 considered so important and you see them moving
9 through." So some of the examples are that... the
10 real importance of case by case reasoning, taking
11 each case on its facts and considering the
12 specifics - there weren't grand declarations.

13 Often, following this, we looked at a Cree
14 justice process, the [Asinīwīchiwiniwak] who worked
15 with on this project wanted to develop a justice
16 process and... and that came up quite... commonly
17 when we would ask, "well so, what would happen in
18 this situation", nd the elders would always say
19 back, "well it will depend on all the circumstances
20 we'd have... like, it depends."

21 So these are experience practitioners where
22 they would say "no, it's really important to
23 consider the... the specific facts and develop the
24 law that way rather than taking guesses."

25 The importance of education, guidance and

1 support came up a lot. That was often seen as a...
2 the best solution or something that would lead to
3 healing, would lead to reintegration.

4 That also came really strongly on the
5 Anishinaabek legal traditions report, which is also
6 included and... I can refer you to page 29 of that
7 report, where Jean Borrows, who is actually John
8 Borrow's amazing mother, talked about that. Like,
9 so she says:

10 "The most important thing is to
11 educate people, particularly when
12 they are young. Because if you
13 teach them the principles, they will
14 govern themselves".

15 So that real eathoughs of internalization and
16 people having that insight and figuring that out is
17 considered important. So it just helps with the
18 bounds.

19 And then finally, the principle that came up
20 for the Cree legal tradition was the principal of
21 Wahkohtowin, so wakhoktowin is a Cree word, it
22 comes from the Cree language obviously, and the
23 roughest translation would be "talking about
24 relationality and interdependence."

25 So rather this assumption, so Dworkin is

1 talking about that individual autonomy as a goal,
2 wakhoktowin focuses more on the idea of relational
3 autonomy and people's interdependence with each
4 other.

5 So those Meta-Principles help give us some of
6 those balance to say, well, we could apply these
7 response principles, let's say, but, in the end, we
8 can... we could make a decision and again, I've
9 been verry grateful for generous judges that have
10 been willing to... to try this out.

11 But once a decision is made, it needs to be
12 checked against these Meta-Principles to say,
13 "well, does it address the relationality, does it
14 address the interdependence, is there some sort of
15 education or guidance or support happening, was
16 this case by case reasoning, you know, or was
17 this... you know, everybody painted with the same
18 brush." So, it gives us some bounds to be able
19 to... to feel some confidence in our own reasoning
20 as we grapple with these.

21 **DR. VALERIE NAPOLÉON:**

22 So, for the [Tsokoutin(ph)], which is one of the
23 other groups that we... the [Tsokoutin] national
24 government, we completed a report there, and one of
25 their major Meta-Principles was proportionality.

1 And so... like, the different legal traditions had
2 different emphasis in terms of what was critical
3 and the maintenance of the integrity of that legal
4 system.

5 And I guess what I want to just emphasize here
6 is that, what this is, is a deep engagement with
7 different legal traditions. It's a different...
8 So what we never do, is go to a community and say,
9 "tell us your laws." Because people... like, if
10 you imagine going to this community to any
11 household and you say, "tell us about Quebec law,
12 or tell us about Canadian law", what kind of
13 response are you going to get. It's... huge,
14 people don't necessarily have the education, they
15 don't necessarily have the experience, and they're
16 not going to be able to tell you all about Canadian
17 legal traditions. And so, we have to structure and
18 find ways to... for the conversations to be
19 productive, for the research to be productive, for
20 to be actually collaborative, and then... so that
21 in the work that we're doing, we have to fulfill
22 these... these principles ourselves, in terms of
23 providing the kind of support that people need in
24 order to be able to work with us.

25 **DR. HADLEY FRIEDLAND:**

1 Um-hum. So, we wanted to give an example, by just
2 using a short story again, just to sort of have a
3 taste of the difference this can make or how... or
4 how things become more visible, working in a more
5 comprehensive way. So we have, for an application
6 example, the story of two (2) women, which is a
7 very short little Cree story that I use a lot,
8 because I love it and also because... it's very
9 short, but there's a lot in it.

10 And it's not so unusual and I've had... I've
11 had colleagues come back, who we've worked with,
12 who would say, "okay, I'm sitting down with this
13 community, they want to work with the justice
14 program, they want to develop their own justice
15 program", or "they want to develop their own child
16 welfare program - you know - things aren't working
17 and they want to do something different, so they
18 told me to go talk to an elder, so I sat down,
19 they said this is the elder to talk to, and the
20 elder..." - not always, but - sometimes an elder
21 will... would tell a story just like this one.

22 And then the lawyer is left saying, "okay,
23 what do I do with this story", how do I apply it."

24 So... - should we read it? Should we... Read
25 it? Okay.

1 **DR. VALERIE NAPOLÉON:**

2 Do you want me to read it? Then you speak to it
3 (inaudible)?

4 **DR. HADLEY FRIEDLAND:**

5 Okay. Sure.

6 **DR. VALERIE NAPOLÉON:**

7 "An old Cree man who was a powerful
8 Shaman heard Sioux woman laughing one
9 day. He got mad because he thought she
10 was making fun of him. He cursed her.
11 And although she did not hear him, she
12 became "sick and crazy" before Christmas
13 and began to turn into a wetiko. Her
14 children grew scared of her. When Sioux
15 Woman's mother saw she was beginning to
16 become a wetigo, she attempted to cure
17 her daughter. While she worked to heal
18 her, "all the children were taken away,
19 and some of the grown people went away
20 too. Only a few stayed there to watch
21 her." When her daughter is cured, her
22 grandchildren all came home, and they
23 lived happily after that. The Shaman
24 died within four days of the Sioux Woman
25 being cured, and everyone was relieved."

1 **DR. HADLEY FRIEDLAND:**

2 So after... and after reading that story, I'll say
3 "show off hands, how many people are ready now, to
4 implement this justice program." And if people
5 don't raise their hands, that's a correct response.
6 One, it's just one story, but also, of course,
7 people often don't know what to do with this.

8 But if you go back and look at... the
9 principles, and again just a response principle,
10 and you could say, if you walk through those eight
11 (8) response principles, you could say, "do you
12 see, in this very short little story..." And
13 again, people may not know... people - actually
14 I'll just go back the story for a minute. Sorry.
15 I should have figured out how to put side by side.

16 People may not know what a wetiko is. People
17 may find this idea of cursing... they might not be
18 sure about this, but that sort of that bracket part
19 two of saying, "well, it's okay, you don't have to
20 be... you don't have to understand all of that, you
21 can bracket that and that can be for further
22 research or talking to an elder about... But
23 working this through, we might say, "so, when you
24 look at this story, can you see the principle of
25 healing?" Can you see where that principle is

1 being demonstrated."

2 And of course, immediately you're able to see
3 this, that... this response when... when Sioux
4 Woman became... they used the word "sick and
5 crazy", so, just also to say, we might quickly say,
6 "we can be critical of these stories, we can draw
7 our conclusions, we can say... that's not an
8 appropriate way to characterize somebody in two
9 thousand and seventeen.

10 If she was behaving erratically, we need to
11 say she was behaving erratically. We need to be
12 really careful to not be... speaking about people
13 as "sick and crazy", right? So, from the get go we
14 might be critical of that, and say, "we're going to
15 be careful about that language." But "her children
16 grow scared of her", and we see the responses her
17 mother does in the attempt to cure her.

18 But we can see more. So we can move on and
19 say, "so we can see that principle in action
20 there." And we can also see temporary separation
21 happening. The... the children are taken away,
22 while the grandmother is attempting to heal her.
23 Some of the adults go away as well. Some of them
24 stay, and we're not clear in the story what
25 criteria that's based on, but... A question I

1 might have is, "is it their vulnerability?" We'd
2 have to find out.

