

**Reclaiming the Language of Law: The Contemporary Articulation and
Application of Cree Legal Principles in Canada**

by

Hadley Louise Friedland

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Abstract

The Truth and Reconciliation Commission of Canada states the revitalization and application of Indigenous laws is vital for re-establishing respectful relations in Canada. It is also vital for restoring and maintaining safety, peace and order in Indigenous communities. This thesis explores *how* to accomplish this objective. It examines current challenges, resources and opportunities for recovering, learning and practicing Indigenous laws. It develops a highly structured methodology for serious and sustained engagement with Indigenous legal traditions, based on reviewing existing methods, then combining the methods of two leading Indigenous legal scholars, John Borrows and Val Napoleon. This method approaches Indigenous stories as jurisprudence. It uses adapted legal analysis and synthesis to identify Indigenous legal principles from stories and oral histories and organize these principles into a rigorous and transparent analytical framework. These legal principles can then be readily accessed, understood and applied.

This thesis demonstrates this adapted legal analysis method is teachable, transferable and replicable, using research outcomes of Cree legal principles responding to violence, harms and conflicts. Through the example of a foundational Cree legal principle, “*wah-ko-to-win*” (our inter-relatedness), it demonstrates how this method can also deepen our understanding of background or ‘meta-principles’ within Indigenous legal traditions, which can help us interpret, apply and change laws in legitimate ways. It then demonstrates how the research outcomes from this method may be understood and applied by Indigenous communities, through a case study exploring the development of a contemporary Cree criminal justice process

based on Cree legal principles, by and with the *Aseniwuche Winewak*. Finally, it examines the current narratives about the appalling rates of violence against and over-incarceration of Indigenous people in Canada and the existing gap between legitimacy and enforcement. It proposes Indigenous legal reasoning as a bridge, and develops the conceit of the “reasonable Cree person” to examine whether principled Cree legal reasoning can be explicitly recognized and implemented within Canada’s current political and legal systems. It concludes that, while there are many potential spaces for doing so, more intellectual work is necessary first, in which both Indigenous and non-Indigenous people engage with Indigenous laws as *laws*. It is this kind of deep engagement that is necessary to effectively and respectfully operationalize the Truth and Reconciliation Commission’s compelling calls for greater recognition of Indigenous laws in Canada.

Preface

This thesis is an original work by Hadley Friedland.

The research project, of which this thesis is a part, received research ethics approval from the University of Alberta Research Ethics Board, Project Name: “Reclaiming the Language of Law: Exploring the Contemporary Articulation and Application of Cree Legal Principles in Canada”, No. Pro00049208, April 27th, 2015.

Chapter 2 of this thesis has been published as Hadley Friedland, “Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws” (2013) 11 (2) *Indigenous Law Journal* 1.

Parts of this thesis are reproduced in reports that, while unpublished, are publically available.

The Cree legal summary in Chapter 3 has been reproduced in Hadley Friedland, *The AJR Project Cree Legal Traditions Report* (May 2014), prepared for the Accessing Justice and Reconciliation Project, on file with the University of Victoria Indigenous Law Research Unit, the Indigenous Bar Association, the Truth and Reconciliation Commission of Canada, the Ontario Law Foundation, and the *Aseniwuche Winewak*, online:

http://indigenoubar.ca/indigenoulaw/wpcontent/uploads/2012/12/cree_summary.pdf. I relied on research and interviews conducted by Kris Statnyk, Aaron Mills and Carol Wanyandie. Maegan Hough and Renee McBeth edited it.

Some of the results and discussion in Chapter 4 have been reproduced in Hadley Friedland, *Aseniwuche Winewak Justice Project Report: Creating a Cree Legal Process Using Cree Legal Principles* (October, 2015), prepared for the Aseniwuche Winewak Nation, on file with the University of Victoria Indigenous Law Research Unit and the *Aseniwuche Winewak*. I relied on interviews conducted by Kris Statnyk and Carol Wanyandie and research conducted by Margot Bishop, Margaret Lovely and Kris Statnyk, funded through the Indigenous Law Research Unit, University of Victoria Faculty of Law.

Dedication

This dissertation is dedicated to the *Aseniwuche Winewak*.

It is also dedicated to the memory of those *Aseniwuche Winewak* elders and friends who had an enormous influence on my work and my life, and passed on during this project.

Dean Wanyandie was my first law teacher, and started me on this path with a story by a river many years ago. He never flinched from talking about the tough stuff, insisted on common sense, and pushed me to trust myself and speak honestly.

Lucy Wanyandie's strength and endurance was unparalleled, and Marie McDonald embodied love and acceptance. My brother-in-law, James Wanyandie, a gifted and gentle man, and wonderful father, taught me so much about the power of kindness and generosity.

I am very grateful for all I learned from you during your time here. I hope you recognize the rightness and dignity of your decision-making in these pages.

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I rely heavily on my learning from the research process and research results from the *Accessing Justice and Reconciliation Project*, a partnership between the Indigenous Law Research Unit, University of Victoria Faculty of Law, the Indigenous Bar Association and the Truth and Reconciliation Commission of Canada, funded by the Ontario Law Foundation. I am grateful to have had the opportunity, in my role as research coordinator, to apply this method on such a scale, in such a meaningful project. I was privileged to work with incredible colleagues and participate in many rich conversations in communities and events across Canada. These people and experiences have all contributed immeasurably to this work.

The *Aseniwuche Winewak* Nation was a true partner in my research. This thesis is deeply informed by the leadership, elders and community members' goals, vision, guidance and generosity. Thank you for trusting me to hear and honour your words and wisdom, and for always being so willing to contribute your unique knowledge in order to teach and enrich the broader community.

My co-supervisors and committee are an extraordinarily brilliant, inspiring and kind group of scholars, who have all been generous with their time, knowledge and support. Thank you to my co-supervisor, Val Napoleon. You connected worlds and opened new ones. You were the perfect teacher and mentor for me. You provided countless unique learning opportunities. Thank you to my co-supervisor Mathew Lewans, for your staunch support and encouragement, as well as your advice, insights and adept infusion of legal theory that so enriched my work. Thank you to my committee members, John Borrows, Janine Brodie and George Pavlich, for making time for me despite your many responsibilities and other demands. I also must say that my own work would not even be imaginable without both Val and John's groundbreaking work and willingness to kindly and generously support and guide so many younger scholars, including me. I hope any good in my work stands as a tribute to your own.

The University of Alberta Faculty of Law has been a warm and collegial place to work from. Special thanks to Mr. Justice Russell Brown, who was a great co-supervisor before being called to the bench, Eric Adams for ably chairing both my candidacy and final exams, Linda Reif, who was a smart, kind and collegial mentor, during and after her time as Associate Dean of Graduate Studies, and Ted DeCoste,

who taught a graduate seminar we argued our way through, only to end up co-writing a paper together by the end.

I am grateful to have also had an amazing circle of diverse interlocutors during this work.

I am thankful for mentorship and role-modeling, as well as many influential and enlightening conversations over the years with elders and community members from *Aseniwuche Winewak*, including Danny McDonald, Rachelle McDonald, Tom McDonald, Alice Moberly, Marianne Moberly, Edna Wanyandie, Robert Wanyandie, Vicky Wanyandie and Brenda Young, as well as elders Adelaide McDonald, Mary McDonald and Mabel Wanyandie. David MacPhee's arguments (and our more serious conversations) have been especially helpful. Hilda Hallock's fearless and compassionate discussions of the unspeakable, and Carol Wanyandie's insights, advice and translation as community coordinator were essential.

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I am sure I will miss some names, but am deeply appreciative of the many conversations about this work with a welcoming community of experienced scholars and contemporary academic colleagues, including Elizabeth Adjin-Tettey, Jessica Asch, Hannah Askew, Cathy Bell, Andree Boisselle, Lindsay Borrows, Gillian Calder, Estella Charleson, Gerry Ferguson, Lori Groft, Al Hanna, Maegan Hough, Rebecca Johnson, Shalene Jobin, Johnny Mack, Renee McBeth, Aaron Mills, Astrid Perez-Pinan, Pierrot Ross-Tremblay, Judith Sayers, Kerry Sloan, Emily Snyder, Kris Statnyk, Jim Tully and Jeremy Webber. I have had the benefit of open-minded and illuminating discussions with colleagues in the legal profession about this work, including Associate Chief Justice John Rooke, who has been very supportive, Judge John Higgerty, Judge Donald Norheim, Jim Kindrake, Amy Martin-LeBlanc, Ron Stevenson, and many other colleagues from the Department of Justice, Canada.

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Table of Contents

Chapter 1: Introduction –Law, Suffering and Reconciliation.....1

Chapter 2: Ay-si-mam-iko-siya: Methods for Accessing, Understanding and Applying Indigenous Laws.....12

1. Introduction: The First Stream
2. Approaches to Engaging with Indigenous Legal Traditions: Resources, Challenges and Analytical Frameworks
 - a. Identification of Legal Resources
 - b. More Challenges for Increased Practical Engagement with Indigenous Legal Traditions
 - c. Indigenous Scholars' Analytical Frameworks for Accessing, Analyzing and Applying Indigenous Laws
3. Next Steps for Legal Scholars
 - a. Learning from and Building on the Frameworks
 - b. A Case Study: Applying Legal Analysis and Synthesis to a 'Deep Slice' of Cree Law for the *Wetiko* (Windigo) Legal Principles Project
 - c. The Project: *Wetiko* (Windigo) Legal Principles
 - d. Legal Resources: Sifting through the Stereotypes
 - e. Method: Applying Legal Analysis and Synthesis to Learn about the *Wetiko* Legal Category
 - f. Research Results
 - g. How This Method Addresses Challenges
4. Conclusion: Another Stream

Chapter 3: Applying the Method – The Accessing Justice and Reconciliation Project and the Cree Legal Synthesis.....72

1. Introduction
2. The AJR Project
3. The Cree Legal Summary
 - a. Legal Processes: Characteristics of legitimate decision-making/problem-solving processes
 - b. Legal Responses and Resolutions: What principles govern appropriate responses to legal/ human issues?
 - c. Legal Obligations: What principles govern individual and collective responsibilities? What are the “*shoulds*”?
 - d. Legal Rights: What should people be able to expect from others?

- e. General Underlying Principles: What underlying or recurrent themes emerge in the stories and interviews that might not be captured above?
- 4. Conclusion

Chapter 4: *Wah-ko-to-win*: Laws for a Society of Relationships.....152

- 1. Introduction: Rich in Relations
- 2. Bringing out the Background
- 3. The Concern: Distortions
- 4. *Wah-ko-to-win*: Relationships as Central and Foundational
 - a. Living within Larger Relationships
 - b. Recognizing the Fact of Relationships
 - c. Relationships as Rationale
 - d. Relationships as Resources
- 5. Conclusion: *Wah-ko-to-win*

Chapter 5: Creating a Cree Justice Process using Cree Legal Principles.....196

- 1. Introduction
- 2. A Cree Justice Process for the *Aseniwuche Winewak* – History and Aspirations of the Proposal
- 3. Methodology for Community Feedback
- 4. A Contemporary Cree Justice Process – General Feedback
 - a. Analysis
 - b. Discussion
- 5. Using Cree Legal Principles in a Cree Justice Process- Specific Feedback
 - a. Analysis
 - b. Discussion
- 6. Conclusion

Chapter 6: Navigating Through Narratives of Despair: Making Space for the Cree Reasonable Person in the Canadian Justice System.....262

1. Introduction
2. The Reasonable Cree Person
3. A Logical Starting Point
4. The Cree Legal Tradition as a Reasoning Process
5. The Cree Reasonable Person's Tools for Practical Reason
 - a. Wah-ko-to-win
 - b. Good-Heartedness, Kindness, Generosity and Hospitality
 - c. Education, Guidance and Support
 - d. Case by Case Reasoning through Cree Legal Principles
6. Narratives about Violence against Indigenous Women and Children
 - a. The Media Narrative
 - b. State Law's Narratives
 - c. The Trauma Narrative
7. Spaces for Indigenous Laws in the Canadian Justice System
 - a. The Supreme Court's *Gladue* Principles and Directives
 - b. Current Access to Justice and Community Justice Initiatives for Aboriginal People
 - c. Challenges and Critiques of Community Justice and Healing Programs
8. Safety First?
9. The Reasonable Cree Person's Place in the Current Justice System
10. Restarting the Conversation: Recovering Indigenous Legal Traditions
11. Conclusion

Bibliography.....333

Appendix A: AJR Project Community Participant Information Package.....350

Appendix B: AWN Cree Justice Project Participant Information Package.....352

Chapter One: Introduction –Law, Suffering and Reconciliation

*There is a truth, debwewin: To be alive is to be entangled in relationships not entirely of our own making.*¹

*We are law-needy beings because we are vulnerable beings....We turn to law to save us safe from harm until our destiny calls us, each and every one of us in our turn.*²

All law deals with vulnerability and suffering. Some suffering will always be beyond the reach of any law. Yet how the law divides suffering, what suffering it imposes or ignores,³ and the spaces in any society that are seemingly beyond law, are critical questions that illuminate painful shadows in any society and in human relations across societies.⁴ There are many ways law can “turn upon us and prey upon our vulnerability.”⁵ As the Truth and Reconciliation Commission of Canada [the TRC] expressed in their final report on the Indian residential schools in Canada, it can

¹ John Borrows, “Foreword,” *Entangled Territorialities: Indigenous peoples from Canada and Australia in the 21st century* at 6 [forthcoming].

² F. C. DeCoste, “Review of Fraser, *Law After Auschwitz*” (2007) 18 *Kings Law Journal* 179, at 186-187 [DeCoste].

³ Louis E Wolcher, “Universal Suffering and the Ultimate Task of Law” (2006) 24 *Windsor Y.B. Access Just* 361 at 381 [Wolcher]. What “law doers” really do is “divide people’s suffering into two parts: suffering that is regarded as socially acceptable, and suffering that is not... Only those that suffer in a manner that is acceptable to the law-doers’ alienated law-thing enjoy the “right” to have their suffering taken seriously.”

⁴ See Sherene H. Razack, “Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George” in Sherene H. Razack, ed., *Race, Space and the Law: Unmapping a White Settler Society* (Toronto: Between the Lines, 2002) 121 at 143, 150. Razack’s focus is on the death of Pamela George, and she identifies “Aboriginality” as one such space, which has a distressing resonance with the findings of the Manitoba Justice Inquiry that Helen Betty Osbourne would be alive today had she not been an Aboriginal woman. See Manitoba Justice Inquiry, *The Deaths of Helen Betty Osbourne and John Joseph Harper, Aboriginal Justice Implementation Commission, Report of the Aboriginal Justice Inquiry of Manitoba*, Vol. 2 (Winnipeg: Queen’s Printer, 1991) at 1, online: < <http://www.ajic.mb.ca/volumel/chapter1.html>>. See also Boaventura de Sousa Santos, “Beyond Abysmal Thinking: From Global Lines to Ecologies of Knowledge” (2007) *Eurozine*, 06, 29, online: <http://www.eurozine.com/articles/2007-06-29-santos-en.html> [Santos, Beyond Abysmal Thinking].

⁵ Decoste, *supra* note 2, at 187.

become “a tool of government oppression.”⁶ Canadian law actively dispossessed and dismantled Indigenous societies.⁷ At the same time, by turning a blind eye to safety and protection of the vulnerable, it fostered dangerous, even fatal relations of vulnerability and indifference, or permitted them to flourish through conditions of “secrecy and concealment” of “horrific truths.”⁸

For a very long time now, I have wondered whether violence against Indigenous people and in Indigenous communities has become implicitly accepted as somehow beyond law, by the general Canadian population, by all levels of governments, and by some Indigenous people themselves. Indigenous ways of regulating day-to-day life in community and between communities, solving problems, resolving disputes, and maintaining safety for the vulnerable were actively denigrated and even prosecuted.⁹ State law offered no reasonable and reliable alternatives. While there have been many sincere and good-hearted efforts and some progress, these efforts have been inadequate to date. This has created and maintained a simply cavernous gap between legitimacy and enforcement that far too many Indigenous people live with and die in every day. Indigenous legal

⁶ Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg, 2015), online: [http://www.trc.ca/websites/trcinstitution/File/2015/Honouring the Truth Reconciling for the Future July 23 2015.pdf](http://www.trc.ca/websites/trcinstitution/File/2015/Honouring%20the%20Truth%20Reconciling%20for%20the%20Future%20July%2023%202015.pdf) at 202 [TRC Final Report].

⁷ TRC Final Report, *ibid*, at 206.

⁸ In the TRC final report, the Commission found that “Canada’s laws and associated legal principles fostered an atmosphere of secrecy and concealment. When children were abused in residential schools, the law, and the ways in which it was enforced (or not), became a shield behind which churches, governments, and individuals could hide to avoid the consequences of horrific truths. Decisions not to charge or prosecute abusers allowed people to escape the harmful consequences of their actions.” TRC Final Report, *ibid*, at 202.

⁹ TRC Final Report, *ibid*, at 202.

traditions themselves may hold more practical and promising answers for restoring and maintaining safety, peace and order in Indigenous communities.

After a six-year process of witnessing thousands of Aboriginal people across Canada share their horrific and inexcusable suffering in residential schools, and researching records of the philosophical, historical, legal and political factors that facilitated or contributed to that suffering, the TRC released their final report on June 2nd, 2015. It included 94 calls to action.¹⁰ Several calls to action relate to the recognition, revitalization and implementation of Indigenous laws and legal orders.

More specifically, the TRC calls upon the federal, provincial and territorial governments to commit to:

the recognition and implementation of Aboriginal justice systems in a manner consistent with the Treaty and Aboriginal rights of Aboriginal peoples, the Constitution Act, 1982, and the United Nations Declaration on the Rights of Indigenous Peoples, endorsed by Canada in November 2012.¹¹

The TRC calls upon the federal government to develop, jointly with Aboriginal peoples and building on the Royal Proclamation of 1763 and Treaty of Niagara 1974, a *Royal Proclamation of Reconciliation*, to ensure Aboriginal people are recognized as real partners in Confederation. A partner to partner relationship includes a commitment to reconciling Aboriginal and Crown constitutional and legal orders, and recognizing and integrating “Indigenous laws and legal traditions in negotiation and implementation processes involving Treaties, land claims, and other

¹⁰ Truth and Reconciliation Committee of Canada, *Truth and Reconciliation Committee of Canada Calls to Action* (Winnipeg, 2015), online: [http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls to Action English2.pdf](http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls%20to%20Action%20English2.pdf) [TRC Calls to Action].

¹¹ TRC Calls to Action, *ibid*, #42.

constructive agreements.”¹² The TRC also calls upon law societies to ensure lawyers receive cultural competency training that includes Indigenous law¹³ and for the federal government to work collaboratively with Aboriginal organizations to fund the “establishment of Indigenous law institutes for the development, use and understanding of Indigenous laws” across Canada.¹⁴

In the *Summary of the Final Report*, the TRC spoke strongly about the need for Aboriginal peoples to have greater control over their own laws and legal mechanisms:

Aboriginal peoples must be recognized as possessing the responsibility, authority, and capability to address their disagreements by making laws within their communities. This is necessary to facilitating truth and reconciliation within Aboriginal societies. Law is necessary to protect communities and individuals from the harmful actions of others. When such harm occurs within Aboriginal communities, Indigenous law is needed to censure and correct citizens when they depart from what the community defines as being acceptable. Any failure to recognize First Nations, Inuit, and Métis law would be a failure to affirm that Aboriginal peoples, like all other peoples, need the power of law to effectively deal with the challenges they face.¹⁵

The TRC went on to state their belief that “the revitalization and application of Indigenous law” would benefit Aboriginal communities, relations between Aboriginal peoples and governments, and “the nation as a whole” and that “for this to happen, Aboriginal peoples must be able to recover, learn, and practice their own, distinct, legal traditions.”¹⁶

I believe the final statement forms the essential foundation for all the other TRC’s calls to action related to the recognition and revitalization of Indigenous legal

¹² TRC Calls to Action, *ibid*, #45(IV).

¹³ TRC Calls to Action, *ibid*, #27.

¹⁴ TRC Calls to Action, *ibid*, #50.

¹⁵ TRC Final Report, *supra* note 6, at 206.

¹⁶ TRC Final Report, *supra* note 6, at 206.

traditions to be taken up in a meaningful and effective way: How exactly can Indigenous people recover, learn and practice their own distinct legal traditions today? How can legal scholars support or assist in this endeavour? What challenges, barriers, opportunities and spaces currently exist for Indigenous laws to be publically and explicitly taught, learned and practiced in Canada today? Over the last six years, I have explored answers to these questions, at times in partnership with the TRC itself.¹⁷

I began this exploration with three unwavering premises I want to make explicit from the outset. The first premise is that we, as human beings, are reasoning, feeling, imagining, seeking, beings. We are also vulnerable beings.¹⁸ The second premise is that there was neither a utopia nor a barbaric free-for-all on this continent prior to the arrival of the Europeans. There were just reasoning, feeling, imagining, seeking and vulnerable beings, who organized themselves and interacted with the world in various ways, just as the Europeans were such beings who organized themselves and interacted with the world in various ways. One of the ways we, as reasoning, feeling, imagining, seeking and vulnerable beings, organize ourselves and interact with the world is through our legal traditions. The third and final premise is that, reconciliation is not about working toward a glorious

¹⁷ I will discuss the research project, *Accessing Justice and Reconciliation*, in which the TRC was a partner, in greater detail in Chapter 3.

¹⁸ Beyond our accidental or deliberate communities of thought and life, there exists something else; that which Alphonso Lingis terms: “the brotherhood of individuals who possess or produce nothing in common”. He explains, “In the time of dying one suffers as one suffers, as anyone suffers, as carnal flesh suffers.” See Alphonso Lingis, *The Community of Those Who Have Nothing in Common* (Bloomington and Indianapolis: Indiana University Press, 1994) at 157.

transcendence.¹⁹ It is, as stated by the TRC, an “ongoing process of establishing and maintaining respectful relationships.”²⁰ This requires people from all walks of life and in all roles, to actually practice reconciliation in “our everyday lives.”²¹

Part of a “process of repair is a reimagining of the future.”²² At bottom, the project of recuperating and reconciling legal traditions in Canada is not about declarations or romanticizing the past, but about reimagining ways to ascribe meaning to our shared world. It is a project that requires us “to patch up, to repair” rather than “create or destroy” and so requires us to have “patient knowledge of the material” with which we are working.²³ I think the Hebrew phrase “*Tikkun olam*” – to mend or repair the world – captures this careful and humble process aptly. In this spirit, I have approached Indigenous (particularly Cree) legal traditions in what I hope is a respectful and useful way.

In Chapter Two, I explore how legal scholarship can assist with the practical tasks of finding, understanding and applying Indigenous laws today. Even prior to

¹⁹ Val Napoleon argues the rhetoric around the imagined future of Aboriginal self-government often seems disturbingly similar to Doris Lessing’s comment on the utopia imagined by young communists in the former Rhodesia: “[W]hen the war was over and the world was restored to normality... everyone would recognize the blessings of communism, and the world would be Communist, and be without crime, race prejudice or sex prejudice. ... We believed that everyone in the world would be living in harmony, love, plenty and peace. Forever. *This was insane. And yet we believed it.*” Doris Lessing, *Prisons We Choose to Live Inside* (Toronto, House of Anansi, 1986) at 30 [emphasis mine], as cited in Val Napoleon, “Aboriginal Discourse: Gender, Identity and Community” in Ben Richardson, Shin Imai and Kent McNeil, Eds., *Indigenous Peoples and the Law* (UK, Hart, 2009) at 233.

²⁰ TRC Final Report, *supra* note 6, at 16.

²¹ TRC Final Report, *supra* note 6, at 21.

²² Katherine T. Bartlett, “Tradition, Change, and the Idea of Progress in Feminist Legal Thought” (1995) *Wisconsin Law Review* 303 at 338.

²³ I borrow these phrases from Michael Oakeshott, *Rationalism in Politics and Other Essays* (Indianapolis, IL: Liberty Press, 1991) at 8. Oakeshott is decrying “rationalist” politics that reject “anything that requires patient knowledge of the material”. This often means, “the politics of creation and destruction have been substituted for the politics of repair (at 26).

the TRC's strong calls for action, there has been increasing academic, professional, and community interest in the greater revitalization and application of Indigenous legal traditions. This chapter takes up the practical question of method, moving the conversation from a 'why' to a 'how'. Through a close analysis of the work of three leading Indigenous legal scholars, I discuss challenges to accessing resources and other barriers to greater engagement with Indigenous laws. I then examine how each of the three legal scholars have addressed these challenges, identifying four analytical frameworks from their respective works, including (1) the linguistic method; (2) the sources of law method; (3) the single-case analysis method; and (4) the multi-case analysis with legal theory method. Finally, building on this ground breaking work, I propose a fifth methodological framework for finding, understanding and applying Indigenous laws: Applying an adapted method of legal analysis and synthesis, as currently taught in Canadian law schools, to Indigenous stories, oral histories and descriptive accounts of practices. I conclude that serious and sustained legal scholarship, scholarship that takes Indigenous laws seriously as laws, is possible and important as long as it remains supportive of Indigenous communities' own political projects of recovering, learning and practicing their own laws today.

In Chapter Three, I explore the question of whether this method is teachable, transferable and replicable. I do so by discussing how others and I applied it in a national research project to ascertain and articulate Indigenous laws about responses to harm and conflict. I also provide a detailed example of the outcomes it produced. The *Accessing Justice and Reconciliation* Project provided an opportunity

to expand the application of my method. I was able to see if it could be taught to and learned by other researchers, and whether it could be replicated in a national research project involving seven Indigenous communities across Canada. This project resulted six summaries of law, specific to each legal tradition represented by the seven partner communities, researched and written up using the method described in Chapter Two. I present a Cree legal summary as an outcome of this applied methodology. Based on the Cree and other five legal summaries produced from this project, I conclude that my method is one effective way to research and organize Indigenous law in a robust and transparent manner, in order to make Indigenous legal principles more accessible, understandable and convenient to apply, as well as open to critical analysis and principled change.

In Chapter Four, I squarely address an important and recurrent criticism of this method – whether researching and organizing Indigenous laws through such an analytical framework will decontextualize or abstract them to the point of distortion. I show that, in fact, when applied mindfully, it can actually deepen our understanding of the background and animating principles of a particular legal tradition. I demonstrate this benefit by revisiting the stories and legal principles in the Cree legal summary from Chapter Two, along with related stories, to illustrate how they lead to a more robust understanding of the Cree concept, *Wah-ko-to-win*. *Wah-ko-to-win* is a core animating or interpretative meta-principle within the Cree legal tradition, which refers to the relatedness of all living things, and the importance of building and maintaining relationships.

In Chapter Five, I address another common concern about this method – will the form of a legal summary of abstract legal principles (albeit grounded in stories/oral histories) make these principles more accessible to non-Indigenous academics and professionals, but *less* accessible to people within Indigenous communities, who may have learned them through more traditional pedagogical methods? I demonstrate this work is recognizable and useful to people within communities, and may assist community leaders to build a solid and useful foundation for application. I do this through a case study of further research eliciting community feedback on the principles from the Cree legal summary. This research was done at the request of and in partnership with one of the partner communities from the AJR project. The *Aseniwuche Winewak* sought community feedback for developing a proposal for a Cree Justice Process using Cree legal principles to address criminal matters. The lively debates and thoughtful, nuanced engagement with Cree legal principles evident in the results of community feedback clearly show that Indigenous community members can confidently and capably re-engage with the framework of principles and use it to support their goals of applying Indigenous laws in more public, formal and transparent ways today.

Finally, in Chapter Six, I turn to the question of the reception of Indigenous legal principles within the narratives and spaces available in current Canadian political and legal institutions and imaginations. I introduce a representative figure of Cree legal reasoning – the reasonable Cree person, drawn from logical premises and the findings in the previous chapters. I review the dominant media, legal and political narratives about grim statistics on the rates of under-protection and over-

incarceration, and violence by and against Indigenous people in Canada and outline some ways in which the courts and mainstream justice system have attempted to ameliorate them. I conclude that, while there are significant directives and spaces within the dominant justice system for Indigenous perspectives and conceptions of justice, these spaces are not growing, nor explicitly applying specific Indigenous legal principles. Even in community justice initiatives, there is a lack of transparency, explicit reasoning, and significant practical barriers to success. This likely contributes to the current lack of safety for Indigenous women and children, even within their own communities. I conclude the current political and justice systems are unlikely to recognize the reasonable Cree person, any more than she would recognize herself in the current narratives and spaces available to her at present.

At first glance, one could be forgiven for finding such a conclusion rather depressing or demoralizing after such compelling calls to action to recognize and revitalize Indigenous laws as part of reconciliation and identification of several promising methodologies for addressing current challenges. One might feel it is a bit disappointing to face the likely lack of receptivity to Cree legal reasoning, after such a rich discussion of Cree legal principles, animating Cree legal philosophy and the nuanced and sophisticated community conversations about practical application. However sobering, it reminds us that this is exactly what Indigenous peoples have been confronted with for hundreds of years. Indigenous reason fell on deaf (and powerful) ears, until persisting must have seemed pointless, even risking more harm. Recognizing the extent of the work that must be done, not just to identify and

articulate Indigenous laws as *laws*, but for non-Indigenous governments and legal actors to be able to recognize them as legitimate, and understand enough to understand Indigenous peoples publically reasoning through them, is part of the repair. If we don't engage in the hard work of active listening, mere declarations may unintentionally recreate conditions of willful blindness, reinforcing narratives and conditions of lawlessness. Nobody, least of all the most vulnerable within Indigenous communities, can afford that.

I hope my research reveals that transferable, transparent and rigorous methodologies for serious and sustained engagement with Indigenous laws are possible and this sort of legal scholarship can enhance our ability to access, understand and apply Indigenous laws. It is this kind of respectful and robust engagement that is necessary to effectively implement the TRC's compelling calls for greater recognition, revitalization and application of Indigenous laws in Canada.

Chapter Two – Ay-si-mam-iko-siya: Methods for Accessing, Understanding and Applying Indigenous Laws

1. Introduction: The First Stream

On October 16, 2010, at the close of the conference entitled “Indigenous Law in Coast Salish Traditions,”¹ Professor John Borrows told a story about an experience he had in the summer on Cape Croker reserve, as he stood by a lake in the early morning. When he looked up, soaking in the beauty of the morning, he realized that he was seeing a reflection of the lake in the sky. As he gazed upon this reflection, he suddenly noticed in it a small stream connected to the lake that he had never noticed before. Sure enough, looking down, he saw the stream, which had always been part of the landscape. That morning, a confluence of events allowed him to view a familiar vista in a new way, making it possible for him to see clearly what had been there all along.

Like the stream in the above story, Indigenous legal traditions continue to exist in Canada, despite a lack of recognition by the state or by the general public. Indigenous legal traditions may be deeply meaningful and have great impact on the lives of people within Indigenous communities.² Yet I have come to accept that, outside those communities, these traditions are largely invisible or even

· This chapter has been published as Hadley Friedland, “Reflective Frameworks, Methods for Accessing, Understanding and Applying Indigenous Laws” (2012) 11 (1) *Indigenous Law Journal* 1.

¹ This conference was held October 14-16. It was hosted by Cowichan Tribes on Cowichan Territory, and sponsored by the Cowichan Tribes and the Research Group on Indigenous Peoples and Governance (IPG), with funding from the Social Sciences and Humanities Research Council of Canada, the Pierre Trudeau Foundation, the Faculty of Law at University of Victoria, and the Consortium of Democratic Constitutionalism.

² John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 23 [Borrows, *Indigenous Constitution*].

incomprehensible. Borrows captures this familiar perception when he relates a personal conversation with an unnamed Chief Justice of a provincial appellate court who bluntly stated, “You say Indigenous law exists; I don’t believe it for a minute.”³ However, even people who want to engage more deeply with Indigenous legal traditions struggle to understand how to do so. Professor Val Napoleon relates her experience of having a well-known lawyer for Aboriginal groups say to her: “We all know there is *something* there—but we don’t know how to *access* it.”⁴ Even if we agree that Indigenous legal traditions *should* be given more respect and recognition within Canada, and drawn upon in more explicit and public ways, we are still left with the very real question of *how* to do this.

Even prior to the prominence of Indigenous laws in the TRC’s calls to action, there has been increasing scholarship in recent years, by both Indigenous and non-Indigenous scholars, arguing for the importance of a revitalization and recognition of Indigenous law in Canada. This scholarship has provided legal and theoretical frameworks for imagining that possibility at a philosophical or political level.⁵

Interest about this goes beyond the academy as well, to the judiciary, legal

³ *Ibid*, at 46.

⁴ Val Napoleon, personal conversation, April, 2010.

⁵ See, for example, Gordon Christie, “Indigenous Legal Theory: Some Initial Considerations” in Benjamin J. Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Portland, OR: Hart Publishing, 2009); Lisa Chartrand, “Accommodating Indigenous Legal Traditions” (Discussion Paper prepared for the Indigenous Bar Association, 2005), online: <<http://www.indigenousbar.ca/pdf/Indigenous%20Legal%20Traditions.pdf>>; Sakej Henderson, “Empowering Treaty Federalism” (1994) 58 Sask L Rev 241; Rupert Ross, *Returning to the Teachings: Exploring Aboriginal Justice* (Toronto: Penguin, 1996); James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995) at 211; Jeremy Webber, “Relations of Force, Relations of Justice: The Emergence of Normative Community between Colonies and Aboriginal Peoples” (1995) 33 Osgoode Hall LJ 623 at 657; and Jeremy Webber, “The Grammar of Customary Law” (2009) 54:4 McGill LJ.580.

professionals, governance organizations, the federal Department of Justice and Indigenous communities.⁶ Yet very little scholarship or discussion has focused on the critical and imminently practical question of how academics, lawyers, judges and members of Indigenous communities can “locate methods of finding, analyzing, and applying [Indigenous] law.”⁷

The need to address this question of methods is highlighted by the fact that, in the U.S. context, several Indigenous scholars who are also tribal court judges, including Mathew Fletcher, Pat Sekaquaptewa and Christine Zuni Cruz, have recently raised and explored variations of the above question.⁸ This is significant

⁶ Some examples of this professional and community interest include the Law Commission of Canada, *Justice Within: Indigenous Legal Traditions*, DVD (Ottawa: Minister of Supply and Services Canada, 2006). In February 2006, the Institute on Governance, a non-profit think tank dedicated to issues of Aboriginal governance, held a “Roundtable on Indigenous Legal Traditions.” For a summary, see online: <http://iog.ca/sites/iog/files/2005_tanaga6summary.pdf>. The Indigenous Bar Association’s annual conference held October 25-27, 2007, was called “Indigenous Laws: Practice, Conflict and Harmonization: Indigenous Laws and Territorial Dispute Resolution,” online: <<http://www.indigenousbar.ca/pdf/Conference%20Agenda%20FINAL.pdf>>. Val Napoleon gave a talk entitled “Indigenous Legal Traditions Today: How Might Trans-Systemic Legal Pedagogy Inform Current Legal Processes?” at the Canadian Association of Provincial Court Judges’ Annual Meeting in Halifax, 2010. On March 9, 2011, Justice Canada–Aboriginal Affairs Portfolio hosted the “Symposium on Indigenous Legal Traditions” in Ottawa. The Splat-sin-Sek’emaws Tribal Council hosted an “Indigenous Legal Traditions Workshop at Neskonalith” in the community of Neskonalith, British Columbia, on July 28-29, 2011, online: <<http://www.splatsin.ca/indigenous-legal-traditions>>.

⁷ Mathew Fletcher, “Rethinking Customary Law in Tribal Court Jurisprudence” (Occasional Paper delivered at Michigan State University College of Law, Indigenous Law and Policy Centre Occasional Paper Series, 2006) at 17, online: <<http://www.law.msu.edu/indigenous/papers/2006-04.pdf>>. Fletcher uses the term “customary law” interchangeably with “traditional law” or “custom”. I prefer the term “Indigenous law”, of which custom is one of several sources, following Borrows on this point. See Borrows, *supra* note 2 at 24, where he explicitly makes the point that “not all Indigenous laws are customary at their root or in their expression, as people often assume.”

⁸ See generally Fletcher, *supra* note 7; Pat Sekaquaptewa, “Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal Lawmaking” (2007-2008) 32 *Am Indian L Rev* 319; and Christine Zuni Cruz, “Tribal Law as Indigenous Social Reality and Separate Consciousness: [Re]Incorporating Customs and Traditions into Tribal Law” (2001)

because, unlike Canada, the United States has a tribal court system. The existence and ongoing operation of tribal courts means that many of the vexing institutional and intellectual questions often regarded as barriers to the greater recognition and integration of Indigenous legal traditions within Canada's legal system, such as jurisdiction and harmonization,⁹ have been answered satisfactorily enough in the American context.¹⁰ In addition, many of these courts have requirements—through “tribal constitutions, tribal court codes and ordinances, and tribal court rules”—to use “customary law” in tribal court decision-making.¹¹

Yet American legal scholars and tribal court judges are clear that a disjuncture exists between the written laws adopted and applied in tribal courts,

1 Tribal LJ, online: <http://tlj.unm.edu/tribal-law/journal/articles/volume_1/zuni_cruz/index.php>.

⁹ For a discussion of some of the institutional challenges, see Borrows, *supra* note 2 at 155-165 (discussion of applicability), 177-218 (ch. 7), 219-238 (ch. 8).

¹⁰ I use the term “satisfactorily” on purpose, as these questions are, no doubt, not answered perfectly. Several American Indigenous legal scholars raise current issues related to federal encroachment on jurisdiction as one of the top concerns for tribal courts today. See, for example, Justin B. Richland, *Arguing with Tradition: The Language of Law in Hopi Tribal Court* (Chicago: University of Chicago Press, 2008) at 13-15; Piestewa (Robert H. Ames), “Contemporary Hopi Courts and the Law” in Edna Glenn *et al.*, eds, *Hopi Nation: Essays on Indigenous Art, Culture, History and Law* (2008) 135 at 137, online: <<http://digitalcommons.unl.edu/hopinotion/15>>; Robert A. Williams Jr., “Foreword: The Tribal Law Revolution in Indian Country Today” in Raymond D. Austin, *Navaho Courts and Navaho Common Law: A Tradition of Tribal Self-Governance* (Minneapolis: University of Minnesota Press, 2009) at x. For a discussion of some of the impact of jurisdictional limitations on the problem of gendered violence, see Sarah Deer, “Toward an Indigenous Jurisprudence of Rape” (2004) 14 Kan JL & Pub Pol’y 121 at 127-128. However, for the purposes of this paper, my point is that these questions do not exist as barriers to the existence of tribal courts in the United States, while in Canada, in part due to the very different histories of the two countries’ legal relationships with Indigenous nations, these questions are posed as barriers to similar processes.

¹¹ Fletcher, *supra* note 7 at 10 (for a complete discussion, see 10-17). See also Zuni Cruz, *supra* note 8 at 5-6.

which remain largely Anglo-American in origin, and “traditional” or Indigenous laws within Indigenous communities.¹² Justin Richland asserts:

Whatever the perspective on the place of customs and traditions in their tribal law, even a cursory review of the contemporary literature on tribal courts reveals that for today’s tribal jurists, the question concerning the relationship between norms of Anglo-American legal procedure and their unique tribal legal heritage is their fundamental jurisprudential concern.¹³

Even with tribal court jurisdiction, incorporating Indigenous laws is a challenging endeavour that often requires further work.¹⁴ The methodological question of how to find, analyze and apply Indigenous laws still remains.¹⁵

It is this question of method I take up in this chapter. To be clear from the outset, I will not be addressing the question of whether or not Indigenous laws exist here. It seems to me illogical to assume otherwise,¹⁶ and I hope we will one day

¹² See, for example, Zuni Cruz, *supra* note 8 at 1 (“even recently enacted law continues to look very much like the western law of states”), 5. See also Ames, *supra* note 10 at 135: “The Hopi Courts are in much the same situation that I am—halfway [about recognizing custom and tradition in rendering decisions].” Even in the Navaho courts, Austin is blunt that “there is an obvious imbalance in all Navajo Nation Law”; Austin, *supra* note 10 at 37. See also Richland, *supra* note 10 at 15-16.

¹³ Richland, *supra* note 10 at 16.

¹⁴ See, for example, Sekaquaptewa, *supra* note 8 at 320; Williams’s discussion in Austin, *supra* note 10 at xx; and Zuni Cruz, *supra* note 8 at 5-6, 10.

¹⁵ As mentioned above, this is not to suggest that there are not Indigenous people in Canada who already access, understand and apply Indigenous laws. In the U.S. context, the Navaho courts are renowned for the extent to which they have incorporated and applied Navaho legal principles to develop a truly Navaho common law. See generally, Austin, *supra* note 10. This may be due to the extensive publically available case law applying these principles, as well as to the cultural knowledge of tribal court judges themselves. However, Sekaquaptewa stresses that, although it may surprise outsiders, “tribal leaders and judges find themselves looking for the law as well,” for good reasons, including the existence of multiple legal levels within any group (Sekaquaptewa, *supra* note 8 at 330, n 31. This inquiry may also be useful for considering how to articulate or reinterpret these laws more explicitly in order to increase general understanding outside communities. See Borrows, *supra* note 2 at 139. Importantly, this inquiry may be used to increase the accessibility of Indigenous laws for the great number of Indigenous individuals who may be alienated from their own communities or legal traditions due to the colonial “socio-economic dislocation amongst Indigenous peoples in Canada” (at 143).

¹⁶ See the discussion of groups and law in Sekaquaptewa, *supra* note 8 at 346. The concept of Indigenous peoples as the ‘lawless other’ is an illogical myth that historically served to

shudder at the collective colonial ignorance and arrogance that once submerged the resources of Indigenous legal thought from the broader Canadian political and legal imagination.¹⁷ However, we now must address one of the intellectual consequences of this: because Indigenous legal traditions have been ignored or invalidated historically, we lack the intellectual tools for accessing and understanding Indigenous laws.¹⁸ I will also *not* be addressing the question of whether legal scholars *should* work towards increasing the accessibility and intelligibility of Indigenous laws. Although I am conscious there are those who might caution against such a thing,¹⁹ I begin from the assumption that there is value in such an endeavour, and I leave debate about this value for others to take up and examine. I also step aside from the broader questions of the political and legal justifications and frameworks for greater formal recognition of Indigenous legal traditions in Canada that other scholars have already grappled with so ably.²⁰

justify denials of Indigenous sovereignty over desired land by imperial cultures. See, for example, Tully, *supra* note 5 at 65; and Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991) 29 Alta L Rev 498 at 507. Prior to European contact or 'effective control', Indigenous peoples lived here, in this place, in groups, for thousands of years. We know that when groups of human beings live together, they must have ways to manage themselves and all their affairs. Therefore, as a matter of logic alone, our starting point for any inquiry has to be that, *at some point*, and for a very long time, all Indigenous peoples had self-complete systems of social order. While not every form of social order is legal in nature, the self-completeness means that these systems had to include some normative mechanisms that legal theorists like to call law.

¹⁷ Austin, *supra* note 10 at xv, points out that a goal for establishing a solid foundation for the Navaho courts is so they may "eventually assume their rightful place among the world's dispute resolution systems."

¹⁸ For a discussion of the resulting challenges of accessibility and intelligibility, see Borrows, *supra* note 2 at 138-148.

¹⁹ Borrows himself points out some cautions around greater accessibility to Indigenous legal traditions that stem from a lack of trust due to a historical and present disregard for Indigenous peoples' intellectual property. See *ibid* at 148-149.

²⁰ See, for example, *ibid* ch. 4-5, 7-8, in which Borrows thoroughly examines and suggests solutions for numerous theoretical, legal and institutional barriers to the greater

The narrow question this chapter contemplates is: How might legal scholarship assist with the practical tasks of finding, understanding and applying Indigenous laws today? In the American tribal court context, there is a recognized need and use for serious and sustained scholarship engaging with Indigenous legal traditions. Sekaquaptewa argues that legal treatises, accounts, studies, compilations and reviews “provide a big picture backdrop for the making and application of written laws. They also generate debate about the deeper meaning of legal principles important to historical and contemporary issues and spur innovation to solve current problems.”²¹ Specifically, this chapter argues that a certain *kind* of legal scholarship could be particularly useful for the critical development and application of written laws in American tribal courts,²² as well as for revitalizing Indigenous legal traditions in Canada: scholarship from an internal viewpoint of a legal tradition.²³ Even more specifically, I conclude that adapting and applying the core method of current legal scholarship from an internal viewpoint—legal analysis and synthesis—is a promising framework to build on the current work of Indigenous legal scholars in this regard.

recognition of Indigenous legal traditions in Canada. See also Tully, *supra* note 5, for a compelling political argument.

²¹ Sekaquaptewa, *supra* note 8 at 379.

²² Zuni Cruz advocates for studies of traditional laws and “the critical development of written law that is based on the principals and precepts of traditional law, thus requiring an inquiry into how any proposed written law relates to principles of traditional law, and whether it is consistent or inconsistent” (Zuni Cruz, *supra* note 8 at 9).