3 You can see supervision in this story. Her
4 mother doesn't leave her while she's... while she's
5 attempting to cure her.

6 You can see, number 4, you can see natural and
7 spiritual consequences for the Shaman. So we might
8 not be able to understand that and some people
9 might be able to understand that very well. But we
10 can see that it's not clear.

11 So, he dies within four (4) days of Sioux
12 Woman being cured. Everyone's relieved, but
13 there's no suggestion that a human being had
14 anything to do with that. So... You could say
15 "okay, it looks like some natural or spiritual
16 consequences can befall him."

17 Can we see acknowledging responsibility in
18 this story? This is an example where, it's not
19 particularly present in this particular story. So
20 again, we're not going to see every principle in
21 every story, just like you wouldn't see every
22 sentencing principle in every case. In criminal
23 law.

24 Reintegration. You can see reintegration
25 happening, because once... once her daughter is

1 cured, her grandchildren all come home, and they
2 lived happily ever after that. So you can see that
3 there's a reintegration where once, the mother is
4 no longer dangerous, the children come back, the
5 family's reunited, there's reintegration happening.

6 Incapacitation. No. Again, you don't see
7 that in this story. You're not going to see any
8 principle and we know that's an extreme.

9 Retribution. Again, we know that's going to
10 be very rare, and you don't see that in this story.

11 But what you can see, when you have the
12 principles to help guide you, is that, a lot of
13 those principles are being demonstrated in this
14 story.

15 So I have used a story with a Cree community,
16 within and we said "let's case-brief it." I mean,
17 within five (5) minutes, people had identified six
18 (6) issues for me. They explained things I could
19 never have thought of. They gave some background
20 on what must have had happened with the Shaman...
21 They explained different things about the cure,
22 they asked, "well, what if... what if Sioux Woman's
23 mother couldn't cure her, what would happen next?"

24 And people had really reasonable ideas of the
25 next steps that would happen. They analyzed this

1 case like... far beyond my own capability. So I
2 want to acknowledge that, even as I'm sharing this,
3 I'm not sharing this as an expert on Cree law. I'm
4 sharing this as a... as a learner. But these are
5 some of the tools that helped me... really have a
6 reasonable conversation with people that know a lot
7 more, and be able to hear stories like this.

8 So the more I found, I think we both found
9 that the more work that we did, pulling out the
10 principles and doing this very hard work, the more
11 we were able to hear stories like this and
12 identify... It starts to pop out, just like when
13 you read cases or when you read codes, it starts to
14 pop out to you what is going on and what's
15 important.

16 And you're also... it also helps with non-
17 ideal resources, because you also start to
18 recognize parts that really don't fit. Once you've
19 looked at a hundred wetiko cases and done this
20 analysis, you can read a description from an
21 outsider and there's certain things that can be
22 really jarring and you can realize, "hey, that
23 doesn't fit with any of the Meta-Principles, that
24 doesn't fit with these principles."

25 I think there's a contemporary writer who

1 writes about the wetiko and, I remember reading
2 that, and immediateI could identify one or two
3 (2) things that didn't seem to fit at all, and
4 other things did fit. So, you can start to really
5 see the difference between debates within the legal
6 tradition, and things that outsiders are importing
7 from their own biases.

8 So, just to use it as a little taste of how
9 this can be applied.

10 And then the second thing is... is people can
11 look at this case and say, "okay, so there's a
12 Shaman, there's a curse, there's a wetiko, you
13 know, this is... it was recorded in nineteen
14 eighty-three and... that must... - sorry, it was
15 recorded in nineteen thirty-eight (1938), I had the
16 site wrong.

17 It was recorded in nineteen thirty-eight
18 (1938), it was presented in nineteen sixteen (1960)
19 at this... so this is a past. What relevance does
20 this have back to those challenges of relevance and
21 utility.

22 But when I look at this case, I say, well, if
23 you looked at this as a case, what if you took off
24 the Shaman and you replaced it with a meth dealer,
25 somebody who's dealing meth or cocaine or something

1 like that. What if Sioux woman was... was somebody
2 that was hooked by somebody who is dealing these
3 poisons, these curses. What if she's a battered
4 wife. What if she's struggling because of the
5 abuse she's suffered.

6 Can we apply these same principles. Can we
7 look at this and say, what principles would apply,
8 what can we take from Sioux Woman and these
9 principles to say, we can address this, we could
10 address a situation where you have a mom who was a
11 loving mother and took good care of her children,
12 ended up with an abusive man, who... perhaps an
13 outsider that was exploiting her, perhaps got her
14 addicted to one of these terrible drugs, and
15 then... what are the principles that we can apply.
16 And we can start looking at healing, we can look at
17 separation for a time, we can look at that
18 supervision. We can look at the fact that,
19 perhaps, their focus was on her and her children.
20 So, we can start taking pieces of that and end
21 applying two (2) issues that we might typically see
22 today as... we might call them criminal matters, we
23 might call them child welfare matters, but... That
24 sort of have application.

25 So that's an application example, I'm just...

1 Again, it's the tiniest, tiniest taste. You have
2 the actual reports, so you know it's much bigger
3 than a tiny list. You can just see the breadth and
4 how could apply...

5 I just wanted to talk briefly about Meta-
6 Principles and in particular Wahkohtowin, and to
7 give an example of that.

8 So again, as Val talked about, the importance
9 of... of recognizing laws that are embedded in the
10 language and how they bring something out. The
11 idea that... in many indigenous communities and
12 Cree communities - because we're talking about
13 Whakohtowin - people live in relationship and
14 fairly dense relationships. So one of the things
15 we heard from... in the Cree legal traditions
16 report, one of our students had only ever heard of
17 wetikos from anthropological accounts, from legal
18 accounts where the wetiko had been executed, so.

19 That analogy brought,... and he came and asked
20 the elder about it, and the elder was pretty snappy
21 with him, and she said, like, "that would be
22 completely ignorant, like, only somebody who would
23 know nothing would do that, you know, these are
24 family members." And it was such a profound moment
25 of saying how important it is to recognize that

1 when we're looking at people becoming harmful
2 inside communities, we're not talking about
3 strangers, the vast majority of the time. We're
4 talking about people we love. And the harm that
5 they cause is to people we love. And that creates
6 a different set of circumstances that isn't always
7 acknowledged.

8 And I think Wahkohtowin is one of those
9 interpretive principles, Meta-Principles that
10 reminds us that, it doesn't necessarily change the
11 result. Somebody may still need to be separated,
12 because with those dense of relationships, harm can
13 spread very fast too, right? But we can check back
14 to a principle like Wahkohtowin and say, okay, if
15 we're assuming there's a society of relationships
16 and we're... we're looking at relationships as both
17 risks and resources, but we're accepting the fact
18 of relationships and mapping that out.

19 And I have this picture up there, this is from
20 a memorial round dance up in [Asinīwichiwiniwak]
21 territory this summer, and I thought it is... it is
22 a beautiful example, I would say Wahkothtowin is a
23 fact and there are beautiful things about
24 relationships, but I'm not arguing that
25 relationships are all benign and good. Harm can

1 come too. But this is a beautiful example, this is
2 a memorial round dance, where there's a song... it
3 was for two (2) really beloved elders, and their
4 family did a memorial round, where they went around
5 once holding their pictures, and then the MC told
6 everybody to come in and surround them.

7 So it's a really beautiful picture, and if you
8 could... if you can see the... it's in an arena,
9 and the arena is completely emptied, everybody has
10 gotten up, and there's about three rounds of people
11 surrounding this family. And it was an incredibly
12 powerful moment, of I thought, Wahkohtowin, of that
13 dance of relationships surrounding... So it wasn't
14 one family struggling alone with their grief, it
15 was... they were completely surrounded by a
16 community.