²³ “Scholarship from an internal viewpoint” refers to legal scholarship that addresses the way one negotiates successfully and argues within the parameters of legal practice itself. I will discuss the concept at greater length below. See H.L.A. Hart, *The Concept of Law*, 2d ed (New York: Oxford University Press, 1994) at 89 [Hart].

In this chapter, I will first discuss the question of what legal resources are available for engaging with Indigenous legal traditions. Next, I outline some of the issues raised by three leading Indigenous legal scholars regarding the current identification and understanding of Indigenous legal traditions, and then I describe the frameworks they propose or use to address these issues in their work. I turn to a discussion of the fundamental similarities in their work, focusing on the questions they ask and on the way they answer these questions—from an internal viewpoint. I then discuss the general recognized benefits of scholarship from an internal viewpoint of a legal tradition, and highlight legal analysis and synthesis as the central method for this scholarship in law schools today. Finally, drawing on my own LLM work applying these adapted tools to Cree laws as a case study, I will argue that this method is the next logical step building on the work of these scholars, as it effectively addresses many of the challenges they raise for finding, understanding and applying Indigenous laws. I conclude that this method is worth pursuing but must be approached responsibly. Legal scholars engaging with Indigenous legal traditions should do so reflexively, conscious of the limits and contributions possible in their role and of their work within the broader communities of practice they engage with.

2. Approaches to Engaging with Indigenous Legal Traditions: Resources, Challenges and Analytical Frameworks

Some recent scholarship by leading Indigenous legal scholars in North America effectively adapts existing theoretical and analytical tools developed within the legal academy to provide analytical frameworks through which other legal scholars and

legal practitioners can begin to engage with Indigenous legal traditions in a realistic and useful manner. I focus specifically on the work of three leading Indigenous scholars mentioned already in this paper: John Borrows, Mathew Fletcher, and Val Napoleon.²⁴ All of their work, in different ways, identifies possible legal resources, directly addresses challenges of practically engaging with Indigenous legal traditions and provides analytical frameworks for accessing, analyzing and applying Indigenous laws to contemporary issues.

a. Identification of Legal Resources

A natural consequence of the dearth of publically accessible and written materials which explain, analyze and use Indigenous laws are the questions, what and where are the resources for engaging with these laws? Where would legal scholars or practitioners start? The Law Commission of Canada Report, *Justice Within*, found that some Indigenous people suggest law can be found in dreams, dances, art, the land and nature, and in how people live their lives. Some people described Indigenous laws as being “written on our hearts.”²⁵ These are not the kind of legal resources your average Canadian law student (or professor) would be familiar with! Borrows, Napoleon and Fletcher have all turned their minds to this issue, and all offer some useful starting points. Fletcher also raises some critical questions about the challenges and limitations posed by accessing many of these resources. A further

²⁴ For representative work, see Borrows, *supra* note 2; Fletcher, *supra* note 7; and Val Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (PhD Dissertation, University of Victoria, Faculty of Law, 2009) [unpublished]. I will focus on these three scholars for clarity but will continue to refer to others as they overlap with or expand on certain aspects of the discussion.

²⁵ Law Commission of Canada, *supra* note 6.

question, addressed later in this chapter, is how to begin understanding and interpreting Indigenous laws, even if one finds resources for identifying them.

Borrows explains that Indigenous laws can be recorded and shared in different forms, and in more broadly dispersed and decentralized ways than the published statutes and court cases legal scholars are accustomed to analyzing.²⁶ He argues that part of the strength and resiliency of Indigenous laws derives from them having been practiced and passed down through “[e]lders, families, clans, and bodies within Indigenous societies.”²⁷ He agrees that Indigenous laws can be recorded and promulgated in various forms, including in stories, songs, practices and customs.²⁸ Although Borrows does not discuss this, he also demonstrates it is possible to identify and interpret law from a variety of different resources through his own identifying and interpreting of legal principles by analyzing published collections of ancient origin stories,²⁹ family and elders’ teachings regarding laws in nature,³⁰ pots, petroglyphs and scrolls found in an ancient ceremonial lodge,³¹ terms

²⁶ Borrows, *supra* note 2 at 139.

²⁷ *Ibid* at 179.

²⁸ *Ibid* at 139.

²⁹ See, for example, *ibid* at 93-95 (a Carrier story about a wife who changes into a beaver), at 119-121 (a Cree story about a meeting between the animal people and the Creator before humans were created). See also John Borrows, “With or Without You: First Nations Law in Canada” (1996) 41 McGill LJ 629 (about a treaty between the deer people and humans).

³⁰ See, for example, Borrows, *supra* note 2 at 29-30 (his mother’s legal reasoning related to the observation of butterflies and milkweeds), and at 31-32 (a community meeting discussing a negotiation for control over fishing, where two respected elders tell stories and recollections of fish management).

³¹ John Borrows, *Drawing Out Law: A Spirit’s Guide* (Toronto: University of Toronto Press, 2010) at 38-47.

within an Indigenous language,³² and even descriptive historical accounts recorded by outsiders.³³

Napoleon appears to agree with Borrows when she explains that law “setting out the legal capacities, relationships, and obligations” can be embedded and recorded in “narrative, practices, rituals and conventions.”³⁴ In her ground-breaking in-depth work with Gitksan legal traditions, Napoleon analyzes cases from witness testimony in the *Delgamuukw* trial transcripts regarding oral history (the *adaawk*), collectively owned stories (*antamahlaswx*), personal memories and direct experiences, information through interviews and through other published research, both by community members and by outsiders.³⁵

In his broad study, Fletcher identifies several sources that tribal court judges in the United States use as a means for discovering Indigenous laws, and he also adds his critical evaluation of the advantages and limitations of each source. His criticisms are worth discussing in some detail, as they may equally apply to some of the sources Borrows and Napoleon explain and use, and thus may be considered when developing frameworks for interpretation. Fletcher states that, in a tribal court setting, the parties to the litigation should be the first source.³⁶ However, he notes that this is “almost never the case,” with lawyers or advocates rarely contributing any arguments or materials based on Indigenous laws, even when the

³² Borrows, *supra* note 2 at 84-86 (using examples from the Cree language).

³³ *Ibid* at 81-82 (a case regarding an Anishinabek group’s collective response to an individual becoming increasingly dangerous, recorded by the Superintendent of Indian Affairs in 1838).

³⁴ Napoleon, *supra* note 24 at 71.

³⁵ *Ibid* at 30-31.

³⁶ Fletcher, *supra* note 7 at 36.

judge directly asks for these.³⁷ Further, he points out that where litigants make representations regarding Indigenous law without citing authority, this guidance may not prove helpful at all—or may even become dangerous if a judge creates precedent based on faulty guesswork.³⁸

A second possible source, one that Fletcher describes as “having the potential of being the finest source available,” is the use of knowledge of the language. He explains that in many Indigenous communities, “the law is encoded right into the language—and the stories generated from the language.”³⁹ Yet this source often remains unavailable, as “realities dictate” there are few judges sitting who are actually fluent in the Indigenous language of the tribal court community, and Fletcher believes that translations to English may miss “fundamental fine distinctions, subtle nuances, and even correct meaning.”⁴⁰ Another source is “people of the community—often elders—who are cognizant of the community’s customs and traditions.” Fletcher describes these community members as the “next best ideal source” after a tribal judge who might fit into this category.⁴¹ Yet he goes on to describe several difficulties with this resource, including finding people “willing and qualified to participate in tribal court litigation,” and, more sensitively, “the

³⁷ *Ibid.*

³⁸ *Ibid* at 36-37.

³⁹ *Ibid* at 37.

⁴⁰ *Ibid.* A notable exception to this concern is perhaps the Navaho courts. See Austin, *supra* note 10 at 40-44 for an example of Navaho fundamental doctrines rooted in Navaho language.

⁴¹ Fletcher, *supra* note 7 at 37. See Austin, *supra* note 10 at 45-46. See also Zuni Cruz, *supra* note 8 at 8, who draws on an approach taken in Saddle Lake to advocate for a “process of utilizing meetings and interviews with elders to determine traditional law” and the “use of the information to then articulate basic, foundational principles and precepts of traditional law and the use of those foundational precepts to build the law.”

legitimacy of the representations made by ... community ‘experts.’” Not only might “reasonable minds differ” but there also might exist “fundamental differences on family or political lines” of what constitutes Indigenous laws and what they require of people.⁴² These are essentially issues of reasonable disagreement and interpretation that judges deal with regarding state laws all the time. However, realistically, tribal judges might “not have the institutional capacity” to choose between competing understandings of Indigenous laws.⁴³

Finally, Fletcher identifies published works as possible sources for locating and identifying Indigenous laws. Fletcher sees “secondary literature about tribal customs and traditions” as having “considerable possibility” as a resource. There is an ample supply of this academic literature, and a good researcher could locate and deliver it to judges.⁴⁴ Fletcher points out that, for many communities, this work may be the only source of histories, legends and laws available.⁴⁵ However, “there is a very significant bias” among Indigenous people against this academic work, which could present a “formidable obstacle” for any tribal court judge using it as a basis for

⁴² See some of the questions around this in Zuni Cruz, *supra* note 8 at 9. One way of addressing some of these challenges is the Navaho case law developed around the qualifications of expert witnesses on Navaho culture (Austin, *supra* note 10 at 48-49).

⁴³ Fletcher, *supra* note 7 at 39. See also Sekaquaptewa, *supra* note 8 at 320, where she describes her surprise “to find a common practice whereby elder community members are randomly consulted ‘on the spot’ to provide information regarding custom where the context, relevance, and application of such information is reserved to the sole discretion of (often non-Native) drafting attorneys or judges. In the case of judges, there is an expectation that a tribal judge will use his or her knowledge and experience of tribal custom.” She argues, “In all such cases, drafting attorneys and judges are de facto policymakers in great need of useful theories or at least guidelines for working with custom.”

⁴⁴ Fletcher, *supra* note 7 at 37.

⁴⁵ *Ibid* at 38. See Austin’s point that some Indigenous nations “will have to dig deep into the past to uncover fundamental philosophies, values, and customs to apply to their governments and communities and various aspects of nation-building” (Austin, *supra* note 10 at xx).

finding and understanding Indigenous laws. Fletcher states frankly, “the legitimacy of a tribal court opinion declaring customary law based on the findings of an academic would be in serious doubt much of the time.”⁴⁶ Another source that might arguably be considered more legitimate is the written work of community members, including “academic research, translation, by others of the oral stories and histories of Indian people and Indian tribes, and even fiction, poetry, stories, and legends told and written by ... community members.”⁴⁷ Although Fletcher does not discuss this, relying on these kinds of sources would likely raise some of the same challenges as would the work of community ‘experts’ or of academics, depending on the author’s proximity to and affiliations with the home community.

The resources identified above can be separated roughly into three categories based on their general availability: (1) resources that require deep knowledge and full cultural immersion; (2) resources that require some community connection; and (3) resources that are publically available.

1) Resources that require deep knowledge and full cultural immersion:

The first category of resources would appear to require something close to full immersion in a specific culture to access. This category would include resources such as specific terms in a language, dreams, dances, art, beadwork, pots, petroglyphs, scrolls, songs, natural landscapes, ceremonies, feasts, formal customs and protocols.

⁴⁶ Fletcher, *supra* note 7 at 38. See also Sekaquaptewa, *supra* note 8 at 382, citing some challenges for judges using outside experts. But see Austin, *supra* note 10 at 48, stating this may not always be the case anymore in the context of a Navaho court, as there are “now non-Navaho authors who have interpreted, analyzed and discussed Navaho culture and philosophy very well in their books.”

⁴⁷ Fletcher, *supra* note 7 at 37- 38.

- 2) **Resources that require some community connection:** The second category of resources would likely require some familiarity with or connection to a particular cultural community to access. These resources include stories, communally owned oral traditions, information from knowledgeable community and family members, including elders, as well as personal knowledge and memories.
- 3) **Resources that are publically available:** The third category of resources requires the least amount of connection to a particular culture or community to access, as it involves publically available, published resources. This category would include written work, including academic work, and works of fiction by community members, descriptive academic work by outsiders to the community, published court cases, trial transcripts involving Indigenous issues and litigant arguments in tribal court settings.

In identifying these categories, I note that in actual practice , no bright lines differentiate these resources, and there is much overlap between them. However, these three categories do roughly map onto the advantages and challenges identified by Fletcher.

Generalizing from Fletcher's insights, it seems fair to say that resources of the first category, such as language or deep knowledge of ceremony, may be perceived as 'ideal' sources for accessing, analyzing and applying Indigenous laws. Yet, realistically, many legally trained scholars, judges and professionals, or even community members, will not have the deep knowledge or cultural immersion they require. While it is worthwhile pursuing, the time required for gaining such

knowledge is immense for those without it, and not everyone has the means to access it. The next best resources may be those that require some community connection, such as conversations with and teachings by community experts, elders and certain oral traditions. However, it may be challenging to find people willing and able to share their knowledge for particular purposes. Further, it may be difficult to navigate internal conflicts of interpretation within communities. Finally, publically available published resources may raise serious questions of bias and legitimacy. However, they may be the most ample, or even the only source of historical legal knowledge available for some Indigenous communities and legal scholars. It thus appears that, generally, the most ideal resources are likely the least available at this time, while the least ideal resources are the most available.

In summary, then, there are many and varied potential resources for accessing Indigenous laws. While the ones identified here are not intended to represent an exhaustive summary of those opportunities, it is nonetheless possible to sort resources into three categories, each one of them requiring a different depth of cultural knowledge. Real challenges and limitations exist for all categories, and at this point in time, we are faced with a disconcerting inverse correlation between the idealness of resources and their availability. This means that legal scholars must consider the specific challenges of particular resources, but must also find legitimate ways to work with the non-ideal to advance an important practical task in the present. Let me now turn to further identified challenges for such work.

b. More Challenges for Increased Practical Engagement with Indigenous Legal Traditions

Borrows addresses institutional and intellectual challenges that interfere with the greater recognition and integration of Indigenous legal traditions within Canada's legal system.⁴⁸ For the purposes of this chapter, I focus on the intellectual challenges. Borrows argues that one barrier to the enhanced recognition of Indigenous legal traditions are negative stereotypes derived from the overgeneralization and oversimplification of these traditions.⁴⁹ He identifies another intellectual barrier as "pressing concerns" regarding the intelligibility, accessibility, equality, applicability and legitimacy of Indigenous legal traditions.⁵⁰ As this chapter focuses on methods of engagement with Indigenous laws, I will not discuss issues of equality and applicability, which primarily relate to the interaction of Indigenous laws with the Canadian legal system.⁵¹

Borrows begins by explaining that some people may see Indigenous laws as too vague or imprecise to constitute intelligible legal prescriptions for conduct. He points out there is "nothing inherently unintelligible within Indigenous laws" but acknowledges "there may be a need to articulate, translate or reinterpret some of them in particular instances."⁵² Closely related to intelligibility is the issue of accessibility, the concern that Indigenous laws are "not readily available" and are

⁴⁸ For a discussion of some of the institutional challenges, see Borrows, *supra* note 2 at 177-218 (ch. 7), 219-238 (ch. 8).

⁴⁹ *Ibid* at 23.

⁵⁰ *Ibid* at 138.

⁵¹ But if the reader is interested, see *ibid* at 150-165.

⁵² *Ibid* at 138-139.

difficult to understand.⁵³ The current conundrum regarding resources for accessing Indigenous laws has already shown us that accessibility is indeed a pressing issue.⁵⁴ Borrows also discusses the problem of legitimacy, which he describes as a “catch-all category” that addresses “broader sociopolitical difficulties,” including “psychological and emotional objections” that both non-Indigenous and Indigenous people might have regarding a broader acceptance of Indigenous laws in Canada.

Another perspective on legitimacy comes from a common-law scholar, Peter Birks, who points out that a contemporary aspect any law’s legitimacy today is that the authority of law has been “deeply challenged by changes in the structure of society itself”: “A democracy the members of which are well educated, ambitious and articulate will not take the authority of law for granted. Authority has now to be earned as legitimacy, and legitimacy must be grounded in reason.”⁵⁵ This contemporary demand for explicit reasoning behind laws is another important consideration alongside the psychological and emotional aspects of legitimacy.

Napoleon identifies at least three problems that arise from the typical descriptive accounts of Indigenous legal traditions. First, oversimplified descriptions can “serve to perpetuate the stereotypical myth [that] [I]ndigenous peoples had little or no intellectual life, but just followed rules and stoically upheld unchanging morals.”⁵⁶ Second, it can be hard to imagine the relevance and current usefulness of “fundamentalist versions” of Indigenous legal traditions because they

⁵³ *Ibid* at 142.

⁵⁴ See Zuni Cruz, *supra* note 8 at 4; and Sekaquaptewa, *supra* note 8 at 378, and suggesting structural solutions to accessibility concerns at 379.

⁵⁵ P.B.H. Birks, “Editor’s Preface” in P.B.H. Birks, ed, *Pressing Problems in Law: What Are Law Schools For?*, vol 2 (Oxford: Oxford University Press, 1996) at vii.

⁵⁶ Napoleon, *supra* note 24 at 29.

tend to erase the “messy stuff of life,” such as “conflicts and contradictions,” and appear to assume a “naturally harmonious people” rather than real people dealing with real life, including disagreements and new experiences.⁵⁷ A third issue is the distortion that occurs when state legal systems consider isolated elements of ‘customary law’ as “disconnected and bizarre practices” rather than as parts of “a comprehensive whole.” This makes Indigenous laws appear “completely and hopelessly stuck in the past” and leads to the assumption that they cannot change or adapt internally to deal with today’s issues “according to current social and legal norms, and politics.”⁵⁸

Napoleon voices particular concern about the issues of relevance and utility, arguing that if “legal traditions are determined to be incapable of change or are pinioned in the past, their theoretical and intellectual resources will no longer be available.”⁵⁹ She argues that if legal principles, processes and obligations are to be seen by both insiders and outsiders as part of living legal traditions, rather than as cultural remnants, they must be seen as relevant in today’s world, stating succinctly, “law is something people *do*... [so] if it is not practical and useful to life ... why bother?”⁶⁰

Significantly, Fletcher points out a dearth of the actual use of Indigenous laws in recorded tribal court decisions in the United States. The reasons he gives resonate with the concerns cited by Borrows and Napoleon in the Canadian context. Fletcher

⁵⁷ *Ibid* at 30.

⁵⁸ *Ibid* at 47. Napoleon uses an example of a treatment of African customary law regarding a modern-day ‘witchcraft’ killing in a South African murder case.

⁵⁹ *Ibid* at 91.

⁶⁰ *Ibid* at 312. See also Zuni Cruz, *supra* note 8 at 4.

identifies eight practical reasons why judges may not rely on Indigenous laws in tribal courts. First, he points out that Indigenous laws are “difficult to discover.” Second, experts may disagree or “be unreliable relaters” of the relevant law. Third, judges who are part of the community may not give written reasons to expound the law (and they may not use English when doing so), while the majority of judges are not part of the community, raising the concern that their written reasons may not necessarily be reliable or legitimate indicators of Indigenous laws. A fourth practical reason is a question of relevance. Fletcher states that Indigenous laws “may have limited utility in modern disputes,” as they may be too broad and vague to apply to specific fact disputes, or, conversely, may be too specific, and so apply “only to limited fact patterns that tend not to arise in the modern world.”⁶¹ Fifth, Indigenous law from the past “may not carry enough moral weight to legitimate its use.” Because cultures are not static, new rules adopted by an Indigenous community may be inconsistent with past laws.⁶²

Another, sixth, reason Fletcher believes tribal courts do not often use Indigenous laws is that litigants often do not cite them, either in oral or written arguments, and tend instead to “rely on Anglo-American law or intertribal common law.”⁶³ Seventh, in some cases, statutes might preclude the use of Indigenous laws, even for interpretation purposes. The final reason Fletcher lists is the one he sees as

⁶¹ Fletcher, *supra* note 7 at 29.

⁶² *Ibid.*

⁶³ *Ibid.* One reason for this may be a structural one. Sekaquaptewa argues that “tribal governments, by default have put the financial burden on our elders [those most likely to need or want] to find and plead custom.” She argues that tribal leaders and legislatures “need to give serious attention to shifting the burden off our more traditional and elder parties and onto the government where it belongs” (Sekaquaptewa, *supra* note 8 at 383).

perhaps the most important one: that “many tribal court judges do not feel competent to announce or apply customary law” and may not even see it as appropriate to their institutional role, seeing this as better left to the political leadership of the community.⁶⁴ Fletcher also brings up some related concerns about tribal courts applying Indigenous laws, including the “sensitive” subject of whether judges who are not members of a community can or should announce those community’s laws.⁶⁵ Additionally, there is the risk of tribal courts carelessly invoking vague, superficial “pan-tribal values” as Indigenous law.⁶⁶

These practical and theoretical issues can be roughly sorted into five categories of challenges to finding, understanding and applying Indigenous laws: (1) challenges of accessibility; (2) challenges of intelligibility; (3) challenges of legitimacy; (4) challenges of distorting stereotypes; and (5) challenges of relevance and utility.

1) Challenges regarding accessibility: This category speaks to the reality that Indigenous laws are not typically readily available, as Borrows points out and as we have already seen when we looked at the legal resources available. It is captured in Fletcher’s practical concerns about the difficulty of discovering what Indigenous laws are, the lack of written reasons citing Indigenous laws, and the reality that the majority of people with legal training may not have deep enough knowledge of the language and culture to recognize and understand Indigenous laws embedded within these resources.

⁶⁴ Fletcher, *supra* note 7 at 30. See Sekaquaptewa, *supra* note 8 at 320, describing this as a “policymaking role” and calling for guidelines for judges interpreting custom.

⁶⁵ Fletcher, *supra* note 7 at 40.

⁶⁶ *Ibid* at 33. See Sekaquaptewa, *supra* note 8 at 328, calling this “essentialism.”

2) Challenges of intelligibility: Some Indigenous laws may appear too vague or too imprecise to serve as standards for conduct. Borrows acknowledges this as a barrier, and Fletcher refers to the issue of specific laws being too broad or vague to be usefully applied to modern issues. There must be a way to understand what laws require of people subject to them. Some laws that are embedded in resources which require deep knowledge or cultural immersion to be understood, may necessitate a more conscious and explicit articulation, translation or reinterpretation in order to be comprehensible to a greater number of people today.

3) Challenges of legitimacy: Borrows's insight that historical, emotional and sociopolitical issues can impact people's perceptions of legitimacy is a crucial one for understanding some of the concerns raised by Fletcher about tribal judges from outside the community, whose decisions, and decision-making capacity regarding Indigenous laws, may not be viewed as legitimate simply because of who they are (or who they are not). Deeply engrained feelings about who should and should not speak about Indigenous laws reflect a reasonable distrust rooted in a long and painful history.⁶⁷ Such emotions clearly impact legal scholarship as well. However, authority and legitimacy is also grounded in people's ability to reason through law. This may be an increasing challenge *within* communities.⁶⁸ Fletcher's point that specific laws from the past simply

⁶⁷ For a discussion of part of this history in the context of academic research and Indigenous peoples, see Shaun Wilson, *Research Is Ceremony: Indigenous Research Methods* (Winnipeg: Fernwood Publishing, 2008) at 45-51.

⁶⁸ See, for example, Zuni Cruz's point that issues regarding the use of 'traditional' laws are raised "by those within the tribe and without the tribe," and pointing out that some tribal

may not have enough moral weight today speaks to this aspect of legitimacy.

Laws that might have been legitimate in the past may not be so in the present, in large part due to reasoning processes within traditions that respond to sociopolitical changes. This process of change is legitimate, and ignoring the results may lead to the fundamentalism and atrophy both Borrows and Napoleon caution against.

4) Challenges of distorting stereotypes: All three scholars point out that there are negative, static, utopian or superficial pan-Indigenous stereotypes that must be successfully addressed if the continued dismissal or distortion of Indigenous laws is to be avoided. Borrows sees overcoming negative stereotypes as one of the most crucial tasks to achieve greater recognition and respect for Indigenous laws in Canada. Napoleon's concerns regarding distortions and the perpetuation of ugly stereotypes of unthinking Indigenous people and Fletcher's concerns about superficial pan-Indian values masquerading as Indigenous laws represent serious concerns about the potential negative impact of stereotypical portrayals of Indigenous laws.

5) Challenges of relevance and utility: Both Napoleon and Fletcher talk directly about the challenge of Indigenous laws' current relevance and utility. Napoleon is particularly concerned that, on a general level, resources from within Indigenous legal traditions will no longer be available to Indigenous people if they are seen as mere remnants of the past, without any capability to change. Fletcher's observation that most litigants in tribal courts do not use Indigenous

members "may feel that traditional law is subject to manipulation" (Zuni Cruz, *supra* note 8 at 4).

laws in their written or oral arguments raises questions in this regard. This is surely an inevitable issue that must be considered, as is his point that some Indigenous laws simply may not apply, for various reasons, to certain modern issues. Issues of relevance and utility will have to be faced at both broad and particular levels.

These challenges are formidable, and they exist both in Canada and in the United States. In Canada, they arise more at the theoretical or philosophical level, sometimes being cited as reasons against the more formal recognition and integration of Indigenous legal traditions. In the United States, where tribal courts exist and are often specifically mandated to consider and apply Indigenous laws, they arise at an intensely practical level.⁶⁹ This suggests that challenges of accessibility, intelligibility, legitimacy, stereotyping and utility are likely to persist for a long time, even if changes occur at the political and institutional levels in Canada. We cannot wish these difficulties away. Once again, we face the question of how to proceed productively in the non-ideal present.

⁶⁹ Fletcher, *supra* note 7 at 10-16, discusses the varied sources of these mandates in a number of tribal courts. The widespread persistence of these challenges to finding, understanding and applying Indigenous laws does not mean that tribal courts in the United States are not doing so. The institutional space of tribal courts, particularly when staffed by culturally embedded judges and legal professionals, creates the interactional space for the ongoing development of unique jurisprudence that considers and incorporates Indigenous laws in various ways. Two excellent examples of this can be found in the extended discussion of the Hopi courts in Richland, *supra* note 10, and of Navaho case law in Austin, *supra* note 10.

**c. Indigenous Scholars' Analytical Frameworks for Accessing, Analyzing
and Applying Indigenous Laws**

It seems fair to say that any legal scholarship robust enough to provide some useful frameworks or guidelines for finding, understanding and applying Indigenous laws will require methodologies that consciously consider and adequately address these challenges. I turn now to examine how different methods of engaging with Indigenous legal traditions create a variety of analytical frameworks for addressing these challenges. Fletcher, Borrows and Napoleon have all developed such analytical frameworks; I will call the different ones (1) the linguistic method, (2) the source of law method, (3) the single-case analysis method and (4) the multi-case analysis and legal theory method. Each of these methods addresses several of the above challenges.

i. The Linguistic Method

I will begin with Fletcher's proposed method because I find it the least useful for legal scholarship if used in isolation, although it may have much merit in the context of U.S. tribal courts. Fletcher argues that if tribal courts are going to require or encourage the use of Indigenous laws, they should also provide "a roadmap for finding, understanding, and applying" these laws.⁷⁰ He then advocates for a specific method of accessing, understanding and applying Indigenous laws in tribal courts, which he relates back to H.L.A. Hart's legal theory involving primary and secondary rules. For those readers in need of a Hart refresher, Fletcher explains that primary rules are rules that "impose obligation to conform behavior of members of the

⁷⁰ Fletcher, *supra* note 7 at 36.

community,” such as prohibitions or requirements,⁷¹ and that secondary rules are rules of recognition, including “rules of adjudication” and “rules of change,” which comprise procedures for determining “where the rules are” and “authoritative determinations of the fact the rule has been broken.”⁷² Based on this discussion, Fletcher proposes what he calls the “linguistic method,” which involves the following process: First, the tribal court judge must “identify an important and fundamental value identified by a word or phrase in the tribal language” (a primary rule).⁷³ Next, that primary rule is applied by the judge to the Anglo-American or intertribal secondary rule “as necessary to harmonize these outside rules to the tribe’s customs and traditions.”⁷⁴

Fletcher gives an example of a tribal court having actually done this, one where a Navaho court applied the tribal principle of *hazho’ogo* (a fundamental tenet about treating other humans with patience and respect)⁷⁵ to expand the procedural prohibitions around self-incrimination in criminal cases.⁷⁶ Fletcher sees this method as transferable and capable of providing “interpretative parameters” to tribal judges.⁷⁷ He believes it provides the “critical advantage” of allowing tribal courts “to bring customary law into the modern era without creating much additional

⁷¹ *Ibid* at 8.

⁷² *Ibid* at 10.

⁷³ *Ibid* at 41.

⁷⁴ *Ibid*.

⁷⁵ My own rough interpretation from the “statement of tribal common-law” by the Navaho Court, as reproduced in Fletcher, *ibid* at 19.

⁷⁶ *Ibid* at 41, referring to the case, *Navaho Nation v. Rodriguez*, discussed in detail at 17-21. See also Austin, *supra* note 10, for extended case law applying fundamental Navaho principles to various cases in a similar way.

⁷⁷ Fletcher, *supra* note 7 at 42.

confusion as to the application of the law,” adhering to a form of “judicial minimalism” in tribal court jurisprudence.⁷⁸

When considering the challenges listed in the previous section, as well as the current quandary regarding legal resources, I have trouble picturing how far legal scholarship could move using Fletcher’s method. In the context of a tribal court, I agree that relying on the inherent knowledge of language as a legal resource, and applying broad concepts as interpretative aids to Anglo-American procedural law, is likely to do the least harm: it risks little in terms of distortions relating to superficial pan-Indigenous values, and it at least gives tribal court judges a concrete way to begin considering and using Indigenous principles in a relatively safe and transparent way. This is perhaps the method’s greatest strength. In addition, by relying on language, which fits into the most ideal category of legal resources, it will have the ring of legitimacy for many people. However, Fletcher himself establishes that the most ideal legal resources are actually the least available, and he does not provide a satisfactory way of addressing this issue.⁷⁹

The other glaring problem that Fletcher does not consider is his own earlier point that reasonable minds can differ regarding the interpretation of any law. His method appears to ignore the reality that serious interpretative conflicts can emerge concerning a single word, particularly one that signifies a fundamental legal principle in a society. For example, Austin describes *hazho’ogo* itself as “a polysemous term.” Although he states that it “generally means respectful and

⁷⁸ *Ibid.*

⁷⁹ Fletcher does suggest that tribal court judges who do not speak the language could still apply the values in a specific term, but this seems to fly in the face of, or at least dodge, his own earlier comments about the problems of translation.

considerate behavior in the presence of others,” the term’s specific meaning “usually depends on the context in which it is used.”⁸⁰ Consider also that troublesome gem of the English language so central to constitutional jurisprudence both in the United States and in Canada, “equality”.⁸¹ Fletcher suggests no real way of grappling with conflicting interpretations of the principle in question. Also troubling, applying single linguistic terms as legal values, without anything more, seems to raise the risks of oversimplification that Napoleon cautions against, as the terms are presented as isolated values, rather than as one principle to consider, which must be balanced against others in a comprehensive whole. While the competing interests before tribal courts may provide this balancing, in scholarship *per se* there is no obvious way to deal with the attendant risks of rigidity, essentialism and fundamentalism using this method.

ii. The Sources of Law Method

Borrows suggests that the intellectual barrier posed by negative stereotypes about Indigenous legal traditions can be overcome if “Indigenous laws are understood in greater detail, free from misleading characterizations.”⁸² He argues that a better understanding of the details of Indigenous laws and of “communities’ legal foundations” could “lead to a better appreciation of their contemporary potential, including how they might be recognized, interpreted, enforced, and implemented.”⁸³

⁸⁰ Austin, *supra* note 10 at 110.

⁸¹ Although examples of this abound, a clear illustration of competing interpretations of equality is found in Borrows’s discussion of equality arguments for and against the greater formal recognition of Indigenous legal traditions in Canada. See Borrows, *supra* note 2 at 150-155.

⁸² *Ibid* at 23.

⁸³ *Ibid*.

Towards this end, he identifies varied sources of Indigenous laws, including (1) sacred, (2) natural, (3) deliberative, (4) positivistic and (5) customary law.⁸⁴ This offers a particularly important discussion for two main reasons. First, by identifying multiple sources of law, Borrows demonstrates Indigenous legal traditions reflect a much richer and more complex social organization than their typical characterization as “customary law” suggests.⁸⁵ Second, Borrows argues convincingly that “the proximate source of most Indigenous law” is deliberation.⁸⁶

This emphasizes the intellectual and inherently social character of all law, including the centrality of questions of interpretation and persuasion. He explains: “When Indigenous people have to persuade one another within their traditions, they must do so by reference to the entire body of knowledge to which they have access, which includes ancient and modern understandings of human rights, due process, gender equality, and economic considerations.”⁸⁷ Borrows stresses that the deliberative character of Indigenous laws is “key to resisting fundamentalist and dogmatic legal practices and ideas.”⁸⁸ It also “means they can be continuously updated and remain relevant in the contemporary world.”⁸⁹

Borrows’s discussion of different sources of Indigenous laws provides an analytical framework for thinking through them in a more complex and complete way than do typical descriptive accounts. This attention to complexity and focus on

⁸⁴ *Ibid* at 23-58 (ch. 2).

⁸⁵ *Ibid* at 51.

⁸⁶ *Ibid* at 35. Mathew Lewans points out that Borrows also argues for a more complex understanding of Indigenous laws than Fletcher’s linguistically determined rule statements (personal conversation, Mathew Lewans, November, 2015).

⁸⁷ *Ibid*.

⁸⁸ *Ibid* at 36.

⁸⁹ *Ibid* at 35.

deliberation appears to effectively challenge and avoid stereotypes, as well as increase intelligibility by making the origins of laws more explicit. Identifying and questioning the sources of any particular Indigenous law also provides a way to reinforce the legitimacy of a statement of law or to respectfully argue interpretative differences rather than the perceived authority or lack of authority of a single source paralyzing conversations about disagreements.⁹⁰ However, this method does not necessarily address the issue of accessibility to laws in the first place, because the laws themselves still must be ascertainable prior to identifying their sources.

iii. The Single-Case Analysis Method

Yet another striking and groundbreaking method Borrows often uses, but rarely, if ever, discusses in detail as a methodology, goes quite far in increasing accessibility to Indigenous laws by closely analyzing individual Anishinabek stories to draw out legal principles, much as law students do with court cases. I call this the “single-case analysis method” and believe it is the single biggest step towards accessibility and intelligibility that has ever been taken in legal scholarship engaging with Indigenous legal traditions.

In some places in *Canada’s Indigenous Constitution*, but more so in its companion book, *Drawing Out Law*, and in previous work,⁹¹ Borrows interprets legal principles from a particular story and uses these principles to explore or explain current issues. In doing so, he explains he is acting on his mother’s teachings

⁹⁰ For example, see Borrows’s discussion regarding the appeals to authority of positivist proclamations where they are practically entangled with a “powerful group’s claims to authority from laws flowing from the Creator [sacred], nature [natural law], or from the functioning of a deliberative council [deliberative]” (*ibid* at 50).

⁹¹ Borrows, *supra* note 29.

about the need to consider and share the current relevance and utility of these stories.⁹² While the single-case analysis method undeniably renders principles within stories much more accessible and intelligible, Fletcher criticizes and actually rejects this method, which he views as a variation of the case method, because he sees the interpretation of principles from specific stories as an essentially boundless endeavour, raising the issue of indeterminacy. He states bluntly: “Some limitation in meaning must be present or else there will be no meaning at all.”⁹³

To be fair, Borrows never claims his interpretations as authoritative; he merely states that ancient stories have useful lessons to give, and that these can be applied to current issues. However, if deliberation, interpretation and persuasion are at the heart of a legal tradition, and if these principles are to be applied with concrete consequences, there must be ways for others to legitimately confirm or challenge his interpretations and their relevance. The single-case analysis method may thus raise similar challenges as I discussed regarding the current availability of ideal legal resources.

Borrows may be operating within implicit interpretative limits when identifying principles from individual stories due to his particular deep cultural knowledge, or to his access to family and community connections, even though he often uses publically available sources in his work. Other people without deep

⁹² In *Drawing Out Law*, Borrows, *supra* note 31 at 87, explains, “his mother always encouraged him to see the wider world through older Anishinabek eyes. She encouraged him to share how their ancient ways still swirled around them. It was obvious to her that the events and stories surrounding them were still very much connected to their living, enduring culture. She always expected her son to make these connections more explicit, no matter where he lived.”

⁹³ Fletcher, *supra* note 7 at 43-44.

knowledge or similar family connections may not have similar implicit interpretative limits at their disposal. Borrows himself points out that “law is a cultural phenomenon,” and so “those who evaluate meaning, relevance, and weight of Aboriginal legal traditions must therefore appreciate the potential cultural differences in the implicit meanings behind the explicit messages if they are going to draw appropriate inferences and conclusions.”⁹⁴ This could pose a particular interpretative challenge for legal scholars who are attempting to engage with and articulate internal dimensions of Indigenous legal traditions but who were not, in fact, raised or trained within that particular Indigenous society.⁹⁵ Both Borrows and Napoleon emphasize the importance for legal scholars to be reflexive about their position in power dynamics and structures,⁹⁶ to recognize the cultural foundations of knowledge and to acknowledge their own biases when engaging with Indigenous legal traditions.⁹⁷ Yet while recognition and reflexivity may allow scholars to question their assumptions, they do not, in and of themselves, support the development of interpretative limits. There must be some way to recognize legitimate boundaries for interpretative arguments to take place within.

Interpretative boundaries would also provide an important safeguard against

⁹⁴ Borrows, *supra* note 2 at 140.

⁹⁵ Napoleon acknowledges that this constitutes a limitation for her analysis, despite her having spent more than 20 years working with the Gitksan and being an adopted member of the Hours of Luuxhon of the Frog Clan. She none the less proceeds to “explore and interpret Gitksan legal traditions from an internal philosophical basis, rather than focus on external descriptions” (Napoleon, *supra* note 24 at 17). While legal scholars of non-Indigenous descent most obviously face this limitation, there are also Indigenous scholars who may be working in a different legal tradition (like Napoleon, who is Cree, but engages with the Gitksan legal order) or who were not raised within Indigenous communities for a variety of reasons.

⁹⁶ *Ibid.*

⁹⁷ Borrows, *supra* note 2 at 141.

distortions deriving from stereotypes or simply profound misunderstandings as people reason through the law.

iv. The Multi-Case Analysis and Legal Theory Method

Napoleon's work with the Gitksan legal tradition stands out as by far the most thorough analysis of a particular Indigenous legal tradition to date. She combines two major approaches to avoid replicating the problems in many descriptive accounts that she criticizes in her own treatment of Gitksan law, as well as to build interpretative limits. First, she deliberately adopts a "law case method" for exploring Gitksan law in a substantive way.⁹⁸ She explains that she has chosen this method, despite extant criticisms, because "the law case method reveals the intellectual aspects of Gitksan law—forms of legal reasoning (*i.e.*, analogy, metaphors, problem-solving, collectively owned outcomes, etc.), use of precedent, interpretation, applications, decision-making and agreements that are often missed or ignored completely in descriptions of [I]ndigenous law."⁹⁹ Second, she draws from Western legal scholars to theorize about the broader "structures, processes, and expressions of law" that enabled the Gitksan "to effectively manage themselves as a decentralized, non-state people."¹⁰⁰ She consciously adapts and applies work from classic Western legal theorists (specifically from H.L.A. Hart's positivist theory of primary and secondary rules, Lon Fuller's interactional law theory, and William Twining's legal theory framework) as critical tools to explore and analyze the

⁹⁸ Napoleon, *supra* note 24 at 24 -29, explicitly refers to the influence on her own thinking of Karl Llewellyn and E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman: University of Oklahoma Press, 1941)..

⁹⁹ Napoleon, *supra* note 24 at 29.

¹⁰⁰ *Ibid* at 38.

substantive Gitksan law she identifies through the case method.¹⁰¹ By combining these two approaches, Napoleon locates principles from specific cases in a comprehensive whole, while also ensuring that her articulation of that comprehensive whole avoids “romanticism and rhetoric”¹⁰² by remaining “grounded in a substantive on-the-ground treatment of Gitksan law.”¹⁰³

In her two-pronged approach, Napoleon first groups cases into rough categories to identify principles within each category. She then applies Twining’s theoretical framework to the principles and practices within these categories to identify a tentative Gitksan legal theory, which she proposes can be “tested and extrapolated for broader application to other areas of law within the Gitksan legal order” and, “with care,” may have potential as a “basic framework model for other non-state and decentralized indigenous peoples.”¹⁰⁴

To give a sense of the complexity and comprehensiveness of Napoleon’s work here, I set out an outline of her articulation of a tentative Gitksan legal theory. Her findings include:

- 1) *A coherent total picture* of the Gitksan legal tradition, including
 - a) a non-state, decentralized governance system¹⁰⁵
 - b) relevant legal actors and relationships (including kinship)
 - c) stabilizing tensions¹⁰⁶

¹⁰¹ *Ibid* at 38, nn 106-107, citing H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961); Lon L. Fuller, “Human Interaction and the Law” in Kenneth Wilson, ed, *The Principles of Social Order: Selected Essays of Lon Fuller* (Portland, OR: Hart, 2001 and William Twining, *Globalisation and Legal Theory* (New York: Cambridge University Press, 2000).

¹⁰² Napoleon, *supra* note 24 at 39.

¹⁰³ *Ibid* at 15.

¹⁰⁴ *Ibid* at 294.

¹⁰⁵ *Ibid* at 296.

d) sources of law¹⁰⁷

e) geographic space or jurisdiction¹⁰⁸

2) *General concepts*, including that

a) Gitksan law comprises implicit and explicit rules *and* the intellectual processes of legal reasoning, interpretation and application¹⁰⁹

b) there are different types of Gitksan laws, including primary, secondary and strict¹¹⁰

3) *General normative principles*, including

a) the “paramount importance of maintaining ... the overall legitimacy of the legal order”¹¹¹

b) the importance of kinship relations

c) individual and collective accountability

d) resistance to hierarchy and centralization

e) the importance of relationships to the land and to non-human life forms (f) agency and independence

g) cooperation¹¹²

4) *General working theories* for participants, including

a) “a focus on compensation rather than a determination of guilt”

¹⁰⁶ *Ibid* at 297-299.

¹⁰⁷ *Ibid* at 299-300.

¹⁰⁸ *Ibid* at 300-301.

¹⁰⁹ *Ibid* at 301-303.

¹¹⁰ *Ibid* at 303-305.

¹¹¹ *Ibid* at 307.

¹¹² *Ibid* at 307.

- b) “public witnessing and accountability”
- c) “collectivity versus individuality insofar as responsibility and compensation are concerned”
- d) the importance of precedent
- e) “the critical importance of knowledge of lineage, history, and kinship relationships”¹¹³

It is hard to imagine someone walking away from legal scholarship so robust imagining that Gitksan legal principles are isolated anachronisms or viewing the Gitksan of the past (or the present) as simple, unthinking people. It is also an accessible and intelligible treatise, even for people who are not Gitksan, or for those who may not even know who the Gitksan are.

Napoleon’s work appears to answer Fletcher’s criticism of boundlessness, as well as his concern about the case method more generally,¹¹⁴ partially because she develops a larger theoretical framework, which arguably sets up interpretative limits, but also because she analyzes a *number* of Gitksan stories and cases (24 in all) as a “small slice” of a larger Gitksan legal tradition.¹¹⁵ By taking Borrows’s method of single-case analysis one step further and “unpacking” several cases at the same time, Napoleon is able to identify differing themes, or categories of legal decision-making, as well as common legal principles.¹¹⁶ Although she does not

¹¹³ *Ibid* at 309.

¹¹⁴ Fletcher, *supra* note 7 at 43.

¹¹⁵ Napoleon, *supra* note 24 at 95. Napoleon stresses the importance of remembering “that the whole of the Gitksan legal traditions is infinitely more extensive than anything I am able to capture here.”

¹¹⁶ For example, Napoleon identifies as a general legal principle a focus on punishment, compensation and remedies, rather than on findings of guilt or responsibility. See the

explicitly identify her methodology beyond that of the case method, she clearly reaches and supports her conclusions by analyzing and synthesizing several cases, from different times and with different fact scenarios. Arguably, such an identification of general principles can serve to set the outer limits of the normative and interpretative debates within the broader Gitksan legal tradition, or at least suggest certain factors that would likely influence the “relative success of various normative assertions” within it.¹¹⁷

Relying on case analysis and synthesis using many legal resources, and building a tentative legal theory based on these findings, may also offer one way to effectively address some of the challenges of legitimacy. Napoleon relies mainly on publically available materials from court transcripts, but her synthesis considers and incorporates interviews with community connections and even published accounts from outside academics. By synthesizing legal principles from all of these resources, and by bringing this synthesis back to sketch a tentative legal theory, her final result becomes more than the sum of its parts. It is both grounded enough to withstand challenge and criticism and flexible and complex enough to acknowledge interpretative debates, as tensions between legal principles are a vital part of a living Gitksan legal tradition.

discussion and analysis *ibid* at 156-160. Other general principles she identifies in this manner include a heavy reliance on reciprocal relationships in kinship systems and an emphasis on public witnessing and accountability. See *ibid* at 148-156, 160-164.

¹¹⁷ Jeremy Webber, “Legal Pluralism and Human Agency” (2006) 44 Osgoode Hall LJ 167, as cited in Borrows, *supra* note 2 at 137-138. Webber’s essential insight is that law’s content is always more provisional and open-ended than “singular or predetermined,” and that it is more useful to look at the range of arguments and terms of the debate itself, rather than focusing on one particular outcome at any given point in time.

Each of the four methods described and discussed in this section have significant strengths. None provides a complete answer to every challenge or represents *the* definitive road map for how to find, understand and apply Indigenous laws. For instance, generally, it would appear that while the strength of Fletcher's framework is the immediacy and efficiency with which it may allow tribal court judges to *apply* Indigenous laws in an institutional setting, the strengths of Borrows and Napoleon frameworks are the extent to which they may allow legal scholars to *access* and *understand* these laws. This arguably creates a more robust foundation for ongoing application,¹¹⁸ but in the end, the question of whether these methods can address the challenge of relevance and utility is still an open one.¹¹⁹

3. Next Steps for Legal Scholars:

Thus far, I have examined some of the opportunities and challenges facing those interested in engaging more deeply with Indigenous legal traditions. By looking closely at the work of three leading Indigenous legal scholars, I have identified several legal resources, which can be roughly grouped into resources that require deep knowledge or cultural immersion, resources that require some family or

¹¹⁸ See Sekaquaptewa, *supra* note 8 at 320.

¹¹⁹ This is not necessarily a bad thing, if a sustained, serious engagement means that relevance and utility are able to be considered, debated and decided upon openly within Indigenous communities. See, for example, the finding by the Navaho Supreme Court in an individual case that "[t]he danger in using Navajo custom and tradition lies in attempting to apply customary principles without understanding their application to a given situation. Navajo custom varies from place to place; Old customs and practices may be followed by the individuals involved in the case or not; There may be a dispute as to what the custom is and how it is applied; or, a tradition of the Navajo may have so fallen out of use it cannot any longer be considered a 'custom'" (*Lente v. Notah*, as cited in Austin, *supra* note 10 at 173. On a political community level, see also Zuni Cruz, *supra* note 8 at 9; and Sekaquaptewa, *supra* note 8 at 373.

community connection and resources that are publically available. I have also outlined the present resource quandary that the most ideal resources are the least available and the least ideal are the most available in many instances. Further, I have identified five additional challenges, ones of (1) accessibility, (2) intelligibility, (3) legitimacy, (4) stereotyping and (5) relevance and utility. Last, I have examined four methods for finding, understanding and applying Indigenous laws, including (i) the linguistic method, (ii) the sources of law method, (iii) the single-case analysis method, and (iv) the multi-case analysis and legal theory method. I have also critically considered whether and how these methods address the identified challenges, establishing the strengths and gaps in each one. Stepping back now to look at this work more generally, I now turn to ask what might be potential next steps in this work for interested legal scholars.

a. Learning from and Building on the Frameworks

The legal scholarship I have examined in this chapter has effectively adapted and applied existing tools from the legal academy to develop analytical frameworks for engaging more productively with Indigenous legal traditions. Despite differences between the methods, all these frameworks constitute significant steps forward because so very little legal scholarship engages substantively with Indigenous legal traditions, and these traditions are not currently taught in university law schools.¹²⁰ This absence implicitly perpetuates colonial legacies that ignore, dismiss or diminish the importance of Indigenous laws. It also means that legal scholarship—

¹²⁰ There have, however, been exceptions to this, and currently efforts are under way for the creation of a degree program in Indigenous Law at the University of Victoria. See Borrows, *supra* note 2 at 228-237.

which is one way for us to recognize and consciously explore aspects of legal traditions and legal practice that practitioners might otherwise not consciously notice, or which they simply take for granted—is unavailable as a resource to Indigenous communities for Indigenous laws.¹²¹ Sekaquaptewa highlights this structural absence when she demands of Indigenous leaders and governments, “Where are our institutionally mandated self-studies? Where are our custom law treatises and archives? Where are our tribal bar study materials and exams requiring attorneys and advocates to have some basic knowledge of our custom law?”¹²² It is worth noting that the role of legal scholarship and law schools in the common law legal tradition is itself a relatively recent phenomenon.¹²³ The common law did not always incorporate legal scholarship, and even now scholarship is not always accepted or used in practice.¹²⁴ Nonetheless, it is currently acknowledged as playing a useful role in that legal tradition.

¹²¹ For a discussion of this complementary role of legal scholarship and legal practice in the U.S. legal system, see, for example, Fred C. Zacharias, “Why the Bar Needs Academics—and Vice Versa” (2003) 40 San Diego L Rev 701; and Andrew Halpin, “Ideology and Law” (2006) 11 Journal of Political Ideologies 153. Of course, “Just as theoretical reflection may bring illumination to practice, so too the wider observation of practice may cause us to refine out theory—where, in particular, a theoretical construct is seen to be artificially restricting our view of what we find is actually going on that practice” (Halpin, at 153).

¹²² Sekaquaptewa, *supra* note 8 at 383.

¹²³ Birks notes that, at the beginning of the 20th century, “the common law had barely begun to acknowledge the existence, much less the importance, of jurists, and the notion that university law schools might be essential to the education of lawyers was still novel.” See Birks, *supra* note 55 at v.

¹²⁴ Obviously, Indigenous legal traditions continue to be practiced without the benefits of legal scholarship. However, in regard to the common law tradition, Birks points out that the role of legal scholars in “shaping raw case law” went largely unrecognized for “the best part of a century after it might first have been observed” and that even now, “neither the image of the common law nor formal accounts of its operation [have] fully adjusted to the necessity of law schools and the law-making and law-shaping role of the juristic literature that flows from them” (*ibid*).

The existing work by the Indigenous legal scholars mentioned above clearly demonstrates that legal scholarship engaging with Indigenous legal traditions can also be useful. It may provide a way into Indigenous legal traditions, offering a concrete step towards the greater accessibility and intelligibility of Indigenous laws. It can dispel negative or pan-Indigenous stereotypes and may help identify the current relevance and utility of these legal traditions. If done carefully and explicitly, it might also provide interpretative limits and transparency, so that the legitimacy of statements about Indigenous laws can be challenged, confirmed or questioned, reinvigorating deliberative traditions. This kind of legal scholarship does appear to increase the possibility of Indigenous laws being accessed, understood and applied to contemporary issues. Therefore, such work can contribute to the continued health and vitality of Indigenous legal traditions,¹²⁵ as well as to increasing respect for and recognition of them within the broader Canadian legal and political framework.¹²⁶

It is worth asking what Fletcher, Borrows and Napoleon have all done differently than other legal scholars who have written about Indigenous legal traditions. I would suggest two main differences. First, they are asking different questions *of* Indigenous legal traditions than are typically or were historically asked. Rather than focusing on broad generalities, or on using Indigenous laws as rhetorical tools to critique state legal systems, these scholars focus on the specifics

¹²⁵ Napoleon, *supra* note 24 at 295. Napoleon argues that the health of law in a society means, at minimum, the legal order “(1) is considered legitimate by the people of that society, (2) is an effective tool by which citizens manage themselves as a society, and (3) provides a constructive way for people to manage internal and external conflict” (at 294-295).

¹²⁶ Borrows, *supra* note 2 at 139, 143.

of Indigenous laws themselves. This focus leads to the following intellectual shifts vis-à-vis typical research questions:

From	To
What is Aboriginal justice?	What are the legal concepts and categories within this Indigenous legal tradition?
What are the cultural values?	What are the legal principles?
What are the “culturally appropriate” or “traditional” dispute resolution forms?	What are the legitimate procedures for collective decision-making?
OVERALL SHIFT:	
What are the rules? What are the answers?	What are the legal principles and legal processes for reasoning through issues?

These shifts in questions are demanding ones, particularly given the current challenges of available and ideal legal resources for engaging with Indigenous legal traditions. However, asking these questions is worth the effort, because they force legal scholars to think beyond stereotypes and pan-Indigenous generalities, and they treat Indigenous legal traditions as seriously as other legal traditions.¹²⁷ This is particularly important because it encourages legal scholarship that grapples with Indigenous laws as *laws*, in all their complexity. Legal scholarship that asks the right questions may be able to play a vital role in reasoning through the “questions, contradictions and conflicts” that arise from the substantive practice of law on the ground.¹²⁸

The second, and closely related, unique aspect of these Indigenous legal scholars’ work is how they have answered these questions. Fletcher, Borrows and

¹²⁷ Zuni Cruz stresses the value of an approach that “represents a serious respect for traditional law and its place not only in resolving specific disputes on a case-by-case basis, but in serving as a foundation for all law of the tribe, including the law of governance, ethics, and substantive and procedural law” (Zuni Cruz, *supra* note 8 at 9).

¹²⁸ *Ibid.*

Napoleon are among a handful of North American scholars who are writing about Indigenous legal traditions from an internal, rather than external viewpoint. HLA

Hart describes this distinction between viewpoints:

When a social group has certain rules of conduct, this fact affords an opportunity for many closely related yet different kinds of assertion; for it is possible to be concerned with the rules, either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides to conduct. We may call these respectively the 'external' and 'internal' points of view.¹²⁹

To be clear, legal scholarship from an internal viewpoint does *not* refer to the legal scholar's Indigenous descent or formal membership in a specific Indigenous group prior to engaging with an Indigenous legal tradition. Rather, it refers to a specific *type* of legal scholarship. Law schools across Canada train law students to learn and write about the common law or the civil law tradition from an internal viewpoint – to grapple with law in all of its rich complexity. In law school I had classmates from all over the world, from China to the Ukraine, but we all learned the Canadian common law legal tradition from an internal viewpoint, because it was this internal viewpoint that would enable us to access, understand and apply laws—in class, in our exams, and eventually in legal practice. We were not disinterested observers trying to merely describe laws as accurately as possible. Rather, we needed to be able to go beyond simple rule statements and understand laws well enough to be able to access and use them. The focus of our engagement was immersing ourselves in a way of thinking that would enable us to do this as future practitioners. Fletcher,

¹²⁹ Hart, *supra* note 45 at 89. See also Jeremy Webber, "The Past and Foreign Countries" (2006) 10 Legal Hist Rev 1 at 2. Webber contrasts this with legal scholarship from an external viewpoint, which focuses on "historical and sociological accounts of the very same body of law." Of course, American tribal court judges such as Zuni Cruz, Sekaquaptewa and Austin are also doing this substantive scholarship.

Borrows and Napoleon all demonstrate that legal scholars can productively adapt and apply the tools they have learned in law school, such as legal theory, to similarly engage with Indigenous legal traditions from an internal viewpoint.

The work of both Borrows and Napoleon demonstrates that it is both possible and productive to analyze Indigenous legal resources. This leads me to take a closer look at the analytical tools of legal analysis and legal synthesis, although neither scholar explicitly identifies these tools in his or her respective methods. Most people who have attended a North American law school in the past century are familiar with the tool of legal analysis, first developed by Christopher Langdell, the dean of Harvard Law School in 1870.¹³⁰ While there is a rich, ongoing debate about the need for and use of other methods and interdisciplinary influences in the study of law, Langdell's "original program of analyzing legal materials and cases (albeit now suitably leavened by a sprinkling of non-legal sources)" continues as a central methodology within legal scholarship and legal education.¹³¹ Minimally, contemporary legal scholarship from an internal viewpoint continues to consist of *legal analysis*, whereby cases are summarized and interpreted (much like Borrows' single-case analysis),¹³² and *legal synthesis*, whereby disparate elements of cases and statutes are fused to develop coherent and useful general legal standards that

¹³⁰ Jack M. Balkin and Sanford Levinson, "Law and the Humanities: An Uneasy Relationship" (2006) 18 Yale JL & Human 155 at 159-160.

¹³¹ *Ibid* at 160.

¹³² Philip C. Kissam, "The Evaluation of Legal Scholarship" (1988) 63 Wash L Rev 221 at 231.

explain, justify or are consistent with a group of particular legal decisions (much like Napoleon's multi-case analysis).¹³³

Legal analysis and synthesis are methods of legal scholarship that start from an "internal" view of a particular legal system,¹³⁴ thus producing "embedded" legal scholarship: extended discussions based on "the authoritative artifacts of law."¹³⁵ The knowledge gained through legal analysis is no longer seriously considered "scientific,"¹³⁶ nor is it necessarily about a broad understanding or critique of the legal order.¹³⁷ Rather, it is considered knowledge of the "language of law":¹³⁸ of the practical nuts and bolts of "how arguments are fashioned and deployed within legal practices."¹³⁹ In other words, legal analysis and legal synthesis are methods that assist scholars and practitioners to learn the law from an internal viewpoint - to learn in a way that enables them to access, understand and apply that law.

In addition to offering this kind of assistance, Birks points out that traditional legal research and scholarship within the common law tradition "criticizes, explains,

¹³³ *Ibid* at 232. For a particularly good article on teaching the skill of legal synthesis in law school, see Paul Figley, "Teaching Rule Synthesis with Real Cases" (2011) 61 J Legal Educ 245.

¹³⁴ Balkin and Levinson, *supra* note 131 at 162.

¹³⁵ Todd D. Rakoff, "Introduction" (2001-2002) 115 Harv L Rev 1278 at 1279.

¹³⁶ Balkin and Levinson, *supra* note 131 at 162. Balkin and Levinson point out that while Langdell originally touted legal analysis as a "scientific method" of studying law, "only the most foolhardy academic today would describe doctrinal analysis as 'scientific'. The preferred term today is 'craft'" (at 162).

¹³⁷ Kissam, *supra* note 133 at 236-239.

¹³⁸ James Boyd White, "Legal Knowledge" (2001-2002) 115 Harv L Rev 1396 at 1397. White argues, "Knowledge of the law is like knowledge of a language: you never know all of it, you never know it perfectly, you cannot reduce your knowledge of it to a set of directions or descriptions or rules; rather, your competence consists of being able to use it more or less well, in one set of situations or another."

¹³⁹ Webber, *supra* note 23 at 2.

corrects, and directs legal doctrine.”¹⁴⁰ It can also be used to resolve doctrinal issues, such as inconsistent or conflicting decisions of different courts,¹⁴¹ and to produce teaching materials for law students.¹⁴² My hypothesis is that employing the methods of legal analysis and synthesis to engage with Indigenous legal traditions could, with some adaptation, likewise allow legal scholars to summarize and interpret legal resources, articulate coherent legal principles and standards, reconcile seemingly disparate resolutions and develop teaching materials from an internal viewpoint of Indigenous legal traditions. This type of detailed and robust scholarship could contribute to increasing potential resources and to addressing the challenges facing those wishing to access, understand and apply Indigenous laws to contemporary issues. I believe that legal scholarship which explicitly adapts and applies legal analysis and synthesis to Indigenous legal materials constitutes the next logical step in building on the current legal scholarship from an internal viewpoint of Indigenous legal traditions. In the following section, I give an example of one way this might be done.

b. A Case Study: Applying Legal Analysis and Synthesis to a ‘Deep Slice’ of Cree Law for the *Wetiko* (Windigo) Legal Principles Project

To illustrate the possibilities in adapting and applying the tools of legal analysis and synthesis to Indigenous legal resources, I discuss my own LLM research as a case study for how this method could potentially build on Borrows’s and Napoleon’s methods to move forward through challenges in future legal scholarship.

¹⁴⁰ Birks, *supra* note 55 at ix.

¹⁴¹ Kissam, *supra* note 133 at 234.

¹⁴² *Ibid* at 236.

c. The Project: *Wetiko* (Windigo) Legal Principles

In *Canada's Indigenous Constitution*, Borrows applied his single-case analysis method to identify principles and processes in a historical account, recorded in 1838 by the Superintendent of Indian Affairs, William Jarvis, of an Anishinabek group who had to urgently respond to, and ultimately execute, a member of their group who had become increasingly dangerous to himself and to others.¹⁴³ Borrows points out that “a vast literature shows this pattern of dealing, over long periods of time, and in different geographic regions where the Anishinabek lived.”¹⁴⁴ He also suggests that these principles and processes, if not the specific outcome, would be familiar to Anishinabek people today.¹⁴⁵

In fact, although I am not Anishinabek, the principles did sound familiar to me, from similar stories I have heard from Cree elders in northern Alberta. These were stories about people who had become a *wetiko* (also known as a windigo). The word “*wetiko*” was sometimes translated to me as a “cannibal,” but on a closer examination, it appears to be a concept or categorization of people who are harmful to themselves or to others. While there are ‘supernatural’ aspects to stories about *wetikos* that might make them difficult to believe for many people,¹⁴⁶ I was immediately struck by the fact that Cree elders living in northern Alberta today related principled responses to a person becoming a *wetiko* that were strikingly similar to the responses of a group of Anishinabek people in Ontario in 1838. In the

¹⁴³ Borrows, *supra* note 2 at 81-83.

¹⁴⁴ *Ibid* at 83.

¹⁴⁵ *Ibid*.

¹⁴⁶ Borrows, *supra* note 31 at 227.

excerpt analyzed by Borrows, the Anishinabek group leader explained how they responded to the man, after observing him becoming increasingly dangerous:

We then formed a council to determine how to act as we feared he would eat our children. It was unanimously agreed that he must die. His most intimate friend undertook to shoot him not wishing any other hand to do it.
After his death we burned the body, and all was consumed but the chest which we examined and found to contain an immense lump of ice which completely filled the cavity.
The [young man], who carried into effect the determination of the council, has given himself to the father of him who is no more: to hunt for him, plant and fill all the duties of a son. We also have all made the old man presents and he is now perfectly satisfied.
This deed was not done under the influence of whiskey. There was none there, it was the deliberate act of this tribe in council.¹⁴⁷

For many reasons grounded in Western legal theory, including the subject matter,¹⁴⁸ the identifiable collective reasoning and problem-solving processes,¹⁴⁹ and the demonstrated felt obligations in most accounts,¹⁵⁰ I concluded that the *wetiko* was best understood as a legal concept or category in at least Cree and Anishinabek legal traditions.¹⁵¹

For this research project, I decided to pursue what I believe to be the next logical step from Borrows's and Napoleon's internal scholarship within Indigenous legal traditions. If Napoleon could identify general legal principles from a "slice" of

¹⁴⁷ Borrows, *supra* note 2 at 82.

¹⁴⁸ No one seriously argues against H.L.A. Hart's assertion that our human vulnerability means that one of "the most characteristic provision[s]" of any system of law or morals must include the prohibition or restriction of "violence in killing or inflicting bodily harm." See Hart, *supra* note 45, at 194-196.

¹⁴⁹ Gerald Postema argues that legal reasoning requires "a distinctive deliberative and discursive capacity ... an ability to articulate and defend judgments publicly." Because legal judgments are public and collectively owned, they must be made in a way that elicits "recognition and acceptance as appropriate in one's community." See Gerald Postema, "Classical Common Law Jurisprudence, Part II" (2003) 3 OJLJ at 10.

¹⁵⁰ In their recent treatise on international law, Jutta Brunnée and Stephen Toope argue that "the distinctiveness of law lies not in form or in enforcement but in the creation and effects of legal obligation." See Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law* (Cambridge: Cambridge University Press, 2010) at 7. A more in-depth discussion of the concept of legal obligation follows at 92-97.

¹⁵¹ For a more in-depth analysis of this, see Hadley Friedland, *The Wetiko (Windigo) Legal Principles* (LLM Thesis, University of Alberta, 2009) [unpublished] at 35-40.

Gitksan legal cases, and Borrows could identify legal principles from individual stories, or even from an outsider's historical account regarding a *wetiko*, what legal principles might emerge from combining the structured rigor of both methods to complete a legal analysis and synthesis of one deep slice of law within Cree and Anishinabek legal traditions? I decided to gather as many legal resources on the subject of the *wetiko* as I could, and then to apply legal analysis and synthesis to those materials in order to identify legal principles that might be evident, just as I had in law school and in legal practice.

d. Legal Resources: Sifting through the Stereotypes

Earlier in this chapter I identified a current conundrum regarding legal resources. While many and diverse resources for accessing Indigenous laws exist, at the current time, those most ideal are least available, and those most available are the least ideal. I had to face this issue squarely when I began my research into the *wetiko* legal category. I do not have any deep knowledge of Cree language or culture to bring to the subject, so the most ideal resource was not available to me at all. I did have access to the next best resource—community connections. I was able to interview knowledgeable elders, as well as younger community members in the Cree community where I had first heard stories of the *wetiko*. Yet I quickly realized that I needed to go beyond personal community connections if I wanted a breadth of perspective on the issue, both in terms of time and geographic space. To gain this perspective I had to look beyond what connections to one Cree community could provide. The only resource realistically available for these purposes was publically available literature, written mostly by outsiders. I gathered stories from a wide

array of sources, including published folk-tale collections, academic publications in anthropology, history and psychology, and Canadian case law.

One thing that became immediately apparent was that if I was to be indiscriminate about resources, I needed a strategy for approaching them which allowed me to access the information they provided without adopting their culturally bounded interpretations, interpretations that often led to illogical, incomplete, distorting or demeaning conclusions. I returned to Borrow's brief work on the *wetiko* to find a way to navigate this issue. Borrow's approach has three interrelated aspects that I adopted as starting assumptions for analyzing the literature about the *wetiko*:

- 1) Borrow begins by assuming that Indigenous people in historical accounts are reasoning people within reasonable legal traditions. This allows him to access the historical rationality of their actions, regardless of any bias the recorder of events may have had.
- 2) His focus lies on the contemporary application of legal principles as present-tense intellectual resources within living legal traditions. This means that his analysis is more concerned with applicability than with some elusive 'authenticity'. This keeps him from being distracted by distorted details.
- 3) He also focuses on the social responses to the universal human problem the concept of the *wetiko* represents and brackets off the big questions about supernatural aspects. This bracketing increases the accessibility of these intellectual resources.¹⁵²

¹⁵² For a more in-depth discussion of these three assumptions, see *ibid* at 45-53.

Adopting these assumptions allowed me to analyze the literature for legal principles, rather than getting distracted by certain aspects of the stories themselves or by the author's biased conclusions. The sheer number of 'cases' I was able to gather also helped with this. Fortuitously for my purposes, the *wetiko* had been a salacious topic for anthropologists and psychologists for many years. I found that by gathering a larger amount of resources on a single topic, patterns did begin to emerge, and this made it easier to sort out what was likely a biased distortion by an outsider and what elements appeared to have greater consistency through time and space. Borrow's assumptions and the public availability of many and diverse resources together helped me manage the bias contained in these materials and to access their potential as a resource.

e. Method: Applying Legal Analysis and Synthesis to Learn about the *Wetiko* Legal Category

As indicated earlier, my method was simple: to adapt and apply legal analysis and legal synthesis to the available resources about the *wetiko*. In the spirit of first-year law school, I began my legal analysis by briefing all resources that gave enough information to identify a problem and a decision or resolution to that problem (23 in all). Assuming descriptive accounts were of reasoning people in reasonable legal orders, I identified either an explicit or implicit ratio for the resolution. Many resources, including written stories and oral accounts, just gave the background or descriptions of certain aspects of the *wetiko* legal category. Where information was insufficient to complete a case brief, I began to record that information under various headings referring to the different aspects identified. Once I had completed a review of all the literature and conducted my interviews within the community, I

undertook a legal synthesis, bringing together all of my legal analysis. How did I do this? I actually worked to prepare an outline of everything I had learned, just as I had done in law school to prepare for exams.

Quite simply, this worked. The results of this research were beyond anything I could have imagined. By applying the analytical tools of legal analysis and synthesis to a 'deep slice', or a single legal area in Cree and Anishinabek legal traditions, I was able to identify many rich legal principles that, together, helped me understand this area of law in a much more detailed and comprehensive way.

f. Research Results

The focus of this chapter is method, rather than a discussion of my substantive research results. In the following chapter I will demonstrate further results from this method. Yet in order to illustrate the depth and complexity that emerged for me in this single area of law, which, of course, is only one area of law within larger legal traditions, I provide here a very brief summary of my LLM findings. In the *wetiko* legal category I found:

- 1) There were principles about *legal processes*, including the principles that
 - a) legitimate decisions are collective and open (public and transparent)
 - b) authoritative decision-makers are leaders, medicine people and close family members
 - c) legitimate responses require three procedural steps:
 - i) recognizing warning signs
 - ii) observation, questioning and evidence gathering to determine whether someone fits in the *wetiko* category

iii) determining the response.

2) There were principles about *legal responses*. The overall principle is ensuring group safety and protection of the vulnerable. Responses usually go from least intrusive to most intrusive, as needed, and available resources and larger political realities affect decisions. There are four response principles that are blended and balanced depending on the facts in a particular case. These are

- a) healing
- b) supervision
- c) separation
- d) incapacitation
- e) retribution (considered to a lesser extent).

3) There were legal principles about *obligations*, including

- a) a responsibility to help and protect
- b) a responsibility to warn
- c) a responsibility to seek help
- d) a responsibility to support.

4) There were legal principles about both *procedural and substantive rights*.

Procedural rights include

- a) the right to be heard
- b) the right to decide.

Substantive rights include

- a) the right to life and safety
- b) the right to be helped

- c) the right to ongoing support.
- 5) There were two *underlying, general principles*:
- a) the principle of reciprocity: helping the helpers
 - b) the principle of efficacy: being aware and open to all effective tools and allies.¹⁵³

g. How This Method Addresses Challenges

As is obvious from the detail and complexity of the principles listed above, the greatest strength of this method is how it addresses the challenges of accessibility and intelligibility. Working through the resources with the process of legal analysis and synthesis was hard work, and it took time. It was intense, but it was possible, even for me, a legal scholar without deep cultural knowledge. I was able to access and understand the principled reasoning behind a wide range of decisions responding to a person causing harm to others in Cree and Anishinabek societies, even from largely descriptive or incomplete external accounts. It was possible to articulate these principles, so that others could access them in an understandable and convenient form. This method also proved an effective way to navigate bias and to effectively challenge distorting stereotypes. Crucially, my claim is not that such research gives me, as a legal scholar, the authority to pronounce or apply Cree or Anishinabek laws. Absolutely not. Rather, this kind of legal research could provide a starting point for the ongoing learning, research and debate Sekaquaptewa

¹⁵³ For a more in-depth discussion of these principles, see *ibid* at 82-122 (ch. 4).

advocates for regarding Indigenous legal traditions, just as scholarly articles and legal texts do within the common law tradition.

This method does little to address the challenge of legitimacy linked to sociopolitical and emotional reactions to *who* articulates legal principles. At least, however, it may go some small way in addressing Fletcher's insights that the legitimacy of a decision based solely on information found in published resources would be seriously questioned, and that there can be interpretative differences within communities. Importantly, any increased understanding of *wetiko* legal principles in this case study was not dependent on my identity, the authority of biased resources or even solely on the authority of the community members interviewed. Rather, the legitimacy of my research results is rooted in the *process of reasoning through* both community interviews and non-ideal resources using the adapted method of legal analysis and synthesis.¹⁵⁴

This process proves particularly useful in that it contains its own interpretative limits. The legal synthesis provides the bounds within which reasonable interpretations can occur, and statements of law within it can be tracked back to a specific legal analysis of one or several legal resources. This provides a reasoned avenue for challenging a particular interpretation as well. For example, if someone finds fault with my interpretations of the *wetiko* legal principles, he or she can track any one of them to its source and challenge me accordingly. This method thus also appears to have real potential for addressing the challenge of legitimacy as it relates to the extent people can reason through law, providing a possible

¹⁵⁴ I thank Val Napoleon for this insight. Val Napoleon, personal conversation, October, 2011.

transparent process for revitalizing respectful deliberation within and between communities.

In addition, by developing additional legal resources for those interested in understanding and applying Indigenous laws, increased scholarship using this method may develop resources that could potentially reduce the time and uncertainty currently correlated with many peoples' challenges to accessing Indigenous legal principles. A good legal synthesis organizes information on a specific legal subject in an accessible and understandable way so that it can be readily analyzed and applied. To the extent that efficacy matters to people facing immediate issues they want to resolve, this may assist in addressing the challenge of utility. Ultimately, however, it is people on the ground, not legal scholars, who will really determine whether they see utility in specific Indigenous legal principles, and what principles, under which circumstances, they consider relevant to reasoning through and resolving their particular issues.

This brief evaluation of how my LLM case study of adapting and applying legal analysis and synthesis to Indigenous legal resources addressed the identified challenges to accessing and understanding Indigenous laws shows clearly that this method does not address every challenge facing the revitalization of Indigenous legal traditions today. Yet it does have significant strengths. It is a simple, bounded and transparent way for legal scholars to access non-ideal resources productively, and to contribute to the greater accessibility and understanding of Indigenous laws. *How* legal scholars approach Indigenous laws matters. At the very least, I contend that legal scholars need to approach Indigenous laws seriously as *laws*, and should

expect to work at least as hard to access and understand them as we do the state laws we learned in law school. This method reminds us of that. It builds on the work of the Indigenous legal scholars engaging with Indigenous legal traditions from an internal viewpoint, and it builds on skills that are already being taught and used in law school. This case study of my own research experience suggests that the method of adapting and applying legal analysis and synthesis to ‘deep slices’ of Indigenous legal traditions is worth pursuing further. For these reasons, I conclude that it constitutes a useful fifth analytical framework for legal scholars to consider using when engaging with Indigenous laws from an internal viewpoint.

4. Conclusion: Another Stream

Shortly before the Cowichan conference mentioned in the introduction to this chapter, my Cree partner pointed out a rather tiny stream beside the road as we drove by.¹⁵⁵ I remarked that I had never noticed it before, and he told me that that was because *this* stream had *not* been there before. He had noticed it a short time before and observed that it was growing wider. He interpreted the fact that the stream had appeared and was growing as a sign of a beaver dam or of another obstruction closer to the water source. If the stream continued to grow, the creek running through the community, a few kilometres away, might dry up.

Until very recently the local community relied completely on this creek for all its water, and some community members and elders still use it as their primary water source. The elders work on hides and drink tea down by the creek, and it is a

¹⁵⁵ He has given me permission to tell this story in this paper. All interpretations, and the analogy I am using it for, are mine alone.

peaceful and familiar gathering spot. My partner noted, matter-of-factly, that he was continuing to watch the stream and would, if needed, eventually go look for the obstruction and break it up. Sure enough, a few weeks later, on his days off from work, he and his mother followed the stream upwards until they discovered the obstruction—a pile of rocks that had fallen into the water. His brother came to join them on his lunch break to assist with the laborious project of moving all the stones.

I tell this second story, about this observation of another stream, to illustrate that while legal scholarship does have contributions to make, the ‘heavy lifting’ of law will still remain in the hands of practitioners on the ground, acting on their responsibilities. In addition, if legal scholars’ understanding of Indigenous legal traditions increases through our research, this increased access and understanding may come with increased responsibilities. A vital aspect of these responsibilities is, as Napoleon has stressed in her work, the need to go beyond aspiration and rhetoric to consider law “on the ground.”¹⁵⁶ The hard, and often messy and mundane work of law in practice is precisely how each generation makes and remakes law, and there is never a guarantee that any legal tradition will continue without our conscious effort.¹⁵⁷ Indeed, “the hard work of ... law is never done.”¹⁵⁸

Gordon Christie argues that Indigenous legal theorists must “maintain their groundings in their communities.”¹⁵⁹ I would suggest that a broader grounding is necessary, one that requires all legal scholars to reflexively consider and act on their

¹⁵⁶ Napoleon, *supra* note 24 at 15.

¹⁵⁷ Anthony Kronman, “Precedent and Tradition” (1990) 99:5 Yale LJ 1029 at 1052-1054.

¹⁵⁸ Brunnée and Toope, *supra* note 151 at 8.

¹⁵⁹ Christie, *supra* note 5 at 231. Christie discusses the importance of both experiential and cultural grounding (at 204-206).

ongoing responsibilities, including the limits of their scholarly role, within the communities of interpretation and practice they are engaging with. In an Indigenous context, the work of consciously revitalizing and developing laws rooted in Indigenous legal principles can be seen as an act of self-determination.¹⁶⁰ The process itself can be seen as the accountability of Indigenous leaders to their community members, requiring questions to be “debated internally on an ongoing basis,” allowing that “at different points in time consensus or compromise will happen.”¹⁶¹ As Austin puts it regarding the U.S. tribal context: “Whatever the process of revitalization, simply drafting customs and traditions into tribal codes and tribal court decisions will not suffice. The people and their leaders must supplement text with meaningful discourse and action to ensure full comprehension and employment of the traditional principles in the native context.”¹⁶² The work then, is about strengthening today’s governance structures and functions. Ultimately, Napoleon argues it is “fundamentally about rebuilding citizenship.”¹⁶³

The Cree phrase, *Ay-si-mam-iko-siya* translates roughly into “its what we’re gifted/blessed with.”¹⁶⁴ It can be used in both good and bad circumstances, in times of hardship and in times of plenty. This phrase is powerful and profound reminder to me that the work of recovering and rebuilding Indigenous laws unavoidably

¹⁶⁰ Zuni Cruz, *supra* note 8 at 11.

¹⁶¹ Sekaquaptewa, *supra* note 8 at 386.

¹⁶² Austin, *supra* note 10 at xx.

¹⁶³ Val Napoleon, “Thinking About Indigenous Legal Orders”, Research Paper for National Centre for First Nations Governance, June, 2007, online: http://fngovernance.org/ncfng_research/val_napoleon.pdf, at 20.

¹⁶⁴ *Ay-si-mam-iko-siya* is a phonetic spelling of a Cree phrase that roughly translates into “It’s what we’re gifted/blessed with.” It can be used in both positive and negative contexts, and so seemed particularly apt. Many thanks to David MacPhee, who taught me this phrase, explained its uses and provided this phonetic spelling. All mistakes are my own.

occurs where we are at, in the non-ideal present, with all its scarcities and abundance. If we are to move forward, we have no choice but to choose from and work with the challenges, circumstances, opportunities and resources we are gifted with today. This chapter took a hardheaded look at current challenges, and argued legal scholarship from an internal viewpoint can be a useful resource. Legal scholars can contribute to the work of recovery and rebuilding Indigenous laws, citizenship and governance, through serious and sustained engagement with Indigenous legal traditions. This scholarship may prove useful in broadening, clarifying, legitimating or critically examining the work of practitioners if legal scholars remain connected to the practices, problems, conversations and questions of the day-to-day practice of law.¹⁶⁵ Ultimately, just as occurs with legal scholarship within the common law tradition, (Indigenous) people themselves will determine if legal scholars' insights contribute to the ongoing work of law within Indigenous legal traditions. We rarely get to choose what we are gifted with in our own life times. However, we do choose how we view, use and care for what we are gifted with, and, ultimately, what gifts we pass on to future generations.

¹⁶⁵ Birks argues that if legal scholarship "is ever useless to [practitioners] we have come adrift from our foundations," and that if a law school "bore no relation" to the activities of law in practice, it "would have defined itself out of existence as a law school" (Birks, *supra* note 55 at vi).

Chapter 3: Applying the Method – The Accessing Justice and Reconciliation Project and the Cree Legal Summary

1. Introduction:

In the last chapter, I discussed challenges to engaging with Indigenous legal traditions, various methods Indigenous legal scholars have used to approach and overcome these challenges, and the highly methodical and structured method I developed based on consciously combining the groundbreaking work of two leading Indigenous legal scholars, John Borrows (the single-case analysis method) and Val Napoleon (the multi-case analysis method). I argued my method provides a promising way to engage with Indigenous legal traditions in a respectful, transparent and robust way. This was demonstrated in my own experience of my LLM research on the Wetiko legal concept or category. However, for this method to be useful, it needed to be teachable, replicable and transferable.

From 2012 to 2014, I was gifted with a truly incredible opportunity to teach, supervise and write up the outcomes of the implementation of my method on a broader scale for a national research project, the Accessing Justice and Reconciliation Project [AJR project]. In this chapter, I briefly describe the AJR project

· Parts of this chapter have been previously released as reports and, while unpublished, are available online as: Hadley Friedland, “The Accessing Justice and Reconciliation [AJR] Project Final Report” (February, 2014), prepared for the AJR Project, the University of Victoria ILRU, the IBA the TRC the Ontario Law Foundation, and all partner communities, online: http://indigenousbar.ca/indigenoulaw/wp-content/uploads/2013/04/iba_ajr_final_report.pdf and Hadley Friedland, “The AJR Project Cree Legal Summary” (May 2014) , prepared for the AJR Project, the University of Victoria ILRU, the IBA, the TRC, the Ontario Law Foundation, and the partner community *Aseniwuche Winewak*, online: http://indigenousbar.ca/indigenoulaw/wp-content/uploads/2012/12/cree_summary.pdf.

and provide an example of one outcome from it – a summary of Cree legal principles responsive to harm and conflicts, approached from an internal point of view and organized using the fifth analytical framework introduced in the previous chapter.

2. The AJR Project:

In 2012, my co-supervisor, Dr. Val Napoleon, offered me an opportunity to introduce and apply the methodology described in the last chapter in a national research project. The AJR Project was a project launched by the University of Victoria Faculty of Law's Indigenous Law Research Unit [the UVic ILRU], the Indigenous Bar Association [the IBA] and the Truth and Reconciliation Commission [the TRC]. The Ontario Law Foundation generously funded it. Dr. Val Napoleon was the academic lead for this project, and I was the research coordinator. As research coordinator, I co-developed and co-taught an intensive orientation for the seven undergraduate and graduate students hired as researchers for the project. This orientation included training all researchers to engage with Indigenous laws through exploring Borrows's and Napoleon's foundational work, and then training them to apply the adapted legal analysis method, which combined both Borrows's and Napoleon's methods in a highly structured form, to research the project's research question.

The overall vision for the AJR project was to honour the internal strengths and resiliencies present in Indigenous societies, including the resources within these societies' own legal traditions. The goal of the AJR Project was to reveal how Indigenous societies used their own laws to successfully deal with harms and conflicts between and within groups, and to identify and articulate legal principles

that could be accessed and applied today to work toward healthy and strong futures for communities. The broad research objective of this project is found in the name: “Accessing Justice and Reconciliation”. In order to make justice and reconciliation truly accessible through Indigenous laws today, we knew we needed to move the work beyond broad descriptive or philosophical accounts of these laws to more specific results that communities could access, understand and use on the ground if and as they wanted to. In order to do this, I broke down the broad research objective of accessing justice and reconciliation into a focused research question designed to assist communities both to respond to the residential school legacy and impacts and to build toward a stronger, healthier future. The research question was: How did/does this Indigenous group respond to harms and conflicts within the group?¹

This project reflected only a small taste of the broad diversity of Indigenous societies and communities across Canada. There were six distinct legal traditions, and seven partner communities represented. Partner communities had to submit an expression of interest, have a community justice or wellness program in current operation, and have a number of elders or knowledge keepers willing to participate in interviews for the project. From west to east, the representative legal traditions and partner communities were:

Coast Salish – Snuneymuxw First Nation and Tsleil-Waututh Nation

¹ Note: Initially there were two research questions, this one and one regarding responses to conflicts and harms between groups. However, communities and materials so overwhelmingly focused on the above question, when writing up the results, I decided to focus, for this project, on this one. See Hadley Friedland, “The Accessing Justice and Reconciliation [AJR] Project Final Report” (February, 2014), prepared for the AJR Project, the University of Victoria ILRU, the IBA the TRC the Ontario Law Foundation, and all partner communities, online: http://indigenoussbar.ca/indigenousslaw/wp-content/uploads/2013/04/iba_ajr_final_report.pdf at 6 [Friedland, AJR Final Report].

Tsilhqot'in – Tsilhqot'in National Government

Northern Secwepemc – T'exelc Williams Lake Indian Band

Cree – Aseniwuche Winewak Nation

Anishinabek – Chippewas of Nawash Unceded First Nation #27

Mi'kmaq – Mi'kmaq Legal Services Network, Eskasoni

The AJR project produced seven comprehensive legal tradition reports, one for each of our partner communities, each with detailed discussion of specific legal principles based on the research question, using the analytical framework as an organizational guide, as well as a final report summarizing overall themes and making recommendations for further work.

We were committed to engage with Indigenous laws seriously as *laws* in this project. We wanted student researchers to work as hard, and with the same rigor required to seriously engage with state laws in Canadian law schools. As I did in my LLM research, the AJR researchers used the adapted case brief method to analyze a number of published and oral stories (between 10 to 70 stories in all), and identify possible legal principles. They attempted an initial synthesis following questions based on my analytical framework introduced in the previous chapter. They then presented this work to elders and other knowledgeable people within our partner communities, who graciously shared their knowledge, opinions and stories with them. This helped our researchers to clarify, correct, add to, and enrich their initial understandings. At that point, as research coordinator, I reviewed all of their materials, drafting, re-drafting and editing as needed, with the invaluable assistance of two lawyers who joined the project to act as editors for the final reports, Jessica

Asch and Megan Hough, as well as the project coordinator, Renee McBeth, who formatted and reformatted, double and triple checked citations, sources and permission forms, along with a thousand other crucial details.

We used my analytical framework, consisting of the five parts outlined in the previous chapter, to approach, explore and organize the information gathered in this project. This analytical framework had emerged organically from synthesizing my case briefed stories and interviews in my LLM project. However, in the AJR project, we used it from the start as a structure for the research. We asked student researchers to look for:

1. **Legal Processes:** Characteristics of legitimate decision-making/problem-solving processes, including:
 - a. Who are authoritative decision makers?
 - b. What procedural steps are involved in determining a legitimate response or resolution?
2. **Legal Responses and Resolutions:** What principles govern appropriate responses and resolutions to interpersonal harms and conflicts?
3. **Legal Obligations:** What principles govern individual and collective duties and responsibilities? Where are the “*shoulds*”?
4. **Legal Rights:** What should people be able to expect from others (substantive and procedural)?
5. **General Underlying Principles:** What underlying or recurrent themes emerge in the stories and interviews that might not be captured above?

There are three important functions this analytical framework serves. On a very practical level, ensuring all the students' research was guided by, then synthesized and organized into a common analytical framework for the AJR project, created consistency, overall coherence, and ease of reference, while still providing space to recognize the unique and diverse aspects of specific legal traditions. Second, it focuses our attention on the "internal view" of laws discussed in the previous chapter. General or descriptive accounts of Indigenous laws, even when well intended, can flatten the complexity of these traditions into over-simplified or pan-Indigenous stereotypes and are hard to imagine applying to concrete issues.² Using the framework encourages us to look for and articulate the specifics and working details of Indigenous legal traditions, rather than remaining at the level of broad generalities. Third, it not only gives the specific details needed for gaining or articulating an internal view of the Indigenous legal tradition in question, but also demonstrates these specific principles, practices and aspirations do not stand alone, but are all interconnected aspects of a comprehensive whole,³ that is greater than the sum of its parts.

² These are challenges identified in Chapter One. I have discussed the practical need for moving past generalities and generalizations elsewhere. See Hadley Friedland, "Practical Engagement with Indigenous Legal Traditions on Environmental Issues: Some Questions", in: *Environmental Education for Judges and Court Practitioners* (University of Calgary, Canadian Institute of Resources Law, 2012), online: http://cirl.ca/system/files/Hadley_Friedland-EN.pdf at 5-8.

³ Val Napoleon has argued elsewhere that is reasonable, and crucial, to contextualize individual legal concepts as one aspect of a "comprehensive whole", a broader, functioning Indigenous legal tradition "(1) that was large enough to avoid conflicts of interest and which ensured accountability, (2) that had collective processes to change law as necessary with changing times and changing norms, (3) that was able to deal with internal oppressions, (4) that was legitimate and the outcomes collectively owned, and (5) that had collective legal reasoning processes": Val Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (PhD Dissertation, University of Victoria, Faculty of Law, 2009) [unpublished] at 47-48.

There were many gifts and learnings from the process and outcomes of the AJR project.⁴ However, here I will focus on the transferability of the method, from its development and application within an individual LLM thesis to a structured methodology used in a national research project with multiple researchers, editors and community partners. I will demonstrate this transferability by providing a specific example of one of the outcomes: the Cree legal summary.

3. The Cree Legal Summary

The Cree legal summary is one of six legal summaries produced as outcomes of the AJR project. This summary, set out exactly as it is written here, was returned to our Cree partner community, the *Aseniwuche Winewak*, as the cornerstone of a larger report, with the intent the community could continue to use, modify, build on, and apply it as they saw fit.⁵ I continued to work with the *Aseniwuche Winewak* on three projects building on this work. The first was working with the *Aseniwuche Winewak* Youth Council to prepare a presentation about Cree legal traditions of reconciliation for the final TRC national event's Education Day.⁶ The second project was working with the *Aseniwuche Winewak* leadership to explore the possibility of developing a

⁴ I have discussed some of these learning elsewhere. See Friedland, AJR Final Report, *supra* note 1 and Hadley Friedland and Val Napoleon, "Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions" (2016) 1 (1) *Lakehead Law Journal* 33.