17 So that's... that's a very positive depiction
18 of some of the strength of that. But Harold
19 Cardinal, who's a Cree lawyer and a well-known
20 leader coming out of Alberta, he wrote about
21 Wahkohtowin, he talked about it as a fundamental
22 Cree doctrine of law, so he also saw this is a
23 Meta-Principle and he describes it as "laws
24 governing relationships."

25 So he says, this was very important to...

1 Wahkohtowin would be a principle and underneath it,
2 there would be other principles.

3 So again, if we think about autonomy, if we
4 think of equality, if we think of... the
5 aspirations of American law or Canadian law or
6 Quebec law or Alberta law, we can think of... of
7 what is established or even constitutional
8 principles. And that these are the principles that
9 govern the conduct and behaviour of individuals,
10 within their families, within their communities and
11 between communities. And he says it's one of the
12 most comprehensive doctrines of law. So he said
13 "there's so much work to be done to understand
14 Wahkohtowin but also revitalize it and start really
15 comprehending how complex it is.

16 So I thought... I thought it's a... it's a
17 good example to talk about, that you can have
18 something that could look deceptively simple or
19 sometimes people use in a very over-simplified way,
20 because they haven't necessarily unpacked it. They
21 haven't necessarily put in the rigor and the study
22 that we do to understand... to try to understand
23 autonomy, to try to understand equality, to address
24 the debates that are going to happen in there.

25 So, just also talking about Wahkohtowin to say

1 that we can come out from this type of really
2 intense scrutiny. This hard work, with one legal
3 question and one legal tradition, and we can move
4 outwards to those bounds and to those Meta-
5 Principles that... that sort of underlie a legal
6 tradition.

7 **DR. VALERIE NAPOLÉON:**

8 So just to recap what... our materials for the
9 morning, which we've just finished, there were two
10 (2) parts to what we talked about: we talked about
11 what are indigenous legal traditions, indigenous
12 laws, we looked very briefly at the Truth and
13 Reconciliation Commission, it's called *The Actions*
14 *for indigenous laws*, and we reframed the challenges
15 that we've... we found during the work... with
16 indigenous laws, in order to create respectful
17 relations in the work going forward.

18 And then the second part of our presentation
19 thus far is, what does it mean to move from the why
20 of the work to the how. So we're past the
21 conversation about whether indigenous people have
22 law, we're passed the conversation about whether it
23 matters.

24 Now it's: how do we do the work in a way
25 that's effective and comprehensive.

1 And here, we look... you know, we looked at
2 historical and contemporary legal institutions,
3 what does it mean to actually engage with
4 indigenous law as *laws* and then we had the one
5 example, just the one very tiny... deceptively
6 simple story about Sioux Woman, and then Meta-
7 Principles that can be drawn, that have much larger
8 application and provide the interpretive balance
9 for doing the work. So I wonder if we could take a
10 very short break - five minutes - and then we have
11 another PowerPoint that we'll continue with.

12 **LE COMMISSAIRE:**

13 So we'll have a five minutes break? Okay.

14 SUSPENSION

15 -----

16 REPRISE

17 **LA GREFFIÈRE:**

18 Silence, please. You may be seated. The
19 commission is back in session.

20 **DR. VALERIE NAPOLÉON:**

21 So we'll start this next session with a very short
22 video; I think it's seven (7) or nine (9) minutes.

23 So...

24 (Visionnement)

25 **DR. HADLEY FRIEDLAND:**

1 So what we wanted to turn to now is to take a step
2 back on... We sort of started quite broadly and
3 then we went to very specific Cree legal principles
4 about the methodology, and we want to take another
5 step back and look at... look at some of the issues
6 that are often raised around gender, sexuality and
7 vulnerability, in indigenous laws, and find some
8 tools to... to effectively grapple with these.

9 So, the five (5) things we wanted to go
10 through this afternoon was: looking at historic
11 debates... stepping back and just reminding
12 ourselves that all law is an intergenerational
13 conversation, and seeing some commonalities between
14 conversations that have happened in the civil law
15 and the common law in Europe and indigenous laws
16 here; looking at the idea of legitimacy and
17 legalities, ways to be checking laws; looking at
18 the issue specifically of gender sexuality and
19 vulnerability, because we know it's a huge issue;
20 looking at human rights, not as a foil to
21 indigenous law, but within indigenous legal
22 traditions as part of indigenous law; and the
23 quickly looking at the ideas of accountability
24 transparency and scale for indigenous laws.

25 **DR. VALERIE NAPOLÉON:**

1 So it's really an important process to locate the
2 issues and work with Indigenous law within dangered
3 generational perspective, but it's also really
4 important to just locate it internationnaly.

5 And one of the things that's really useful is
6 to look at what's happening to people at different
7 points in time, and what does it mean for law of
8 different people at those different points in time.

9 And so... one of the things that this does is
10 look at specifically common law in Europeen history
11 and look at times of change, you know starting with
12 the fifteen hundreds and little bit earlier but
13 than going up to the seventeen hundreds and beyond,
14 and what we see is economic and political change
15 which was huge; there were... there was complete
16 upheaval in the different kinds of institutions
17 that existed. And notions of law were shifting all
18 of through this time, and there was general
19 insecurity, there was general uncertainty, and this
20 was at a point in history of people trying to find
21 there way in their worlds.

22 And so if we skip over to Canada, you know
23 part of what we've been talking about, with the
24 undermining of Indigenous law, is a similar kind of
25 profound disorientation, where Indigenous legal

1 institutions - social, political, economic and so
2 on - also have been undermined, creating
3 uncertainty, creating insecurity and, you know, a
4 moral crisis.

5 So there's... we can look at a particular
6 European history and we can look at similar parts of
7 that history being played out again in Canada, with
8 colonization.

9 So the other kinds of thing that were
10 happening was the development of the economic
11 system into what we know today, and the rise of the
12 modern state. The centralization of the government
13 powers from the small... smaller kingdoms and so
14 on, and in Canada for Indigenous peoples, you know,
15 the experience has been with the... a global
16 dynamic of state players, organizing themselves
17 internationally, and exploiting different countries
18 that had Indigenous peoples and have Indigenous
19 peoples, and so, in the face of that, Indigenous
20 peoples were also experiencing changes to trade,
21 international relations to treaties. There were
22 all different kinds of things that were going on
23 for Indigenous peoples that, you know, we can look
24 to what was happening again in Europe and see the
25 repercussions internationnaly for Indigenous

1 peoples.

2 One of the struggles was the role of law, and
3 the role of law as part of government, as a part of
4 dealing with the sovereign in Europe. And so that
5 law did become the most powerful instrument of the
6 sovereign.

7 And in Canada, law became the central
8 instrument for the displacement of Indigenous
9 peoples from land.

10 And the expectation in Europe was that...

11 What grew, what became expected was that law was
12 the way to maintain social ordering. It was a way
13 to... to maintain cohesion, rationality and unity.
14 So there was... the role of law expanded and took
15 on these other aspects of governance.

16 And for indigenous peoples, you know I went
17 through earlier with a different chart, the
18 reorganization, reorientation and classification of
19 Indigenous peoples corresponded with those kinds of
20 changes that took place in Europe.

21 Through european histories, there were
22 opposing ideas, lots of different ways of thinking
23 about law, huge arguments about whether law should
24 be written down, whether law could only remain
25 effective and pure, if it was only in the minds of

1 people, about who could make decisions.