⁵ Hadley Friedland, "The AJR Project Cree Legal Summary" (May 2014) , prepared for the AJR Project, the University of Victoria ILRU, the IBA, the TRC, the Ontario Law Foundation, and the partner community *Aseniwuche Winewak*, online: http://indigenousbar.ca/indigenoulaw/wp-content/uploads/2012/12/cree_summary.pdf [Friedland, AJR Cree Legal Summary].

⁶ For a photo-story commemorating this beautiful event, see Hadley Friedland and Lindsay Borrows, *Creating New Stories: Indigenous Legal Principles on Reconciliation* (June, 2014), on file at the University of Victoria ILRU, online: <http://keegitah.wordpress.com/author/keegitah/>

community based justice process based on Cree legal principles. The third project was to build on the results by using a the single case analysis method to explore Cree stories in a series of constitution-building workshops. I will refer to outcomes from the youth presentation and the constitution-building workshops through this dissertation, but will focus on the Cree Justice project in the most detail.⁷

This Cree legal summary is *not* a comprehensive or complete statement of legal principles and was not intended to be. It is *not* intended to be a codification of law, like some statutes. Nor does it claim to be an authoritative statement of law, like a court judgment. Rather, this summary is intended to be more like a legal memo, in that it reflects my best understanding of relevant legal principles on a specific topic after a serious and sustained engagement with those principles. I prepared this summary of legal principles relying on publically available resources such as published stories and interviews conducted by two student researchers, Aaron Mills and Kris Statnyk, within the community of *Aseniwuche Winewak* in the summer of 2012, as well as Statnyk's draft synthesis from these materials. It is designed to make it as usable and accessible as possible, a format I owe largely to Megan Hough, one of the two incredible lawyers and editors who worked on the AJR project with me.⁸

Each section in the analytical framework begins with the title and the operating question. There is then a "general restatements of law" part, where the main legal principles identified under that part are stated simply, with all identified

⁷ The Cree Justice Project will be discussed in detail in Chapter 4 of this dissertation.

⁸ Megan Hough looked at the rough drafts collected from all the students and developed the structure used here. The other professional and amazing editor was Jessica Asch, currently Research Director of the University of Victoria's ILRU.

sources supporting that principle briefly cited beside them. I extracted these general restatements from the report and used them as a stand-alone summary or “short synthesis” in information packages for interviews with professionals and community participants for *Aseniwuche Winewak’s* community justice project.⁹ They served as an accessible reference guide and focal point throughout the interviews, for professionals and community participants alike. I have also used the “short synthesis” for mock application exercises in interactive presentations and workshops. I ask participants to read the principles and discuss where they recognize them being applied in a short story, or to practice applying them in a group to a fact pattern, in order to give them a small ‘taste’ of applying Indigenous legal principles from an internal point of view, with the guidance of explicit written principles.¹⁰

In the full legal summary, these general restatements are followed by a “discussion” part, where the general statement of law is explained and discussed relying on the stories and interviews it was drawn from, including inferences made and complete citations of all sources. This discussion gives vital context and nuance to the general restatements, to avoid a stereotypical oversimplified list of rules, and

⁹ See Appendix A for Community Participant Information package.

¹⁰ For example, I asked university audience members to analyze a story using this short summary in “Mikomosis and the Wetiko –Storytelling Indigenous Laws”, a presentation at the Law.Art.Culture Colloquium, Osgoode Hall, York University in October, 2014. We asked community-based workshop participants to apply the principles in the short summary to a fictional fact scenario in the “Indigenous Laws Workshop – Central Coast First Nations” Hakai Institute, Hakai, BC, July 29-31st 2014 and “Working with Indigenous Law Today: Supporting Indigenous Land and Marine Stewardship” Coastal Stewardship Network, Prince Rupert, BC, Nov 25-27th 2014 (both workshops were co-facilitated with Dr. Val Napoleon).

to promote greater comprehension. It also provides examples of facts that someone applying the legal principles today could conceivably use to distinguish or analogize them in novel factual situations. Finally, it allows a reader to examine, challenge or confirm the statement of law, based on criticism of the sources or the inferences and interpretation of those sources by the author. This transparency is crucial to striking a balance between clarity and the realistic complexity of any living law.

Summary of Cree Legal Principles: Examples of Some Legal Principles Applied to Harms and Conflicts between Individuals within a Group

1. Legal Processes: Characteristics of legitimate decision-making/problem-solving processes

1.1 Authoritative Decision-makers: Who had the final say?

General Restatements of Law:

- a) **Medicine People:** Medicine people who have specialized spiritual and medicine knowledge are relied upon and sought out to use their power to address harms and protect the community: *Killing of a Wife, Anyway, Water Serpent, The Hairy Heart People, AWN Anonymous Interview #2.*
- b) **Elders:**
 - When there is a risk of danger, or harm, if elders have greater knowledge, they may collectively act or direct action to prevent harm and protect people: *AWN Anonymous Interview #2, The Water Serpent, AWN Anonymous Interview #2, AWN Anonymous Interview #3.*
 - Where there is an interpersonal conflict, but no immediate danger or risk of harm to people, elders take on a more persuasive role: *AWN Anonymous Interview #4.*
- c) **Family Members:**
 - The family members of the person who has caused harm may act to remedy the harm or to prevent further harm from occurring when necessary: *Indian Laws, Mistacayawis, Thunderwomen.*
 - Family members may take a pro-active role to prevent harm from occurring: *AWN Anonymous Interview #2, AWN Anonymous Interview #4.*
 - Family members take a persuasive role in resolving interpersonal conflict: *AWN Anonymous Interview #4.*
- d) **Group:** Important decisions for community safety are made collectively by a group: *Mi-She-Shek-Kak, AWN Anonymous Interview #3, AWN Anonymous Interview #2, AWN Anonymous Interview #5.*

Discussion:

- a) **Medicine People:** *Medicine people who have specialized spiritual and medicine knowledge are relied upon and sought out to use their power to address harms and protect the community.*

Several stories show how the specialized knowledge and skills of medicine people are called upon to help the community protect itself from harmful persons. For example, in the story *Killing of a Wife*, a man kills his wife. Meskino, acting on the guidance of his *mistabeo* (a spiritual helper in the shaking tent), investigates the killing and then publically tells the man that he knows the truth, that what the man did was wrong, and that the man will not live long as a result (he dies within the year).¹¹ Another example is the story of *Anway*, in which cannibals threaten a community. A medicine person is asked to use a shaking tent to contact Anway, a famed cannibal-hunter, who resolves the problem using spiritual means.¹²

Medicine people are also called upon to protect the community from harm caused by animals. In *The Water Serpent*, a water serpent is a persistent source of danger and harm to women and children. Medicine people and ‘wise ones’ decide to ask the “wisest one” to contact the Thunderbirds through spiritual means, who then resolve the problem.¹³

The role of protecting a community from harm also applies to potential or predicted harms. For example, in *The Hairy Heart People*, an old man with spiritual gifts dreams that there are dangerous people approaching (‘Hairy Heart People’).

¹¹ Richard J Preston, “Untitled (Killing of Wife)” in *Cree Narrative*, 2nd ed (Montreal and Kingston: McGill-Queens University Press, 2002) at 149 [*Killing of a Wife*].

¹² Louis Bird, “Anway and the Cannibals” in *The Spirit Lives in the Mind: Omushkego Stories, Lives, and Dreams*, (Montreal & Kingston: McGill-Queens University Press, 2007) at 116 [*Anway*].

¹³ Eleanor Brass, “The Water Serpent” in *Medicine Boy and Other Cree Tales*, (Calgary: Glenbow-Alberta Institute, 1979) [*Water Serpent*].

He warns his camp and uses his power to hide them so they stay safe.¹⁴ An anonymous AWN community member shared another story of how the community members once grew concerned about a woman potentially becoming a *wetiko* (a legal concept describing a very harmful or dangerous person), and hence dangerous. They asked a “tent-shaker” to cure her.¹⁵

The obligation for those with specialized knowledge to help extends beyond his or her community. Elder Marie McDonald described a situation where people were being attacked by *wetikos* and two medicine men appeared from outside the community. She describes how those medicine men took care of the community and used medicine to battle the *wetikos* and force them to leave:

eventually they probably kind of took care of the people, so instead of going after the people, probably *wetiko* would probably have somebody else to curse. So they probably end up like going back and forth like that, that in turn probably left the people alone, so these people probably kind of stepped in and said, no, he can't do that.¹⁶

b) Elders:

- *When there is a risk of danger, or harm, if elders have greater knowledge they may collectively act or direct action to prevent harm and protect people.*

¹⁴ Robert A Brightman, “The Hairy Heart People” in *A?cađo?hki?wina and a?cimo?wina: Traditional narratives of the Rock Cree Indians*, (Regina: University of Regina and Canadian Plains Research Center, 2007) at 116 [*The Hairy Heart People*].

¹⁵ Interview of Anonymous AWN Community Member #2 by Kris Statnyk and Aaron Mills (17 June 2012), Grande Cache, Alberta, at 17 [AWN Anonymous Interview #2]. For a more in-depth exploration of the *wetiko* as a legal concept or category, see Hadley Friedland, *The Wetiko (Windigo) Legal Principles: Responding to Harmful People in Cree, Anishinabek and Saulteaux Societies – Past, Present and Future Uses, with a Focus on Contemporary Violence and Child Victimization Concerns* (LLM Thesis, University of Alberta, 2009) [unpublished] at 21-53.

¹⁶ Interview of Marie McDonald by Kris Statnyk and Aaron Mills (25 June 2012), Grande Cache, Alberta at 7-8 [AWN Interview: Marie McDonald].

In her interview, elder Marie McDonald described one time when there were safety risks to an isolated family due to a *wetiko* being nearby. The elders from one community directed community members to go get the family members and bring them back to their place before nightfall to protect them. The elders weren't questioned about this decision "because they were the elders in the community...they had more knowledge than everybody else".¹⁷ Other community members also spoke of how, more generally, when an individual showed signs of becoming a *wetiko*, elders would recognize this and take him or her away from the community to someone who could perform the shaking tent ceremony necessary to resolve the issue.¹⁸

Sometimes the elders' knowledge was not about how to stop threats, but how and when to seek help. In the story *The Water Serpent*, the community faces a serious threat from a giant serpent that lives in the water. The serpent entices women and children to come to the lake where it drowns them. When faced with this threat, which is beyond their capability to remedy, the medicine people and 'wise ones' direct the 'wisest one' to act in order to resolve the harm. In this instance, the 'wisest one' communicates with the Thunderbirds, who remove the serpent from the water.¹⁹

¹⁷ AWN Interview: Marie McDonald, *supra* note 16 at 5.

¹⁸ AWN Anonymous Interview #2, *supra* note 15 at 13; Interview of Joe Karakuntie by Kris Statnyk and Aaron Mills (25 June 2012), Grande Cache, Alberta at 6 [AWN Interview: Joe Karakuntie].

¹⁹ *Water Serpent*, *supra* note 13.

- *Where there is an interpersonal conflict, but no immediate danger or risk of harm to people, elders take on a more persuasive role.*

Sometimes elders employ communication skills to resolve conflict. Elder Joe Karakuntie explained that elders used to play a major part in dispute resolution by consulting with all the parties involved.²⁰

This use of persuasion was not always successful. In a historic case, when a well-respected family decided to leave the community as a result of a conflict, first extended family members, then elders tried to persuade them to remain. However, the family left anyway.²¹ In another historic case in which a married couple decided to separate, first extended family members, then elders tried to persuade them to reconcile. However, the couple separated anyway.²²

In other cases the elders were successful. For example, a man was creating conflict by inappropriately getting mad at another man for fishing (out of necessity) on his trap line. Elders confronted him about this and resolved the conflict.²³

c) Family Members:

- *The family members of the person who has caused harm may act to remedy the harm or to prevent further harm from occurring when necessary.*

Family members may act to remedy the harmful actions of individuals, as illustrated by the story *Indian Laws*. In that story, after We-ya-te-chu-pao assaults E-pay-as's

²⁰ *Ibid* at 3-4.

²¹ Interview of Anonymous AWN Community Member by Kris Statnyk and Aaron Mills (26 June 2012), Grande Cache, Alberta at 5 [AWN Anonymous Interview # 4].

²² *Ibid* at 8 and 12.

²³ *Ibid* at 26-27.

brother, Mis-ta-wa-sis, his father publically tells people that his son's actions should not have been done, and decides to remedy the harm by offering compensation to E-pay-as.²⁴ In another story, *Mistacayawis*, a woman becomes an incurable *wetiko*. In order to prevent her from causing any more harm, her only surviving family member, the youngest brother, kills her by chopping off her finger.²⁵ In yet another example, in *The Thunderwomen*, a younger brother shoots his brother's wife with an arrow. The older brother of the wrongdoer confronts him and then goes on a long journey to make amends to her family, before returning with their forgiveness.²⁶

- *Family members may take a pro-active role to prevent harm from occurring.*

Family members sometimes set rules to protect others from harm. Elder Marie McDonald explained that “mama and papa” made the decision that during winter, when *wetikos* were most feared, children had to be indoors and quiet before the sun went down.²⁷

Family members also took decisive action to stop the escalation of harmful conflict. In a historical case described by an anonymous AWN community member, the father of one family determined that as a result of the accumulation of bad things and malicious gossip, his family would permanently leave the community.²⁸

²⁴ Edward Ahenakew, “Indian Laws” in *Voices of the Plains Cree*, (Toronto: McClelland and Stewart Limited, 1973) at 34 [*Indian Laws*].

²⁵ Robert A. Brightman, “Mistacayawis” in *A?cađo?hki?wina and a?cimo?wina: Traditional narratives of the Rock Cree Indians* (Regina: University of Regina and Canadian Plains Research Center, 2007) at 99 [*Mistacayawis*].

²⁶ Robert A. Brightman, “The Thunderwomen” in *A?cađo?hki?wina and a?cimo?wina: Traditional narratives of the Rock Cree Indians* (Regina: University of Regina and Canadian Plains Research Center, 2007) at 86 [*The Thunderwomen*].

²⁷ AWN Interview: Marie McDonald, *supra* note 16 at 2.

²⁸ AWN Anonymous Interview #4, *supra* note 21 at 3-4.

- *Family members take a persuasive role in resolving interpersonal conflict.*

As is the case with elders, family members may take a persuasive strategy when seeking to prevent or remedy interpersonal conflict. In the above case in which the father of the family decided the family would permanently leave the community, first extended family members, and then elders tried to persuade the family to remain. However, the family left anyway.²⁹

In another historic case, when a married couple decided to separate, first extended family members, and then elders tried to persuade them to reconcile. However, in the end, the couple's decision to separate was respected.³⁰

d) Group: *Important decisions for community safety are made collectively by a group.*

The story of *Mi-She-Shek-Kak*, tells of the time before humans when a giant skunk roamed. The giant skunk, feared because of its size, age and smell, is a threat to the lives of all the other animals. To protect themselves from harm, the animals gather together to collectively decide how to get rid of the giant skunk, which is endangering them all.³¹

There are more recent examples of communities making collective decisions to protect themselves. For example, one anonymous AWN elder related an incident where a woman was becoming increasingly dangerous and the "overall community"

²⁹ *Ibid* at 5.

³⁰ *Ibid* at 8, 12.

³¹ Louis Bird, "Mi-Shi-Shek-Kak (The Giant Skunk)" in *Telling our Stories* at 73 [*Mi-Shi-Shek-Kak*].

determined that she had to be removed from the community for healing.³² In a situation in which a runaway had been spotted near a homestead and those present needed to decide a course of action, AWN community member Robert Wanyandie explained that “it would probably be a group decision” and “it always kind of went to the oldest” or who had the most relevant experience.³³

³² AWN Anonymous Interview #2, *supra* note 15 at 20.

³³ Interview of AWN Community Member Robert Wanyandie by Kris Statnyk and Aaron Mills (19 June 2012), Grande Cache, Alberta at 11 [AWN Interview: Robert Wanyandie].

1.2 Procedural Steps: What were the steps involved in determining a response or action?

General Restatements of Law:

Although the order of these steps is not rigid and not every step is present in every account, several steps emerge as important for ensuring a response or resolution is viewed as legitimate and effective by the community. These are:

- a) **Recognizing warning signals that harm may be developing or has occurred:** *The Hairy Heart People, Mistacayawis, AWN Anonymous Interview #2, Killing of a Wife, AWN Anonymous Interview #5, AWN Interview: Marie McDonald.*
- b) **Warning others of the potential harm and taking appropriate safety precautions to keep people within the group as safe as possible:** *The Hairy Heart People, Mi-She-Shek-Kak, Mistacayawis, AWN Anonymous Interview #1, AWN Interview: Marie McDonald, AWN Anonymous Interview #2.*
- c) **Seeking guidance from those with relevant understanding and expertise:** *Indian Laws, Anyway, The Water Serpent, The Thunderwomen, The Hairy Heart People, AWN Anonymous Interview #1, AWN Anonymous Interview #4, AWN Interview: Joe Karakuntie, AWN Anonymous Interview #2.*
- d) **Observing and collecting corroborating evidence:** *The Hairy Heart People, AWN Anonymous Interview #2, Killing of a Wife, Mistacayawis.*
- e) **Public confrontation and deliberation by appropriate decision-makers when possible:** *Indian Laws, Killing of a Wife, Mistacayawis, AWN Anonymous Interview #4, AWN Interview: Joe Karakuntie, Thunderwomen, AWN Anonymous Interview #1, AWN Anonymous Interview#2.*
- f) **The appropriate decision-makers are identified and implement a response. This may be a pre-emptive response in some cases:** *Indian Laws, Anyway, The Water Serpent, Mi-She-Shek-Kak, Whitiko and the Weasel, Mistacayawis, AWN Anonymous Interview #2, AWN Interview: Joe Karakuntie.*

Discussion:

a) Recognizing warning signals that harm may be developing or has occurred:

- *People may recognize warning signals there is risk of harm or harm has occurred through noticing behavioural signs.*

In *The Hairy Heart People*, a woman recognizes that her husband, who many years ago had hunted other humans, may be becoming dangerous again because he tells her he thinks a person in his hunting party is an animal (distorted thinking). The woman warns another hunter and the husband is stopped before causing harm.³⁴

Other community members, not just close family, also look for suspicious behaviour. In *Mistacayawis*, a man recognizes that something may be wrong when a woman goes hunting two days in a row, one day with her brother-in-law, the next with her husband. On both days she returns without them, telling others they got lost (suspicious story). The suspicious man investigates further and discovers the woman is a *wetiko* and has killed both men.³⁵

Those with special skills might be able to observe signs of danger and help. A couple who practice traditional medicine talked about an older case where they noticed several behavioural signs that a woman was turning *wetiko*. For example, she was smiling in an odd way, wrapping herself in a black blanket, keeping her whole house dark, and refusing to get out of bed. Despite these signs, her husband

³⁴ *The Hairy Heart People*, *supra* note 14.

³⁵ *Mistacayawis*, *supra* note 25.

denied the risk and refused offers to help for a long time. The couple continued to observe and continued to offer help for some time.³⁶

- *People may recognize warning signals that there is a risk of harm or harm has occurred through spiritual means.*

Sometimes information about harm or potential harm arrives in dreams or visions or through the intervention of spirit guides. In *The Hairy Heart People*, an old man gifted with medicine sees that dangerous people (the Hairy Heart people) are nearby through a dream.³⁷

In *Killing of a Wife*, a man kills his wife at a site down river from Meskino's shaking tent. The man tells everyone that his wife has drowned then immediately takes a new wife (his reason for killing his first wife). In the shaking tent, Meskino's spirit helper (his *mistabeo*) tells him the man has actually killed his wife, which prompts Meskino to investigate the man's story further.³⁸

An anonymous AWN elder recalled that spirits warned her grandfather in a dream that his sister was becoming dangerous (turning *wetiko*). The same interviewee noted that, more generally, elders and medicine people may have visions that tell them when a *wetiko* is near or that someone is turning *wetiko*.³⁹ One elder stated that, historically, medicine people could sense when traditional enemies (in this case, Dogrib people) were in the area.⁴⁰

³⁶ AWN Anonymous Interview #2, *supra* note 55 at 22-26.

³⁷ *The Hairy Heart People*, *supra* note 14.

³⁸ *Killing of a Wife*, *supra* note 11.

³⁹ AWN Anonymous Interview #2, *supra* note 15.

⁴⁰ Interview of Anonymous AWN Community Member by Kris Statnyk and Aaron Mills (22 June 2012), Grande Cache, Alberta [AWN Anonymous Interview #5].

- *People may also recognize warning signals that there is a risk of harm or harm has occurred through observations of the natural world and their environment.*

Elder Marie McDonald stated that observations of nature (in this case, the wind blowing backwards) could be a warning signal someone might be turning *wetiko*.⁴¹ Other examples of warning signs include the weather being colder, and a horse behaving oddly and vomiting ice.⁴²

AWN community member Robert Wanyandie shared the importance of more generally observing the natural world for warning signals. He explained that in the bush, a person with enough knowledge can recognize warning signs from listening to animals warn each other. He gave examples of being warned of a bear or a cougar nearby simply from listening to squirrels, beavers or ravens warn each other. Even though the animals are warning each other, and probably scared of the person listening, that person's knowledge still allows him or her to recognize the noise as a warning sign:

if he's warning whatever in his surroundings and you happen to be one of them, you know, I guess I don't know, I guess you could say you're part of it, right. You're part of the relationship, I guess, because you know what he's doing, because you know, because I guess I would say when he's yapping away you know the understanding of that meaning of what he's doing.⁴³

b) Warning others of the potential harm and taking appropriate safety precautions to keep people within the group as safe as possible.

When individuals observe or receive a warning of harm, they are responsible for warning the larger community. For example, in *The Hairy Heart People*, an old man

⁴¹ AWN Interview: Marie McDonald, *supra* note 16 at 4.

⁴² AWN Anonymous Interview #2, *supra* note 15 at 13.

⁴³ AWN Interview: Robert Wanyandie, *supra* note 33 at 3-7.

sees through a dream that harmful people, the Hairy Heart People, are in the area, so he warns the members of his camp and uses his powers to hide them, and then leads the Hairy Heart People in the opposite direction. Once his camp is safe, he sends people to go warn other camps to stay together in a large group for safety.⁴⁴

In the extension of the *Hairy Heart People* story, when the wife of one of the former Hairy Heart People observes her husband showing signs of becoming harmful again, she warns her brothers to watch out for him.⁴⁵

In *Mi-She-Shek-Kak*, in which a dangerous and feared giant skunk was roaming the land, the animals developed rules to avoid harm from the giant skunk until they were better positioned to address the harm. When the weasel inadvertently broke a rule and let the giant skunk find them, he got his family to safety and warned all of the other animals that the giant skunk was coming.⁴⁶

Serious consequences can befall those who fail to warn others of harm. In *Mistacayawis*, a woman becomes a *wetiko* and kills her brother-in-law. The woman's younger sister was aware of the danger her sister posed but failed to warn the rest of the family. The younger sister is executed once the murders are revealed, and the narrator suggests this was because her failure to warn was considered so unacceptable or reprehensible by others.⁴⁷

One anonymous elder explained that if a person is warned that someone will be harmed, they will tell other people. The community will then talk about it and

⁴⁴ *The Hairy Heart People*, *supra* note 14.

⁴⁵ *Ibid.*

⁴⁶ *Mi-Shi-Shek-Kak*, *supra* note 31.

⁴⁷ *Mistacayawis*, *supra* note 25.

pray for them even if they do not know exactly who the victim will be.⁴⁸ Similarly, elder Marie McDonald explained that when people recognize warning signs that a *wetiko* might be present, everyone openly discusses present or future observations, because the *wetiko* will hear the discussion and be more cautious because of it.⁴⁹ She explained that, historically, people would also gather together in larger groups for safety. For example, where there were warning signals of danger (in this case signs of a *wetiko* nearby), elders from a nearby community sent people to bring an isolated family to stay with them every night so they would not be alone.⁵⁰

The obligation to warn others includes harm caused by outside enemies. Historically, medicine people warned others when they sensed the Dogrib people were near (these are traditional enemies who people feared would kidnap women). They sewed red cloths on the tipis and people gathered together at night to keep women safe when there were warning signs Dogrib people were nearby.⁵¹

One elder stated that when spirits warned her grandfather in his dreams that his younger sister was becoming harmful (in this case, turning *wetiko*), her grandfather knew that he had to watch her and keep the community safe:

Like with my grandfather, he probably should dream about a lot of stuff, like different spirits and stuff they used to come to him in his dreams. So...he was probably forewarned in a dream...what was happening to his younger sister, so in his dream he was probably told, you know, watch her, so that was his responsibility to keep an eye on her and keep the community, you know, from being harmed.⁵²

⁴⁸ Interview of Anonymous AWN Community Member by Kris Statnyk and Aaron Mills (17 June 2012), Grande Cache, Alberta [AWN Anonymous Interview #1].

⁴⁹ AWN Interview: Marie McDonald, *supra* note 16 at 4-5.

⁵⁰ *Ibid* at 6.

⁵¹ AWN Anonymous Interview #5, *supra* note 40 at 1-2.

⁵² AWN Anonymous Interview #2, *supra* note 15.

When the same elder became aware that a woman was turning *wetiko*, she told the woman's husband, "you know there's something wrong with your wife...I think you know we should talk about it." She explained that it was her responsibility to tell him because she saw it.⁵³

Safety precautions could require action when necessary. In a historical case, prior to police availability in the area, when a woman with two small children was turning *wetiko*, her father had to bring her for healing on horseback with a gun trained on her to protect her children in case she suddenly attacked them in that state.⁵⁴

c) Seeking guidance from those with relevant understanding and expertise:

- *When faced with risk of harm or conflict, people seek out and rely on guidance from those with the relevant understanding and expertise to advise and help respond to or resolve the issue.*

Certain community members with roles related to leadership and conflict-resolution are consulted about potentially harmful situations. For example, *Indian Laws* is a story of a young man, E-pay-as, who leads a reckless incursion into Blackfoot territory to bring back horses. The Blackfoot retaliate and kill a woman and child in the Cree community. The murdered woman's grieving husband requests compensation in the form of horses from E-pay-as for the actions of the Blackfoot that E-pay-as caused. When E-pay-as refuses to pay compensation, the husband

⁵³ *Ibid.*

⁵⁴ *Ibid* at 22.

consults with those in respected roles who enforce rules for safety and hunting, in this case, the Dancers and Providers who enforce the law and who hold roles and responsibility for hunting.⁵⁵

Elders are generally a source of guidance. One elder stated that it is common for people to go to elders for help when they need to resolve a conflict.⁵⁶ In the story of *Anway*, the community is endangered by an increasing number of cannibals in the area so they turn to the elder about what to do. The elders use a shaking tent to communicate with Anway, an expert *wetiko* exterminator, who agrees to help.⁵⁷ Similarly, in *The Water Serpent*, when a giant serpent is endangering the community, the people consult with medicine people and ‘wise ones’ to figure out how to get rid of it.⁵⁸ In *The Thunderwomen*, an older brother needs to deal with a harm committed by his younger brother against his wife, whose family are Thunderwomen, so he consults with an elder who tells him where the Thunderwomen are and what he needs to reach them.⁵⁹

Sometimes a person with special gifts has the ability to advise the community. For example, in *The Hairy Heart People*, the community relies on the guidance of an old man with spiritual gifts to keep them safe from the impending harm from dangerous people in their area.⁶⁰

Some community members may be the ones best placed to notice potential dangers and prevent conflict because of their closeness to the individuals involved.

⁵⁵ *Indian Laws*, *supra* note 24 at 34.

⁵⁶ AWN Anonymous Interview #1, *supra* note 48.

⁵⁷ *Anway*, *supra* note 12.

⁵⁸ *The Water Serpent*, *supra* note 13.

⁵⁹ *The Thunderwomen*, *supra* note 26.

⁶⁰ *The Hairy Heart People*, *supra* note 14.

For example, more than one community member remarked that when people saw that a relationship was in trouble, first family members, then elders, would go talk the people involved, and advise them on how to repair the relationship.⁶¹ When one elder's grandfather had been warned in a dream that his younger sister was turning *wetiko*, she explained that his related responsibility was "for her to be able to go get help. For him to take her to go get help."⁶²

In a story mentioned above, a husband, who had rebuffed multiple offers of help for his wife who was feared to be turning *wetiko*, finally relented and requested help from a couple who practices traditional medicine. The elder and her husband came and smudged the woman, and were able to heal her and prevent her from completely turning *wetiko* (although no one can be completely healed and must be watched).⁶³

Even where individuals have special roles, skills, or knowledge, they do not act alone unless they have to. One elder, who practices medicine, and is often called upon to be a decision-maker, explained that discussion and deliberation in her role is generally important. She explained she always discusses matters of wrongdoing or harm with her husband. If he is not available, she will seek out one of her sons, particularly the one son who "picks up what she picks up" regarding spiritual warning signs.⁶⁴ Interviewees also noted that different individuals, even elders, had different skills and abilities. One interviewee explained that when you look for

⁶¹ AWN Anonymous Interview #4, *supra* note 21, at 8-10; AWN Interview: Joe Karakuntie, *supra* note 18 at 3-4.

⁶² AWN Anonymous Interview #2, *supra* note 15.

⁶³ AWN Anonymous Interview #2, *supra* note 15 at 24-26.

⁶⁴ *Ibid* at 27-28.

guidance, you would go to the person who the community recognized was knowledgeable in that specific area. He noted that not every elder or person is fit for everything.⁶⁵

d) Observing and collecting corroborating evidence:

- *When there are warning signs or signals a person is at risk of becoming harmful, others observe him or her before taking further steps.*

Once the warning signs have been noticed, community members will observe the individual for further signs of harmful behaviour. For example, in *The Hairy Heart People*, a wife tells her brothers about her husband, a former Hairy Heart, after recognizing warning signs of danger. Afterwards, her brothers keep a close eye on him when they are out hunting.⁶⁶

Sometimes the observer must have certain skills or attributes. One elder explained that only people who are capable or strong enough to be near someone turning *wetiko* will observe them.⁶⁷

The observation period might be long. In one instance, a couple who practices traditional medicine observed a woman for two years because they noticed behavioural signs she was turning *wetiko*.⁶⁸

- *When a person is suspected of causing grave harm, others observe him or her to confirm suspicions before taking further steps.*

⁶⁵ AWN Anonymous Interview #4, *supra* note 21.

⁶⁶ *The Hairy Heart People*, *supra* note 14.

⁶⁷ AWN Anonymous Interview #2, *supra* note 15.

⁶⁸ *Ibid* at 24.

As in the case when there are warning signs of harmful behaviour, suspicions of actual harmful behaviour must be confirmed through observation before further action is taken against the harmful person. This is demonstrated in the story *Killing of a Wife*, when Meskino's spirit helper (his *mistabeo*) tells him a certain man has killed his wife. Meskino goes down river to observe the man in order to confirm what his *mistabeo* had told him.⁶⁹ Similarly, in *Mistacayawis*, when a man becomes suspicious of a woman whose brother-in-law and husband both disappeared after going hunting with her, he follows her to observe her and confirm his suspicions. He confirms that she is a *wetiko* and has killed and eaten the two men.⁷⁰

Community member Robert Wanyandie described how, historically, when it was reported or suspected that a dangerous person was nearby, people would be sent to look for evidence of his presence in the area, including identifying missing items. Specifically, he remembered an incident involving a desperate runaway from the local jail.⁷¹

e) Public confrontation and deliberation by appropriate decision-makers when possible:

- *When a person is suspected of causing harm or conflict, authoritative decision-makers confront him or her publically when possible.*

Public confrontation of suspected wrongdoers is an important procedural step, as demonstrated by the story *Indian Laws* where a man, E-pay-as, is confronted twice about his reckless raid on a Blackfoot camp, which brought harm to others in his

⁶⁹ *Killing of a Wife*, *supra* note 11.

⁷⁰ *Mistacayawis*, *supra* note 25.

⁷¹ AWN Interview: Robert Wanyandie, *supra* note 33 at 12-13.

camp. The husband and father of two people killed in the retaliatory Blackfoot raid confront E-pay-as about his reckless actions. When E-pay-as refuses to pay compensation and leaves the camp, the Dancers and Providers, both respected groups, go to his camp and confront him about his actions.⁷² In both *Killing of a Wife*⁷³ and *Mistacayawis*,⁷⁴ the suspected wrongdoer is publically confronted with the proof of his actions.

Elder Joe Karakuntie confirmed that, generally, when a person was suspected of doing wrong, elders would confront him or her and ask them if it was true.⁷⁵ For example, another AWN community member described an incident where a man was fishing on another man's trap line out of necessity for an extended period of time. The man who owned the trap line confronted the wrongdoer. The elders then confronted the owner publically and corrected him for being too stingy and showing a lack of care for another person's welfare. He was told to not be so stingy.⁷⁶

- *At times, private or one-on-one confrontation is seen as effective and beneficial to solving problems and restoring peace.*

There are some exceptions to the general requirement of public confrontation. For example, in the story of *The Thunderwomen*, two brothers and their wives live alone, and the younger brother shoots an arrow at his older brother's wife (she doesn't die, but she and her sister leave). The older brother confronts the younger brother

⁷² *Indian Laws*, *supra* note 24.

⁷³ *Killing of a Wife*, *supra* note 11.

⁷⁴ *Mistacayawis*, *supra* note 25.

⁷⁵ AWN Interview: Joe Karakuntie, *supra* note 18.

⁷⁶ AWN Interview #4, *supra* note 21 at 26-27.

before he leaves to resolve the issue himself. When he returns, he tells the younger brother he can never do what he has done again.⁷⁷

Historically, when there was interpersonal conflict within a family or between people in the community, family members, then elders, would make multiple visits to apply social pressure to solve the problem. This confrontation included room for listening and deliberation. Maintaining relationships was valued, and the confrontations were softened because people loved each other and depended on each other for survival. In one case, in which a respected family decided to leave the community, once the reasons for leaving were given and understood, the decision was accepted and the social pressure ceased.⁷⁸

One elder suggested that in a situation where an offender does not accept responsibility for his or her actions, the person offended against should confront the offender directly, which might result in the offender apologizing and seeking forgiveness.⁷⁹ While stressing that each case of wrongdoing or potential wrongdoing should be addressed based on its own unique circumstances, one elder stated that “most of the time” she responds by confronting the relevant person.⁸⁰

⁷⁷ *Thunderwomen*, *supra* note 26.

⁷⁸ AWN Anonymous Interview #4, *supra* note 21 at 11.

⁷⁹ AWN Anonymous Interview #1, *supra* note 48 at 17-18.

⁸⁰ AWN Anonymous Interview #2, *supra* note 15 at 27.

f) The appropriate decision-makers are identified and implement a response. This may be a pre-emptive response in some cases:

- *This step includes identifying who is the decision-maker most capable, or best positioned, to respond to the harm or risk of harm, or resolve the conflict in the particular circumstances.*

In *Indian Laws*, after the Dancers and Providers, who typically uphold the laws, are unable to resolve an escalating conflict, Mis-ta-wa-sis, who is capable of doing so, steps in and resolves the conflict by generously giving two of his own horses to be used for compensation.⁸¹

In the story of *Anway*, a community is in danger from cannibals moving into the area. The elders, to whom the community first turned to for help, decide a resolution is beyond their power and so use a shaking tent to seek further help and call for Anway, an expert cannibal killer.⁸² Similarly, in *The Water Serpent*, people seek help dealing with a dangerous water serpent. The medicine people and wise ones decide it is beyond their power to stop the danger and so ask the 'wisest one' to use a shake tent to ask the thunderbirds for help.⁸³

This principle is evident in ancient stories. When faced with the need to overcome a giant skunk in *Mi-She-Shek-Kak*, the animals discuss things and select the wolverine, as he is the only one who has the necessary physical attributes to

⁸¹ *Indian Laws*, *supra* note 24.

⁸² *Anway*, *supra* note 12.

⁸³ *The Water Serpent*, *supra* note 13.

defeat the giant skunk.⁸⁴ In a Wasakeechaak story, Wasakeechaak identifies weasel as someone capable of saving him by killing a giant *wetiko*.⁸⁵

In *Mistacayawis*, when a woman who had killed many people (as a *wetiko*) wants to be executed, she identifies the only person who can kill her (her younger brother) and she instructs him on how to do so.⁸⁶ This story is confirmed by an elder, as pointed out above, who explained that only certain people were capable or strong enough to be near to observe someone turning *wetiko*.⁸⁷

In the story told above of the elder's grandfather seeking help for his younger sister who was turning *wetiko*, the elder explained that he was only able to keep her from harming others for a short period before he realized he had to take her elsewhere for help: "he's monitoring her, she's getting worse so he knew he had to take her to somebody else who would be able to help her in a way that he couldn't help her". In this case, he brought her to another community, where a person with the needed expertise and power was expecting them. The elder explained, "that person knew so that person met them there and that person probably had a different kind of power because the only person who could cure that kind of a person is a person who has dreamed of a *wetiko*, probably you dream about it and you get told what to do" (note that this was a pre-emptive, or pro-active response).⁸⁸

⁸⁴ *Mi-Shi-Shek-Kak*, *supra* note 31.

⁸⁵ Robert A Brightman, "Whitikow and Weasel," *A?cađo?hki?wina and a?cimo?wina: Traditional narratives of the Rock Cree Indians* (Regina: University of Regina and Canadian Plains Research Center, 2007) at 33.

⁸⁶ *Mistacayawis*, *supra* note 25.

⁸⁷ AWN Anonymous Interview #2, *supra* note 15.

⁸⁸ *Ibid.*

Elder Joe Karakuntie described another situation in which expert knowledge was sought was when a woman was turning *wetiko* after others had tried to help unsuccessfully through prayer. She was accompanied to a shaking tent by two elders, one of whom was her brother, because she respected them and was afraid of them, which gave them a little bit of control over her. Joe explained not just anyone would have the ability to help. They would have to have knowledge of what was happening. Note that this was a pre-emptive, or pro-active, response.⁸⁹

Joe also explained that, historically, in conflict situations where there was no immediate risk of harm, when elders would go in and try to talk to the people in conflict, it was significant that different people responded better to being talked to by different elders: “probably it wasn’t really like nobody didn’t listen, but there was always somebody that you would listen to”.⁹⁰

⁸⁹ AWN Interview: Joe Karakuntie, *supra* note 18 at 6.

⁹⁰ *Ibid* at 3-4.

2. Legal Responses and Resolutions: What principles govern appropriate responses to legal/ human issues?

General Restatements of Law:

- a) **The Principle of Healing:** When someone is becoming or has become harmful or dangerous to others, the predominant and preferred response is the healing of that person: *The Hairy Heart People*, *AWN Interview: Joe Karakuntie*, *AWN Anonymous Interview #2*.
- b) **The Principle of Avoidance or Separation:**
- When healing is not possible, a group may respond to a harmful actor by moving away from or actively avoiding him or her in order to maintain group safety: *Mi-She-Shek-Kak*, *The Hairy Heart People*, *AWN Interview: Robert Wanyandie*, *AWN Interview: Marie McDonald*, *AWN Interview: Joe Karakuntie*.
 - A person becoming harmful or causing harm may be temporarily separated from the group to prevent harm to others: *AWN Interview: Joe Karakuntie*, *AWN Anonymous Interview #2*.
 - After multiple interventions by multiple people fail to resolve the issue, active avoidance of an individual, family, or group may be used to deliberately send a message of disagreement or of disapproval of inappropriate or harmful behaviour: *AWN Anonymous Interview #4*.
 - Avoidance can be employed to avoid the escalation of conflicts, where the conflict might cause more harm than the original concern: *Indian Laws*, *AWN Anonymous Interview #2*, *AWN Anonymous Interview #5*, *AWN Anonymous Interview #4*.
- c) **The Principle of Acknowledging Responsibility as Remedy:**
- A wrongdoer can remedy harms by taking responsibility, apologizing, and seeking forgiveness directly from the person harmed: *AWN Anonymous Interview #1*, *AWN Anonymous Interview #4*.
 - A wrongdoer, or their family, can remedy harms by paying compensation or restitution directly to the person harmed, or to their family: *Indian Laws*, *AWN Anonymous Interview #1*.
- d) **The Principle of Re-Integration:**
- When possible and safe to do so, a person who has committed harms, even grave harms, is integrated or reintegrated back into the community as a fully functioning group member: *The Hairy Heart People*, *Thunderbird Women*, *AWN Interview: Joe Karakuntie*, *AWN Anonymous Interview #2*, *AWN Anonymous Interview #1*.
 - Re-integration includes ongoing observation and monitoring of the person for warning signs that he or she may be becoming harmful again: *The Hairy Heart People*, *AWN Anonymous Interview #2*.

e) The Principle of Natural or Spiritual Consequences:

- In some cases, the legitimate response to someone causing harm is to step back and allow the person who caused the harm to experience the natural or spiritual consequences of his or her action. These consequences are usually proportionate to the harm caused, but may be quite severe: *The Man who was Bitten by Mosquitoes, Killing of a Wife, AWN Anonymous Interview #1, AWN Anonymous Interview #4.*
- Individuals use their knowledge of this principle to guide their own actions, and avoid causing or escalating harm: *AWN Anonymous Interview #5, AWN Interview: Robert Wanyandie.*
- However, in some cases, people may take action to facilitate these consequences to respond to harms: *AWN Anonymous Interview #4.*
- Natural and spiritual consequences for misuse or bad use of medicine can also fall on the wrongdoer's family: *AWN Anonymous Interview #1, AWN Anonymous Interview #5.*

f) The Principle of Incapacitation: In older stories, or historically, in cases of extreme and ongoing harm, where no other response could keep the group safe and prevent future harms, a harmful agent would sometimes have to be incapacitated (executed) as a last resort: *Mi-She-Shek-Kak, Anway, The Hairy Heart People, Mistacayawis.*

Discussion:

a) The Principle of Healing: *When someone is becoming or has become harmful or dangerous to others, the predominant and preferred response is the healing of that person.*

Several published stories and interviews with elders and community members revealed a preference for healing wrongdoers above other possible resolutions. For example, in *The Hairy Heart People*, when a father and a son (Hairy Hearts who kill and eat people) arrive at a large camp, the medicine man responds by inviting them into his lodge, which heals them for quite some time by melting the ice in their

hearts. The father and son are then welcomed into the community, contributing to it and even marrying.⁹¹

Elder Joe Karakuntie described how when a woman was becoming increasingly dangerous and bothering a lot of people (in this case, turning *wetiko*), two elders took her to a shaking tent and “they probably healed her...healed her spirits”.⁹² One elder related a story of her grandfather, who was warned in a dream that his younger sister was becoming dangerous (in this case, turning *wetiko*). She explained that he knew he needed to find a way “for her to be able to go get help. For him to take her to go get help.” He took her to a person in another community who “could cure that kind of a person” and was able to heal her.⁹³

Another elder described how the husband of a woman who was becoming harmful to herself and others (in this case, turning *wetiko*) finally sought help for his wife, after trying to pretend everything was fine for over two years. The elder and her husband, who knew what to do, came and smudged the woman, and were able to heal her to the extent of preventing her turning into *wetiko* once they were invited to help.⁹⁴

The same elder explicitly stressed that the predominant and preferred response to people who are harmful or becoming harmful, such as people turning *wetiko*, is healing. When one researcher asked this elder about published stories he had read in which *wetikos* were killed, the elder stated emphatically that “probably someone who didn’t know nothing and had no compassion would just go kill

⁹¹ *The Hairy Heart People*, *supra* note 14.

⁹² AWN Interview: Joe Karakuntie, *supra* note 18 at 4-5.

⁹³ AWN Anonymous Interview #2, *supra* note 15.

⁹⁴ AWN Anonymous Interview #2, *supra* note 15 at 24-26.

somebody else.” She went on to say the proper response is to try to help the person turning *wetiko* instead. She stressed that people turning *wetiko* should not be seen as faceless dangers, but rather that “these are our family members”.⁹⁵

b) The Principle of Avoidance or Separation:

- *A group may respond to a harmful actor by moving away from or actively avoiding him or her in order to maintain group safety.*

Avoidance could be an effective way to prevent harm. In *Mi-She-Shek-Kak* the animals, when faced with the threat of the giant skunk, decide to avoid him, and establish rules to facilitate that avoidance. It is only when weasel inadvertently breaks these rules that they can no longer avoid the giant skunk, and must fight.⁹⁶ Similarly, in *The Hairy Heart People*, a medicine man first hides everyone under a moose hide (using medicine) to avoid the threat of the Hairy Heart People until they pass by.⁹⁷

One AWN community member, Robert Wanyandie, explained his understanding that, generally, in the past, a community response to perceived danger was to relocate to a place with more people for safety.⁹⁸ He used an example where children were alone at camp, and saw signs of an escaped convict, known as a ‘runaway’ in the area. They decided as a group to relocate and avoid the runaway until he moved on and the danger had passed.⁹⁹ Elder Marie McDonald used

⁹⁵ *Ibid* at 21.

⁹⁶ *Mi-Shi-Shek-Kak*, *supra* note 31.

⁹⁷ *The Hairy Heart People*, *supra* note 14.

⁹⁸ AWN Interview: Robert Wanyandie, *supra* note 33 at 10-12.

⁹⁹ *Ibid* at 8.

another example involving children: When there was known danger in the area (in this case a *wetiko*), children were told to stay inside and a family was relocated closer to a larger group every night in order to avoid potential risks.¹⁰⁰

In a final example of this principle, elder Joe Karakuntie described how when a woman had brought harm to many of her family and the community recognized she was turning *wetiko*, everyone avoided her because they were afraid of her causing harm to them, although they would have preferred to heal her.¹⁰¹

- *A person becoming harmful or causing harm may be temporarily separated from the group to prevent harm to others.*

Elder Joe Karakuntie described a situation where a woman who was becoming increasingly dangerous (turning *wetiko*). Two elders she respected (one was her brother), took her away from her community until she could be healed. It was explained that these two elders took her because they had some control over her behaviour because of her respect for them.¹⁰² In a similar situation, a man's sister was becoming more and more dangerous to others (becoming *wetiko*). With great difficulty, the man transported her away from the community for safety and to seek the necessary resources for healing because he was "probably the only one who was close to her" and could help.¹⁰³

- *Active avoidance of an individual, family or group may be used to deliberately send a message of disagreement or of disapproval of inappropriate or harmful behaviour.*

¹⁰⁰ AWN Interview: Marie McDonald, *supra* note 16.

¹⁰¹ AWN Interview: Joe Karakuntie, *supra* note 18 at 8.

¹⁰² *Ibid* at 6.

¹⁰³ AWN Anonymous Interview #2, *supra* note 15 at 13.

On a general level, one community member explained that his understanding was that avoidance can be used actively by individuals to send various messages. Active avoidance can signal “I’m not comfortable with this” or the absence of support for an idea or proposal. It might mean “somebody’s integrity is in question”. In addition, if a victim of wrongdoing avoids the person who caused them harm, this sends a powerful message. However, he also stressed that elders and extended family would always try intervention before avoidance. Avoidance only occurs when the interventions don’t resolve the issue.¹⁰⁴

In a historic story, a marital relationship ended after multiple chances were given by multiple people to resolve the conflict. The community believed the relationship ended because one person failed to fulfil the obligations within that relationship so the community actively avoided that person to show its disapproval.¹⁰⁵

A community member described a historical case where a man engaged in an incestuous relationship with his daughter (connected to the misuse of medicine). The man and his family were actively avoided and shunned by the rest of the community. This was a rare case of instant avoidance with no initial attempt to intervene. The community member explained that the community went straight to avoidance because the community teachings against this act were so strong and clear, meaning that the man would have known engaging in incestuous behaviour was very wrong from a early age.¹⁰⁶

¹⁰⁴ AWN Anonymous Interview #4, *supra* note 21 at 1, 4, 15 and 20.

¹⁰⁵ *Ibid* at 11.

¹⁰⁶ *Ibid* at 19-20.

Active avoidance, such as choosing to permanently separate from the community, can also be practiced by individuals or smaller groups as a way to identify harmful behaviour in the larger group. In a historical story, a respected community member decided to leave the community permanently with his family to show his disapproval of behaviour that was occurring in the community at the time. The message sent by doing this was powerful because of how respected the man was, because he announced his reasons for leaving and left in a very public way, and because this was witnessed by many people.¹⁰⁷

- *Avoidance can be employed to avoid the escalation of conflicts, where the conflict might cause more harm than the original concern.*

When the conflict arises in *Indian Laws* over whether E-pay-as should pay compensation for the loss of life in the Blackfoot raid he triggered, he branches off from the main camp with his brothers and establishes his own camp. When he is confronted at the new camp and the conflict escalates, rather than retaliate again, he declares they no longer have relatives. This makes it possible for an older man to step in and let him save face through his generosity (compensation is also finally paid).¹⁰⁸

In a historical situation, local people were using a man's trap line without permission. The man decided to let them continue doing so, avoiding a conflict, out of generosity and because he had a good heart.¹⁰⁹

¹⁰⁷ *Ibid* at 2-7.

¹⁰⁸ *Indian Laws*, *supra* note 24.

¹⁰⁹ AWN Anonymous Interview #2, *supra* note 15.

In another historical situation, two cousins, one of whom was quite big and mean, often fought but then would make up again and everything would be fine. But the conflicts continued. After trying to talk to them, the rest of the community responded by simply avoiding them whenever they were fighting.¹¹⁰

When describing the case of the permanent separation by a respected community member, the interviewee explained that this action could have been out of concern for the best interests of the community, because it avoided what would have otherwise been “a huge rift, not only within that family but the surrounding families and everything else.” In part, this was because if the man had chosen to confront the people he disapproved of directly, this would have been understood as direct confrontation with the harmful person’s relations, including parents, uncles, and aunts, which could have been seen as disrespectful.¹¹¹

In a historical story, a strange group was observed in the area. After determining that the size of the group indicated it was a scouting party, and not an attacking party, and that the leader was a powerful medicine man, the group decided that they would not attack the party, even though they were in their territory uninvited. Instead, they decided that simply avoiding conflict with them was the best course of action. Some men did escort the group back out of their territory.¹¹²

On a general level, when asked why there became less conflict in the area, one elder stated that it was probably due to the fact people “ran away and tried to

¹¹⁰ AWN Anonymous Interview #5, *supra* note 40.

¹¹¹ AWN Anonymous Interview#4, *supra* note 21 at 6.

¹¹² Interview of Anonymous AWN Community Member by Kris Statnyk and Aaron Mills (26 June 2012), Grande Cache, Alberta at 8, 18-19 [AWN Anonymous Interview #3].

protect their families and stuff like that, go hide somewhere else. Probably lots of times it happened like that”.¹¹³

c) The Principle of Acknowledging Responsibility as Remedy:

- *A wrongdoer can remedy harms by taking responsibility, apologizing, and seeking forgiveness directly from the person harmed.*

One elder explained, generally, his belief that the remedy for almost all harms is for the offender to sincerely apologize and seek forgiveness from the person he or she hurt. If the offender will not accept responsibility for his or her actions, the person hurt could confront the offender directly, which the elder believed could then result in the offender apologizing and seeking forgiveness.¹¹⁴

A second community member explained that a wrongdoer acknowledging his or her wrongdoing generally sends a powerful message. If the harmed person avoids the wrongdoer this can send a message to the wrongdoer and community.¹¹⁵

- *A wrongdoer, or their family, can remedy harms by paying compensation or restitution directly to the person harmed, or to their family.*

The power of compensation as a symbol of acknowledging responsibility and resolving conflict is central in *Indian Laws*. In that story, a huge conflict in a camp was resolved by an older man (Mis-ta-wa-sis), giving two horses to E-pay-as as compensation for his son’s wrongdoing, with the expectation that E-pay-as would then pay compensation to Bad Hand’s son, who E-pay-as killed in the escalating

¹¹³ AWN Anonymous Interview #1, *supra* note 48.

¹¹⁴ AWN Anonymous Interview #1, *supra* note 48 at 17-18.

¹¹⁵ AWN Anonymous Interview #4, *supra* note 21 at 15.

conflict. The originating cause of the conflict is E-pay-as' refusal to pay compensation to a man who lost his wife and son in a Blackfoot raid triggered by E-pay-as' reckless raid.¹¹⁶

One elder stated that the remedy for theft is for the person who stole to return the stolen item, and for the person stolen from to forgive them.¹¹⁷

d) The Principle of Re-Integration:

- *When possible and safe to do so, a person who has committed harms, even grave harms, is integrated or reintegrated back into the community as a fully functioning group member.*

In *The Hairy Heart People*, a father and son have killed and eaten many people, but are healed, and so are welcomed into the camp and even marry. They live as fully functioning community members until the wife of one notices warning signs that he is becoming dangerous (a Hairy Heart) again.¹¹⁸

In *The Thunderwomen*, a younger brother attempts to kill his brother's wife, and she flees back to her family (the Thunderwomen). Once the older brother makes the difficult journey to make amends, they see the younger brother has been crying the whole time he is gone, and he is told he must never do what he did again. The wife and her sister, who is married to the younger brother, return with the

¹¹⁶ *Indian Laws*, Supra Note 24, at 36.

¹¹⁷ AWN Anonymous Interview#1, *supra* note 48, at 17.

¹¹⁸ *The Hairy Heart People*, *supra* note 14.

older brother and they all resume living together as before. In fact, the sisters retrieve the arrow used to shoot one of them and give it good hunting luck.¹¹⁹

Elder Joe Karakuntie described how a woman was healed after she caused grave harms and even deaths of family members when she was in a harmful state (in this case, a *wetiko*) and so was welcomed back into her community.¹²⁰ One elder explained that a person who had been healed and recovered from becoming a *wetiko* generally would not be treated differently for having been a *wetiko*. Community members would not change their actions in respect to him or her, although they would take sensible precautions and watch him or her carefully for the rest of his or her life because no one could ever be completely healed (in addition, life would often be short for that person after being healed).¹²¹

On a general level, one elder stated his belief that where a wrongdoer takes responsibility and apologizes to the person harmed, if that person refuses forgiveness, it is his or her choice. The wrongdoer should still be seen as fine in the eyes of the wider community because “there is no more you can ask for.” Similarly, if a someone who has stolen something makes restitution, the person stolen from should forgive them.¹²²

- *Re-integration includes ongoing observation and monitoring the person for warning signs he or she may be becoming harmful again.*

The story of *The Hairy Heart People* demonstrates how a father and son who have been healed from their cannibalistic ways can live as fully functioning community

¹¹⁹ *The Thunderwomen*, *supra* note 26.

¹²⁰ AWN Interview: Joe Karakuntie, *supra* note 18 at 8-9.

¹²¹ AWN Anonymous Interview #2, *supra* note 15 at 22.

¹²² AWN Anonymous Interview #1, *supra* note 48 at 16-17.

members. However, when the wife of one notices warning signs he is becoming dangerous again (in this case, viewing a human as an animal), she warns her family and they are observed closely. In this case, her husband has relapsed, and has to be incapacitated for group safety.¹²³

One elder explained that although someone who has been healed from being a *wetiko* would be treated the same as everyone else, the rest of the community would take sensible precautions and watch him or her carefully for the rest of his or her life, because no one can be completely healed.¹²⁴

e) The Principle of Natural or Spiritual Consequences:

- *In some cases, the legitimate response to someone causing harm is to step back and allow the person who caused the harm to experience the natural or spiritual consequences of his or her action. These consequences are usually proportionate to the harm caused, but may be quite severe.*

In an older story, *The Man Who was Bitten By Mosquitoes*, a man living out on the land is aggravated by mosquitoes biting him so he decides to retaliate by capturing them and releasing them in the middle of the winter so they freeze instantly. The next spring, even more mosquitoes bite him until eventually they eat him up entirely. This is explained as a natural consequence of his cruelty.¹²⁵

¹²³ *The Hairy Heart People*, *supra* note 14.

¹²⁴ AWN Anonymous Interview #2, *supra* note 15 at 22.

¹²⁵ Douglas Ellis, "The man who was bitten by mosquitoes," *âtalôhkâna nêsta tipâcimôwina: Cree Legends and Narratives from the West Coast of James Bay*, (Winnipeg: University of Manitoba Press, 1995) at 153 [*The Man Who was Bitten by Mosquitoes*].

Killing of a Wife also provides a good example of this principle. After a medicine man investigates and confirms that a man has killed his wife, he publically confronts the man in front of the entire group in a shaking tent. He tells him that he knows the truth, that killing is not good, and that he does not have long to live. No human agent takes action against the man, but he dies within the year.¹²⁶

One elder gave the example of meeting up with an old man who had used medicine with bad intentions and was now walking with two canes. The elder explained: “that’s why he’s suffering now. He said, ‘Now I’m paying for it’. He does pay for it all right. And then next year I went back looking for him, he wasn’t there so he must have died or something like that, but he thought he was going to give up so I believe pretty well he got what had come for him.” He went on to state that, more generally, “no matter what you do, something wrong, when you hurt somebody, especially if you’re using medicine, that thing is coming back for you.” Even though this elder saw forgiveness as the best response to most harm, he pointed out that asking forgiveness does not prevent these consequences from occurring.¹²⁷

Another interviewee explained: “I think people would turn around and would say, you know, just leave it be. It’ll come back to him anyways or sometimes bad things will happen to a person, like, just one after another, whatever and people will say, oh, something is visiting him”.¹²⁸

¹²⁶ *Killing of a Wife*, *supra* note 11.

¹²⁷ AWN Anonymous Interview #1, *supra* note 48.

¹²⁸ AWN Anonymous Interview #4, *supra* note 21 at 21.

- *Individuals use their knowledge of this principle to guide their own actions, and avoid causing or escalating harm.*

One elder shared a story about a relative who had been killed by a curse. The family chose not to retaliate or fight back because of their understanding that it would have just gotten worse if they had done so.¹²⁹ Although not about harm or conflict between people, one community member, Robert Wanyandie, shared a story that illustrated this principle on a general level. He was out hunting and saw an eagle. He was about to shoot the eagle but something inside told him it was not right because he would face a consequence for harming the eagle:

the instinct inside me was that, you know, if I shoot it, you know, something might not work out for me, you know, like maybe a bad luck or something, you know what I mean? So I just, you know, there's consequences I think you have to face or something, so, so I just, you know, I didn't want to, didn't want to go through that process or I didn't want to find out about it anyways, you know what I mean?¹³⁰

- *However, in some cases, people may take action to facilitate these consequences to respond to harm.*

In one story, told by a community member, a medicine man deliberately triggered spiritual consequences. Many people were using medicine to torment others from one side of a mountain range. A medicine man from the other side blew a beaver tooth over the mountains in return, and it started a forest fire that burned everything. This was seen and accepted as a spiritual consequence for using medicine to torment the other people.¹³¹

¹²⁹ AWN Anonymous Interview #5, *supra* note 40 at 4.

¹³⁰ AWN Interview: Robert Wanyandie, *supra* note 33 at 1.

¹³¹ AWN Anonymous Interview #4, *supra* note 21 at 18-19.

In another story from a community member, a medicine man was not to open his medicine bag in front of women or else they would be seduced. The spiritual consequence of him failing to respect this medicine was that when he opened the medicine bag in front of his daughter, he ended up in an incestuous relationship with her. The community viewed the ongoing harm to his daughter as a consequence of his lack of integrity. In this case, the spiritual consequences were not considered sufficient and the community shunned and avoided the man to show their condemnation of his actions. Unfortunately, his family suffered this response with him.¹³²

- *Natural and spiritual consequences for misuse or bad use of medicine can also fall on the wrongdoer's family.*

One elder explained that, generally, using medicine for bad intentions usually comes back to the wrongdoer's family.¹³³ These consequences may be disproportionate to the severity of the harm. One elder explained that when someone uses medicine to harm another person, they bring even worse harm to their own families as a consequence.¹³⁴

f) The Principle of Incapacitation

- *In older stories, or historically, in cases of extreme and ongoing harm, where no other response could keep the group safe and prevent future harms, a harmful agent would sometimes be have to be incapacitated (executed) as a last resort.*

¹³² *Ibid* at 19-20.

¹³³ AWN Anonymous Interview #1, *supra* note 48.

¹³⁴ AWN Anonymous Interview #5, *supra* note 40.

In the story of *Mi-She-Shek-Kak*, after avoidance no longer worked to keep the group safe, the animals gather together to incapacitate the giant skunk. In this case it does not die, but its pieces become small skunks that are less capable of causing future harm.¹³⁵

In an old story, many cannibals attacking a community are unstoppable so an elder calls in Anway, a powerful cannibal killer. Anway overpowers and kills the cannibals to stop the ongoing harms and deaths in the community.¹³⁶ After using avoidance, then healing and reintegration to respond to a father and son who had been killing and eating people (*The Hairy Heart People*), the son relapses and both become dangerous again. Finally, when no other response is left except to execute them, this is implemented to keep the group safe and prevent future harm.¹³⁷

In *Mistacayawis*, it is the harmful person who decides she should be incapacitated because, as a *wetiko*, she killed almost her entire family. She asks her youngest brother to kill her, and tells him how to do so, in order to prevent her from causing future harms. He complies with her wishes.¹³⁸

¹³⁵ *Mi-Shi-Shek-Kak*, *supra* note 31 at 63.

¹³⁶ *Anway*, *supra* note 12 at 116.

¹³⁷ *The Hairy Heart People*, *supra* note 14 at 116.

¹³⁸ *Mistacayawis*, *supra* note 25 at 99.

3. Legal Obligations: What principles govern individual and collective responsibilities? What are the “*shoulds*”?

General Restatements of Law:

a) Responsibility to Help:

- People are responsible to help when asked if they are capable of doing so, and to ask for help when they are not: *Mi-She-Shek-Kak, Wasakeechaak Tricks the Bear, Whitiko and the Weasel, Water Serpent, Anway, Killing of a Wife, Indian Laws, The Hairy Heart People, The Thunderwomen, AWN Anonymous Interview #1, AWN Anonymous Interview #2, AWN Interview: Joe Karakuntie, AWN Anonymous Interview #5.*
- The responsibility to help extends to helping people from other groups as well: *The Hairy Heart People, AWN Interview: Marie McDonald, AWN Anonymous Interview #1, AWN Anonymous Interview #3, AWN Anonymous Interview #4.*

b) Responsibility to Give Back: People are responsible to give back something for help they ask for or receive: *Whitikow and the Weasel, AWN Anonymous Interview #1, AWN Interview: Joe Karakuntie, AWN Anonymous Interview #5, AWN Interview: Marie McDonald.*

c) Responsibility to Prevent Future Harms: People are responsible to find ways to stop ongoing harms and prevent or mitigate future harms when necessary: *Mi-She-Shek-Kak, The Water Serpent, Anway, Mistacayawis, The Hairy Heart People, Indian Laws, The Thunderwomen.*

d) Responsibility to Warn: People are responsible to warn others once they are aware of a potential danger or risk of harm: *Mi-She-Shek-Kak, The Hairy Heart People, Mistacayawis, AWN Anonymous Interview #1, AWN Anonymous Interview #2, AWN Interview: Marie McDonald, AWN Interview: Robert Wanyandie.*

Discussion:

a) The Responsibility to Help:

- *People are responsible to help when asked if they are capable of doing so, and to ask for help when they are not.*

This principle is demonstrated in many older stories. In the story of *Mi-shi-shek-kak*, once the animals decide to defeat the giant skunk, they identify the wolverine as being quick and strong enough to do so and ask him to help. He agrees and the skunk is defeated.¹³⁹ In the story *Wasakeechaak Tricks the Bear*, the trees take on the responsibility to remedy a harm. Wasakeechaak, while hunting with a bear, becomes hungry and decides to kill and eat the bear. He tricks the bear into covering his eyes with berries then kills it and prepares the meat. Wasakeechaak is greedy and wants to eat all of the meat, but realizes that he is not able to eat it all himself. He asks two trees to stretch him so that he is able to eat more. The trees agree to stretch him but then trap him between them. The trees then call for all the animals nearby to come and eat the bear meat. When the trees release Wasakeechaak, all the meat was gone. In this way, the trees take on the responsibility of addressing the harm to the bear and Wasakeechaak's greed.¹⁴⁰

In *Whetiko and the Weasel*, Wasakeechaak has fallen into the grasp of a *wetiko* who has ordered Wasakeechaak to gather sticks so that he can be cooked and eaten. While gathering sticks, Wasakeechaak comes across a weasel and asks the weasel for help. The weasel immediately agrees to do so. He crawls into the *weitko*

¹³⁹ *Mi-Shi-Shek-Kak*, *supra* note 31.

¹⁴⁰ Douglas Ellis, "Weesakechak tricks the Bear" in *âtalôhkâna nêsta tipâcimôwina: Cree Legends and Narratives from the West Coast of James Bay*, (Winnipeg: University of Manitoba Press, 1995) at 137 [*Weesakechak Tricks the Bear*].

and chews on his heart until he dies. The weasel drowns in the *wetiko's* blood but then is brought back to life by Wasakeechaak.¹⁴¹

The principle of providing help to those who ask appears in many stories. For example, in *The Water Serpent*, when the people need help to remove the dangerous water serpents, they call on the Thunderbirds in the shaking tent. The Thunderbirds, who are capable of dealing with the water serpents, respond and remove them.¹⁴² When asked why they would help the people, one elder answered that it was probably because they were asked to do so.¹⁴³ Similarly, in *Anway*, when a community is unable to defeat dangerous cannibals on their own, they use the shaking tent to ask for help from Anway, a famed cannibal killer, who is capable of doing so. He is not from the community, but comes to help them get rid of the cannibals when asked.¹⁴⁴

Again, in *Killing of a Wife*, when Meskino is given a vision of a wife's murder by his spirit helper, he uses that knowledge to see the truth behind the husband's story regarding his wife, who was the murderer. Meskino takes steps to confirm the vision, reveal the truth, and denounce the husband.¹⁴⁵ In *Indian Laws*, a man who felt he is wrongly being refused compensation for the death of his wife and child in a Blackfoot raid triggered by E-pay-as needs help. He approaches the Dancers and Providers (groups known for their strength and ability to provide) for help, who

¹⁴¹ *Whetiko and the Weasel*, *supra* note 85.

¹⁴² *The Water Serpent*, *supra* note 13.

¹⁴³ AWN Interview: Joe Karakuntie, *supra* note 18 at 9-10.

¹⁴⁴ *Anway*, *supra* note 12.

¹⁴⁵ *Killing of a Wife*, *supra* note 11.

then step in to attempt to resolve the conflict.¹⁴⁶ In *The Hairy Heart People*, an old man is gifted with the power to help protect the community from the Hairy Hearts, and uses his knowledge and medicine to do so.¹⁴⁷

Sometimes the obligation falls on close family members, as in *Mistacayawis*. In that story, the husband of a woman who is killing others (as a *wetiko*) is powerful enough to help stop her and doesn't because of his grief. This failure leads to his death. When the woman realizes all she has done, she asks her surviving youngest brother to kill her since he is the only one who capable of doing so. He complies, ending the danger.¹⁴⁸ Similarly in *The Thunderwomen*, an older brother is capable of addressing the harm his younger brother causes to his wife because he knew what has happened. He takes on that responsibility and when he needs help finding his wife's family (the Thunderwomen) he asks an elder for help, who tells him how and where to find them.¹⁴⁹

One elder discussed his understanding of the obligation for elders and medicine people to help when needed. He believes that the obligation to, for example, pray for someone does not come from someone asking. It comes from messages to pray. He stated, "If somebody asked me to pray for them I just don't know how to pray. If somebody can get me a message, 'Pray for this lady or him', those are the words I hear from somewhere... nobody is around, and I'll be praying for people. If I don't get it at all I won't do it." He explained he sees the obligation of a

¹⁴⁶ *Indian Laws*, *supra* note 24.

¹⁴⁷ *The Hairy Heart People*, *supra* note 14.

¹⁴⁸ *Mistacayawis*, *supra* note 25.

¹⁴⁹ *The Thunderwomen*, *supra* note 26.

medicine person to help is also dependent on the intentions or cause of the person who is seeking help. He sees this as a process, rather than a single decision.¹⁵⁰

One elder explained that when the parents of a woman turning *wetiko* called her and her husband on the phone and asked if they would come help her with their medicines, they went over and her husband smudged the woman as requested.¹⁵¹

The same elder related a story where spirits warned her grandfather (visiting him in his dreams) that his younger sister was turning *wetiko*. The elder stated:

Like with my grandfather, he probably should dream about a lot of stuff, like different spirits and stuff they used to come to him in his dreams. So he was probably forewarned in a dream what was happening to his younger sister, so in his dream he was probably told, you know, watch her, so that was his responsibility to keep an eye on her and keep the community, you know, from being harmed. So probably like that was his responsibility was her, for her to be able to go get help. For him to take her to go get help.¹⁵²

The elder explained that, more generally, a medicine person who is asked to help with severe harms, such as someone turning *wetiko*, must help. This responsibility is linked to their gift. However, this elder stated that, for less severe matters, a medicine person can decide how or whether to help someone asking them.¹⁵³

When asked how people seeking help from a person running a shake tent would know he would help, elder Joe Karakuntie explained:

he probably wouldn't have any choice; the person who was already being brought to the shake tent, he said the spirits will already know about that person and, you know, to know if they could help that person, but the person holding the shake tent ceremony wouldn't probably have a choice to at least attempt to help.¹⁵⁴

¹⁵⁰ AWN Anonymous Interview #1, *supra* note 48.

¹⁵¹ AWN Anonymous Interview #2, *supra* note 15.

¹⁵² *Ibid.*

¹⁵³ *Ibid* at 18-19.

¹⁵⁴ AWN Interview: Joe Karakuntie, *supra* note 18 at 6.

One elder related a story where she went to go see a medicine person for help with a curse put on her. It was her understanding that the medicine person had to help, or at least attempt to help her because of the gifts and tobacco she brought him.¹⁵⁵ The same elder explained that if someone needed medicine help badly, but would not go for help on his or her own, sometimes other people would take them if the family decided they needed the help.¹⁵⁶

On a general level, one interviewee explained that because the interviewer had offered him tobacco and he had accepted, he was now obligated to spend time with him, engaging with him about the matter for which he requested assistance (in this case, this very research project). The interviewee explained that if he failed to deliver on the legitimate expectation he created, he would be at fault, his integrity would fall into question, and he would be insulting the interviewer.¹⁵⁷

- *The responsibility to help extends to helping people from other groups as well.*

The obligation to help extends beyond one's own community, as shown in many stories. For example, in *The Hairy Heart People*, an old man who is gifted with the power to help protect people from the Hairy Hearts, uses his knowledge and medicine to protect all the camps, not just his own.¹⁵⁸

Elder Marie McDonald told a story of a time when two people with a lot of knowledge and medicine came and helped the community by alleviating a lot of the problems with *wetiko* spirits. Although they were not asked to come, they had to help if they knew they could:

¹⁵⁵ AWN Anonymous Interview #5, *supra* note 40.

¹⁵⁶ *Ibid.*

¹⁵⁷ AWN Anonymous Interview #4, *supra* note 21 at 16-17.

¹⁵⁸ *The Hairy Heart People*, *supra* note 14.

with medicine and, like, that you know that much, they don't need to be told, they kind of go where they're needed and they go and help... probably you would ask to come but you didn't have to come, but as soon as they're asked they know they could probably go with the spirit, come and check out the power that the person has. So that person would then, in turn, know if they can come. If they're going to get beat, they won't come.

Similarly, Marie explained her understanding that if someone had knowledge of *wetikos* through medicine, it was generally their responsibility to protect the whole community and, if necessary, take the person turning *wetiko* for help.¹⁵⁹

Sometimes individuals approach a community that is not their own for help. One elder recalled how after a massacre occurred in his own community, a man fled and was chased to the neighbouring community. The community helped him by protecting him and fighting with him against those who were chasing him.¹⁶⁰

Another elder described how when a Cree couple came upon a woman from far away, who had escaped from the Dogrib people and was living alone in their territory with no clothes and eating only small game, they immediately helped her in every way they could. The elder relating this historical story was taken aback when the interviewers asked if the couple helped because they “had to”, and stressed they helped her out of compassion.¹⁶¹

¹⁵⁹ AWN Interview: Marie McDonald, *supra* note 16 at 8-10.

¹⁶⁰ AWN Anonymous Interview #1, *supra* note 48.

¹⁶¹ AWN Anonymous Interview #3, *supra* note 112 at 17.

b) The Responsibility to Give Back: *People are responsible to give back something for help they ask for or receive.*

The obligation to help is reciprocal. For instance, in *Whitiko and the Weasel* after the weasel saved Wasakeechaak from the Whitiko, Wasakeechaak brought him back to life and gave him his name and a spot on his tale in thanks for the help received.¹⁶²

The community members interviewed gave several examples of individuals giving back to those that helped them. One elder explained that, historically, horses were usually given as gifts to medicine people for their help. Other gifts that were commonly given for advice or help from an elder or medicine person included tobacco, money, horses, medicines or goods that would last a long time.¹⁶³ Elder Joe Karakuntie stated that someone going to a person who runs a shake tent would bring at least tobacco or cloth.¹⁶⁴ Elder Marie McDonald shared that a person who knew medicine and was using it to look after the community would receive tobacco and gifts of gratitude. They used to give a lot.¹⁶⁵ Sometimes the gifts are given in advance like when one elder who went to do see a medicine person for help with a curse put on her, brought tobacco and gifts.¹⁶⁶

¹⁶² *Whitiko and Weasel*, *supra* note 85.

¹⁶³ AWN Anonymous Interview #1, *supra* note 48.

¹⁶⁴ AWN Interview: Joe Karakuntie, *supra* note 18 at 5.

¹⁶⁵ AWN Interview: Marie McDonald, *supra* note 16 at 10.

¹⁶⁶ AWN Anonymous Interview #5, *supra* note 40.

c) Responsibility to Prevent Future Harms: *People are responsible to find ways to stop ongoing harms and prevent or mitigate future harms when necessary.*

In the ancient story of *Mi-She-Shek-Kak*, the animals that defeat the giant skunk cut the giant skunk into small pieces and disperse them across the land so that the skunk will not be a dangerous size in the future when the humans come to inhabit it.¹⁶⁷ Similarly, Thunderbirds not only protect the community from the immediate danger posed in *The Water Serpent*, they remove the dangerous water serpent entirely to prevent him from harming the people in the future.¹⁶⁸

In several stories, where there was no other way to stop ongoing harms or prevent future harms, drastic measures, including incapacitation (execution) of those perpetuating the harms are taken in order to prevent future harms to the group. This is the case in *Anway*, *Mistacayawis*, and *The Hairy Heart People*.¹⁶⁹

This principle might require an individual to settle a dispute instead of fighting to the end. For example, in *Indian Laws*, after a long and bitter conflict, and after losing his brother, E-pay-as accepts compensation for the welfare of the band.¹⁷⁰ Sometimes a simple warning or lesson can prevent future harm. In *The Thunderwomen*, an older brother first makes amends to his wife and her family for the harm committed by his younger brother (shooting her with an arrow), and then

¹⁶⁷ *Mi-Shi-Shek-Kak*, *supra* note 31.

¹⁶⁸ *The Water Serpent*, *supra* note 13.

¹⁶⁹ *Anway*, *supra* note 12; *Mistacayawis*, *supra* note 25; *The Hairy Heart People*, *supra* note 14.

¹⁷⁰ *Indian Laws*, *supra* note 24.

prevents future harms by forbidding the younger brother from doing what he did again.¹⁷¹

d) Responsibility to Warn: *People are responsible to warn others once they are aware of a potential danger or risk of harm.*

The responsibility to warn others is at play within communities and across communities. In the story of *Mi-She-Shek-Kak*, when the weasel realizes he has accidentally insulted the giant skunk, rather than just saving his own family, he warns all the other animals as he runs to hide with his family.¹⁷²

In *The Hairy Heart People*, a spiritual man gifted with dreams is warned in a dream that dangerous Hairy Heart People are coming to the camp. He warns others and leads them to a place to hide. The obligation is then spread to everyone who knows of the warning. Once the immediate danger has passed, the people come out of hiding and go warn other camps they should all stay in one large group and watch for the Hairy Hearts.¹⁷³ Later in that same story, when a woman notices warning signs her husband may be relapsing and becoming a Hairy Heart again, she warns her brothers immediately and, in doing so, saves the entire camp from him.¹⁷⁴

In contrast, *Mistacayawis* is a cautionary tale about the consequences of failing to warn. In that story, a woman knows her sister has become extremely harmful (a *wetiko*), but fails to warn others, which results in many more deaths. Once her failure to warn is revealed, she is executed for going along with her sister

¹⁷¹ *The Thunderwomen*, *supra* note 26.

¹⁷² *Mi-Shi-Shek-Kak*, *supra* note 31.

¹⁷³ *The Hairy Heart People*, *supra* note 14.

¹⁷⁴ *Ibid.*

instead of not warning the others. A man in the camp discovers the older sister is a *wetiko* and does warn the others, but it is too late by that time, and everyone in the entire camp is killed except for one boy.¹⁷⁵

One elder explained that if a person is warned that someone will be harmed they will tell other people. They will talk about it and pray for the intended victim, even if they don't know exactly who the victim will be.¹⁷⁶ Another elder shared a story in which she became aware that a woman was becoming harmful (turning *wetiko*). The elder told the man's husband, "you know there's something wrong with your wife, I think, you know, we should talk about it." She stated that because she saw this, it was her responsibility to tell him.¹⁷⁷

One elder talked about long ago when the Dogrib people, who are traditional enemies, used spirits to visit. She explained that medicine people who could feel the Dogrib spirits coming would warn the others.¹⁷⁸

Elder Marie McDonald talked about the efficiency of warnings. She related that long ago adults used to warn children to stay inside after dark when there was risk of a *wetiko*, which kept them safe. As well, if people noticed spiritual or natural warning signs that a *wetiko* was nearby, people would start talking about it openly to keep safe: "once you start seeing the signs and, you know, observing, like just keep talking about it, kind of be open about it, because that all probably, you know, held back off a little bit because he knows people are talking about him".¹⁷⁹

¹⁷⁵ *Mistacayawis*, *supra* note 25.

¹⁷⁶ AWN Anonymous Interview #1, *supra* note 48.

¹⁷⁷ AWN Anonymous Interview #2, *supra* note 15.

¹⁷⁸ AWN Anonymous Interview #5, *supra* note 40.

¹⁷⁹ AWN Interview: Marie McDonald, *supra* note 16 at 3-4.

More generally, when discussing the observation of a squirrel sending warning signals to others that danger was near (in this case, a cougar), community member Robert Wanyandie explained this by saying it was the squirrel's responsibility to warn those with whom he has a relationship.¹⁸⁰

¹⁸⁰ AWN Interview: Robert Wanyandie, *supra* note 33 at 5-6.

4. Legal Rights: What should people be able to expect from others?

4.1 Substantive Rights

General Restatements of Law:

- a) **The Right to Protection/Safety:** This right can be inferred from the inverse obligation to protect people from future harms and to warn others of danger or potential harm (See- **Responsibility to Protect from Future Harms:** *Mi-She-Shek-Kak, The Water Serpent, Anyway, Mistacayawis, The Hairy Heart People, Indian Laws, The Thunderwomen*, and the **Responsibility to Warn:** *Mi-She-Shek-Kak, The Hairy Heart People, Mistacayawis, AWN Anonymous Interview #1, AWN Anonymous Interview #2, AWN Interview: Marie McDonald, AWN Interview: Robert Wanyandie*.
- b) **The Right to Be Helped when Incapable/ Vulnerable:** This right can be inferred from the inverse obligation to help those when capable and to ask for help when incapable or vulnerable (See – **Responsibility to Help:** *Mi-She-Shek-Kak, Wasakeechaak Tricks the Bear, Whitiko and the Weasel, Water Serpent, Anyway, Killing of a Wife, Indian Laws, The Hairy Heart People, The Thunderwomen, AWN Anonymous Interview #1, AWN Anonymous Interview #2, AWN Interview: Joe Karakuntie, AWN Anonymous Interview #5, The Hairy Heart People, AWN Interview: Marie McDonald, AWN Anonymous Interview #1, AWN Anonymous Interview #3*.

Discussion:

- a) **The Right to Protection/Safety:** *This right can be inferred from the inverse obligation to protect people from future harms and to warn others of danger or potential harm.*

For a detailed discussion of this legal principle see **Section 3 c) Responsibility to Protect from Future Harms.**

- b) **The Right to Be Helped when Incapable/ Vulnerable:** *This right can be inferred from the inverse obligation to help those when capable and to ask for help when incapable or vulnerable.*

For a detailed discussion of this legal principle see **Section 3 a) Responsibility to Help.**

4.2 Procedural Rights

General Restatements of Law:

- a) **The Right to Have Warning Signals Corroborated by Observation or Evidence before Action is Taken:** In all cases, where people recognize warning signals that a person may be becoming harmful, or may have committed harms, no action is taken unless this is corroborated by observation and evidence: *The Hairy Heart People, Killing of a Wife, Mistacayawis, AWN Anonymous Interview #2.*
- b) **The Right to Be Heard:**
- People who have caused harm, people who have observed harm, and people who have experienced harm have the opportunity to be heard whenever possible prior to a response or resolution: *Indian Laws, Killing of a Wife, The Thunderwomen, AWN Anonymous Interview#4, AWN Interview: Joe Karakuntie.*
 - People who have acknowledged their wrongdoing and are sincerely seeking resolution, are given the opportunity to be heard: *Indian Laws, Thunderwomen, AWN Anonymous Interview #1.*
- c) **The Right for Decisions to Be Made through Open, Collective Deliberation Guided by Appropriate Consultation:** In all cases where it is possible, decisions about responses or resolutions to harm or conflict are made through an open, deliberative process, guided by appropriate consultation with those who have relevant knowledge or expertise: *Mi-She-Shek-Kak, The Water Serpent, Anyway, Mistacayawis, AWN Anonymous Interview #2.*

Discussion:

- a) **The Right to Have Warning Signals Corroborated by Observation or Evidence before Action is Taken:** *In all cases, where people recognize warning signals that a person may be becoming harmful, or may have committed harms, no action is taken unless this is corroborated by observation and evidence (See – Procedural Step 4: Observing and Corroborating Evidence).*

This principle applies even when the suspected harm is severe. The wife in *The Hairy Heart People* takes the precaution of warning her brothers about signs that

her husband may be becoming dangerous. They keep a close eye on him when they are out hunting, but take no action until his behaviour confirms he has relapsed and become dangerous again.¹⁸¹ Similarly, in *Killing of a Wife*, when Meskino's spirit helper (his *mistabeo*) tells him a certain man has killed his wife, Meskino goes down river to observe the man in order to confirm this before taking any further action.¹⁸² And, in *Mistacayawis*, when a man becomes suspicious about a woman who returns home two days in a row without her hunting partner, he follows her to observe her and confirm his suspicions before taking action.¹⁸³

In one contemporary example, a couple who practices traditional medicine observed a woman for two years because they noticed behavioural signs she was turning *wetiko*, before stepping in to help heal her at the request of her husband.¹⁸⁴

b) The Right to Be Heard:

- *People who have caused harm, people who have observed harm, and people who have experienced harm have the opportunity to be heard whenever possible prior to a response or resolution.*

In *Indian Laws*, when a father feels he is being unfairly denied compensation by E-pay-as for the death of his wife and child, he has the opportunity to be heard by the relevant decision-makers (in this case, the Dancers and Providers). The Dancers and

¹⁸¹ *The Hairy Heart People*, *supra* note 14.

¹⁸² *Killing of a Wife*, *supra* note 11.

¹⁸³ *Mistacayawis*, *supra* note 25.

¹⁸⁴ AWN Anonymous Interview #2, *supra* note 15 at 24.

Providers then approach E-pay-as and offer him the opportunity to be heard as well.¹⁸⁵

In *The Thunderwomen*, when an older brother strongly suspects that his younger brother has harmed his wife, he offers him the opportunity to be heard. In this case, the younger brother lies, but after his brother leaves, he weeps constantly.¹⁸⁶ In *Killing of a Wife*, even though Meskino has observed enough to confirm a man has killed his wife, he holds a shaking tent ceremony and gives the man the opportunity to be heard by the group as Meskino announces the truth and denounces the act.¹⁸⁷

One elder explained that, historically, when there was interpersonal conflict within a family or between people in the community, family members, then elders, would make multiple visits to apply social pressure to solve the problem. These multiple visits included the opportunity for everyone involved or affected to be heard. In one case, in which a respected family decided to leave the community, once the reasons for leaving were given and understood, the decision was accepted and the social pressure ceased.¹⁸⁸

Elder Joe Karakuntie stated that, generally, when a person was suspected of doing wrong, elders would confront him or her to ask if it was true. This implies the suspect had an opportunity to be heard before a response was decided upon.¹⁸⁹

¹⁸⁵ *Indian Laws*, *supra* note 24.

¹⁸⁶ *The Thunderwomen*, *supra* note 26.

¹⁸⁷ *Killing of a Wife*, *supra* note 11.

¹⁸⁸ AWN Anonymous Interview #4, *supra* note 21 at 11.

¹⁸⁹ AWN Interview: Joe Karakuntie, *supra* note 18.

- *People who have acknowledged their wrongdoing and are sincerely seeking resolution, are given the opportunity to be heard.*

In *Indian Laws*, after the conflict had escalated, resulting in injury and a death, E-pay-as allows the man who brought a peace offering the opportunity to be heard, despite his anger. As a result, E-pay-as accepts his compensation and, in turn, provided compensation for his wrongdoing, ending the conflict.¹⁹⁰

The older brother in *The Thunderwomen* seeks out the family of his sister-in-law (the Thunderwomen) who has been shot with an arrow by his younger brother in order to make amends. The Thunderwomen gives the older brother the opportunity to be heard, after which the wife and her sister agree to return with him and the younger brother is told he must never do such a thing again.¹⁹¹

One elder explained his understanding that the community expects someone who has hurt someone else to visit the person they have harmed, acknowledge the wrongdoing and ask for forgiveness. While the person harm is not obligated to forgive the person, there is an implicit right of the wrongdoer to be heard by the person harmed. The elder explained that if the person has sought forgiveness sincerely, the community will take note of this and the wrongdoer will not have to 'own' the harm any longer.¹⁹²

This principle is practiced at broader levels, including resolution to generational inter-community conflict. One elder gave an example of such a conflict. The Blackfoot had caused his family a great deal of harm in the past. In this

¹⁹⁰ *Indian Laws*, *supra* note 24.

¹⁹¹ *The Thunderwomen*, *supra* note 26.

¹⁹² AWN Anonymous Interview #1, *supra* note 48.

generation, descendants approached this elder and his family to seek forgiveness for these harms, bringing tobacco as a gift and inviting him to a ceremony. He gave them the opportunity to be heard. Once he listened to them, he saw their efforts as sincere and did forgive them, resolving the intergenerational conflict.¹⁹³

c) The Right for Decisions to be Made through Open, Collective Deliberation Guided by Appropriate Consultation:

- *In all cases where it is possible, decisions about responses or resolutions to harm or conflict are made through an open deliberative process, guided by appropriate consultation with those with relevant knowledge or expertise (See- Procedural Step 3- Seeking Guidance from those with relevant knowledge and expertise, and Procedural Step 5- Public Confrontation and Deliberation).*

As with most principles, examples can be found in older stories and in historical examples. For example, in *Mi-she-shek-kak*, all the animals are involved in an open, deliberative process to come up with a plan to address the harm of the giant skunk.¹⁹⁴

Similarly, in *The Water Serpent*, the entire group deliberated and consulted with the elders and the wise ones, who had appropriate knowledge and expertise (who, in turn, deliberated among themselves). Through this process, they reached the decision to ask the Thunderbirds for help to resolve the danger of the water

¹⁹³ AWN Interview: Joe Karakuntie, *supra* note 18 at 3.

¹⁹⁴ *Mi-Shi-Shek-Kak*, *supra* note 31.

serpent.¹⁹⁵ *Anway* is another example in which the community, in danger from nearby cannibals, deliberates and consults with elders, who decide to ask Anway for help.¹⁹⁶

In *Indian Laws* a conflict arises over compensation for harm. The Dancers and Providers are consulted because they have the relevant knowledge and expertise. They lead an open, deliberative process to decide what resolution to impose on E-pay-as and also how to respond to his flouting of this resolution. When Mis-ta-wa-sis decides to resolve the escalated conflict by compensating E-pay-as first, he first consults with the group.¹⁹⁷

When Meskino discovers the truth about the death of a man's wife in *Killing of a Wife*, he announces the truth and denounces the act openly in a shaking tent ceremony. The decision to allow the man to suffer the natural or spiritual consequences of his act, rather than other responses, is made by the group.¹⁹⁸ Group deliberation is also used to address threats from within the community, as in *Mistacayawis*, in which a family finds out that a woman is killing her hunting partners. They deliberate together before deciding they must try to kill her in order to stop her.¹⁹⁹

More generally, one elder, who is often called upon to be a decision-maker because she practices traditional medicine, explained that discussion and deliberation as a decision-maker is important. She explained she always discusses

¹⁹⁵ *The Water Serpent*, *supra* note 13.

¹⁹⁶ *Anway*, *supra* note 12.

¹⁹⁷ *Indian Laws*, *supra* note 24.

¹⁹⁸ *Killing of a Wife*, *supra* note 11.

¹⁹⁹ *Mistacayawis*, *supra* note 25.

matters of wrongdoing or harm with her husband. If he is not available, she will seek out one of her sons, particularly the one son who “picks up what she picks up” regarding spiritual warning signs.²⁰⁰

²⁰⁰ AWN Anonymous Interview #2, *supra* note 15 at 27-28.

5. General Underlying Principles: What underlying or recurrent themes emerge in the stories and interviews that might not be captured above?