2 There are... were incredible legal arguments
3 that took place within the history of the common
4 law.

5 And over, in Canada, we see that... you know,
6 the Canadian legal benchmarks became central to the
7 different... to the relationships between
8 Indigenous peoples in Canada: early constitutions,
9 the different kinds of agreements, the Royal
10 Proclamation and so on.

11 All of these became a part of indigenous legal
12 history as well. And within Europe, within all of
13 this upheaval in change, and different things...
14 uncertainty that people were experiencing, those
15 arguments that people were having, they were being
16 conducted by people who cared very deeply about
17 their world, about what was going to happen in
18 their world. They weren't abstract questions, they
19 were about civility, they were about order, they
20 were about being the best that people could be at
21 that point in time, for all different reasons, some
22 of which we can disagree with now. But, people
23 cared very deeply.

24 If we look over to Canada. We see that
25 Indigenous peoples have in fact survived

1 colonization, pragmatically, strategically,
2 sometimes accidentally. But people have not stayed
3 still, and Indigenous law didn't go anywhere, but
4 it is incomplete. And... so we have upheaval in
5 indigenous legal orders and we have people who care
6 very deeply about maintaining civility and order
7 and social cohesion during these times of change.

8 So the historic tensions within the common
9 law, they play out in all different areas of law.
10 They continue to play out in property law, in
11 torts, criminal law and so on. You know, that
12 happens today.

13 And so... and we can see similar kinds of
14 changes and depth, time depth temporal issues, with
15 Indigenous law. And so it helps to think about the
16 comparative experiences that people are having, and
17 what the consequences of those comparative
18 experiences are.

19 In Canada, elsewhere, there's this whole idea
20 of multijuridicalism which is being advanced in
21 many different quarters, and people trying to
22 figuring out, "where do we go with Indigenous law",
23 "what does it mean to have Indigenous law in the
24 world", "what will the relationship be between the
25 indigenous law and Canada."

1 And so, we can see some of the debates within
2 the Indigenous discourse. Some of the debates are
3 actually similar to the debates that carried out in
4 Europe, about what is the role of law, about who
5 should be empowered, how should it be accountable,
6 what is legitimate.

7 This means that the legal traditions, they're
8 alive, and they'll continue to be alive as long as
9 people can take that constructive, productive
10 engagement with it.

11 So the debates don't under... the debates, if
12 done constructively and if people are able to make
13 their way through them, strengthens legal orders,
14 legal theories strengthens legal orders as well,
15 and strengthens communities, strengthens by
16 strengthening the intellectual life. So that's
17 what we're wanting to see for Indigenous peoples.
18 And it is taking place in all different places: in
19 communities, in universities and elsewhere.

20 **DR. HADLEY FRIEDLAND:**

21 Can I just comment on that for a minute.

22 **DR. VALERIE NAPOLÉON:**

23 Yes.

24 **DR. HADLEY FRIEDLAND:**

25 Just going back... Let me just go back for just

1 one minute.

2 One thing I do want to be really clear about
3 is that, in talking about that there are some
4 similar legal debates happening within Indigenous
5 laws as the debate is happening in Europe in the
6 17th century, we're not suggesting at all that
7 Indigenous laws were behind European laws. I think
8 it's... It's probably obvious, but I think it's
9 really important because of some of those miss we
10 talked about earlier.

11 What we're talking about is different
12 histories and points of upheaval.

13 It's also important to talk about that,
14 because the very existence of Indigenous law has
15 been denied so strenuously for so long in North
16 America, and particularly Canada, there's a version
17 of that myth of lawlessness, where if any debate is
18 raised, people will say, "okay, you... there's no
19 way Indigenous people could have their own justice
20 program, because listen... I just listened to Jo
21 and Bob argue about... about this Cree law and what
22 they should do in this case."

23 That again is a standard that doesn't happen
24 in any other law. Just like after first-year law,
25 the answer is always, "it depends". There's the

1 old joke: if you're standing in a room with two
2 Senior lawyers, how many opinions are there? At
3 least three (3)." And the reality is, when we hear
4 that, it's a compliment. It's not... It's not...
5 It's a joke that's a compliment that says: when you
6 know law that well and you care that deeply, you
7 have devoted your life to it. People have strong
8 opinions and vigorous debates. And in fact, that's
9 a sign of the vitality of law.

10 So I just wanted to really stressed that point
11 because of some of those miss that... that when
12 we're seeing debate, what we're seeing is living
13 law. We should be excited that... that, to me,
14 actually, would be... as opposed to people, say,
15 "there's no way there could be a justice program
16 here because people disagree..."... I think we
17 come to the opposite conclusion where we say,
18 "Excellent. There's vigorous debate, absolutely,
19 these people are ready for a justice program." So.

20 **DR. VALERIE NAPOLÉON:**

21 Yes. In some of that debate, historically, for
22 European law, has been around gender; whether women
23 could own property, whether women could vote and so
24 on. And for some Indigenous peoples, these are
25 current debates that gender continues to... to be

1 an issue, and... in a both productive and not
2 productive way, as we'll get to...

3 So, questions of legitimacy and what... what
4 is meant here is, what are the signals of
5 legitimacy in different legal orders.

6 And this is one of the questions to ask in
7 terms of, what is it that enables people to uphold
8 a legal decision even if they don't get their own
9 way. What is it that's required, in the legal
10 processes and in the decisions, that will enable
11 people to uphold them so that they become part of
12 the public precedent, part of the public memory of
13 that society, part of the normative order.

14 And we talked briefly about societal
15 aspirations, and there's an internal logics and
16 legal perspectives and the different ways that
17 people create meaning. And all of these kinds of
18 questions that are once to... to pay attention to
19 in doing the research, and doing the... and in
20 ensures that, the way that law's engaged with and
21 the end result of that engagement remains alive,
22 remains in the present, as opposed to being
23 retrospectively placed in the past.

24 And law, as a part of... as a distinct mode of
25 governance, is always within the society that

1 comprises it, which means that the struggles of
2 that society, whatever it is that we're trying to
3 deal with, whether it's violence or whether it's
4 rationalization or poverty or whatever else we're
5 trying to deal with, we have to pay attention to
6 what those surrounding struggles are around law.
7 And so, that means for Indigenous societies,
8 Indigenous communities, we have to also critically
9 look at what is the context around these, you know,
10 particular legal issues that arise.

11 So there's a whole question of what makes law,
12 law. And Lon Fuller is a very useful legal
13 theorist, who has done a lot of work that's
14 important to my own work and to other's, and one of
15 the things that... that he said out was there's
16 some basic things that have to be a part to be a
17 legal order in order for it to be law, in order for
18 it to be a legal order.

19 And if you're missing any of these, you might
20 have a system of governance, but it's not going to
21 be law, it's going to be, you know, other kinds of
22 public ordering.

23 And so these are useful to look at, when
24 thinking about what are the expectations and what
25 are the ways that we can understand Indigenous

1 legality, what... when we talk about processes,
2 when we talk about authoritative decision makers,
3 Meta-Principles and so on.

4 We can also think about them in terms of
5 legalities, that there are established rules, that
6 there are people get to know about those rules,
7 they're publically available, either through oral
8 histories or through other means. That we can
9 retroactively... retrospectively apply them, that
10 they be clear, that whatever is being talked about,
11 people have... it's understandable.

12 There has to be congruence in the different
13 parts of a legal order as well as who the legal
14 players are. There's obligations that are... that
15 exist, and those have to be possible for the people
16 who are in that legal order to actually fulfill.

17 And there's some constancy through time. That
18 doesn't mean that change can't take place, but in
19 terms of the integrity, the cohesion and so on, of
20 a healthy legal system, there's constancy in the
21 kinds of changes that are made. And then the last
22 one, there is that there be some... there be a
23 relationship that makes sense between government
24 and the law, between who has authority and the
25 actual law.