General Restatements of Law:

- a) The Proposition that Responses are Always Fluid and Contextualized:** *AWN Anonymous Interview #2.*
- b) The Proposition that it is Important to Value and Acknowledge Relationships:** *AWN Anonymous Interview #4, AWN Anonymous Interview #2.*
- c) The Proposition that Reciprocity and Interdependence are Important.**

Discussion:

a) The Proposition that Responses are Always Fluid and Contextualized:

There is no static formula for how to respond to harms or conflicts under the Cree legal tradition. It is a fluid and deliberative process that is dependent on the circumstances posed by the harm or conflict, as well as the people involved. In almost every story and interview, the importance of flexibility and responsiveness to the needs and abilities of the people involved and available, and the context when responding to or resolving harms or conflict is evident. As one elder explained succinctly, because “each case will be different”, her responses to each one will vary as well.²⁰¹

While this explanation suggests some similarity to the fact-specific, case-by-case approach in the common law legal tradition, characterized by the Canadian model of law, the decentralized, non-hierarchical nature of the Cree legal tradition means that flexibility and responsiveness extends beyond what is typical in the common law approach. Although legal responses and resolutions reflect an

²⁰¹ AWN Anonymous Interview #2, *supra* note 15 at 27.

individualized and contextualized approach, in the Cree legal tradition, the particular needs of the people involved, their relationships, and the situation or context are additional considerations that influence a number of key questions. These questions include who might be the legitimate decision-maker, what the role and authority of the decision-maker might be, who has the relevant knowledge and expertise to be consulted, and who should be involved in the deliberation to reach a legitimate and effective response.

b) The Proposition that it is Important to Value and Acknowledge Relationships:

In almost every story and interview, the importance of recognizing and considering relationships is evident. In two interviews, this point was made explicitly. At a general, cosmological level, one community member explained his belief that the Cree legal tradition needs to be understood as existing fundamentally within larger relationships. He argues that even the term, “law”, can be a misleading term for Cree people, if they associate it only with the Canadian model of law, which assumes a Canadian-style judiciary. Instead, he explained his understanding that Cree law relies on “protocols” — the proper conduct for ceremony, hunting, address of others, life generally, or “everything”. Underlying the importance of protocols, on this view, is the foundational importance of relationship between individuals and Creator, other humans, the land, and “nature.” Protocols are simply ways of understanding that, in respect of these relationships, “there’s right ways of doing things and there’s wrong ways of doing things.” Everything is seen as related parts of one whole: “the language, the culture, and protocols are all so intertwined, I think

if you were to take one out, it automatically starts disintegrating the other ones.” He sees this as equally true for spirituality:

in the English language like we say spirituality, but in native cultures, I don’t think it was seen that way. I think it was life. It was all inclusive... And it’s, like, life with the medicines, like there’s life with spiritual realms. There’s life with people, like, but it’s all centred around relationships, right?²⁰²

This worldview, with its emphasis on relationships and the interconnection of all aspects of life, is reflected throughout the stories and interviews. In particular, spirituality is not separated or elevated beyond other life realms. For example, elders talk matter-of-factly about recognizing warning signs through the observations of people’s behaviour and animals and the natural world, and through spiritual means, such as visions or dreams. Similarly, relevant knowledge and expertise for responding effectively to harms or resolving conflicts can be gained and recognized through these various means. The response principle of healing is most often discussed as implemented through spiritual means. Natural and spiritual consequences are both referred to as well. In general, relationships, between actions and consequences, between people and peoples, and between humans and the rest of the world, are assumed and permeate legal decision-making at many levels.

At a practical level, another interviewee stressed the point that in small, tightly-knit Cree communities, it is vital to keep in mind that people who cause harm are not faceless, nameless agents of harm, but rather loved ones within families. One interviewer believed that, from the published materials he read, someone who had ‘turned *wetiko*’ was generally killed. When he asked about this, the elder responded

²⁰² AWN Anonymous Interview #4, *supra* note 21 at 16-17, 21.

quite emphatically: “probably someone who didn’t know nothing and had no compassion would just go kill somebody else.” The elder stressed that the appropriate response was to try to help the person instead, explaining: “these are our family members”.²⁰³ This response suggests that Cree legal tradition does not operate in a way that artificially extracts individuals from community, or ignores the reality that all people involved in a situation of harm or conflict exist within a rich network of familial relationships. Rather, these relationships are acknowledged and even accessed as resources. For example, a family member or elder that has a particular connection or is particularly respected by an individual will be asked to take on a persuasive role in resolving a conflict, or a supervisory role in temporarily separating someone who is dangerous from others, until he or she can be healed. The acknowledgement and valuing of relationships explains the strong rationale behind healing as the most important response, the importance of re-integration, ongoing observation and supervision, and also why avoidance is a response when the original issue is not seen as being as harmful as escalating a conflict within a community.

c) The Proposition that Reciprocity and Interdependence are Important:

In many stories and interviews, there appears to be an unspoken assumption of reciprocity or an emphasis on the importance of reciprocity in all relationships. On a cosmological level, the acceptance that there are natural and spiritual consequences

²⁰³ AWN Anonymous Interview #2, *supra* note 15 at 21.

to every action informs peoples' decision making and their responses to situations of harm and conflict.

On a practical level, the principle of reciprocity is best illustrated through the obligation of a person to help others when capable and ask for help when incapable or vulnerable, the obligation to give back when asking for or receiving help, and the right to receive help when incapable or vulnerable. One inference supporting these rights and obligations could be that a person may never know when and how they may require help. Thus, reciprocity encourages people to value interdependence, rather than privileging an ideal of independence.

4. Conclusion:

The AJR Project provided an opportunity to expand the application of my method, and see if it was replicable and transferable from an individual LLM project to a national research project involving both undergraduate and graduate law students as well as seven Indigenous communities across Canada. As mentioned above, this Cree legal summary is one of six summaries researched using the method and written up using the same analytical framework and format. I have reproduced it here in the form it was returned to the community to illustrate the rigor used for the community reports was equal to the rigor expected in academic work.

Based on the Cree and other five legal summaries produced from this project, I conclude that my method is one effective way to make Indigenous legal principles more accessible, understandable and convenient to apply, as well as open to critical analysis and principled change. The approach of gathering as many resources and case briefing as many relevant stories as possible, interviewing elders and other knowledgeable people within communities, and then integrating all the information into the analytical framework, is a method that is teachable, replicable and transferable. In the AJR project, we taught this method to legally trained researchers, who then applied it in their research. This allowed us to produce the summaries of Indigenous legal principles in a consistent, accessible and transparent format.

The Cree legal summary for the AJR project confirmed many of the legal principles I identified in my LLM work, but did not map on precisely. Instead, it expanded and enriched the principles in it. There were some similarities and some

differences between the process in my LLM work and the AJR project. The same method was used, interviews were conducted in the same community, and the same knowledgeable and insightful translator participated in all interviews.²⁰⁴ In my LLM work, I was the only person case-briefing stories and the primary person asking questions in interviews, while in the AJR project, Kris Statnyk and Aaron Mills were conducting the interviews. They both brought their own backgrounds, insights and interests, the respondents were different, and even overlapping respondents were responding to the students as unique learners, so actively teaching them what they thought they needed to learn, which may have differed from what they thought I did.²⁰⁵ I was the person conducting the analysis in both projects, and writing up the final results. However, I believe the process of working through the legal analysis and synthesis of the *wetiko* legal principles increased my capacity to recognize and learn Cree law through observation and participation, and this, and the four years of learning between the two projects, enabled me to ascertain greater nuance and complexity in the AJR project. In addition, in my LLM work, I concentrated on the very narrow legal category of extreme harm - the *wetiko*, while the AJR project expanded this category to a broader inquiry into harms and conflicts.

These differences provided some fruitful insights. For example, one thing I learned was the differing roles elders and family members take in responding to an

²⁰⁴ Carol Wanyandie provided translation for my LLM work and was the Community Coordinator, a arranging interviews and providing translation for the students in the AJR project.

²⁰⁵ While elders' and other respondent's active teaching to the interviewer's perceived needs was not confirmed by any of the respondents specifically, Carol Wanyandie, the community coordinator explained this was what they were doing. See Follow-up conversation, Carol Wanyandie, June 2015.

immediate danger or risk to others, and in responding to interpersonal conflicts where there is no immediate danger or risk of harm. Where there is a risk of danger or harm, like in most *wetiko* stories, it came out very clearly that elders are directive or initiate decisive action to prevent the harm and protect others. Family members will also take action, even pro-active measures, to prevent further harm or remedy harm caused by their family. However, where the issue is interpersonal conflict, rather than imminent harm, both elders and family members adopt a persuasive role, by visiting, listening, encouraging, and applying gentle social pressure.²⁰⁶

In the AJR project, my analysis of the students' research confirmed four legal response principles from my LLM research (healing, supervision, separation and incapacitation), and added three more (natural and spiritual consequences, taking responsibility, and re-integration) which became more clear to me through their interview questions and answers. The students did not identify one principle I had (retribution). This was not surprising, given it was so rarely used in particularly egregious circumstances.²⁰⁷

In the next chapter, I will discuss some of these Cree legal principles and revisit stories in the Cree legal summary, my LLM work, and related work, to discuss how using my method to identify legal principles and the process of working through the analytical framework to write this legal summary can do more than making the principles more accessible in a convenient format. It can actually deepen our understanding of the animating principles and background narratives to these

²⁰⁶ This is crucial for application because conflating violence with conflict can lead to real harm. See: See generally Alan Edwards and Jennifer Haslett, "Violence is not Conflict: Why it Matters in Restorative Justice Practice" (2011) 48:4 *Alberta Law Review* 893.

²⁰⁷ I will discuss one rare instance in the following chapter, from the story, *Mistacayawis*.

principles. Understanding this background allows us to understand the interpretive bounds of the principles when applying them today and uphold the integrity of the larger legal tradition they come from.

Chapter 4: Wah-ko-to-win: Laws for a Society of Relationships

1. Introduction: Rich in Relations

*"The separative self, clinging to the rights that affirm its separateness, can deny the interconnection that would implicate itself in the surrounding pain."*¹

I wrote this work embedded. Embedded in relationships. Living in love. I did not mean to live this dissertation. I intended to carve out a quiet space to work and write, but the lives of others overtook me. I had forgotten what it is to be entwined, moving in fluidity with the motion of others, weeping with their despair, resting in their warmth, laughing with their jokes, aching from their grief, and receiving quiet comfort. At times the image that possessed me was being entangled in countless living vines. These vines wrapped their way around me, slowed my steps to an excruciating crawl and left my muscles and heart aching with their stories and their struggles. They carried with them – everything – every ache and joy imaginable. Yet even this image doesn't do this justice. How to explain what it is to live so openly and completely in relation?

For the last three years I have lived in a community where to talk about living in relation does not require any great insight or imagination. In fact, it is no more than stating the obvious. Day to day, the fact of our human relationships is explicit and tangible at the most familiar and recognizable levels. My partner and I live in a community where we are connected to everyone, and familially related to almost everyone. Let me give you a small taste of this for illustration.

¹ Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy and Law* (New York: Oxford University Press, 2011) [Nedelsky, *Law's Relations*] at 116.

My partner is one of nine siblings, all of whom have spouses, and all of whom live in the same community as we do. We have 36 nieces and nephews and 14 great nieces and nephews at last count. With his parents, there are 70 people in this first close circle of familial relationships. And I haven't even gotten to his aunties and uncles, cousins and further extended family. We not only know all our neighbours, we are familially related to most of them. There is not one house within one hundred meters from our own that we could not just walk in to at almost any time. My partner scolds the kids that try to knock first (only white people do that). People don't visit around as much as they did in the old days, but we still go visiting or have visitors on a fairly frequent basis. Kids come in and out, especially on the weekends. There are big family dinners – Thanksgiving, Christmas, but also birthday parties, celebrations, a call late at night to come and feast because someone has just killed a moose. Our kitchens and our houses fill up regularly with people, food, love and laughter.

My sister-in-law and I will laugh ruefully at the futility of trying to explain to our respective spouses about the loneliness of elderly relatives who live alone in the city. Try as they might, neither brother can really wrap his head around the idea of someone truly living so isolated. We think we will have explained it to their satisfaction, and one or both of them suddenly think of another relative to ask about (But doesn't she have any cousins? Where are her nieces? Etc. etc.). To them, it is almost inconceivable. There may be other issues living in such close proximity in the same community for generations, but being alone is not one of them. In a world where loneliness is endemic, and there appears to be ever-increasing disconnection

and dislocation, their capacity to take for granted a background of secure thick belonging can be viewed as an immeasurable wealth and privilege.

One of my favorite stories about my late brother-in-law, James Wanyandie, who has seven children, is about when a man from town, upon seeing them all, said, 'wow, you must be rich.' James, who was not financially wealthy, laughed and replied simply, 'Yep, rich in kids.' This reply resonates with me. When I would give up trying to write because my house had been filled with the chaos of a dozen children visiting, and I was too entranced by soaking in the delight of them all to kick them out so I could work, or when I would put down my book to go to the latest birthday party, I would think to myself, 'I'm rich now too, not in money, and certainly not in time, but rich in nieces and nephews, rich in kids.' And maybe James' phrase is more resonant than the metaphor of vines. To live embedded in community is to be rich in relations.

This richness is reality, not a romanticized version of some imagined ideal community. On the flip side of the same coin, the first year I moved back to the community, there were eight funerals. Eight. By the fifth one I found myself mumbling to my long distance colleagues, almost physically unable to get the words out of my mouth that I had to cancel or postpone yet another commitment due to yet another death. In the haze of grief, I worried about being disbelieved, not because I thought they would consciously doubt my integrity, but because I didn't know how they could possibly conceive of such relentless loss, any more than my partner could conceive of such unrelenting loneliness. In sometimes what felt like waves of fear and pain, the socio-economic issues that are notoriously endemic in

many Indigenous communities sizzled through our vast connections. Suicide, homicide, family violence, sexual violence, child welfare, criminal justice, poverty, addiction. Embodied, urgently enacted by and enacted upon our loved ones.

At times I felt as if I were drowning, and would search for language – boundaries, limits, goals, compassion fatigue – to stop the flood, but these words and withdrawal were no match for it, no match for the look on a loved one's face when they asked for help, and needed it. Or didn't ask for help, and needed it. Or was beyond all help. The pain was there, in the lives of people who mattered deeply to me. No matter how I chose to act in response, I could not stop their suffering from touching me. To live in relation is to be rich, and to live in relation is to be permeable.

After a couple of years of struggling with this and, in my mind, placing my academic work in opposition to it, as if these relations, in all their beauty and all their sorrow, were keeping me from my work, I finally got it. This was it. This was the work. It was precisely within in these kinds of relations Cree legal principles and procedures emerged, and when applied, implicitly or explicitly, are applied within. I let myself go, fall gracefully back in to the web, the vines, the many outstretched arms of the rich relations surrounding me, and trusted them to sustain me until the words came.²

² John Borrows, who once kindly and gently told me, “you’re living your dissertation”, and Val Napoleon, who empathetically and respectfully listened, often redirecting me to broader questions, guided me to this epiphany. Their complete acknowledgement and wise support opened space for reflection, rather than building tension, resentment or despair by pushing me to choose one set of responsibilities over others. The existence of this safe space permitted me to make connections rather than compartmentalize issues I had yet to reconcile internally.

2. Bringing out the Background:

Legal traditions, by their very nature, are dynamic, and constantly changing to adapt and integrate new circumstances and information. John Borrows describes how the vital processes of deliberation and interpretation allow Indigenous peoples to draw on a wide array of new and ancient sources of law to respond to novel problems and persuade each other in modern communities.³ Yet this dynamism is not completely open-ended. When engaging with and articulating Indigenous laws, Val Napoleon points out how essential it is to do so in a way that stays mindful of the intellectual processes and interpretive bounds that enable change to occur within that legal tradition in a legitimate way that maintains its integrity.⁴ This includes understanding legal traditions as embedded in what Charles Taylor describes as a certain “irreducible background of practices and understandings.”⁵ As Andree Boisselle argues, it is these ““sedimented ways of making sense of...experience”⁶ or “shared understandings” that “ground the meaning and legitimacy of stable legal orders.”⁷

In my second chapter, I proposed a method for engaging with and articulating Indigenous laws. I demonstrated this method has proven to be effective

³ See John Borrows’s discussion of deliberation as a source of law in John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 35-46 [Borrows, *Indigenous Constitution*].

⁴ For further discussion in the context of Gitksan legal theory, see Val Napoleon, Ayook: Gitksan Legal Order, Law, and Legal Theory. Faculty of Law, University of Victoria Ph.D. Dissertation 2009 [unpublished] [Napoleon, Ayook] at 289- 290.

⁵ Charles Taylor, “Irreducibly Social Goods” in *Philosophical Arguments* (London: Harvard University Press, 1995) at 135 and 139.

⁶ Andree Boisselle, “Beyond Consent and Disagreement: Why Law’s Authority is Not Just About Will” in Jeremy Webber and Colin McLeod, eds., *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010) at 219.

⁷ *Ibid*, at 220.

in giving people a ‘way in’ to respectful and robust engagement with Indigenous laws generally and me a way to do so with Cree laws. The method adapts the common-law tools of legal analysis and synthesis and results in an analytical framework outlining legal principles on a specific subject from a specific legal tradition. This framework doesn’t change the legal principles identified in it, but it does organize them in a convenient, accessible form that makes them easier to access, understand and apply today. I have had the good fortune of presenting this methodology to many audiences over the past five years, and described outcomes of applying it in the AJR Project in the previous chapter. I will rely on heavily on these outcomes throughout this chapter. Several Indigenous groups have requested and received training in this method in order to use it to ascertain and articulate their own laws for their own goals and projects.⁸ I feel confident stating that this method works to do what I say it does – no more, no less.

But can this methodology also bring out some of the background? In this chapter, I explore whether engaging with Indigenous laws through this methodology can provide more than rigor, transparency and convenience – that is – whether it can lead to understanding and articulating aspects of this vital cultural and political background. I do so by closely examining a general underlying principle in Cree legal traditions that I suspect most readers would consider fairly

⁸ I have co-facilitated numerous workshops teaching this method with Dr. Val Napoleon, including the *Gitanow Legal Traditions Workshop for Gitanow Chiefs*, Gitanow, BC, Oct 16-17th, 2011, *Indigenous Laws Workshop – Central Coast First Nations*, Hakai Institute, Hakai, BC, July 29-31st 2014 and *Working with Indigenous Law Today: Supporting Indigenous Land and Marine Stewardship – Coastal Stewardship Network*, Prince Rupert, BC, Nov 25-27th 2014.

uncontentious, almost to the point of triteness – that is, that Cree laws are laws premised on an interconnected worldview (a society and world of relationships, inclusive of human beings, animals, natural elements, land and spirit) instead of an exclusively human society comprised of atomistic agents.

In Chapter Two, I criticized Mathew Fletcher’s linguistic method as sensible but not sufficient. In this chapter, I explore the meaning of the Cree word, “Wah-ko-to-win”, which refers to our interrelatedness, and our world of relationships. I hope to show through this discussion that this methodology can be complimentary to others,⁹ and that the focus on identifying specific principles can also enable us to reach a much deeper and complex understanding of broader foundational principles.¹⁰ This richer understanding of this foundational principle enhances our basic competency to effectively apply other Cree legal principles, and engage respectfully in crucial practices of deliberation, persuasion, interpretation and pursuing legitimate change within the Cree legal tradition.¹¹ It may also provide a way to respectfully raise critical theoretical and practical questions within the Cree legal tradition and evaluate the application of specific legal principles to particular or novel facts.

⁹ For examples of how students in the AJR project connected to other methods through this one, see Hadley Friedland and Val Napoleon, “Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions” (2016) 1 (1) *Lakehead Law Journal* 33 at 43 [Gathering the Threads].

¹⁰ Both Napoleon and I identified this as a result of working through this method. Val Napoleon and Hadley Friedland, “An Inside Job – Engaging with Indigenous Legal Traditions Through Stories” (forthcoming 2016, 61 *McGill Law Journal*) at 17.

¹¹ Much as Ronald Dworkin argues certain political ‘meta-principles’ from liberal political theory enable legal practitioners and judges to interpret and apply the common-law in a manner congruent to the core aspirations of liberal society. See, for example, Ronald Dworkin, “Laws Ambition for Itself” (1985) 71 (2) *Virginia Law Review* 173 [Dworkin].

3. The Concern: Distortions

A common concern that I have repeatedly heard is whether my methodology might create distortions if the identified legal principles were to be used and interpreted in a way that abstracts them from the fundamental political debates and cultural background they are informed by and form part of. If all you knew about Cree laws was the Cree legal summary in the previous chapter where might that take you, or leave you? For some, even engaging with these laws through a modified common-law method of analysis, is seen as inherently distorting, a means that irreversibly alters the ends. Analytical jurisprudence itself, which my method undoubtedly falls within, can be seen to perpetuate the erasure of certain people's embodied acts of meaning, experiential knowledge and even, at it's worst, their humanity.¹² However, I think the heart of these criticisms is a fear that such an analytical approach to law can decontextualize principles from their human, cultural and political background to a dangerous degree. This is a serious question that deserves serious reflection.

Anecdotally, in my experience, this concern is raised more often by academic or professional people interested in engaging with Indigenous laws than Indigenous people in a community interested in identifying and articulating their own laws. The difference could well be attributed to the latter naturally being comfortable taking their own 'background' for granted and the former wisely being aware there is crucial context they are missing. However, this distinction cannot be broken down into simple insider/outsider, Indigenous /non-Indigenous dichotomies. For many

¹² For a compelling argument on this erasure, see William E. Conklin, "The Ghosts of Cemetery Road: Two Forgotten Indigenous Women and the Crisis of Analytical Jurisprudence" (2011) 35 *Australian Feminist Law Journal* 3 [Conklin].

historical, social and practical reasons, these two points of view exist, along with varying levels of deep knowledge, cultural immersion and community connection discussed in the Chapter Two,¹³ in a continuum inside Indigenous communities and outside as well as in the multiple and overlapping spaces of the interface.¹⁴

Some of the issues described by Fletcher, Borrows and Napoleon in Chapter Two of this dissertation could arise if Indigenous laws are articulated as principles completely abstracted from their political and cultural context. This could lead to distortions in meanings, analogous to (or including) Fletcher's concerns about Indigenous laws being translated to English, and people missing out on crucial nuance and even correct meaning.¹⁵ It also runs the risk of over-simplification and over-generalization Borrows and Napoleon both caution can end up reinforcing negative stereotypes.¹⁶ This could seriously inhibit the capacity for legitimate change. Napoleon also stresses that a focus on isolated practices could lead to Indigenous laws being seen as stuck in the past or incapable of change in response to changing circumstances if they are not seen as part of a larger, comprehensive whole, which includes interpretative resources for principled change.¹⁷ Recall Fletcher's concerns about the current "moral weight" of past laws brought forward and applied in very different present contexts.¹⁸ He sees one of the most important barriers to tribal court judges applying Indigenous laws is feeling hesitant, unsure of

¹³ I discuss this in Chapter Two, at 24-27, in relation to the accessibility and perceived idealness of resources for engaging with Indigenous laws.

¹⁴ See Chapter Two at 16, Note 15 for Sekaquaptewa and Borrows' discussion on this point.

¹⁵ Chapter Two, at 38.

¹⁶ Chapter Two at 34.

¹⁷ Chapter Two, at 30.

¹⁸ Chapter Two at 31.

their role or incompetent to do so.¹⁹ A list of abstracted principles alone cannot resolve such concerns, and could simply perpetuate them.

On the other hand, the paralysis around ascertaining and articulating Indigenous legal principles, though well meaning, has led to distortions of its own. First, the absence of accessible and understandable Indigenous legal materials reinforces pervasive stereotypes about the absence of law in Indigenous societies.²⁰ Second, the space to discuss these complex legal traditions is often reduced to highly abstract, descriptive or philosophical accounts which fail to address how they might be applied in practice,²¹ or into the even narrower and distorting role as idealized or utopian foils which are only used to critique state justice systems.²² Third, Indigenous laws can be diminished into isolated cultural practices that are viewed fearfully or used as a 'culturally sensitive' gloss, rather than principles for practical reason which might be employed to address complex social problems and the human condition that all law must grapple with.²³ A fourth distortion, that Fletcher alludes to in Chapter Two, is emerging as state and tribal codes and constitutions encourage and even mandate the use of Indigenous laws, but there still is not the supporting scaffolding for applying these laws that legal decision-makers can usually rely on, such as legal education, law texts, articles and a shared or public

¹⁹ Chapter Two, at 31-32.

²⁰ Val Napoleon and Hadley Friedland, "Indigenous Legal Traditions: Roots to Renaissance" in Markus D. Dubber and Tatjana Hornle eds., *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014) at 227 [Roots to Renaissance].

²¹ *Gathering the Threads*, *supra* note 8 at 37.

²² *Roots to Renaissance*, *supra* note 17 at 239.

²³ Chapter Two, at 30 (Napoleon) and 31 (Fletcher).

body of legitimate authorities.²⁴ There is the real risk that these laws are seen as too impractical, ineffectual or inaccessible for judges to actually apply to the urgent practical problems that people come to a court seeking solutions for.²⁵

It is important to note these existing risks and distortions, because we are not starting from a neutral place, where no harm is done. The status quo is creating and perpetuating distortions about Indigenous laws, and I am striving to correct some of these distortions in my own work by engaging with Indigenous laws using a structured, transparent and rigorous methodology. Certainly there are risks, but certain risks may be well worth taking. At the same time, in areas of the world where courts are tasked with or mandated to apply Indigenous laws, one of the concerns is that the application separates so widely from the understanding within communities, they are indeed losing their claim to legitimacy, defeating the purpose of applying them in courts in the first place.²⁶ This illustrates the concerns raised about this methodology are, while not fatal, definitely valid. Indigenous laws could become incomprehensible, pernicious, or even meaningless without an understanding of larger narratives they embody. Abstracted completely, they would lose any claim to legitimacy and risk inadvertently perpetuating stereotypes and undermining the integrity of the Indigenous legal tradition in question.

²⁴ Chapter Two, at 40 (Sekaquaptewa).

²⁵ Chapter Two, at 16 (Zuni Cruz, Ames, Austin and Richland) and 30-32 (Fletcher).

²⁶ See Fletcher's concerns about this in the American tribal court context in Chapter Two at 31. This issue is increasingly arising in South Africa and the South Pacific, where the use of customary law in courts has been constitutionalized.

Robert Covers famously describes law as “not merely a system of rules to be observed, but a world in which we live.”²⁷ He argues “because both precept and narrative operate together to ground meaning, one cannot truly inhabit any given *nomos* without a rich understanding of its narratives”.²⁸ A crucial aspect of the work of recovering and revitalizing Indigenous legal traditions is to recognize that participating in any legal tradition involves more than merely identifying principles and procedures. It also involves “sharing a way of speaking about the world which, like language...shapes forms and in part envelops the thought of those who speak it and think through it.”²⁹ Stephen Kieger argues there is “no clear demarcation between a culture’s rules of control and its meaning-making narratives.”³⁰ Stories make it “humanly possible for us to provide culturally comprehensible justifications for our principled decisions and opinions.”³¹ Thus, background societal stories are our shared understandings, and provide both the tools of persuasion Borrows argues allow for necessary change and growth within Indigenous legal traditions, and the interpretative bounds Napoleon argues are required for maintaining their legitimacy and integrity.

This means the work of engaging robustly with Indigenous legal traditions, so that they can be accessed, understood and applied today, clearly requires more than just identifying and articulating legal principles. It requires recognizing the

²⁷ Robert Covers, “Nomos and Narrative” (1983) 97 *Harv L Rev* 4 at 5 [Covers].

²⁸ *Ibid*, at 4.

²⁹ *Ibid*, at 244.

³⁰ Stefan Kieger, “The Place of Storytelling in Legal Reasoning: Abraham Joshua Heschel’s Torah Min Hashamayin” (2007) Legal Studies Research Paper Series, Research Paper No. 07-26 at 6[Kieger].

³¹ *Ibid*, at 50.

shared language and narratives that give these legal principles meaning, that make them meaningful to us and make sense of the world around us. Can my methodology, that extrapolates principles from stories, and re-states them like so much dry dust into an analytical framework,³² also help us connect or reconnect these principles deeply to these essential narratives? In this chapter, I hope to demonstrate that it can.

The analytical framework I use to organize Indigenous legal principles in a usable synthesis has several categories, including the authoritative decision makers, procedures, response principles, rights and obligations in any given body of law within a particular legal tradition. The final category in the framework is for general underlying principles – for identifying underlying or recurrent themes that appear to guide the expression and application of the other identified legal principles. This category is addressed at the conclusion of the legal analysis and synthesis, after stepping back and reflecting on all of the particular, from the crucial perspective that these are all parts that form part of a larger whole.³³ It is these fundamental principles that represent the ‘connective tissue’ in a body of law, and begin to provide glimpses into the themes and commitments of a broader background story that informs and infuses the rest.³⁴ To mix my metaphors, they also provide a

³² Michael Oakeshott, *Rationalism in Politics and Other Essays* (Indianapolis, IL: Liberty Press, 1991) at 41, criticizes demanding people choke down dry lists of principles excised from their surrounding traditions, which are the “liquid in which our moral ideals were suspended.”

³³ Napoleon, Ayook, *supra* note 3, at 47-48.

³⁴ While underlying Cree principles differ from those identified by Dworkin, my argument largely follows his interpretivist theory of law. See Ronald Dworkin, “The Model of Rules” (1967) *Yale Law School Faculty Scholarship Series*. Paper 3609. See also Dworkin, *supra* note 10.

rudimentary litmus test for the legitimacy of possible interpretations and applications. A decision ostensibly relying Cree legal principles that is incongruent with or counter to certain fundamental underlying principles, would be and should be suspect. Conversely, a decision that implicitly or explicitly upholds the same principle could be evaluated as far more legitimate. While there is more than one general underlying or foundational principle in Cree legal traditions,³⁵ here I focus in on one that stands out and emerged the most strongly from the particular principles identified using my methodology in the AJR project: the explicit centrality of relationships in Cree legal thought – Wah-ko-to-win – to recognize our relatedness, to live in relationship.

4. Wah-ko-to-win: Relationships as Central and Foundational:

“We all exist within larger relationships and these relationships are the foundation for everything else.”³⁶

In “Creating New Stories: Indigenous Legal Principles of Reconciliation”, David

MacPhee explains his understanding of the word, Wah-ko-to-win:

Wah-ko-to-win is how we are related to one another, and how things relate to one another. We all exist within larger relationships and these relationships are the foundation for everything else. Most importantly the word describes how all is related to God the Creator. In relationships there are roles that each party has. It is

³⁵ In Chapter Two, I identify underlying principles from my LLM project as: (1) the principle of reciprocity: helping the helpers, and (2) the principle of efficacy: being aware and open to all effective tools and allies (Chapter Two, at 65). In Chapter Three, I identify underlying principles from the AJR Project Cree Legal Traditions Report as: (1) Responses are Fluid and Contextualized; (2) It is important to value and acknowledge Relationships, and (3) Reciprocity and Interdependence are important (Chapter Three, at 143-147).

³⁶ David MacPhee, Aseniwuche Winewak Nation President, in Hadley Friedland and Lindsay Borrows, “Creating New Stories: Indigenous Legal Principles of Reconciliation” (2014) Online: <https://keegitah.wordpress.com> [Friedland and Borrows, Creating New Stories].

critical to recognize there is also responsibility as part of relationships. The issue of responsibility creates a lot of discussion if it was not exercised appropriately.³⁷

I think I can be so bold as to state my research, engaging with Cree legal traditions through my methodology, has provided enough evidence for me to make the claim that a fundamental background societal story underlying Cree legal traditions, like many other Indigenous legal traditions, is that of a society (and world) of relationships. As MacPhee says eloquently, relationships are foundational to everything in Cree legal thought. Put another way, as Jennifer Nedelsky suggests, I believe Cree legal traditions approach the universal human and social issues that all laws are concerned with in a primarily relational way.³⁸ Just as the background story of individuals as atomistic units informs and permeates western legal thought and practice,³⁹ this narrative of each individual existing and inextricably connected within a network of relationships, informs and permeates Cree legal thought and practice.

In claiming this, I follow Nedelsky in noting what saying the Cree legal tradition is premised on a relational approach to law does *not* mean. I think it is particularly important to distinguish this when talking about Indigenous legal traditions because there are certain pan-Indigenous stereotypes that have held sway, either as dire warnings against the risk of individual human rights abuses, or as over-simplistic utopian visions of what communities need, or can currently

³⁷ David MacPhee, *ibid.*

³⁸ See generally, the relational theory of autonomy and law explicated in Nedelsky, *Law's Relations*, *supra* note 1.

³⁹ Nedelsky, *Law's Relations*, *supra* note 1 at 42.

provide, to overcome the immense social suffering and violence disproportionately inflicted on Indigenous peoples, and specifically Indigenous women and children.⁴⁰

First, in claiming Cree laws are fundamentally premised on and informed by a relational outlook and approach, I am *not* saying that the collective is valued over the individual in Cree legal traditions.⁴¹ Indeed, I found very little, if any, supporting evidence of this oft asserted ‘truism’. Second, I am *not* saying that, because relationships are recognized, valued and explicitly relied on in Cree legal traditions, that all existing or potential relationships are inherently beneficial or benign.⁴² Recognizing the power of and even centrality of relationships within Cree legal and political thought is not the same as romanticizing them or claiming them as a cure-all.

Finally, while I maintain that a relational approach to law is an enduring feature underpinning the interpretation and implementation of Cree legal principles today, I think it is equally important to take seriously the fact that not all relationships themselves have endured and there have been profound ruptures. Those relations that have endured have necessarily changed, and new relationships have become relevant as well. If Cree laws are fundamentally informed by a

⁴⁰ I discuss this reality in greater depth in Chapter 6.

⁴¹ Nedelsky, *Law’s Relations*, *supra* note 1 at 33. See also David Milward’s strong cautions against assuming there can be any straightforward tradeoff between collective good and individual freedoms in contemporary communities: David Milward, *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights* (Vancouver: UBC Press, 2012) at 222.

⁴² Nedlesky, *Law’s Relations*, *supra* note 1 at 32. See also Veena Das, *Life and Words: Violence and the Descent into the Ordinary* (Los Angeles: University of California Press, 2007), who writes eloquently of appreciating, “not only the security provided by belonging to a community with shared agreements but also the dangers human beings post to each other” (at 16), as well as women witnessing the “possibility of betrayal coded in their everyday relations” (at 72).

relational outlook on the world, and we are to take seriously the goal of accessing, understanding and applying Cree laws today, we have to interrogate the fluid and dynamic nature of all relationships, and consider the implications of the massive changes over time (both imposed and chosen) that have transformed Cree people's relationships with each other, with outsiders, with animals and other non-human beings, the land and place itself.⁴³

a. Living within Larger Relationships:

"It's all centered around relationships, right?"⁴⁴

Relationships are both recognized and reasoned through in almost every story and interview reviewed for the Cree Legal Summary in the last chapter. One interviewee made the centrality of relationships and relatedness in Cree legal thought was made explicit at a general level. As a community leader, he explained his belief that Cree legal traditions need to be understood as existing fundamentally within larger relationships. He argued that even the term, "law", can be a misleading term for Cree people, if they only associate it with the Canadian model of law, with authority relying on people in certain positions, such as police and judges. Instead, he explained his understanding that Cree law is grounded in "protocols" — the proper conduct for ceremony, hunting, interacting with others, life generally, or "everything".⁴⁵ He views the importance of protocols as lying in the foundational importance of relationship between individual humans and the Creator, other

⁴³ I discuss these critical points further in Chapter Six.

⁴⁴ Chapter Three, at 145.

⁴⁵ Chapter Three, at 144.

humans, the land, and “nature.” Protocols are simply ways of reminding us that, in respect of these relationships, “there’s right ways of doing things and there’s wrong ways of doing things.”⁴⁶

This leader saw everything as related parts of one whole: “the language, the culture, and protocols are all so intertwined, I think if you were to take one out, it automatically starts disintegrating the other ones.” He saw this as equally true for spirituality:

in the English language like we say spirituality, but in native cultures, I don’t think it was seen that way. I think it was life. It was all inclusive... And it’s, like, life with the medicines, like there’s life with spiritual realms. There’s life with people, like, but it’s all centred around relationships, right?⁴⁷

This recognition of relationships and the interconnection of all aspects of life was reflected throughout the Cree stories and interviews, and is woven through every category in the analytical framework.

In particular, spirituality and non-human life forms did not appear to be relegated to a separate sphere or elevated below or above other life realms. For example, in conversations about legal procedures,⁴⁸ elders talked matter-of-factly about recognizing warning signs that someone was becoming dangerous to others through observations of people’s behaviour and animals and the natural world,⁴⁹ and through spiritual means, such as visions or dreams, with equal equanimity.⁵⁰ One particularly knowledgeable elder who practices traditional medicine, talked matter-a factly about her grandfather being warned by spirits in a dream about his

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ Chapter Three, at 90-105.

⁴⁹ Chapter Three, at 91-92.

⁵⁰ Chapter Three, at 93.

sister when she was becoming dangerous,⁵¹ about another case where the warning sign was a horse behaved oddly and vomiting,⁵² and yet another case where she and her husband were called to a house where a woman was demonstrating several behavioral signs, such as “smiling in an odd way, wrapping herself in a black blanket, keeping her whole house dark and refusing to get out of bed.”⁵³ To this elder, all of these warning signals were simply warning signals to be heeded, and led to further observation, offers of help, and action as necessary to keep others safe.⁵⁴

Similarly, relevant knowledge and expertise for responding effectively to harms or resolving conflicts were gained and recognized through these various means.⁵⁵ Someone could be sought out to provide guidance due to their respected roles as good hunters and providers,⁵⁶ their special spiritual gifts or ability to communicate with spirit helpers,⁵⁷ or their close relationship with the person or people involved.⁵⁸ The response principle of healing was most often discussed as implemented through spiritual means.⁵⁹ Natural and spiritual consequences were both referred to as well.⁶⁰ In the story, *The Man Who was Bitten by Mosquitoes*, a man who is cruel to mosquitoes one year is eaten up by them the next year.⁶¹ In the story, *Killing of a Wife*, a man who kills his wife is publically confronted and exposed

⁵¹ Chapter Three, at 92.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ Chapter Three at 96-99 ((c) Seeking Guidance from those with relevant understanding and expertise) and 103-105 ((f) The appropriate decision-makers are identified and implement a response).

⁵⁶ Chapter Three, at 97.

⁵⁷ Chapter Three, at 97-98.

⁵⁸ Chapter Three, at 98.

⁵⁹ Chapter Three, at 108-109.

⁶⁰ Chapter Three, at 118-119.

⁶¹ Chapter Three, at 118.

by a medicine man in the shaking tent, who tells him killing is not good and warns him he does not have long to live. He dies within the year, even though no human agent takes any further action against him.⁶² An elder spoke of an old man who he met walking with two canes, who told him he used medicine with bad intent and was “paying for it now.”⁶³

In general, relationships, between actions and consequences, between people and peoples, and between humans and the rest of the world, are assumed and permeate decision-making at many levels. One of the most interesting things about this deep understanding of relatedness is how people spoke about it influencing their reasoning and actually preventing them from making decisions that might lead to harm or further harm to themselves or others.

Robert Wanyandie, a respected hunter and guide, talked about staying safe in the bush by paying attention to squirrels warning each other of danger:

If he’s warning whatever in his surroundings and you happen to be one of them, you know, I guess I don’t know, I guess you could say you’re part of it, right. You’re part of the relationship, I guess, because you know what he’s doing, because you know, because I guess I would say when he’s yapping away you know the understanding of that meaning of what he’s doing.⁶⁴

Even though Wanyandie stressed he himself did not have a relationship with the squirrel, and in fact, pointed out the squirrel would view him as a predator too, he knew it was important to pay attention to what the squirrels were saying to each

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ Chapter Three, at 119-120.

other because it was related to his safety in the same area.⁶⁵ It would be foolish to ignore them.

Wanyandie also talked about making the decision not to commit a wrong action when he was younger, based on his understanding of spiritual relationships. He was out hunting and spotted an eagle, and was about to shoot it, but something inside stopped him:

The instinct inside me was that, you know, if I shoot it, you know, something might not work out for me, you know, like maybe a bad luck or something, you know what I mean? So I just, you know, I didn't want to, didn't want to go through that process or I didn't want to find out about it anyways, you know what I mean?⁶⁶

Wanyandie used this knowledge of relatedness to guide his choices and actions, even when nobody was around to see him or 'catch' him killing the eagle.

One elder explained, "no matter what you do, something wrong, when you hurt somebody, especially if you're using medicine, that thing is coming back for you."⁶⁷ This can lead to people explicitly making decisions to *not* retaliate or punish someone when they do something wrong or cause harm to them. One interviewee explained:

I think people would turn around and would say, you know, just leave it be. It'll come back to him anyways or sometimes bad things will happen to a person, like, just one after another, whatever and people will say, oh, something is visiting him.⁶⁸

Another elder talked about a relative being killed by a curse. The family resisted the urge to retaliate or fight back because they believed things would have just gotten worse if they did so.⁶⁹ An underlying belief that we all live in larger relationships can

⁶⁵ *Ibid.*

⁶⁶ Chapter Three, at 119.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

lead to the understanding that people will face the consequences of their actions through these, whether other people intervene or not, and it was clear many people interviewed applied this belief in their own reasoning and decision-making in their lives.⁷⁰

b. Recognizing the Fact of Relationships:

Many readers might understand the need to explicitly describe the recognition of humans existing in larger relationships in Cree legal thought, when these larger relationships encompass and understanding of relationships with non-human elements. However, I would argue an equally important aspect of Cree legal thought, that is often overlooked or absent in western legal philosophy and political thought, is the explicit recognition of the *fact* of our human relationships and interdependence, and the *value* placed on these relationships. Relationships are not peripheral, but central to Cree legal thought.⁷¹

In one interview for the AJR project, an elder stressed the crucial point that, at a practical level, in small, closely-knit Cree communities, most people who harm others are not faceless, nameless wrong-doers, but rather well known loved ones

⁷⁰ This was seen in other Indigenous legal traditions the AJR project engaged with as well. See, for example, *The AJR Project Tsilhqot'in Legal Traditions Report*, prepared for the AJR Project, the University of Victoria ILRU, the IBA, the TRC, the Ontario Law Foundation, and the partner community, Tsilhqot'in National Government (May 2014, unpublished), on file at the University of Victoria ILRU, at 35-37 and the *AJR Project Anishinabek Legal Traditions Report*, prepared for the AJR Project, the University of Victoria ILRU, the IBA, the TRC, the Ontario Law Foundation, and the partner community, Chippewas of Nawash Unceded First nation #27 (May 2014), on file at the University of Victoria ILRU at 31-32.

⁷¹ See Nedelsky's aspiration for moving relationship from the periphery to the centre of this in western legal and political thought and practice, Nedelsky, *Law's Relations*, *supra* note 1 at 3.

living in close proximity.⁷² In an illuminating exchange, a student interviewing this very knowledgeable elder, who practices traditional medicine, expressed his belief that, based on the published materials he read, someone who had ‘turned *wetiko*’ was usually killed. When he asked her about this, the elder was upset and responded quite emphatically: “probably someone who didn’t know nothing and had no compassion would just go kill somebody else.” She then stressed that the appropriate response was to try to help the person instead, explaining: “these are our family members”.⁷³ This exchange captures the factual reality that most, if not all people involved in a situation of harm, even monstrous harm, exist within a network of familial and other relationships. The elder in question was not willing or able to engage in a discussion that would artificially extract an individual, even an individual turning *wetiko*, from the *fact* of their human relatedness. Yet the students were used to doing exactly that in their studies in Canadian law schools.⁷⁴

Background societal stories impact what is looked for, and what is overlooked, in legal reasoning. A good illustration of how different societies can explain the same facts with different emphasis, depending on what they recognize and value, is found in Julie Cruikshank’s comparison of written and oral accounts of the life of Skookum Jim, a Tagish and Tlingit man who gained folk hero status by discovering gold in the gold rush era. While written accounts portrayed Skookum

⁷² Chapter Three, at 146.

⁷³ *Ibid.*

⁷⁴ This raises the issue of how many forms of writing can erase human stories, just as analytical jurisprudence can. Conklin describes the absence of his ancestors’ names on their gravestones making it harder to access or imagine their human and experiential reality, *supra* note 11 at 3-4. These students had never imagined talking to someone knowing *wetikos* as real people, some still alive today. They only knew what they had read in books.

Jim as “an individualistic frontier genre...the lone prospector-trapper whose efforts are ultimately rewarded,” oral accounts from his community “describe him as a man impelled by social and cultural motives – a strong sense of responsibility to his sisters and an ability to communicate with and be guided by superhuman helpers.”⁷⁵

Cruikshank explains:

Oral traditions use metaphors of connection to explain Skookum Jim’s actions just as written records rely on metaphors of frontier individualism, but the explanatory narratives in each case reflect different understandings about how society works.⁷⁶

While the non-Indigenous written accounts recognized and valorized Skookum Jim’s individual effort and drive, the oral accounts recognized and valorized his relational connectedness and responsibilities as the driving force behind his success.⁷⁷

Like the oral accounts of Skookum Jim, many of the stories and interviews in the AJR project appear to value relational connectedness and have an unspoken assumption of responsibilities, interdependence and reciprocity in all relationships. As discussed above, at a cosmological level, the acceptance that there are natural and spiritual consequences to every action informs peoples’ decision making and their responses to situations of harm and conflict. On a practical level, the value seen in reciprocity and interdependence is best illustrated through the obligation of a person to help others when capable and ask for help when incapable or vulnerable,⁷⁸ the obligation to give back when asking for or receiving help,⁷⁹ and the

⁷⁵ Julie Cruikshank, *The Social Life of Stories: Narrative and Knowledge in the Yukon Territory* (Nebraska: University of Nebraska Press, 1998) at 81 [Cruikshank].

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*, at 74-81.

⁷⁸ Chapter Three, at 124-129.

⁷⁹ Chapter Three, at 130.

right to receive help when incapable or vulnerable.⁸⁰ One inference supporting these rights and obligations could be that a person may never know when and how they may require help. Thus, relational connectedness and reciprocity encourages people to value interdependence, rather than privileging an ideal of independence.

Differing societal ideals of independence and interdependence can shape what is recognized and valued profoundly. In *Law's Relations*, Nedelsky asserts the "fact of human dependence" is a truth claim.⁸¹ She gives examples of many experiences of "non-singularity" and "interconnection"⁸² that are part of the human condition, and yet points out "in North America, our language, conceptual framework, metaphors and institutions serve to emphasize individual boundedness and are extremely poor at capturing the equally important interconnection."⁸³ She argues that a relational approach to autonomy recognizes the empirical *fact* of the "ubiquitous structures of dependence and interdependence that characterize everyone's lives" rather than privileging a "(usually illusory) independence" that is valorized in western society.⁸⁴ In other words, like the differing versions of Skookum Jim's story, the issue is not the *factual absence* of human relationships or interdependence in North America. The issue is that the bulk of western legal and political thought proceeds without recognizing or valuing these, with attendant real life consequences.⁸⁵

⁸⁰ Chapter Three, at 135.

⁸¹ Nedelsky, *Law Relations*, *supra* note 1, at 34.

⁸² *Ibid.*, at 111.

⁸³ *Ibid.*

⁸⁴ *Ibid.*, at 134.

⁸⁵ Such as undervaluing or devaluing the essential work of care. *Ibid.*, at 28-29. See also Deborah Stone, "For Love nor Money: The Commodification of Care" in Martha M. Ertman,

This is an essential point, because the Cree elder's statement about even very harmful people still being family members, and needing compassion and help, can be reduced to a false dichotomy of abstract versus concrete reasoning. But this is nonsense. Like any legal practitioner, the elder in question definitely had a keen eye toward practice, but she was perfectly capable, and indeed willing to engage in, abstract conversations about Cree law. She was just articulating her sense of the central importance of relationships in her legal reasoning process. Nedelsky states that one of her hopes for her formal articulation of a theory of relational autonomy is to "help people [who view things relationally] formulate a language for how they see the world." This is important work because "when people's frameworks do not fit the dominant one, they can be rendered inarticulate. Indeed they can be made to feel stupid, perhaps especially in formal settings."⁸⁶ The massive failure of the Canadian justice system, which is often attributed to cultural differences in understanding human behaviour and the appropriate means of responding to incidents of harm or conflict, immediately comes to mind.⁸⁷

Joan C. Williams, eds. *Rethinking Commodification* (New York: New York University Press, 2005) at 271-290.

⁸⁶ Nedelsky, *Laws Relations*, *supra* note 1, at 10.

⁸⁷ There are many examples of Aboriginal and non-Aboriginal conceptions of elemental issues of justice as being set out as contradictory or dichotomous. See, for example, Jeremy Webber, "Individuality, Equality and Difference: Justifications for a Parallel System of Aboriginal Justice" in RCAP, *Aboriginal People and the Justice System: National Round Table on Aboriginal Justice Issues* (Ottawa: Royal Commission on Aboriginal Peoples, 1993) at 4 [RCAP: Roundtable on Justice]. See also James Dumont, "Justice and Aboriginal People" in RCAP: Roundtable on Justice, at 42-85; Patricia A. Monture-Okane, "Reclaiming Justice: Aboriginal Women and Justice Initiatives in the 1990s" in RCAP: Roundtable on Justice, at 106; Mary Ellen Turpel, "On the Question of Adapting the Canadian Criminal Justice System for Aboriginal People: Don't Fence Me In" in RCAP: Roundtable on Justice, at 173-179. Daniel Kwochka, "Aboriginal Injustice: Making Room for a Restorative Paradigm" (1996) 60 Sask. L. Rev. 153 at 160 who argues that "if these values [of the Justice system] ... are not in harmony with Aboriginal values, then imposing them becomes an act of repression."

c. Relationships as Rationale:

*"These are our family members."*⁸⁸

Nedelsky's work re-centering human relationships into political and legal theory serves as a useful "bridge of connection" to Cree and other Indigenous legal traditions that "are based on, or have deeply integrated a relational approach".⁸⁹ I believe this relational approach provides both the rationale and resources for many of the principled responses to harm and conflict in the Cree legal tradition. As the Cree elder above explained, recognizing the fact everyone lives in relationship provides a strong rationale behind the principle of healing as the predominant and preferred response to someone who becoming, or at risk of becoming harmful or dangerous to others.⁹⁰ Elder Joe Karakuntie told a story about a woman in the community becoming increasingly dangerous and disruptive, scaring everyone around her, until finally two elders (one was her brother) took her to a shaking tent and "healed her...healed her spirits."⁹¹ Elders told stories about a husband seeking help for his wife, who was becoming a *wetiko*, and a man having a dream about his sister, and so seeking help and healing for her to prevent her from becoming a *wetiko*.⁹² These loved ones were all dangerous, but could not have been reduced to faceless dangers. They were all *literally* family members.

⁸⁸ Chapter Three, at 109.

⁸⁹ Nedelsky, *Laws Relations*, *supra* note 1, at 10.

⁹⁰ Chapter Three, at 108-109.

⁹¹ *Ibid.*

⁹² *Ibid.*

Recognition of the reality people live in relationships similarly provides a rationale for the response principle of reintegration.⁹³ Like healing, reintegration provides hope that a loved one will cease causing harm and return to their relational role. The story, *The Thunderwomen*, demonstrates this Cree legal ideal. Two brothers are married to two sisters, who are actually thunderwomen. The younger brother tries to kill his older brother's wife and she flees back to her family with her sister. The older brother makes the difficult journey to his wife's family to make amends. When he returns with his wife and her sister, they find the younger brother has been crying the whole time, and he is told he must never do what he did again. They all resume living together as before. The sisters even find the arrow used in the attempted murder and give it good hunting luck, creating something positive and useful out of the ugly incident. This ideal resolution relies on the younger brother's remorse and the older brother taking responsibility. It is made clear that everyone is safe, and everyone knows this must never happen again.⁹⁴

While the reality that people live in relationship provides a rationale for healing and reintegration being viewed as ideal, it provides an equally strong rationale for the need for these responses not to be applied in inappropriate situations or in a way that is blind to real risk of recidivism. It was clear that the principle of reintegration included responsibilities of others to observe and supportively monitor the person who became harmful in the past,⁹⁵ and to warn others if they noticed warning signs the person had relapsed or was at risk of doing

⁹³ Chapter Three, at 116-118.

⁹⁴ Chapter Three, at 116.

⁹⁵ Chapter Three, at 117-118.

so.⁹⁶ In a historical example where a woman was dangerous and disruptive but refused help, elder Joe Karakuntie pointed out that, while they would have preferred to heal her, the rest of her family and community had little choice but to avoid her in order to avoid being harmed themselves. For a time, her brothers, who had some control over her, took her away from the community and separated her from everyone else completely for safety.⁹⁷ In the story, *The Hairy Hearts*, a man's wife noticed warning signs he and his son are becoming dangerous after many years of being safe and contributing community members. In that case, no other response was left except incapacitation.⁹⁸ Those living in close relation to a harmful person had a responsibility to prevent future harms.⁹⁹ Recognizing the reality of relationships includes recognizing the fact a person who can be dangerous is also living in relation to vulnerable others, who are equally loved and valued family or community members.

It is clear that relational thinking is not tunnel vision, where the only relationships (or lives) that matter, or are worth preserving, are those of the person causing harm. Someone living in such close proximity can cause an enormous amount of harm to those around them if the people aware of their propensity for violence or those closest to them turn a blind eye. The cautionary counter story to *The Thunderwomen* is the story of *Mistacayawis*.¹⁰⁰ In this story, a woman is aware her older sister has become a *wetiko* and is killing other people. She does not warn

⁹⁶ Chapter Three, at 132-134.

⁹⁷ Chapter Three, at 110.

⁹⁸ Chapter Three, at 91 and 122.

⁹⁹ Chapter Three, at 131-132.

¹⁰⁰ Chapter Three, at 132.

them. After her sister has killed everyone in their camp they move to a larger camp to join relatives, and her sister kills her brother-in-law while hunting. Still, the younger sister says nothing. By the time one man realizes what is going on, almost everyone in the larger camp has been killed. The younger sister is executed once the murders are revealed. This is a rare instance where execution is explicitly *not* just used as a means for incapacitation.¹⁰¹ The narrator strongly suggests the younger sister is executed because her failure to warn others about her sister was seen as so reprehensible by the group.¹⁰² Interestingly, the older sister begs to be killed so she will not harm anyone else, and tells a younger relative the secret for doing so is cutting off her little finger (she is enormously strong and unstoppable by that point).¹⁰³ This detail suggests her younger sister's silence did not even save her from suffering.

In situations of conflict, where others were not in danger, the reality that everyone lives in a web of relationships provided a rationale for the response of avoidance or separation. In one historical situation, two cousins often fought with each other, but would then reconcile. This happened frequently. Many people from the community tried to talk to them, to no avail, so they simply avoided them when they were fighting, so things wouldn't escalate further through the community.¹⁰⁴ One interviewee shared a historical case, where a well-respected community member took his family and left the community permanently, because he

¹⁰¹ In my LLM thesis, I said this was a rare instance of the principle of retribution.

¹⁰² Chapter Three, at 132-133.

¹⁰³ Chapter Three, at 87.

¹⁰⁴ Chapter Three, at 113.

disapproved of how many people were living their lives.¹⁰⁵ The interviewee explained this action was done in the best interests of the community, because direct confrontation with the people he disapproved of would have been understood as a confrontation with all of each person's relatives, including parents, aunts and uncles, and thus could have caused "a huge rift, not only with that family but surrounding families and everything else."¹⁰⁶ Instead the man left, very publically giving his reasons why, to send a powerful message.¹⁰⁷ He never returned. Similarly, in the story *Indian Laws*, when conflict escalates, the man at the centre of it branches off with his brothers and establishes his own camp away from the main camp. When he is confronted at his new camp, rather than retaliate, he declares they have no relatives.¹⁰⁸ In this case, however, this creates some breathing room for his father to step in and create a face saving solution for everyone involved, and he does return in the end.¹⁰⁹

On a practical level, where everyone knows everyone is related, ripple effects from choices and actions by or toward one individual or family have to be taken seriously. Harms can spread fast. Principled responses and resolutions to harms and conflicts vary, and depend on many factors, including risk assessment and the nature of the harm or conflict in question. However, ignoring the *fact* of the relatedness of everyone involved could easily lead to inadvertently perpetuating, escalating or compounding harms and conflicts in communities where everyone is

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

so deeply interconnected, through generations. My sad sense is that most serious run ins with the Canadian criminal justice system, which rarely considers the fact of relationships, could provide a thousand tragic examples of this. Conversely, decision-making that keeps this reality at the forefront may not necessarily leading to a different response to the core issue, but may stop the reverberating impacts, and increase the overall community safety and wellness.

Take, for example, the case of Mayamaking, that John Borrows shares, where a man becomes a *wetiko* and the council reaches a decision that the only possible response capable of keeping the community safe is incapacitation, which, at that time in history, meant execution.¹¹⁰ What is a relational approach to making and implementing a decision to kill another human being? First, Mayamaking's loved ones were involved in the decision, and it was established that there was no other way to keep everyone else, who we can assume were also loved and valued relations, safe and alive. Second, Mayamaking's best friend said he had to be the one to implement it, as he knew he would not be able to stop himself from hating someone else if they killed his best friend, despite intellectually understanding there was no choice. Third, the impact on Mayamaking's other relations was also carefully considered, and responded to. He had an elderly father reliant him for support, so the father was given gifts, and his best friend agreed to take over his responsibilities in that relationship. As a result, the father would not suffer needlessly from deprivation, on top of his loss and grief. No doubt there was immense sorrow and grief for all involved, and no wonder execution was the last resort, when all else had

¹¹⁰ John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 82. See discussion in Chapter Two, at 45-48.

failed, but perhaps the relational approach to the issue meant the burden of the awful legal necessity of inflicting suffering and violence was shared.¹¹¹ The pain of the unavoidable decisions and consequences did not unfairly and disproportionately fall on certain individuals, and keep reverberating and multiplying through Mayamaking's relations. This case also illustrates that relationships as rationale do not automatically prescribe or preclude certain results. What it does is widen the legal reasoning process and require legal decision makers to consider and respond to a fuller picture.

d. Relationships as Resources:

*"Probably it wasn't really like nobody didn't listen, but there was always somebody that you would listen to."*¹¹²

In Cree legal traditions, relationships are not just recognized as fact and valued as a good, but accessed as resources to avoid, prevent or respond to harms and conflicts. Historically, building relationships literally ended wars and saved lives.

Family members are a legitimate category of authoritative decision makers. In cases of harm, they act to both prevent and remedy harm. In the story, *Indian Laws*, the father of the a man whose actions had created a great deal of harm and conflict in the community, publically renounced his son's actions, and offered a horse as compensation to a man who had lost his wife and children due to the son's

¹¹¹ This necessity of violence and infliction of pain is an often overlooked but key point for all law. For compelling reminders of this, see Robert Cover, "Violence and the Word" (1985-1986) Yale Law Journal 1601, reminding us "Legal interpretation takes place in a field of pain and death" (at 1601) and Louis E. Wolcher, "Universal Suffering and the Ultimate Task of Law" (2006) 24 *Windsor YB Access Just* 361, stating, "even at its most banal, a legal tradition always "both remedies and causes human suffering." (at 367).

¹¹² Chapter Three, at 105.

reckless actions.¹¹³ In the story *Thunderwomen*, discussed above, it is the older brother of the wrongdoer who confronts him and then goes on the long journey to make amends for his actions.¹¹⁴ In *Mistacayawis*, the younger sister clearly was thought to have some duty to warn others about her sister, and, in the end, it is the older sister's only surviving relative, a young boy, who kills her by chopping off her finger, at her own request.¹¹⁵ The Cree legal response principles often rely on relatives acting on their responsibilities. In *The Hairy Heart People*, the wife of the man noticed warning signs he was relapsing and warned others.¹¹⁶ In a historical case, where a woman was becoming *wetiko*, her brother had a dream warning him. The elder relating this explained that this meant he had a responsibility "for her to be able to go get help. For him to take her to go get help."¹¹⁷

In cases of interpersonal conflict, family members take on a persuasive role in resolving the conflict.¹¹⁸ In a historic case, a married couple decided to separate at a time where this was seen as cause for concern. First extended family members, then elders visited them, trying to persuade them to reconcile. However, when the couple decided to separate anyway, this decision was respected.¹¹⁹ In the historic case of the man who left the community, his extended family members, then elders, also visited him, trying to persuade him to stay. Again, in this case, once he decided

¹¹³ Chapter Three, at 87.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ Chapter Three, at 91.

¹¹⁷ Chapter Three, at 108.

¹¹⁸ Chapter Three, at 88.

¹¹⁹ *Ibid.*

to leave anyway, this decision was respected.¹²⁰ One community leader said these were typical processes, if not results. He explained that, where there was interpersonal conflict, it was common for extended family members, then elders, to try to help solve the problem through multiple visits. These visits allowed everyone involved or affected to talk and be heard and also served to apply social pressure to resolve things.¹²¹

Deciding who were the most appropriate people to seek out for guidance¹²² as well as to make and implement decisions¹²³ in a particular situation were actually identifiable procedural steps in Cree legal process. There are obvious benefits to having access to many different people, with different gifts and connections, to seek out or draw upon in different situations. One interviewee pointed out that it couldn't be assumed, for example, that every elder or person practicing traditional medicine is suited for everything. He explained that if he were looking for help or guidance, he would go to the person recognized by the community as knowledgeable in that specific area or about the specific issue.¹²⁴ One elder, who practices traditional medicine, so is often called upon to be a decision-maker, explained that discussion and deliberation in her role is important. She explains she always discusses issues involving wrongdoing or harm with her husband. If he is not available, she will seek out one of her three sons, particularly the one who "picks up what she picks up" in

¹²⁰ *Ibid.*

¹²¹ Chapter Three, at 102.

¹²² Chapter Three, at 96-99.

¹²³ Chapter Three, at 103-105.

¹²⁴ Chapter Three, at 99.

regard to spiritual warning signs.¹²⁵ In the historical case of the sister turning *wetiko*, her brother was monitoring her and realized she was getting worse and he couldn't help her alone, "so he knew he had to take her to somebody else who would be able to help her in a way that he couldn't help her."¹²⁶ In this case he took her to a nearby community where there was someone with the necessary power and skill to cure her.¹²⁷ People did not act alone when they had others they could turn to.

Sometimes, the power was in the connection itself. For example, a family member or elder that has a particular connection or is particularly respected by an individual will be asked to take on a persuasive role in resolving a conflict,¹²⁸ or a supervisory role in temporarily separating someone who is dangerous from others, until he or she can be healed.¹²⁹ In the above case of the sister turning *wetiko*, elder Joe Karakuntie explained that the brother and another elder were able to keep the community safe from his sister, because she respected them, and was a little afraid of them. This pre-existing respect is what enabled them to have some control over her even when she was almost completely out of control and extremely dangerous to others. For this reason, they were seen as the most appropriate people to supervise and monitor her, and eventually accompany her to a shaking tent for healing.¹³⁰

Karakuntie also explained that this careful selection of who was most appropriate to respond to the specific situation carries over to conflicts or problems

¹²⁵ *Ibid.*

¹²⁶ Chapter Three, at 104.

¹²⁷ *Ibid.*

¹²⁸ Chapter Three, at 105.

¹²⁹ *Ibid.*

¹³⁰ Chapter Three, at 111.

where there is no imminent risk of harm. He pointed out that different people respond better to being talked to by different family members or elders, based on their experience, personality or relationship, stating, “probably it wasn’t really like nobody would listen, but there was always somebody that you would listen to.”¹³¹ This is a powerful assumption – that if a person doesn’t respond to one person, the next logical step is to consider who they might respond to better, rather than automatically assuming they are uncooperative or uninterested in help. It makes intuitive sense. If I am struggling with a difficult issue, I might respond best to someone who has dealt with a similar issue so I trust will understand me without judging. If I am feeling stuck or unsure about myself, I might be able to hear advice or accept guidance from someone I particularly relate to or respect and admire. Some personalities click, and some don’t. What this relies upon is a background that includes a rich pool of people to draw on, and deep knowledge of the person and knowledge of the people around them – their strengths and weaknesses, their personal history, experiences, relationships and connections.

The efficacy of relational thinking was not always dependent on this deep knowledge. There are powerful stories where building or re-building relationships between people literally saved lives, stopped wars and created enduring connections and change. There are the older stories, when the world was new, where animals, spiritual beings and humans communicate, connect, make deals and form relationships to everyone’s eventual benefit. A good example of this is the story, *Buffalo Child*, where humans accidentally leave a human child behind, and the

¹³¹ Chapter Three, at 105.

Chief Buffalo insists on taking him in and taking care of him, saving his life, and raising him up to be his son.¹³² The boy grows up thinking he is a buffalo, returns to humans for a time, then comes back to the buffalo. He struggles with the complexity of the human-buffalo relationship, and eventually transforms, by his own choice, into a special rock that is a perpetual reminder of the importance of interdependence and respect between the two peoples, who rely on each other to survive and thrive, and must take care to maintain and renew the respectful relationship between them through time.¹³³ Relationships are foundational.

Relationships saved lives. In some stories, set in times of starvation, individuals and whole groups are saved from death by strangers intervening and caring for them for a time. In *The Starving Uncle*, the narrator describes how a stranger saves his uncle's life. The man stumbles upon his uncle's dwelling while hunting, and realizes his uncle is too weak and is starving to death. The man, who has a fresh kill, expands the dwelling and actually moves in and lives with his uncle until the spring, nursing him back to health.¹³⁴ In *The Fearful Winter*, the best hunters from a group of woodland Crees and Chipewyans, camping in the mountains, stay behind when they hear a large group of starving plains Cree are on their way. They feed them the last of their food, and travel together with them to a river where a cache of food is left, saving their lives. Those that didn't stay behind

¹³² "Ahtahkakoop Learns the Story of Buffalo Child" in Deanna Christensen, *Ahtahkakoop: The Epic Account of a Plains Cree Head Chief, His People, and their Struggle for Survival 1816-1896* (Shell Lake, Sask.: Ahtahkakoop Publishing, 2000) 34-46.

¹³³ *Ibid.*

¹³⁴ This is an oral history recounted by a Whapmagoostui Cree elder, living in northern Quebec, to Naomi Adelson and reproduced in Naomi Adelson, *'Being Alive Well': Health and the Politics of Cree Well-Being* (Toronto: University of Toronto Press, 2000) at 30-33.

are labeled “deserters.”¹³⁵ In another story, urged by his spirit helper, an old man who was left behind to starve by his own people, but is helped to survive from his spirit helper, saves them from starvation by agreeing to rebuild the relationship through feasting, giving them all his food to eat, and admonishing them to never leave him behind again.¹³⁶

Cree elder Louis Bird shares a beautiful story called *Morning Star: A Love Story, and the Spread of the Cree Language*, where the spread of the Cree language from the east, all the way across the prairies to the rocky mountains in the west, is explained as the byproduct of extraordinary love of two people, the love that surrounds them, from the woman’s parents and grandparents, to their own children and grandchildren, and everyone acting on their relational responsibilities within this expansive and generous love.¹³⁷ Louis Bird states this lesson explicitly at the end of the story:

[This is] how the Cree language spread to the far west, past the prairie land. It was Morning Star who fulfilled this job. And the man went back and fulfilled his duty as a grandfather to her grandchildren who now speak the Cree language. And that is why the language spread way out west.¹³⁸

This story delights me, not the least because it is a beautiful, life-affirming story.

When I read it, I laughed out loud at myself. I thought I was starting to be familiar

¹³⁵ This is true descriptive account recounted by Michel Sandy Cardinal, as told to Joseph F. Dion in Joseph F. Dion, *My Tribe the Crees*, ed. Hugh Dempsey, (Alberta: Glenbow-Alberta Institute, 1979) at 71-75.

¹³⁶ This was a story recounted by John Blackned, as told to Richard J. Preston in Richard J. Preston, *Cree Narrative* 2nd ed. (Montreal: McGill-Queen’s University Press, 2002) at 175-180.

¹³⁷ “Morning Star, a Love Story, and the Spread of the Cree Language” in Louis Bird, *The Spirit Lives in the Mind*, ed. Susan Elaine Gray, (Montreal: McGill-Queen’s University Press, 2007) at 132- 140.

¹³⁸ *Ibid*, at 140.

enough with the background, through my research, that I should not have been so surprised to learn that the spread of the Cree language across a continent is explained, not through tales of war or conquest, but through a love story.

Historically, building relationships stopped wars and built peace.¹³⁹ A powerful story recounted by Cree elder, Edward Ahenakew in *Voices of the Plains Cree*, told by Chief Thunderchild, describes a context of more than fifty years of attempts to end the warfare between the Blackfoot and Cree Nations. Sometimes there were short truces, and sometimes reckless young men from either Nation would break the truces by killing a peace party, or raiding the other Nation to steal horses. Chief Thunderchild says a long truce occurred when a Blood chief adopted him as a son. He accomplished this by boldly walking unarmed with a friend into the Blood Chief's tent at daybreak. The surprised (and naked) Blood Chief said:

These two young men have killed the anger in me by coming into my tent like this, in the early morning. If they are willing I will take them as my relatives. I thought that I would never be friendly with them, for they took the lives of two of my sons. But these have killed the anger in me. They will be my sons.¹⁴⁰

The Blood Chief then gave them his sons' best clothing and ornaments, as well as many more things, including a gun, and Chief Thunderchild lived in the Blood Camp for a time.¹⁴¹

Chief Thunderchild concludes with a story about the great Blackfoot Chief, Chief Crowfoot and the great Cree chief, Chief Poundmaker:

Neighbouring camps of Crees and Blackfoots could be brought close to warfare by such reckless actions. Chief Crowfoot tried to stop the horse stealing. When they

¹³⁹ "Truce Making and Truce Breaking", recounted by Chief Thunderchild to Edward Ahenakew, and recorded in writing in Edward Ahenakew, *Voices of the Plains Cree*, ed. Ruth M. Buck (Saskatchewan: Canadian Plains Research Centre, 1973) 32-35.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

would not listen to him, he said to his young men, “Then I will be Cree,” and he took his tent and came to live with the Crees. There was no more trouble after then. He made Poundmaker his son.

After Poundmaker was released from the white men’s prison, he went to visit Crowfoot, and he died there, in the country of the Blackfoot. Crowfoot ordered that Poundmaker’s body should lie in state. “First, all the Bloods will see my son before his burial.” Many great men, Indian and white, came to see Poundmaker, but his death broke Crowfoot’s heart. “I will not be far behind him,” he said, and he died a broken-hearted and a great-hearted man.¹⁴²

Like attributing the origin of the Cree language spreading to a love story, peace between the Cree and Blackfoot is attributed to the brave and selfless building of personal relationships between individual chiefs, for the good of all their people – Chief Thunderchild walking into the Blood Chief’s tent, being adopted, and living in the Blood camp, and Chief Crowfoot coming to live with the Crees, and adopting Chief Poundmaker as his son. There is love here too. Crowfoot’s heart is broken when Poundmaker dies.

In the first of a four part series of Constitution-building workshops I facilitated for the *Aseniwuche Winewak*, we talked about Cree principles for peace-building. I introduced these two stories related by Chief Thunderchild and, using Borrow’s single case analysis method, asked community participants to identify how the chiefs resolved the issues and what they thought the reasons were behind the chiefs’ actions.¹⁴³ Participants identified many possible reasons, including the chiefs wanting peace for their people, and between all tribes, stopping the killing and stealing of horses, so:

¹⁴² *Ibid.*

¹⁴³ Hadley Friedland, *AWN Constitution Building Workshops Final Report*, January 2015, (unpublished, on file with author, Aseniwuche Winewak Nation and Government of Alberta, Aboriginal Relations) at 9-11.

- “the feelings of grief, loss, and hardship would come to an end so that both groups would have life and prosper”,
- “self-healing”, to “end the pain”,
- stop the losses, to “move forward in life,” “getting out of a rut”,
- wanting to “improve conditions”, wanting “something better for future generations”,
- to be able to “ally together to fight bigger problems”,
- improve both groups wellbeing, safety and security and to be able to sleep better at night.¹⁴⁴

Some reasons were more about forgiveness, protocols and spiritual principles.¹⁴⁵

People engaged seriously and deeply with this question.

All the elders in attendance at this workshop were in one group because of translation. Things came full circle for me when they spoke, confidently and unanimously identifying the reason behind the chiefs’ actions as “the importance of relationships, building relationships between people – Wah-ko-to-win.”¹⁴⁶

5. Conclusion: Wah-ko-to-win

The Cree word, Wah-ko-to-win, describes the centrality and importance of relationships and building relationships in Cree legal thought. Without more, is trite to say that the Cree legal tradition, like many other Indigenous legal traditions, is premised on a world and society of relationships. However, exploring the depth,

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*, at 10.

nuance and scope of this concept by connecting common themes that run through specific or particular stories, interviews or legal principles set out in the analytical framework, can deepen and complexify our understanding of it. This reinforces and illustrates the point that Wah-ko-to-win represents an essential background narrative or meta-principle for Cree laws.

Existing in larger relationships is foundational, recognizing the fact and value of human relationships is central, and relationships can be both rationale and resource in Cree legal thinking and practice. This broadens the scope of considerations in Cree legal reasoning and raises possibilities, but does not necessarily preclude or prescribe certain results in each case. It does give us some clues for evaluating new or novel applications of Cree law, because we know grounding questions will be relational in nature. I will draw and return to this deeper understanding of Wah-ko-to-win, or relational reasoning, throughout the rest of this dissertation.

In this chapter I retold some of the principles, stories and interview excerpts from the Cree legal summary from the previous chapter to show that my methodology for engaging with Indigenous laws can not only provide a rigorous, transparent and convenient form for restating legal principles so they can be more easily accessed, but can also bring us to a deeper exploration of the essential background narratives needed to properly understand and apply them in a bounded way that upholds the integrity of the legal tradition itself. This is an essential task in reinvigorating and revitalizing Indigenous legal traditions in a way that does not create unnecessary distortions. In the next chapter I turn to the critical task of

application – can this method produce outcomes that are recognizable and acceptable within Indigenous communities and that can be usefully applied by Indigenous communities in their own goals and projects?

Chapter 5: Creating a Cree Justice Process using Cree Legal Principles

“Maybe it’s time we start researching ourselves back to life.”¹

1. Introduction:

Mathew Fletcher’s compelling call to find ways to “access, understand and apply” Indigenous laws has become an overarching objective for my own work. In Chapter Two, I discussed challenges of accessing, understanding and applying Indigenous laws, and methods for approaching these challenges. I proposed a method for engaging with Indigenous legal traditions that I hoped would render Indigenous laws more accessible, understandable and applicable today. In Chapter Three, I demonstrated how this method could lead to the ability to ‘restate’ a specific area of law, in an accessible, transparent and convenient form, using the example of the Cree Legal Summary I prepared as part of the AJR project. In Chapter Four, I shared a common criticism and valid concern about this method – that it might dangerously abstract or decontextualize principles from their crucial background narratives. Using the example of Wah-ko-to-win, or relational theory, I demonstrated that this method could not only make Indigenous legal principles more accessible, but also, if approached thoughtfully, reflecting on the essential meta-principles and background narratives that inform and permeate any legal tradition, promote deeper understanding.

¹ A Nakota Elder’s words at the workshop to shape the emerging research agenda of the Royal Commission on Aboriginal Peoples [RCAP], as related by Marlene Brant Castellano, “Ethics of Aboriginal Research” (January, 2004) *Journal of Aboriginal Health* 98 at 98 [Brant Castellano].

In this chapter, I demonstrate how my method may address Fletcher, Borrows and Napoleon's concerns about ensuring Indigenous laws are not frozen in the past, but are engaged with as living principles, useful, relevant and capable of change to respond to Indigenous people's real issues today.² I show how my method may assist communities to build a solid and useful foundation for application that is both understandable and adaptable, through the case study of the development of a justice process proposal, at the request of the *Aseniwuche Winewak*.

Another common criticism or comment about this method is that, while using the form of a legal summary of abstract legal principles (albeit grounded in stories/oral histories), may make these principles more accessible to non-Indigenous academics and professionals, it is not necessary or desirable for Indigenous individuals and communities themselves. A related question is whether this form might actually make Indigenous laws *less* accessible to people within Indigenous communities, who have learned them through more traditional means. Might it displace or supplant an Indigenous legal tradition's pedagogies, authorities, and methods for dissemination and interpretation? These are serious issues to consider and address. Like the concern about distortion through abstraction, these are valid concerns rooted in historical and present lived experiences of Indigenous peoples. On one level, the best I can say, with complete honesty, is that *I hope not*.³

² Chapter Two, at 34-35.

³ Larry Chartrand, in response to my concerns about publishing my LLM thesis, out of fear it would be misinterpreted and misused, very kindly but wisely told me, yes, it will be by some people. It's unavoidable. But at this point, he said he believed the potential benefits of having it publically available was greater than the potential risks of misuse (personal conversation, November, 2010).

Val Napoleon and I have acknowledged this concern elsewhere, stressing our belief that we need many methods of engaging with Indigenous legal traditions, just as we need many methods for engaging with other legal traditions and state legal systems. This method is intended to “supplement, not supplant” other methods of engagement with Indigenous legal traditions.⁴ It is not intended to ‘occupy the field’ but to contribute to supporting practical application of Indigenous laws as well as making space for more respectful and symmetrical conversations between Indigenous laws and other laws.

On the other hand, like the distortion of the status quo discussed in the last chapter, it is also important to point out that, while Indigenous legal traditions exist today and are meaningful normative resources for many people, the ground is decidedly uneven.⁵ There has been immense damages wrought through colonialism,⁶ and as pointed out in Chapter Two, even finding appropriate resources for engaging with Indigenous laws is a real challenge at this point in history. The “radical exclusion” of even the idea of Indigenous legality by colonial forces, through force and narrative, over several generations, has created “radical absences” about and *within* Indigenous legal traditions.⁷ It is highly unlikely the level of respectful

⁴ Val Napoleon and Hadley Friedland, “An Inside Job – Engaging with Indigenous Legal Traditions Through Stories” (forthcoming 2016, 61 McGill Law Journal) at 23 [Inside Job], Napoleon and I argue this method, while a useful tool, “is not intended to supplant existing learning and teaching methods, but rather to supplement them. There needs to be many methods for engaging with Indigenous legal traditions.”

⁵ Hadley Friedland and Val Napoleon, “Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions” (2016) 1 (1) *Lakehead Law Journal* 33 at 33 [Gathering the Threads].

⁶ *Ibid*, at 34.

⁷ Boaventura de Sousa Santos, “Beyond Abysmal Thinking: From Global Lines to Ecologies of Knowledge” (2007) *Eurozine*, online: <http://www.eurozine.com/articles/2007-06-29->

and robust engagement needed to access, understand and apply Indigenous laws can be as simple as approaching people who have access to and can articulate a completely intact and explicit set of laws.⁸ Part of engaging with Indigenous laws, at this point in history, necessarily involves “conscious and mindful acts of recovery and revitalization.”⁹ Doing nothing, or even passively recording statements with no further analysis, may inadvertently reinforce colonial myths of fragility, incommensurability or the absence of Indigenous legal thought.¹⁰

I was both eager and nervous to find out if the legal summary of Cree legal principles in Chapter Three of this dissertation would be accessible, or even *recognizable*, to Cree elders and other community members who participated in interviews for it. Would they see it as a useful tool to reclaim these principles, and apply them more explicitly today, or as something that would take away the crucial roles and traditional authority from people within the community, inadvertently furthering displacement, co-option and appropriation?

While the *Aseniwuche Winewak*’s relative isolation has meant they have not been subject to a long history of research,¹¹ there is are long, painful and ugly

[santos-en.html](#) , describes how the colonizing project depends on radical exclusion of multiple forms of knowledge and legality, and so creates radical absences of legality, condemning those on the wrong side of the line. I will discuss this at greater length in the following chapter [de Sousa Santos].

⁸ As Val Napoleon frequently says, this is not actually a realistic approach to researching any laws. Nobody would expect we could sit down and ask even the most knowledgeable and respected senior lawyers and judges to fully explain all subjects within and all procedural aspects of the state legal system (Personal Conversation, September, 2015).

⁹ Gathering threads, *supra* note 5, at 34.

¹⁰ Inside Job, *supra* note 4, at 24 and Gordon Christie, ‘Indigenous Legal Theory: Some Initial Considerations’ in Benjamin J. Richardson, Shin Imai & Kent McNeil (eds.), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (2009) at 213.

¹¹ There has been scant academic work about the Aseniwuche Winewak, and the little that exists focuses on those that identify as Métis. See, for example: Trudy Nicks and Kenneth

histories of appropriation of knowledge and the misuse of research conducted on Indigenous peoples throughout the world. There is an extensive body of literature on this subject, including developing ways to resist and address it today.¹² As Iroquois scholar, Marlene Brant Castellano has said, it is commonly said that Indigenous people are the most researched people on earth. People feel “researched to death.”¹³ The biggest barrier I’ve observed to respectful engagement with Indigenous legal traditions, in people attending workshops or talks about this method, is not what they *don’t* know, but what they think they *do* know.¹⁴ Many people rely on misleading preconceptions about Indigenous peoples and laws.

Indigenous peoples have sound and sensible reasons to be cautious, even distrustful of outside researchers on any topic. However, in recent years, the flip side of this is also becoming apparent. Research can provide useful and needed data and support for reasoned and reasonable actions and initiatives. On a general level, in Canada, many people voiced alarm at the former Harper government’s decision to

Morgan, “Grande Cache: The historic development of an Indigenous Alberta Métis Population” in Jacqueline Peterson and Jennifer S.H. Brown, eds., *The New Peoples: Being and Becoming Métis in North America* (Winnipeg: University of Manitoba Press, 1985) at 163. Richard Andre Oullette, “Tales of Empowerment: Cultural Continuity within an Evolving Identity in the Upper Athabasca Valley” (Masters of Arts Thesis, Simon Fraser University, 2003, unpublished). This created some ethical challenges for me. I knew about the long histories of appropriation and misuse, but was aware that most of the people I was talking to, particularly elders, likely did not. They were sharing openly and generously with me, and I sometimes felt as if I needed to caution them or remind them that I was in an academic role, and explain some of the histories I was aware of, above and beyond ethics forms and requirements. Consistently, I was told that that was too bad, but this was true, and it might teach people something, it would be good to have it out there.

¹² An excellent source of information on this subject, including extensive reading lists, is the website of the IPinCH (Intellectual Property Issues in Cultural Heritage) Project, online: <http://www.sfu.ca/ipinch/>

¹³ Brant Castellano, *supra* note 1 at 98.

¹⁴ Recall how sure my student researchers were they understood the *wetiko* concept from books they had read. See Chapter Four at 23.

end the long form census, and restrict funding for research in key environmental areas.¹⁵ Dr. John Hylton drew attention to the significant lack of evidence-based research on sexual offending in Indigenous communities, and the desperate need for reliable research in this urgent area.¹⁶ Métis scholar, Chris Anderson, has pointed out both the importance of statistical research for urban Métis populations, as well as the lack thereof.¹⁷ He has also highlighted the reality that the otherwise right-headed approach of seeking approval for any research from community leaders can lead to the denial of research approval for projects benefiting or generated by vulnerable sub-groups within that community, inadvertently contributing to their voicelessness.¹⁸

Brant-Castilano talks about an elder powerfully declaring, at the start of a workshop for RCAP Indigenous researchers: “If we’ve been researched to death, maybe it is time we start research ourselves back to life.”¹⁹ Research, done well, can be a valuable tool for Indigenous communities to further their own goals and aspirations.²⁰ Increasingly, Indigenous scholars and organizations are taking control of research protocols with outside researchers, and there are emerging best

¹⁵ See, for example, Antonia Maioni, “We Haven’t Forgotten the Long-form Census” (February 6, 2015) Globe and Mail Debate, online: <http://www.theglobeandmail.com/globe-debate/we-havent-forgotten-the-long-form-census/article22819338/> and Zi-An Lum, “Erosion of Science ‘Reflects State Of our Democracy’ Former Scientist says” (August 8, 2015) Huffington Post, online: http://www.huffingtonpost.ca/2015/08/05/federal-election-2015-canada-science-cuts_n_7938638.html

¹⁶ Dr. John Hylton, *Aboriginal Sexual Offending in Canada* (Ottawa: Aboriginal Healing Foundation, Aboriginal Healing Foundation Research Series, 2006) at 70-71 and 124.

¹⁷ Dr. Chris Anderson, personal conversation, May 2013.

¹⁸ *Ibid.*

¹⁹ Brant Castellano, *supra* note 1, at 98.

²⁰ *Ibid.*, at 106 -107.

practices in this area for academic researchers.²¹ The Social Sciences and Humanities Research Council [SSHRC] recently released a new statement of principles regarding Aboriginal research. It starts out with, what for me, is the pivotal change from misguided and harmful research *on or for* Aboriginal Peoples in the past, to mutually beneficial research partnerships in the present: “SSHRC is committed to supporting and promoting research *by and with* Aboriginal Peoples.”²²

Aseniwuche Winewak’s goal for a proposal for a regional justice process converged with the completion of the *Cree Legal Traditions Report*. Working with the *Aseniwuche Winewak* to accomplish this goal, using the report to do address a community priority, also created an opportunity to explore the potential uses and usefulness of results produced through this method.

2. A Cree Justice Process for the *Aseniwuche Winewak* – History and Aspirations of the Proposal

*How do you build an Indigenous justice process in contemporary Canadian society?*²³

In May 2013 the *Aseniwuche Winewak*, approached me about using the Cree legal principles that had been identified and articulated in the *Cree Legal Traditions Report*²⁴ as a foundation for a proposal for building a Cree justice initiative in the

²¹ See, for example, Shaun Wilson, *Research is Ceremony: Indigenous Research Methods* (Winnipeg: Fernwood Publishing, 2008) and Catherine Bell and Val Napoleon, eds., *First Nations Cultural Heritage and Law: Case Studies, Voices and Perspectives* (Vancouver: UBC Press, 2008).

²² SSHRC Aboriginal Research Statement of Principles, online: http://www.sshrc-crsh.gc.ca/about-au_sujet/policies-politiques/statements-enonces/aboriginal_research-recherche_autochtone-eng.aspx (emphasis mine).

²³ Rachelle McDonald, AWN Senior Strategic Advisor, follow-up conversation, June, 2015.

²⁴ *The AJR Project Cree Legal Traditions Report* (May 2014), unpublished, on file with the author, the University of Victoria ILRU, the IBA, the TRC, the Ontario Law Foundation, and

local area. The *Aseniwuche Winewak* wanted to develop and implement a credible justice process that would be acceptable and sensitive to the needs, norms and aspirations of the Cree communities in the local area.²⁵ The goals for this justice process would be to promote the personal responsibility of offenders to their communities and support community healing, with an overarching goal of contributing to the maintenance of safe, healthy and peaceful communities.²⁶ David MacPhee, *Aseniwuche Winewak* President, envisioned a justice process that was fair, principled and transparent, and where a record of decisions, along with the principled reasons for them, was kept and could be continually built on as precedent.²⁷

There were two historical experiences to learn from and build on for such an initiative. First, the Aboriginal people of this area maintained social order within their societies for thousands of years. These social orders logically included law, and principled ways to deal with harm and conflict, and while not perfect, worked well enough over this long time period.²⁸ The people who are known as the *Aseniwuche Winewak* maintained traditional lifestyles, including their own social ordering, up until the early 1970s, when coal was discovered, and the town of Grande Cache

the partner community *Aseniwuche Winewak*, online:
http://indigenoussbar.ca/indigenousslaw/wp-content/uploads/2012/12/cree_summary.pdf
[Cree Legal Traditions Report]. The legal summary in this report is reproduced in full in Chapter Three.

²⁵ Hadley Friedland, *Aseniwuche Winewak Justice Project Report: Creating a Cree Legal Process Using Cree Legal Principles* (October, 2015) (unpublished, on file with the author, AWN and the University of Victoria ILRU) [AWN Cree Justice Project Report] at 4.

²⁶ *Ibid.*

²⁷ *Ibid.*, and David MacPhee, AWN President, Follow up Conversation, June 2015.

²⁸ As all Indigenous societies logically did. See Val Napoleon and Hadley Friedland, "Indigenous Legal Traditions: Roots to Renaissance" in Markus D. Dubber and Tatjana Hornle eds., *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014) at 227-228 [Roots to Renaissance].

established. At this time, enormous social upheaval and change occurred.²⁹ The Canadian justice system began to play a more influential part in the lives of the *Aseniwuche Winewak*. However, up until this time, the people of this area had responded to the universal human and social issues all societies face, using the particular principles and practices they had learned from their ancestors, and the resources available to them, as all communities do. This means that elders had a lived experience of this way of life, both prior to and continuing through the forced interaction with non-Aboriginal laws and law enforcement.

The second historical experience to build upon and learn from was a “Native Court” established in the town of Grande Cache in the 1980s. Provincial Court Judge Michael Porter initiated the Native Court in Grande Cache, in response to a high incidence of Aboriginal offenders and obvious social distress.³⁰ This involved a panel of 3 elders, a judge and a representative from Native Counseling Services and dealt with sentencing only. Anecdotally, some people say the Native Court stopped running due to issues getting elders to participate, offenders not wanting to go through Native Court, and lawyers disliking it. Others say it was just so successful, there stopped being a high enough volume of Aboriginal offenders to run it. Whatever the reasons, it has not run in Grande Cache for many years, although it is still technically in existence.

²⁹ Rachelle McDonald, “Introduction to Community Partner” in the Cree Legal Traditions Report, *supra* note 24 at 8.

³⁰ See Dana Wagg, “Grande Cache Natives in ‘crisis’ says Counsellor” (1989) 7 (17) Windspeaker at 3. Available online: <http://www.ammsa.com/node/17085> and Tony Susan Goldbach, “Sentencing Circles, Clashing Worldviews and the Case of Christopher Pauchay” (2011) 10 (1) *Illumine Journal for the Centre of Studies in Religion and Society Graduate Students Association* 53 at 8.