1 So, we can look at these and we can say,
2 "okay, so here's one understanding of what a legal
3 system requires in order for it to be law", and
4 then we can start thinking about what are the
5 similar kinds of legalities that exist... similar
6 or different kinds of legalities that exist, in
7 order for Indigenous law to be law.

8 And it's a critical piece of the work, so that
9 we don't just get into declaring what law is, as if
10 it's just philosophy or just spirituality or just
11 rules to be followed, it's much more than that.

12 Kirsten Rundel is another legal theorist who
13 is taking on Lon Fuller's work, and so she has, in
14 her work, her arguments are around human dignity
15 and that that is a legality within any system of
16 law to be law.

17 Her other legality... - and again she's
18 distilling Fuller's work - is agency, it's not
19 about obedience, it's about everybody being a
20 reasoning agent, legal agent within a legal order,
21 particularly when someone is affected by law. And
22 that again, back to the question of surrounding
23 context, law is both constituting and it's
24 constitutive. It's a part of society, as well as
25 forming society. So it's lived and it provides

1 structuring and leadership and overall order.

2 And I just note on the pictures. The pictures
3 are photographs that I've taken over the years.

4 We've talked about how Indigenous law has continued
5 to be in the world despite colonization, despite
6 the fact that it's been undermined and eroded.

7 And, just like these little plants that grow in
8 very difficult circumstances, we see indigenous
9 laws as having a similar kind of vitality and
10 resilience in the face of... great oppression.

11 So the little plants are different form of
12 representation of indigenous law.

13 So you probably are familiar with H.L.A. Hart,
14 another well-known legal theorist. Hart did a lot
15 of works, but one of them was to look at different
16 ways that a legal order is organized. And he said,
17 "there has to be primary rules, so things which are
18 substantive, which form the substance of the
19 obligations that we have."

20 And he also said that, "there has to be
21 secondary rules which, at a minimum, we have to
22 collectively know, when a law is a law. We have to
23 have processes and the ability to do that. We also
24 have to know when to change the law, and the power
25 to create law. And this can include legislation,

1 it includes other kinds of processes as well. And
2 we have to know when a law is broken, and this
3 includes the power to adjudicate."

4 So again, this is another, you know... it's
5 drawing on the resources of the world, to inform
6 the work of Indigenous law not just here in Canada
7 but elsewhere. So, Matthew Fletcher for instance,
8 who we've referred to as one of the Tribal Court
9 judges, has taken this framework and has applied it
10 to Indigenous law that he works with.

11 So it's another useful framework, it's another
12 tool, that allows engagement with Indigenous law as
13 law. And it also... it's enough of a substantive
14 framework so that... so that we can get beyond
15 declarations by individuals about what law is. It
16 includes accountability, it includes critical
17 understanding of law, that people can actually work
18 with. That's far beyond philosophy, far beyond
19 some of the ways that Indigenous law has been
20 described.

21 **DR. HADLEY FRIEDLAND:**

22 I was just going to add, because I think we did...
23 I don't know if it's printed, but I did add it to
24 our list. What is your chapter of your
25 dissertation where you talked about Hart?

1 **DR. VALERIE NAPOLÉON:**

2 The theory chapter.

3 **DR. HADLEY FRIEDLAND:**

4 The Theory chapter.

5 **DR. VALERIE NAPOLÉON:**

6 The theory chapter. In Dr. Napoéon's doctoral
7 dissertation, where she takes up Gitksan law,
8 she's... she's written about H.L.A. Hart and
9 applied it to the Gitksan legal order. And I think
10 one of the things that is powerful again about that
11 is Hart himself, he's one of the legal theorists,
12 who talks about primitive people and often as a
13 foil.

14 Again, he's not talking about real Indigenous
15 people, he probably never met an Indigenous person
16 in his life, but... there has... Hart is sometimes
17 being used, and this theory of primary and
18 secondary rules has in sometimes been used as a way
19 of saying "oh, indigenous people don't have law",
20 or "it's just customary law, it's just these
21 primary rules, not the secondary rules."

22 And the theory chapter, I think in Val's... in
23 Dr. Napoléon's dissertation, really shows the power
24 of turning that, of getting rid of those foils and
25 tropes; Indigenous people as this, you know,

1 primitive person in the theorist... But applying
2 what's useful in them and developing really a body
3 of legal theory that is truly global, truly global,
4 and that includes indigenous law. And I think
5 as... I think it's a real benefit to legal theory
6 in general, that as more and more people start
7 really engaging and articulating indigenous laws,
8 we're going to start understanding things about
9 law, what law can be, what... what law's limits
10 are, in a way that is going to enrich law and legal
11 theory on a global... in a global way.

12 It's not Indigenous people's jobs to enrich
13 the global legal theory, but it is a real benefit,
14 and an exciting move.

15 **DR. VALERIE NAPOLÉON:**

16 Yes. So, and most of these theorists are talking
17 about centralized legal orders, and so... in
18 applying them to Indigenous legal orders, which are
19 decentralized non-state legal orders, there's
20 thinking that has to go on in terms of... in terms
21 of that application.

22 There's a number of theorists from Africa -
23 - Gordon Woodman and others - who've talked about:
24 does Africa have to create its own african legal
25 theory or can it draw on... legal... intellectual

1 resources from elsewhere. Does it always have to...
2 recreate everything or can they build on the
3 intellectual resources of others.

4 And, it's one of those debates I... the
5 approach that we've taken is that, these are ideas
6 of the world, and they're useful and they're
7 helpful to the... actually doing the work.

8 So, in thinking about what are indigenous
9 legalities, what is it that makes indigenous law,
10 law. There are two (2) that have been the focus of
11 reason work: one is gender, and the importance of
12 gender in sexuality and vulnerability in the work,
13 and then there's human rights. And understanding
14 that within Indigenous legal orders, within
15 Indigenous law, there are constructs of human
16 rights.

17 And to take that, we can identify those, we
18 can understand how they work and we can... take
19 that further and... and argue that human rights,
20 for Indigenous people, this is Indigenous human
21 rights from within Indigenous law, is an integral
22 part of Indigenous self-government and integral
23 part of Indigenous citizenries today.

24 And so, understanding that these are essential
25 aspects to Indigenous societies and need to be a

1 critical part of any future work with Indigenous
2 law.

3 So that's part of what we're working with,
4 with legalities.

5 And in the short film that you saw, *The*
6 *Indigenous Law On Demand* film, there's... I talked
7 about a spectrum, and the spectrum, as we imagine
8 it, is a... there is the reality of missing and
9 murdered Indigenous women and girls, across Canada
10 and elsewhere in the world, that is a part of our
11 experience today. And that is at one end of the
12 spectrum. And on that same spectrum are all of the
13 other ways that Indigenous women are thought about
14 or are treated or are living with the consequences
15 of different kinds of decisions.

16 And so I think that, at the other end of the
17 spectrum of the missing... of the violence, the
18 other end of the spectrum, is the reification of
19 Indigenous women, the idealization of the past
20 is... and the fundamentalization of Indigenous
21 women's roles. And that... that's... it creates a
22 very unrealistic expectations of Indigenous women
23 that Indigenous women cannot live up to. And then,
24 on that spectrum, in every community, there's
25 different decisions that are made, that have

1 material consequences; whether it's housing or
2 whether it's employment or other kinds of decisions
3 that affect Indigenous women.

4 So the spectrum, they are connected, and
5 the... they... and all parts of that have to be
6 dealt with.

7 And one of the questions that I often ask,
8 when people are thinking about the missing and
9 murdered Indigenous women and girls, is to think
10 about what happens to our imagination when we
11 understand the missing and murdered Indigenous
12 women and girls as legal agents, as human beings,
13 who within the circumstances that they were in,
14 made the best possible decisions that they could
15 have made. And to do that thinking and that
16 imagination so that it isn't just Indigenous women
17 and girls as victims.

18 And if we can shift that perspective, what it
19 means is that it forces us to think about and to
20 consider what are the conditions of violence that
21 are created, and what are the conditions of
22 vulnerabilities that are also created in
23 communities as well as in the rest of Canada.

24 The... one of the... the third question there
25 has to do with how do we respond when there are

1 distortions of Indigenous law that are advanced as
2 if they are legitimate representations. And I want
3 to give an example from another... from a national
4 event where a very elderly indigenous woman was
5 asked to speak to... law from her society. And
6 what she described was being part of an arranged
7 marriage when she was very young, and during her
8 marriage, she was disciplined. And that, as a
9 result of that disciplining, she... they have a...
10 they had a good marriage.

11 And this was a... testimony from her which
12 paralyzed everybody in the room. Nobody knew how
13 to respond to that, because how could one respond.

14 And thinking about it, there's a couple of
15 things that are really important: one is to imagine
16 the position that she had been placed in, which
17 was, she'd been part of an arranged marriage, she
18 experienced violence through her marriage, and
19 she's asked to talk about law and how else is she
20 going to do it, except to find meaning in her
21 experience. And to find lawfulness in her
22 experience.

23 So, that's... part of what she's trying to do
24 is to maintain her dignity, in how she recounts law
25 that affects her.

1 The other thing to keep in mind is, we would
2 never accept such a declaration about canadian law.
3 Like, any law that had to do with violence,
4 intimate violence in a relationship or marriage,
5 would be asked, as a legal question, to be
6 determined by the precedent and by the processes
7 and by the law of a legal order.

8 Just the mere declaration of it doesn't make
9 it law. But, what happens is that, that's often
10 what's accepted as law for Indigenous peoples. And
11 the legal processes, what to do when the law is
12 broken, all of the other kinds of legalities go out
13 the window, because someone stands up and says,
14 >this is what law is", where in fact, it's one
15 person's opinion about what law is, but it's not a
16 legal opinion and it's not been dealt with as a
17 legal issue.

18 So, in looking at gender and sexuality and
19 violence... vulnerability rather, there's... there
20 are things that we have to pay attention to, in
21 doing the work, so that... so that the resources
22 that are capable of dealing with internal
23 oppressions from within Indigenous law can be
24 brought to bear, and... so that Indigenous women
25 aren't held up to unrealistic standards, which they

1 can't live up to, and which can... and the failure
2 to live up to those standards have sometimes been
3 used as a justification of violence against
4 Indigenous women.

5 **DR. HADLEY FRIEDLAND:**

6 And I think part of that - and we have the paper by
7 Dr. Emily Snyder and Dr. Napoléon and John Borrows,
8 speaking to this, and I think that's a really
9 powerful piece that takes up a lot of these issues.

10 And I think part of the reason this is really
11 important to be addressing, when we're advocating
12 for the revitalization of Indigenous laws, is the
13 fact that sometimes the rhetoric really doesn't
14 match the reality. And we're wanting to pay
15 attention to those conditions of vulnerability that
16 Val is talking about, within communities and
17 between communities, where that creates sose
18 conditions where violence is more likely to happen
19 or to be unnoticed or not stopped.

20 And also, part of this is about recognizing,
21 and that's part of talking about the historic
22 development too, is just remembering with law,
23 choices are always being made. We're always making
24 choices about what law to bring forward from the
25 past or the present, what law to change, when to

1 change law, when again we need to draw on bigger
2 principles when a law's no longer working. And...
3 That is part of... Sometimes people talk about the
4 right of law making, and that's a powerful part of
5 the right of law making, to be able to say, "that
6 piece of the past we're... as John said in the
7 video, that piece of the past, we're not going to
8 bring that one forward, that one we see has had
9 really negative consequences on certain people in
10 our society", I mean, "this piece of the past, it
11 makes a lot of sense within our society, this one
12 we'll bring forward."

13 So, part of that, I think, is just recognizing
14 that, that those choices are always happening, and
15 we can... just like how I said with the story, I
16 choose to not use the term "crazy" and "sick", I
17 think that this is not an appropriate respectful
18 dignified way of describing what's going on with
19 someone that may be struggling with a behavioral or
20 even mental health issue.

21 We can make those choices, and we do make
22 those choices, so just always paying attention to
23 that, because... because they're such profound and
24 real consequences to real people, and we can't ever
25 forget that in our aspirations. We can't ever

1 forget that, the reality of the day-to-day is...
2 can be very dangerous for many people.

3 **DR. VALERIE NAPOLÉON:**

4 So, with this issue, gender, sexuality, sexual
5 orientation, we also need critical tools that are
6 responsible, and often many of the recordings of
7 oral histories or stories - depending on how
8 they're recorded of course, but - issues of gender
9 and sexuality, for lots of those stories, they're
10 not dealt with. And what ends up happening is that
11 there's... women in the stories can just be...
12 experience lateral violence or... and that...
13 what's happening to the women in their experience
14 is, is not taken up, because they're put to the
15 side.

16 So this particular framework is one that can
17 be applied to working with oral histories, working
18 with different kinds of stories and resources.

19 It's been developed by... it's adapted from the
20 work of Dr. Emily Snyder, who's now teaching at the
21 University of Saskatchewan, and it's a similar kind
22 of process of causing a shift in attitudes and
23 assumptions about gender. And so, what she's
24 arguing is that, "we have to move to the general
25 questions, we have to get specific in the kinds of

1 questions that we're asking about gender in oral
2 histories and stories."

3 And so, rather than asking "what are the
4 traditional gender roles", for example, we look at
5 what are our own understandings about gender and
6 sexuality. And what's even more important is how
7 is it that our understandings are shaping our legal
8 interpretations, and where in that should we be
9 questioning our own understandings about gender and
10 sexuality.

11 We should also be looking at... instead of
12 asking just about cultural values - and this is
13 similar to the earlier shifts - so instead of
14 looking at what are the cultural values about
15 gender and sexuality and sexual orientation that we
16 actually look at, what are the kinds of principles
17 that are going to help guide our decisions about
18 gender and sexuality and orientation.

19 So, I've talked about principles of fairness
20 and safety and inclusion or participation, and the
21 overarching Meta-Principles and questions of
22 legality. So there's... there's different kinds of
23 resources that can be brought to these issues, in
24 the analysis and the work that people are doing, so
25 that these are capable of being a part of how

1 people govern themselves today.

2 The third section has to do with looking at,
3 instead of asking again what is culturally
4 appropriate; which often just lend ways to police
5 Indigenous women's behaviour and clothing, to
6 wearing skirts or other kinds of things, instead of
7 being stuck there, shifting and looking at
8 assumptions about how legal subjects engage with
9 the law, in the way that different genders engage
10 with the law, the way that law has different
11 consequences depending on one's gender, on what
12 assumptions underlie Indigenous law, how Indigenous
13 law treats gender sexuality, sexual orientation.

14 So it's asking the questions, that move from a
15 static position, about what's culturally
16 appropriate and assuming that that's what one
17 perpetuates, to looking at what are the assumptions
18 and how do those need to change if they do today.

19 The overall shift is moving from, again, the
20 notion of just rules, in this case about gender and
21 sexuality and orientation, to looking at how are
22 indigenous laws gendered, how... and the material
23 consequences of Indigenous laws that are played
24 out, how are they gendered.

25 And, instead of just looking at sort of

1 idealized versions of gender balance in the past,
2 and some past harmony, looking at what are the
3 deliberative processes today, and approaches today
4 that are anti-oppressive and anti-colonial, in the
5 legal relations that people at the community level
6 have, and in other relations as well.

7 In continuing with the development of tools,
8 for dealing with women and gender, sexuality, part
9 of looking at the conditions of violence and
10 condition of vulnerabilities is that where... you
11 know, again, those spaces of lawlessness, where
12 Indigenous law has been undermined and where
13 Canadian law has failed, it's in those spaces of
14 lawlessness that violence happens.

15 And again, we need different kinds of
16 practical tools to deal with those realities and
17 those experiences.

18 So this is another analysis that can be
19 applied to oral histories, as well as to practices
20 as well as to other kinds of resources, Indigenous
21 legal resources.

22 So it's being specific about who's involved,
23 in decision-making, and like, who's included or
24 excluded. It's looking at whether responses and
25 resolutions have different kinds of results,

1 depending on gender or sexuality or orientation.

2 It's looking at what's overlooked, like what can
3 some people expect and other people are unable to
4 achieve in their lives. And then looking at the
5 overall gender dynamics that are in the material.

6 So it's... we've used this at community... in
7 community processes, we've used it in classroom,
8 academic classrooms, community workshops, so
9 it's... it's a very effective way of forcing a
10 critical gendered analysis with Indigenous law,
11 that's... And it's a kind of thing that we
12 absolutely have to do with Indigenous law, so
13 that... so that it's useful for women and girls
14 today.

15 So we have another section, the [decs]
16 legality here is on human rights. But... and so,
17 one of the people who I'll be drawing on for human
18 rights is Sally Engle Merry, she's a legal
19 anthropologist and has worked internationally on
20 gendered violence, as well as on human rights. So
21 she's done both, and tomorrow I'll refer to her on
22 human rights.

23 But, here's some of her comments on gendered
24 violence, and... So she is also advocating the
25 locating of violence within social arrangements,

1 that we pay attention to how we organize ourselves
2 in a way that enables or supports violence or not.
3 And so she's basically arguing that, violence,
4 similar to the spectrum arguments that are made
5 earlier, it's never separate from the rest of
6 society, where you have oppressions that are based
7 on race or class or... or strength, other kinds of
8 conditions that are upheaval that societies are
9 experiencing, violence is always a part of other
10 things that are going on in a society.

11 So similar for the violence against Indigenous
12 women and girls, it's connected to all the other
13 things that are going on in Canada, as well as
14 within Indigenous communities.

15 And identifying any violence or threat of
16 violence, it's going to be... you know, this is
17 changed through time, and it is going to continue
18 to change as we... as our own consciousness about
19 what violence and what is acceptable and what is...
20 what are legalities and so, on change as well.

21 And so, this means making sure that we have
22 ongoing conversations in which these issues are
23 taking up in a way that doesn't allow the
24 stereotypes, or the fundamentalism and... what some
25 have called "legal evangelicism" to take place

1 - Rod McDonald uses the term "legal evangelicalism"
2 in his work, and it's a helpful... and we can
3 explain that further.

4 So, the next section that we go on to is human
5 rights. But I'm wondering... for some guidance,
6 like it's four thirty (04:30) now, whether you want
7 to... We can switch to tomorrow...

8 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

9 Est-ce qu'on a encore du temps Monsieur le
10 Commissaire, pour continuer un peu?

11 **LE COMMISSAIRE:**

12 As you wish, it's four thirty (04:30)... How long
13 would you need?

14 **DR. VALERIE NAPOLEON:**

15 Well...

16 **LE COMMISSAIRE:**

17 Because we still have tomorrow and...

18 **DR. VALERIE NAPOLEON:**

19 Yes.

20 **LE COMMISSAIRE:**

21 ... the day after.

22 **DR. VALERIE NAPOLEON:**

23 We'll continue... we'll continue tomorrow then.

24 **LE COMMISSAIRE:**

25 Continue tomorrow?

1 **DR. VALERIE NAPOLÉON:**

2 Yes, I think.

3 **LE COMMISSAIRE:**

4 So we'll adjourn till nine thirty (09:30) tomorrow
5 morning?

6 **ME MARIE-ANDRÉE DENIS-BOILEAU:**

7 Maybe... Est-ce que... Maybe I will... Because
8 we have a lot of documents to file.

9 **LE COMMISSAIRE:**

10 Because we have a lot of documents to file.

11 **ME MARIE-ANDRÉE DENIS-BOILEAU:**

12 Yes.

13 **LE COMMISSAIRE:**

14 Go on.

15 **ME MARIE-ANDRÉE DENIS-BOILEAU:**

16 So I'll... Maybe we'll start today, at... So, it
17 will be easier that way, because we have about
18 sixty (60) documents we have to file into evidence.

19 So... Yes.

20 We will start now and... we'll make it in
21 [parts].

22 So, Madame la Greffière, at what number are
23 we now, for filing the...?

24 **LA GREFFIÈRE:**

25 P-250.

1 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

2 P-250 you say? Okay. So we will file into
3 evidence the two (2) PowerPoints, en liasse. Alors
4 à B...

5 **LA GREFFIÈRE:**

6 Under P-2...

7 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

8 Bien, on peut le faire en français en fait là,
9 le...?

10 **LA GREFFIÈRE:**

11 Sous P-250.

12 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

13 Sous P-250, oui, les deux (2) présentations
14 PowerPoint.

15 **- PIÈCE COTÉE P-250 -**

16 Ensuite, sous P-251, il y a une bibliographie
17 qui était préparée par les deux témoins. P-251.

18 **- PIÈCE COTÉE P-251 -**

19 Sous P-252, John Borrows, Canada's Indigenous
20 Constitution.

21 **- PIÈCE COTÉE P-252 -**

22 P-253, l'article de Lens Finch, The Duty to
23 Learn: Taking account of Indigenous Legal Orders
24 and Practice.

25 **- PIÈCE COTÉE P-253 -**

1 P-254, Sébastien Grammond, Indigenous Law
2 Making in Terms of Coexistence: Indigenous Peoples
3 in Canadian Law.

4 **- PIÈCE COTÉE P-254 -**

5 Sous P-255, Val Napoléon, Thinking about
6 Indigenous Legal Orders.

7 **- PIÈCE COTÉE P-255 -**

8 P-256, Val Napoléon et Hadley Friedland,
9 Indigenous Legal Traditions: Roots to Renaissance.

10 **- PIÈCE COTÉE P-256 -**

11 Sous P-257, Jeremy Weber: The Grammar of
12 Customer Relaw.

13 **- PIÈCE COTÉE P-257 -**

14 Sous P-258, le chapitre 2 du volume 6 du
15 rapport final de la Commission de Vérité et de
16 Réconciliation.

17 **- PIÈCE COTÉE P-258 -**

18 Sous P-259, le texte de John Borrows, *Heroes,*
19 *Tricksters, Monsters and Caregivers*, Indigenous
20 laws and Legal education.

21 **- PIÈCE COTÉE P-259 -**

22 Sous P-260, Hadley Friedland et Val Napoléon,
23 Gathering the Threads, Developing a Methodology for
24 Researching and Rebuilding Indigenous People Legal
25 Traditions.

1

- PIÈCE COTÉE P-260 -

2

Sous P-261, Sarah Morales, Stl'Ul Nup: Legal
Landscapes of the Hul'Qumi'Num Mustimuhw - excuse
my pronounciation.

5

- PIÈCE COTÉE P-261 -

6

Sous P-262, Val Napoléon, Hadley Friedland, An
Inside Job: Engaging with Indigenous Legal
Traditions Trough Stories.

9

- PIÈCE COTÉE P-262 -

10

Sous P-263, Val Napoléon, Angela Cameron,
Colette Arcand and Dahty Scott: Where's the Law in
Restorative Justice?

13

- PIÈCE COTÉE P-263 -

14

Sous P-264, Nancy Sandy, un texte du Windsor
Yearbook Access of Justice, on Laws from the Lands
from St'Exelemc Nation - can't pronounce it right.

17

- PIÈCE COTÉE P-264 -

18

Sous P-265, The AJR Project: Anishinaabek
Legal Traditions Report.

20

- PIÈCE COTÉE P-265 -

21

Sous P-266, Harold Cardinal, Nation Building:
Reflections of a Nihiyaw (Cree). That was
mentioned today.

24

- PIÈCE COTÉE P-266 -

25

Sous P-267, Hadley Friedland, The AJR Project,

1 Cree Legal Traditions Report.

2 - PIÈCE COTÉE P-267 -

3 Sous P-268, Hadley Friedland's chapter four
4 (4) in five (5) of her Ph.D. dissertation...

5 - PIÈCE COTÉE P-268 -

6 Sous P-269, un texte de Sébastien Grammond et
7 Christiane Guay, qui a déjà été déposé en version
8 française en pièce, sous la pièce P-92, mais on va
9 la déposer en anglais aujourd'hui: Understanding
10 Innu Normativity in Matters of Customary Adoption
11 and Care.

12 - PIÈCE COTÉE P-269 -

13 Sous P-270, la thèse de doctorat de la
14 professeure Val Napoléon, Ayook: Gitksan Legal
15 Order, Law and Legal Theory.

16 - PIÈCE COTÉE P-270 -

17 Sous P-271, le Indigenous Legal Traditions
18 Core Workshop Materials de Val Napoléon et Hadley
19 Friedland en liasse, versions française et
20 anglaise...

21 - PIÈCE COTÉE P-271 -

22 Sous P-272, Angela Cameron, Stopping the
23 Violence: Canadian Feminist Debates on Restorative
24 Justice and Intimate Violence.

25 - PIÈCE COTÉE P-272 -

1 Sous P-273, un texte de Val Napoléon,
2 Aboriginal Discourse: Gender Identity and
3 Community.

4 **- PIÈCE COTÉE P-273 -**

5 Sous P-274... - ça va toujours Madame la
6 Greffière?

7 **LA GREFFIÈRE:**

8 Um-hum.

9 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

10 Oui. Val Napoléon, Raven's Garden: A Discussion
11 about Aboriginal Sexual Orientation and Transgender
12 Issues.

13 **- PIÈCE COTÉE P-274 -**

14 Sous P-275, Emily Snyder, Val Napoléon et John
15 Borrows, Gender and Violence: Drawing on Indigenous
16 Legal Resources...

17 **- PIÈCE COTÉE P-275 -**

18 Sous P-276, un texte de Marie-Ève Sylvestre et
19 Marie-Andrée Denis-Boileau - moi-même - qui a déjà
20 été déposé en version française à P-58, on va le
21 déposer en anglais: Ipeelee and the Duty to Resist,
22 P-276.

23 **- PIÈCE COTÉE P-276 -**

24 Sous P-277, un texte de Hadley Friedland,
25 Navigating Through Narrative of Despairs: Making

1 Space for the Cree Reasonable Person in the
2 Canadian Justice System.

3 **- PIÈCE COTÉE P-277 -**

4 Sous P-278, encore Hadley Friedland, Tragic
5 Choices and the Division of Sorrow: Speaking about
6 Race, Culture and Community Traumatization in the
7 Lives of Children.

8 **- PIÈCE COTÉE P-278 -**

9 Sous P-279, Naomi Metallic, Indian Act By-
10 Laws: A Viable Means for First Nations to
11 (Re)assert Control Over Local Matters now and not
12 Later.

13 **- PIÈCE COTÉE P-279 -**

14 Sous P-280, Val Napoléon et Hadley Friedland,
15 chapter 11, Accessing Tully, Political Philosophy
16 for the Everyday and the Everyone.

17 **- PIÈCE COTÉE P-280 -**

18 Sous P-281, Sherene H.Razack, Gendered Racial
19 Violence and Spatialized Justice: The Murder of
20 Pamela George.

21 **- PIÈCE COTÉE P-281 -**

22 Sous P-282, Wrapping our Ways Around them:
23 Aboriginal Communities and the CFCSA Guidebook, de
24 Ardith Walkem.

25 **- PIÈCE COTÉE P-282 -**

1 Sous P-283, un texte de Geneviève Motard et
2 Mathieu-Joffre Lainé, Prendre le Droit Autochtone
3 au Sérieux: Entretien avec Hadley Friedland. Puis
4 on va déposer également les documents que la
5 professeure Napoléon nous a donnés.

6 **- PIÈCE COTÉE P-283 -**

7 Donc sous P-284, Mikomosis and the Wetiko
8 Graphic Novel.

9 **- PIÈCE COTÉE P-284 -**

10 Sous P-285, The Teaching Guide de Mikomosis
11 and the Wetiko.

12 **- PIÈCE COTÉE P-285 -**

13 **LA GREFFIÈRE:**

14 Excuse me?

15 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

16 C'est un teaching guide.

17 **LA GREFFIÈRE:**

18 C'est un teaching guide. Ok.

19 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

20 So...

21 **LA GREFFIÈRE:**

22 From... You said? What's the name of the authors?

23 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

24 It's Indigenous Law Research Unit. C'est un PDF,
25 je l'ai envoyé ce matin celui-là.

1 **LA GREFFIÈRE:**

2 Ah, d'accord. Si on l'a en PDF, pas de problème.

3 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

4 Sous P-286, Gender Inside Indigenous Law Casebook.

5 Un document du Indigenous Law Research Unit.

6 **- PIÈCE COTÉE P-286 -**

7 P-287, A Toolkit for Unreserved Matrimonial
8 real Property Dispute Resolution, encore un
9 document du Indigenous Law Research Unit par
10 professor Napoléon, professor Friedland et Jessica
11 H.

12 **- PIÈCE COTÉE P-287 -**

13 **LA GREFFIÈRE:**

14 I have these documents in PDF.

15 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

16 Do you have them in PDF?

17 **DR. VALERIE NAPOLÉON:**

18 They're online.

19 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

20 Oh, they're all online?

21 **DR. VALERIE NAPOLÉON:**

22 Yes.

23 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

24 Ok, on va pouvoir...

25 **LA GREFFIÈRE:**

1 They're online. Okay.

2 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

3 ... les trouver. Thank you.

4 Et sous P-288, Gender inside Indigenous Law
5 Toolkit; encore du Indigenous Law Research unit.

6 So we're good?

7 - PIÈCE COTÉE P-288 -

8 **LE COMMISSAIRE:**

9 That's it?

10 **Me MARIE-ANDRÉE DENIS-BOILEAU:**

11 Yes, that's it.

12 **LE COMMISSAIRE:**

13 So, have a good evening, see you tomorrow, nine
14 thirty (09:30) ?

15 **DR. HADLEY FRIEDLAND:**

16 Yes.

17 **LA GREFFIERE:**

18 All rise, please. On recess until tomorrow.

19 -----

20

21

22

23

24

25

1

2 Je soussignée, **Ann Montpetit**, sténographe
3 officielle bilingue, certifie sous mon serment
4 d'office que les pages qui précédent sont et
5 contiennent la transcription exacte et fidèle des
6 notes recueillies au moyen de l'enregistrement
7 mécanique, le tout hors de mon contrôle et au
8 meilleur de la qualité dudit enregistrement, le
9 tout conformément à la loi;

10

11 Et j'ai signé:

12

13



14

15

16

Ann Montpetit, s.o.b.