In April 2012, Provincial Court Judge Donald Norheim, who sat on the original court, met with the *Aseniwuche Winewak* and suggested the Native Court could and should be revived. In March 2013, Provincial Court Judge John Higgerty and his wife, the manager of a local regional healing program, again met with and encouraged the *Aseniwuche Winewak* to develop a proposal for reviving the Native Court.³¹ Everyone involved agreed that, in order to build a credible and acceptable justice process that is responsive to the community needs, sensitive to community concerns and congruent with community understandings and aspirations for justice, it would be vital to ground this work in a clear understanding of the range of opinions, beliefs, questions, concerns and within the community regarding justice, wellness, accountability and safety.³² If it didn't have this community grounding, it would just be another 'top-down' program foisted on people, rather than a justice process that could contribute meaningfully to building and maintaining safe, healthy and peaceful communities over the long term.

3. Methodology for Community Feedback:

The *Cree Legal Traditions Report* had analyzed published stories and oral histories in conversation with elders and other knowledgeable people within the *Aseniwuche Winewak* community, to identify and articulate a synthesis or 'restatement' of Cree legal principles responding to harms and conflicts. The convenient and accessible format of this report, as well as the fact it was already grounded in the community, provided an opportune starting point for eliciting community feedback on these

³¹ Rachele McDonald, Follow-up Conversation, June 2015.

³² AWN Cree Justice Report, *supra* note 25 at 4.

crucial topics. Rather than ask people impossibly broad and abstract questions about justice, or asking them to identify community problems and the many failures of the mainstream Canadian justice system, the *Cree Legal Traditions Report* provided a framework for a targeted and specific strength based approach to community engagement. In turn, conversations with community participants discussing Cree legal principles and how they might be explicitly applied in a contemporary and formalized justice process, led to valuable confirmation and insights about the principles themselves, key questions and nuanced, thoughtful and practical advice about applying these principles today.

Kris Statnyk,³³ one of the original researchers for the *Cree Legal Traditions Report*, Carol Wanyandie, the AJR project's community coordinator, and I met with *Aseniwuche Winewak's* leadership team, the healing program's manager, and several human services and justice system professionals, including judges, in order to understand the bigger picture issues in the region, and professionals' perceptions of community strengths, needs, challenges and opportunities. We then were faced with a real challenge of practical translation – how to prepare and conduct interviews in such a way that we kept the Cree legal principles at the fore, but also produced information that connected to the practical questions leaders and professionals needed to be able to imagine implementation, and was understandable within their current frames of reference. We were faced directly with the challenges of relevance and utility.

³³ Then a law student, Kris is now an associate with Mandell Pinder LLP Barristers and Solicitors. <http://www.mandellpinder.com/team/kris/>.

To take a small example that illustrates the larger challenge – in Chapter Two, and in countless academic, professional and community talks, I argue that it is critical to shift from talking broadly about “Aboriginal Justice” to talking about “specific Indigenous legal concepts and categories.” I don’t think I have made a power point presentation in the last four years that doesn’t include the importance of this shift. Yet, with few exceptions (notably, the *Aseniwuche Winewak* leadership), every professional we met with about a potential justice process applying Cree legal principles immediately reverted to and exclusively used the language of “Aboriginal Justice.” How could we maintain the integrity of our approach to Indigenous laws, and our prior findings, which we saw as aligned with *Aseniwuche Winewak*’s vision, while still producing results that key decision makers and potential partners could readily understand and endorse? Would the language of law, which I see as so important, actually be a stumbling block? There was the separate but related question of how to collect useful information about the Cree legal principles and information wanted for practical implementation issues, without overwhelming participants.

Kris, Carol and I had many long conversations grappling with these issues. Sticking with the above example, we wondered if the shift in language from ‘Aboriginal Justice’ to ‘Indigenous legal principles’ was quite as important I had made it out to be, or if it was, in the end, more of an academic, or advocacy point than a practical need in all cases. The actual translation between the Cree and English languages kept me from taking myself too seriously. The first language of all the elders and almost all adults over forty in the *Aseniwuche Winewak* community is

Cree.³⁴ Anecdotally, my partner, who was fifty at the time of writing, has shared that he thinks and dreams mainly in Cree, while younger community members, like Carol, usually say they think and dream in both Cree and English.³⁵ Carol pointed out that, when she was translating, neither the word “law” nor “justice” translated perfectly into Cree. In fact, as she expressed eloquently:

When I was talking with the law students and translating for elders being interviewed [for the AJR project], I realized I had heard many of the stories before, since I was a small child, but had never thought about them being about ‘law’ or ‘legal principles’. To me, it just always seemed the ways things were, part of life. As I talked and listened, I started to see the ‘law’ in the stories. The principles in them suddenly seemed to stick out so clearly. Once I started seeing the principles, I couldn’t stop ‘seeing’ them. I realized, of course Cree people had always had laws and practiced law. It was right there in the stories. *It just wasn’t talked about as ‘law’, but rather, ‘a way of life.’*³⁶

It seemed the height of academic hubris, and a little silly, to spend too much time grappling with distinctions between the English words of ‘law’ and ‘justice’ when the vast majority of our Cree participants thought and talked about what we were talking about as neither, but rather, as a “way of life.”³⁷

At the same time there obviously was value, as Carol pointed out, to consciously look for and draw out specific and explicit principles from the stories. The underlying goal of the intellectual shift – a focus on specificity, and principles,

³⁴ Follow-up Conversation, Ken McDonald, June 2015.

³⁵ Follow-up Conversation, Ken McDonald, June 2015, and Follow-up Conversation, Carol Wanyandie, June 2015.

³⁶ Carol Wanyandie, Carol shared this insight at the TRC Education Day Presentation. See Hadley Friedland and Lindsay Borrows, “Creating New Stories: Indigenous Legal Principles of Reconciliation” (2014) Online: <https://keegitah.wordpress.com> [Friedland and Borrows, Creating New Stories], at 12-13 (emphasis mine).

³⁷ The fact people do not call their guiding principles for their way of life “law” is not indicative, in itself, that these principles are not, in fact, law. See H. Patrick Glenn, “The Capture, Reconstruction and Marginalization of “Custom”” (1997) 45 *American Journal of Comparative Law* 613 at 620 and Joseph Raz, “Can There be a Theory of Law?” in eds. Martin P. Golding and William A Edmundson, *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Oxford: Blackwell Publishing Ltd., 2005) at 331.

was important, particularly if the goal was useful application to real life issues. Talking this through together allowed me to realize this in a fuller way. In addition, of course, translation from Cree to English was already happening, younger community members were growing up unilingual, inundated with popular media and culture, and almost everyone had some experience with Canadian state laws. Mainstream society is 'lousy with law' while the myth of Indigenous peoples as lawless is both pernicious and pervasive. It has been used to justify dispossession and subjugation of Indigenous peoples on a massive scale throughout the world.³⁸ We didn't want the language of 'law' to be a barrier to engagement by professionals, but we did want to continue to promote its use, and broaden both professional and community understanding of what the English term 'law' encompasses.

We were all learning together as we went. Eventually we settled on a questionnaire we collaboratively developed, which included targeted questions about specific Cree legal principles and about practical implementation issues. We decided it made sense to describe the overall project as a "Cree Justice Process" but stuck with using the English language of law and legal principles in the questionnaire and interviews. We did provide each participant and professional a common information package of educational information.³⁹ Kris prepared a brief, plain language definition of 'law', which stressed law had different forms, and included Indigenous groups' "approaches to solving problems, making decisions,

³⁸ See, for example: James Tully, *Strange Multiplicity: constitutionalism in an age of diversity* (Cambridge: Cambridge University Press, 1995) at 65, and Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty" An Essay on R v. Sparrow" (1991) 29 Alta L Rev. 498 at 507.

³⁹ AWN Cree Justice Project Participant Information Package, Appendix B [AWN Information Package] .

creating safety and maintaining or repairing relationships.”⁴⁰ We developed a short version of the Cree legal summary that included all the identified principles, with a brief overview statement and the sources relied on, but omitted the longer discussion of each principle.⁴¹ We then discussed the goals for the Cree Justice process proposal and the questionnaire.⁴² These packages were provided to professionals and potential community participants, as well as anyone else who expressed interest. Community participants were approached using a modified ‘snowball’ approach. Carol gave packages and questionnaires to people who had previously participated in the AJR project, who had expressed interest in a Cree Justice process or frustration at the mainstream justice system, expressed curiosity or strong opinions, or, to be completely honest, came visiting at certain times.

Once people had the packages, they either decided to fill the questionnaire out themselves and bring it back or to go through it with Kris and Carol, like an interview. The interview format was the preferred method for most of the participants and all of the elders. One interview typically took about two to three hours, including visiting before and after. Given the length of time each took, the short time period for the active research, and other factors beyond our control, we ended up with eighteen questionnaires filled out in total. These questionnaires were anonymous, because we were sensitive to the fact people might end up sharing more personal experiences or feelings about the current justice system, and wanted to ensure privacy. We did collect certain identifying data for interpretative purposes

⁴⁰ Kris Statnyk, “Indigenous Law – What are we Talking About?”, *Ibid* at 1.

⁴¹ “Short Cree Legal Synthesis”, *Ibid* at 3-8. I discuss the development and use of this short synthesis in Chapter Three.

⁴² “An Indigenous Justice Process: Exploring the Possibilities Today”, *Ibid* at 9-10.

(for example, an elder's words might carry more weight on certain subjects), and that the *Aseniwuche Winewak* leadership identified as important for knowing how representative the questionnaires were, insofar as gender, specific community, personal and family involvement with the justice system and local healing program.⁴³

I compiled the results of the completed questionnaires, with no knowledge of who each participant was.⁴⁴ These results included reflections and opinions about using Cree legal principles in a formalized contemporary justice process, both generally and specifically, and identifying practical needs for the implementation of such a process. In total, of the eighteen participants, all were Aboriginal and from the local coops and enterprises that *Aseniwuche Winewak's* membership comes from. The majority of participants (ten) came from Susa Creek, the co-op community where Carol and I live and Kris was based. There were three participants from Wanyandie Flats, one who currently lives in the town of Grande Cache, one from Victor Lake and three from Grande Cache Lake. Eight participants were elders. There were eleven women and seven men. Three participants were professionals in the human services field. Of the eighteen participants, eight had some personal involvement and fourteen had family members involved with the state justice system at some point. Six participants had some personal involvement with the local

⁴³ AWN Cree Justice Process Questionnaire Compiled Results, on file with author and Aseniwuche Winewak Nation [Cree Justice Process Questionnaire Compiled Results] at 1-2.

⁴⁴ Though I would be disingenuous if I do not acknowledge I could make a pretty educated guess in some instances, based on the identifying data collected. This is the reality of the limits of anonymity in small communities.

'healing' program.⁴⁵ All in all, there was a fairly representative mixture of people with a variety of knowledge and experiences that informed their thinking and responses.

4. A Contemporary Cree Justice Process – General Feedback:

*Using Cree legal principles, for most people using the Native Court it would be more appropriate. It has a Cree foundation. It's more in tune with the community's ways.*⁴⁶

a. Analysis:

On a general level, all participants said they would like to see Cree legal principles used within a court process.⁴⁷ The vast majority of participants (seventeen) said that they would participate in such a process, if they, a loved one or a family member were charged with an offence.⁴⁸ Participants saw many potential benefits to individuals and the community in developing and having a court process that uses Cree legal principles. There were two major themes regarding potential benefits. The majority of responses (twelve) related to the potential efficacy of such a process to actually help people in the community. As one elder said, "it would be...good to see that. Maybe we won't have to see as many people in court eventually. Elders could talk to them and help them."⁴⁹ A strong and overlapping theme in the responses (six) was that such a process would be, put simply, "our own

⁴⁵ Cree Justice Process Questionnaire Compiled Results, *supra* note 43 at 1.

⁴⁶ *Ibid*, Participant #8, at 6.

⁴⁷ *Ibid* at 3.

⁴⁸ *Ibid* at 4. One participant said it would depend on the health of the decision makers, and what was best for her family or loved ones in the particular situation (Participant #6). The one who said he wouldn't approached this from the perspective of a decision maker, stating he would not want to sentence his own family (Participant #1).

⁴⁹ *Ibid*, Participant #3, at 3.

way.”⁵⁰ Participants generally liked the concept of a court that was “for the Native people”⁵¹, “Native people talking with their own people rather than white people telling us what to do and how to do it”⁵², with decision-makers who “would talk and not be racist.”⁵³ Once participant summed this up particularly eloquently:

Using Cree legal principles, for most people using the Native Court it would be more appropriate. It has a Cree foundation. It’s more in tune with the community’s ways.⁵⁴

The predominant benefit participants saw in having a Cree justice process was its efficacy. They saw it as having a huge potential for helping people within their community, and believed helping and healing would occur through:

- A process that was “more inclusive and...more complete”⁵⁵ and “more holistic and focused on reconciliation,”⁵⁶
- A process with “resources focused on helping and restoration,”⁵⁷ that “deals more with findings solutions.”⁵⁸
- Elders and other community members talking to, guiding and “working with” offenders,⁵⁹ and
- Elders and other community members really listening and understanding offenders’ stories and struggles.⁶⁰

Participants believed a Cree justice process would provide offenders:

⁵⁰ *Ibid*, Participant #12, at 6.

⁵¹ *Ibid*, Participant #4, at 6.

⁵² *Ibid*, Participant #3, at 6.

⁵³ *Ibid*, Participant #17, at 6.

⁵⁴ *Ibid*, Participant #8, at 6.

⁵⁵ *Ibid*, Participant #14, at 6.

⁵⁶ *Ibid*, Participant #6, at 6.

⁵⁷ *Ibid*, Participant #13, at 6.

⁵⁸ *Ibid*, Participant #12, at 6.

⁵⁹ *Ibid*, Participant #1, Participant #3, Participant #15, Participant #16, and Participant #17 at 6.

⁶⁰ *Ibid*, Participant #5 and Participant #17 at 6.

- A space to “tell your own story”⁶¹ and “access...traditional healing.”⁶²
- Help and support to “follow through”⁶³, “take responsibility”⁶⁴ and be “accountable to family and community.”⁶⁵
- “A chance to change their path”⁶⁶,
- “An opportunity to make it right”⁶⁷ and
- A way to help others in the community.⁶⁸

While everyone saw clear potential benefits, there was also a hardheaded clarity about potential risks. There were some definite cautions offered, participants stating that it would be good only if “it was taken seriously”⁶⁹ and “as long as people were made accountable.”⁷⁰ One participant stated frankly that she would only use such a process:

As long as the people were healthy/had recovered but I would be afraid to use it. It would be dependent on the situation and what avenue is best for me, loved ones or family member.

There were a variety of different risks people identified. The single biggest risk identified (five participants) was the risk of such a process not being taken seriously, and a lack of accountability and follow through (due to poor decision-making, or if there wasn’t adequate supervision or extensive enough help available

⁶¹ *Ibid*, Participant #5, at 6.

⁶² *Ibid*, Participant #13, at 6.

⁶³ *Ibid*, Participant #2, at 6.

⁶⁴ *Ibid*, Participant #10, at 6.

⁶⁵ *Ibid*, Participant #13, at 6.

⁶⁶ *Ibid*, Participant #11, at 6.

⁶⁷ *Ibid*, Participant #6, at 6.

⁶⁸ *Ibid*, Participant #16, at 6.

⁶⁹ *Ibid*, Participant # 16, at 3.

⁷⁰ *Ibid*, Participant #11, at 4.

afterwards).⁷¹ Some participants proposed ways to mitigate these risks even as they named them. For example, one woman flagged the concern of conditions not being taken seriously, then added: “Community hours need to be assigned, not giving them a choice.”⁷² Three participants identified a risk of family influences, interference, or biases against certain individuals or communities.⁷³ Three participants identified risks of whom the decision-makers are, their history, personal wellness and capacity to work well together.⁷⁴ Finally, two participants identified concerns about potential risks *to* community based decision-makers, generally, and when “helping people who are very unstable.”⁷⁵

Participants revealed a realistic understanding of the complexity of such a process, and the challenges participants and decision-makers would have to contend with due to the relational networks everyone lives within. One elder, who had sat on the original Native Court in the 1980s, said he would volunteer for a Cree Justice process if he was asked, once it was up and running⁷⁶ but that he would prefer a loved one or family member go to the “regular court” if he was the decision-maker “because it would be too hard to sentence my family.”⁷⁷ Ten participants said they would have concerns about confidentiality if they, a family member or a loved one participated in such process.⁷⁸ It is clear there are genuine concerns and real

⁷¹ *Ibid*, Participant #10, Participant #11, Participant #13, Participant #15 and Participant #16, at 6.

⁷² *Ibid*, Participant #15, at 6.

⁷³ *Ibid*, Participant #6, Participant #8 and Participant #14, at 6.

⁷⁴ *Ibid*, Participant #5, Participant #15 and Participant #17, at 6.

⁷⁵ *Ibid*, Participant #4 and Participant #5, at 6.

⁷⁶ *Ibid*, Participant #1, at 3.

⁷⁷ *Ibid*, Participant #1, at 4.

⁷⁸ *Ibid*, at 12.

challenges of maintaining confidentiality in a small, close-knit community where people are interconnected in so many overlapping roles and relationships. It was also clear people are experienced dealing with this challenge, as several participants also offered suggestions for mitigating their concerns.⁷⁹ Seven participants said they did not have concerns about confidentiality. One participant pointed out, “court is already pretty public”⁸⁰ and another thoughtfully said she “wouldn’t want anything hidden especially if it was serious. Keeping things hidden hinders healing.”⁸¹

There were also insights offered about how a contemporary process might take into account changing circumstances and new needs and resources.⁸² For example, one participant said a potential risk of such a process was that “some Cree legal principles would not address problems today (i.e. Avoidance on its own).”⁸³ One elder also wondered aloud about the legal response principle of avoidance, stating, “I’m not sure about this because we all live so far apart now. It might not be as important as it used to be.”⁸⁴ Another participant, a human services professional, cautioned the community would need to be “mindful of the principles that cannot apply today (i.e. incapacitation),”⁸⁵ and was cautious about applying other principles (in this case, confronting the offender) that have been acted on coming from “a place

⁷⁹ See, for example, *Ibid*, suggestions from Participant #4, Participant #5 and Participant #17 at 12.

⁸⁰ *Ibid*, Participant #12, at 12.

⁸¹ *Ibid*, Participant #13, at 12.

⁸² This adaptability is in keeping with the findings in the AJR Project Final Report, online: http://indigenousbar.ca/indigenoulaw/wp-content/uploads/2013/04/iba_ajr_final_report.pdf [AJR Project Final Report] at 13.

⁸³ Cree Justice Process Questionnaire Compiled Results, *supra* note 43, Participant #12, at 6.

⁸⁴ *Ibid*, Participant 18, at 18.

⁸⁵ *Ibid*, Participant #6, at 3. I assume this was based on her conflating the *principle* of incapacitation with historical *practice* of execution. This is a good example why principles and practices need to be distinguished carefully.

of anger' and so had "done more harm than good in the past."⁸⁶ Still another participant, also a human services professional stated:

It has to be linear. Young people and people with FASD have to understand it. More direct which is a little bit different than how stories were used in the past. Very concrete and descriptive like the Cree language.⁸⁷

Several participants suggested that victim, family and community safety could best be maintained through partnerships with service providers and police.⁸⁸ Training, programs and resources were cited as ways to fulfill the Cree legal obligation to help prevent future harms,⁸⁹ promote healing,⁹⁰ necessary for people to meet expectations or obligations within a Cree justice process⁹¹ and generally an essential part of the process being beneficial.⁹² These thoughtful responses demonstrate how the participants were familiar and confident enough with Cree legal principles they could proficiently contemplate reform, adaption and applicability. For these participants, the Cree legal principles discussed are clearly part of a living legal tradition.⁹³

⁸⁶ *Ibid*, Participant #6, at 13.

⁸⁷ *Ibid*, Participant #5, at 3.

⁸⁸ *Ibid*, Participant #5, Participant #11 and Participant #15, at 11.

⁸⁹ *Ibid*, Participant #15, at 26.

⁹⁰ *Ibid*, Participant # 13, at 3 and 6 (saying a process would be good if there was help like "dry centres" and a benefit would be the focus on healing/helping, but the risk could be if help through programs was too short or not extensive enough). Participant 8 at 18 (saying it would be okay for an offender to be separated from the community if leaving is "necessary for the offender to access resources for healing or if its needed for the healing of the victim.")

⁹¹ *Ibid*, Participant #2, Participant #5, Participant # 12 and Participant #15 at 31.

⁹² *Ibid*, Participant #13, at 3. Participant #1, Participant #2, Participant #3, Participant #6, Participant #9, Participant #10, Participant #11, Participant #13, Participant #14, Participant #15 and Participant #18 at 30.

⁹³ John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 1-7.

Another example of the adept and mature legal reasoning already present at a community level was in relation to the Canadian justice system. While the mainstream justice system was referred to as unhelpful and problematic at times, it was also referred to as a resource. For example, one participant thought that decision-makers should “have a reference from the native court worker to know what the sentence would be in the mainstream justice system.”⁹⁴ She also suggested that a way to maintain victim, family and community safety would be to let offenders know “this is their one chance to correct. Have it so re-offending goes to mainstream justice.”⁹⁵ When talking about legal rights, one participant suggested the best approach would be to:

Look at if there are different rights between Canadian court and Native court. Should not deny rights available under both. If they conflict go with rights that favour the offender but try to stick to traditional rights/Cree legal rights. ⁹⁶

The most interesting example of this came up in the discussion about what types of offences such a Cree Justice process could or should deal with. The majority of participants (eleven) stated that any and all offences could be dealt with.⁹⁷ Six participants said it should be only minor offences, and exclude serious offences such as rape and murder.⁹⁸ Two participants gave more nuanced answers, saying that while they believed all offences could be dealt with through such a process, in the case of serious and violent offences, it “should have to work with mainstream court

⁹⁴ Cree Community Justice Process Questionnaire Compiled Results, *supra* note 43, Participant #15, at 7.

⁹⁵ *Ibid*, Participant #15, at 11.

⁹⁶ *Ibid*, Participant #12, at 27.

⁹⁷ *Ibid*, at 5.

⁹⁸ *Ibid*, at 5.

system”⁹⁹ and it would be good if a “judge had final say and acted as a check in these situations” to ensure they were dealt with seriously.¹⁰⁰

b. Discussion:

It is significant that every participant wanted a court process that used Cree legal principles, and that their primary reason was its perceived efficacy relative to the current mainstream justice system. While people did like the idea of it being their own generally, they also clearly saw their own laws and ways of responding to dangerous or harmful actions as more *effective* in helping people and creating and maintaining safe healthy and peaceful communities. There are practical reasons that Cree legal principles might be more effective to maintain safety, peace and order within Cree communities that are rooted in a long history of learning from both successes and failures of Cree legal responses to universal human and social issues within Cree communities. For example, as discussed in the previous chapter, if Cree laws emerged and developed within a society of relationships, they may simply be more effective for dealing with issues that occur within unavoidable and continuing relationships of people living in close proximity, like the deeply intertwined relationships that make up most Cree communities. It makes intuitive sense that laws developed in and for a ‘society of strangers’ would not only be strange, but ineffective, even damaging, when applied to this very different set of circumstances.

This analysis of where resources such as training, programs, service providers, police and the mainstream justice system may fit, or even support a

⁹⁹ *Ibid*, Participant #15, at 5.

¹⁰⁰ *Ibid*, Participant #13, at 5.

contemporary formalized Cree justice process suggests principled discussions on specific and particular subjects may lead to real potential for harmonization between Indigenous and state based justice processes. Napoleon and I have written elsewhere about the unexamined effects of states delegitimizing and criminalizing Indigenous societies' legal responses to human vulnerability, violence, harm and safety, which are both a core foundation to any functional legal order,¹⁰¹ and are the most likely to require, at least in the most urgent or extreme cases, some use of force to maintain community safety.¹⁰² As some space has opened up within states for using Indigenous laws, under the rubric of "Aboriginal Justice", this unexamined limit has led to distortions. We say:

Because only select aspects of certain Indigenous legal traditions are acceptable within the Canadian state, specifically, those aspects that do not require the use of coercive force or enforced separation from society, a peculiar set of assumptions develop regarding Indigenous laws related to what we broadly understand to be criminal behavior. This narrative completely and problematically conflates 'Aboriginal justice' with 'restorative justice' or rallies around the singular description of justice as 'healing'. All other aspects of Indigenous legal traditions are ignored, or described in whispers as 'uncivilized' oddities or embarrassing cultural remnants.¹⁰³

While it is clear that healing is a key aspiration and principle in Cree legal traditions, a significant distortion flowing from states limiting 'Aboriginal justice' to *only* healing, is that both Indigenous and non-Indigenous people may now perceive Indigenous laws as inherently incapable of addressing serious offences, rather than seeing the limit as related to the state's monopoly on the use of coercive force in

¹⁰¹ H.L.A. Hart, *The Concept of Law* 2nd ed. (New York: Oxford University Press, 1994) at 194 [Hart].

¹⁰² Roots to Renaissance, *supra* note 28 at 231.

¹⁰³ *Ibid*, at 237-238.

situations where such means are necessary for community safety.¹⁰⁴ In the *Aseniwuche Winewak*, where people lived their distinct way of life in relative isolation until the late 1960s, there are still elders with living memories of being called upon to deal with serious cases of harm and violence prior to police, courts or jails becoming the default response or even realistically available. Carol reflected that this reality may have influenced why so many participants believed a Cree Justice process could and should deal with all offences, even serious and violent ones.¹⁰⁵ Doing so was not novel to many elders.¹⁰⁶

The majority of participants' willingness to contemplate addressing even serious offences in a Cree Justice process does stand out from the direction of most current Aboriginal justice or Native courts today, most of which only deal with minor non-violent offences.¹⁰⁷ It is worth pointing out that serious and violent crimes, particularly sexual and other forms of intimate violence are notoriously underreported within Indigenous communities (and Canadian society generally).¹⁰⁸

¹⁰⁴ *Ibid*, at 238.

¹⁰⁵ Carol Wanyandie, Follow-up Conversation, June , 2015.

¹⁰⁶ Of the 18 community participants, there were 8 elders who participated in community feedback about applying Cree legal principles in a Cree justice process. See Cree Justice Process Questionnaire Compiled Results, *supra* note 43 at 1.

¹⁰⁷ To the best of my knowledge, there are no Aboriginal courts or Community Justice initiatives that currently deal with indictable offences. Community Justice initiatives are increasingly limited and standardized. Hollow Waters is often lauded as an effective response to child sexual abuse, but it has not been replicated and it actually could not have been developed and implemented within today's restrictive guidelines. See Jonathan Rudin, "Aboriginal Justice and Restorative Justice" in Elizabeth Elliot and Robert Gordon, *New Directions in Restorative Justice: Issues, Practice, Evaluation* (Portland: Willan Publishing, 2005).

¹⁰⁸ The Department of Justice found that 78% of sexual assaults are never reported. See Government of Canada, Department of Justice, Bill C-46, Records Application Post-Mills, as Case law Review, online: http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr06_vic2/p3_4.html. See also: Amnesty International, Canada, No More Stolen Sisters Campaign, online: <http://www.amnesty.ca/our-work/campaigns/no-more-stolen-sisters>.

For many complex social and historic reasons, police and courts are still often not a realistic or reliable option for restoring or maintaining safety or order in Indigenous communities, with or without the factor of geographic isolation.¹⁰⁹ One necessary implication of this reality is that, whether or not we acknowledge it, Indigenous people living in communities currently *do* deal with serious and violent offences. Individuals, families and groups currently *do* make decisions between tragic choices in terrible situations.¹¹⁰ They just can't do so in a public, explicit and adequately supported and resourced way. Rather, they often do so completely disconnected from the checks, balances, and *resources* of the mainstream justice system.

We continue to ignore this reality, at the very real peril of the vulnerable. We also leave people to carry unspoken and unspeakable burdens of responsibility for

¹⁰⁹ The Manitoba Justice Inquiry found that the manner in which victims were treated and the way the police responded to other women in similar situations discouraged women from going to the police for help: A.C. Hamilton and C.M. Sinclair, Commissioners, *The Justice System and Aboriginal People: Report of the Aboriginal Justice Inquiry of Manitoba*, online at <http://www.ajic.mb.ca/volume1/chapter5.html#8> [Manitoba Justice Inquiry]. "Aboriginal Women" at 485-487. See more recently, Stonechild Inquiry, Justice D.H. Wright, Commissioner, *Commission of Inquiry Into Matters Relating to the Death of Neil Stonechild*, October 2004, online at <http://www.stonechildinquiry.ca/finalreport/Stonechild.pdf> [Stonechild Inquiry] at 209-210. In a B.C. study of community justice initiatives in five Aboriginal communities, the authors found that in every focus group they held, "[w]omen's stories of police brutality and disillusionment with the criminal justice system were all too common" and that "[i]n many cases police attitudes and responses was cited as the biggest deterrent in seeking support or reporting the violence". It was generally found that "the police discriminate against Aboriginal peoples and often fail to respond when they are called": Wendy Stewart, Audrey Huntley and Fay Blaney, *The Implications of Restorative Justice for Aboriginal Women and Children Survivors of Violence: A Comparative Overview of Five Communities in British Columbia* (2001), chapter IV, Online: <<http://www.lcc.gc.ca/pdf/Awan.pdf>> at 4.

¹¹⁰ Mary Ellen Turpel Lafond, "Some Thoughts on Inclusion and Innovation in the Saskatchewan Justice System" (2005) 68 Sask L Rev 293, at 295 and Hylton, *supra* note 16 at 69, stating "all available evidence suggests the rates of violence and sexual offending in many Aboriginal communities are ...as much as five times higher than Canadian rates, perhaps higher."

their own and loved ones' safety and survival.¹¹¹ Conditions of silence and virtual impunity create spaces ripe for abuses, and abusers, to flourish.¹¹² A man from another community captured the heart of the problem when he spoke about a long period of almost a complete breakdown in social order, where horrific crimes occurred, and elders felt both Canadian state and Indigenous laws failed people:

I think there always was law, but probably a period when people just didn't regard it anymore and didn't care and a lot of it came when they stopped fearing and stopped respecting the leadership, the Chief, and it seemed lawless, but there is a law but all of a sudden it is not being enforced anymore.¹¹³

There has been, and in many cases, continues to be, a cavernous gap between legitimacy and the capability for enforcement in Indigenous communities. The two participants who proposed accessing the mainstream justice system as a resource for serious offences clearly understood the usefulness and necessity of authority and force in serious cases, and knew where and how that can be accessed today – through the state justice system. Their suggestions made eminent practical and principled sense in the current context. Their reasoning reinforces the point that how well we answer institutional level questions like harmonization will depend on how well we do the intellectual work first that is needed to approach them in the most grounded and symmetrical way possible.

¹¹¹ Anne McGillivray and Brenda Comaskey, *Black Eyes All of the Time: Intimate Violence, Aboriginal Women, and the Justice System* (Toronto: University of Toronto Press, 1999) at 75.

¹¹² Truth and Reconciliation Committee of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg, 2015), online: [http://www.trc.ca/websites/trcinstitution/File/2015/Honouring the Truth Reconciling for the Future July 23 2015.pdf](http://www.trc.ca/websites/trcinstitution/File/2015/Honouring%20the%20Truth%20Reconciling%20for%20the%20Future%20July%2023%202015.pdf) at 202.

¹¹³ Rick Gilbert, AJR Project Secwepemc Legal Traditions Report, (May 2014), on file at the University of Victoria ILRU at 41.

5. Using Cree Legal Principles in a Cree Justice Process- Specific Feedback

David shared his vision of a contemporary, formalized Cree Justice process that was built on, and would continue to build a repository of principled decisions. We had completed the *Cree Legal Traditions Report*, which includes a written summary of Cree legal principles related to harms and conflicts, set out in a framework I hoped could make these principles more transparent and accessible to people wanting to use them in a more formal and explicit way today. This included principles about legal processes, responses, rights and obligations, as well as the general underlying principles. This seemed like a perfect match. The question was, would elders and other community members view these principles as their own? Would they see the principles, restated in this form, rather than embedded in narrative, emerging from landmarks, or discussed over endless cups of tea, as recognizable and usable, as I hoped they could be? Could they imagine accessing them in this form and applying them to issues within a Cree justice process, as David imagined? As may already be apparent from the discussion above, the short answer is there was no problem whatsoever.

Napoleon et al argue that, critical, rigorous and practical exploration of the relevance of and application of Indigenous laws to contemporary situations are necessary if they are to be seen as more than “cultural remnants,”¹¹⁴ We sought community feedback about specific Cree legal principles we had identified and articulated in the *Cree Legal Traditions Report* related to process, responses, rights

¹¹⁴ Val Napoleon, Angela Cameron, Colette Arcand and Dahti Scott, “Where’s the Law in Restorative Justice?” in Yale Belanger, ed., *Aboriginal Self Government in Canada: Current Trends and Issues*, 3rd edition (Saskatoon, Purich Publishing Press, 2008) [Napoleon et al] at 21.

and obligations. All participants appeared completely comfortable discussing the specific principles, and gave incredibly nuanced and thoughtful clarifications, cautions and guidance for applying them within a formalized justice process today. Despite it being possible for participants to respond to the questions without giving reasons, most explained their reasoning behind their responses. Their explicit reasoning sometimes affirmed details that were omitted from the short summary they were provided with, but were present in the full legal summary, and often broadened or deepened my own understanding of how these principles should be interpreted and applied. At the end of the interviews, Kris said he had learned so much he wished he could re-write the legal synthesis, based on the additional feedback.¹¹⁵ This was exciting because it is exactly the vision for the legal synthesis –that it is like a legal memo that can be continually added to and changed or adapted as people discuss, debate, clarify and apply the principles. The following analysis will map on to the categories in the analytical framework.

i. Legal Process:

a. Analysis:

Decision-Makers:

*A person who understands the people, a good hearted person.*¹¹⁶

All eighteen participants thought all identified decision-makers from the legal synthesis, which included: (1) medicine people, (2) elders, (3) family members and

¹¹⁵ Kris Statnyk, personal conversation, June 2014.

¹¹⁶ Cree Community Justice Process Questionnaire Compiled Results, *supra* note 43, Participant #17, at 8.

(4) the community as a group, should be involved in a court process that uses Cree legal principles.¹¹⁷ Seven participants stressed that which decision-makers would be involved would depend on the situation, and should be determined on a case-by-case basis.¹¹⁸ When explaining the reasoning behind the importance of selecting decision-makers on a case-by-case basis, one participant explained:

Each group of decision-makers have their gifts. Have people with relevant understanding, knowledge and expertise.¹¹⁹

On a similar vein, another stated:

Knowledge is key. Not all elders have the knowledge. Need people with knowledge. Family members would be appropriate depending on the situation.¹²⁰

However, she went on to say honestly, that, as a family member, “I wouldn’t do it. I wouldn’t be comfortable with it.”¹²¹ Two elders stressed it would be most effective if all decision-makers discussed things as a group:

Yes, but it would work better if everybody as a whole group could discuss it whether they are medicine people, elders or family members.¹²²
Yes, these ones. The best way would be to have them together as a group so they all have a say.¹²³

Two participants added more decision-makers to the existing categories, stating it would be vital to include victims, offenders and support people, which might include the native court worker or a lawyer.¹²⁴ Another participant said that, while the identified decision-makers should all be involved, and all “bring their own valuable

¹¹⁷ *Ibid*, at 7.

¹¹⁸ *Ibid*, Participant #4, Participant #5, Participant #7, Participant #8, Participant #11, Participant #13, and Participant # 17 at 7.

¹¹⁹ *Ibid*, Participant #5, at 7.

¹²⁰ *Ibid*, Participant #13, at 7.

¹²¹ *Ibid*, Participant #13, at 7.

¹²² *Ibid*, Participant #2, at 7.

¹²³ *Ibid*, Participant #18, at 7.

¹²⁴ *Ibid*, Participant # 6 and Participant #15, at 7.

perspectives,” she thought they “shouldn’t all be the same” and a court process should “have a resource person involved as well who has a background in local history.”¹²⁵

Given the emphasis on choosing the appropriate decision-makers carefully, on case-by-case basis, from this feedback, and in the procedural steps below, how decision-makers should be selected, and their important characteristics, were crucial issues when imagining applying these principles in a court process. Seven participants emphasized asking potential decision makers and seeing if they were willing to take part.¹²⁶ As one participant pointed out, “not everyone will want to or has too many other obligations.”¹²⁷ Two participants suggested having people actually apply,¹²⁸ one stressing the importance of an “extensive screening process” including criminal record and child welfare checks.¹²⁹ Two participants suggested it would be best to have a pool of people to choose from for each case.¹³⁰ The majority of participants (eleven) suggested selecting decision-makers by asking elders or seeking spiritual guidance about who would be best suited and selecting decision-makers’ based on their knowledge, personal qualities and character.¹³¹ Important characteristics of decision-makers included:

¹²⁵ *Ibid*, Participant # 8 at 7.

¹²⁶ *Ibid*, Participant #1, Participant #2, Participant #3, Participant #4, Participant #9, Participant #10 and Participant #12 at 9.

¹²⁷ *Ibid*, Participant #4, at 9.

¹²⁸ *Ibid*, Participant #6 and #15 at 9.

¹²⁹ *Ibid*, Participant #6 at 9.

¹³⁰ *Ibid*, Participant #13 and Participant #16 at 9.

¹³¹ *Ibid*, Participant #1, Participant #5, Participant #7, Participant #8, Participant #10, Participant #11, Participant #12, Participant #13, Participant #14, Participant #17 and Participant #18 at 9.

People living their own lives in a healthy, responsible way:

- “Somebody who is living a good life.”¹³² “A person who makes responsible choices in their own lives.”¹³³ “They need to walk their talk.”¹³⁴
- “Well/healthy, objective. No criminal record or very old record.”¹³⁵
- “A person with a good lifestyle, people who have personal successes.”¹³⁶
- “Maturity in mind and character.”¹³⁷
- “Good-standing elder, role models, addiction-free, someone grounded in their faith.”¹³⁸

People bringing varied knowledge and wisdom:

- “Someone who would be able to understand the problem and be able to put it all together. People who understand the process.”¹³⁹
- “Wise people (elders), western education background for some.”¹⁴⁰
- “A person with lots of knowledge.”¹⁴¹
- “Understands Cree laws.”¹⁴²
- “Someone wise. Elders that know and share their background.”¹⁴³

¹³² *Ibid*, Participant #4, at 8.

¹³³ *Ibid*, Participant #10, at 8.

¹³⁴ *Ibid*, Participant #5, at 8.

¹³⁵ *Ibid*, Participant #6, at 8.

¹³⁶ *Ibid*, Participant #11, at 8.

¹³⁷ *Ibid*, Participant #14, at 8.

¹³⁸ *Ibid*, Participant #15, at 8.

¹³⁹ *Ibid*, Participant #1, at 8.

¹⁴⁰ *Ibid*, Participant #8, at 8.

¹⁴¹ *Ibid*, Participant #11, at 8. See also Participant #13, at 8.

¹⁴² *Ibid*, Participant #12, at 8.

¹⁴³ *Ibid*, Participant # 16, at 8.

People with certain personal attributes and skills, such as being balanced, objective, trustworthy, and capable of follow through, while also being respectful, compassionate and non-judgmental, with good listening and communication skills:

- “Ability to be impartial,”¹⁴⁴ objective...someone fair, able to reason.”¹⁴⁵
- “Trustworthy, someone who returns your respect fully.”¹⁴⁶
- “Non-judgmental,”¹⁴⁷ “Humility”¹⁴⁸, “honesty”¹⁴⁹
- “Respected person (not gossiping or negative who put people down), reliable.”¹⁵⁰
- “A balanced person (not mean, not easy), somebody who will follow through, people who would be able to do.”¹⁵¹
- “Ability to follow through on decisions, knows ramifications of their decisions, compassionate and stern (balanced).”¹⁵²
- “You probably don’t want to get anybody too mean. Somebody that is willing to help the younger people.”¹⁵³
- “Someone who can speak good English and Cree. Someone who can make the people understand.”¹⁵⁴
- “Ability for them to talk together well with each other (communication).”¹⁵⁵

¹⁴⁴ *Ibid*, Participant #14, at 8.

¹⁴⁵ *Ibid*, Participant #6, at 8.

¹⁴⁶ *Ibid*, Participant #7, at 8. “Trustworthy” – Participant #16, at 8.

¹⁴⁷ *Ibid*, Participant #8, at 8.

¹⁴⁸ *Ibid*, Participant #4, at 8.

¹⁴⁹ *Ibid*, Participant #5, at 8.

¹⁵⁰ *Ibid*, Participant #13, at 8.

¹⁵¹ *Ibid*, Participant #11, at 8.

¹⁵² *Ibid*, Participant #12, at 8.

¹⁵³ *Ibid*, Participant #18, at 8.

¹⁵⁴ *Ibid*, Participant #2, at 8.

¹⁵⁵ *Ibid*, Participant #3, at 8.

- “Able to listen to the needs of others.”¹⁵⁶
- “A person who understands the people, a good hearted person.”¹⁵⁷

While I have separated these for clarity here, most participants identified at least two, if not all of these characteristics as important for decision-makers.¹⁵⁸

Procedural Steps:

*I think these are all the right steps. I can't think of anything that is missing.*¹⁵⁹

There were varied opinions about how important each of the procedural steps identified in the Cree legal summary were (participants were asked to rate their importance on a scale from one to five) and some people did not answer all of the questions, as will be discussed below. The procedural steps identified in the Cree legal summary were:

- (1) Recognizing Warning Signs
- (2) Taking Appropriate Safety Measures for Individuals and Community
- (3) Seeking Guidance from those with Relevant Understanding/Expertise
- (4) Confronting offenders and deliberating decisions publically
- (5) Identifying appropriate decision-makers and implementing their decisions.

(1) Recognizing Warning Signs:

Thirteen participants rated this step as very important (5/5), and two rated it 4/5 for importance. Three participants commented that recognizing warning signs

¹⁵⁶ *Ibid*, Participant #4, at 8.

¹⁵⁷ *Ibid*, Participant #17, at 8.

¹⁵⁸ *Ibid*, at 8.

¹⁵⁹ *Ibid*, Participant #3, at 13.

would be important and preventative.¹⁶⁰ However, one also commented that while this was important, it could be “difficult to recognize with some people.”¹⁶¹ Two participants commented that it would depend, and did not circle any number.¹⁶² Obviously more discussion around this step would be necessary prior to including it in a court process today.

(2) Taking Appropriate Safety Measures for Individuals and Community:

Sixteen participants rated this step as very important (5/5) and two rated it 4/5 for importance. Two participants offered cautionary comments, saying this step is important “if you know how to do it”¹⁶³ and “it would be hard though.”¹⁶⁴ When asked how a process could ensure victim, family and community safety is maintained, participants gave a wide variety of insightful suggestions. Seven participants suggested proper supervision of offenders was vital.¹⁶⁵ Two elders stressed this included talking to them regularly,¹⁶⁶ and other participants suggested supervision could be implemented by having “family or people close to them...watch over them”¹⁶⁷ or by “small groups” for smaller offences, as long as they were “people that take it seriously.”¹⁶⁸ The same participant stressed it depended on the offence, and said, in the case of more serious offences, “avoidance might be best- keeping

¹⁶⁰ *Ibid*, Participant #8, Participant #9 and Participant #17 at 13-14.

¹⁶¹ *Ibid*, Participant #17 at 14.

¹⁶² *Ibid*, Participant #10 and Participant #11, at 13.

¹⁶³ *Ibid*, Participant #10, at 13.

¹⁶⁴ *Ibid*, Participant # 18 at 14.

¹⁶⁵ *Ibid*, Participant #4, Participant #8, Participant #9, Participant #13, Participant #16, Participant #17 and Participant #18 at 11.

¹⁶⁶ *Ibid*, Participant #9 and Participant #18, at 11.

¹⁶⁷ *Ibid*, Participant #17 at 11.

¹⁶⁸ *Ibid*, Participant #13, at 11.

people separated.”¹⁶⁹ Another participant said that in cases of intimate violence “then separation from victims, people at risk.”¹⁷⁰

Four participants said that, for safety to be maintained, the whole community needed to work past divisions and make supporting safety a priority.¹⁷¹ Participants believed maintaining safety was possible with “the whole community’s support”¹⁷² and “if safety was a community priority and process.”¹⁷³ One elder stated strongly: the “whole community [needs] to get together then they will be safe. That’s the only way.”¹⁷⁴ As discussed in the previous section, three participants said that partnerships with police, service providers and the mainstream justice system were vital for maintaining safety.¹⁷⁵ One participant highlighted “substance abuse conditions”¹⁷⁶ and another taking “a bigger picture approach to community wellness.”¹⁷⁷ All participants believed taking measures to keep individuals and the community safe was important. The variety of solutions offered reveals their nuanced understandings and experiences grappling with the challenges and complexity of doing so effectively today.

¹⁶⁹ *Ibid*, Participant #13, at 11. See also Participant 16, at 11, stating: “Have to watch people, can’t hide things. Stay away from them, avoid them.”

¹⁷⁰ *Ibid*, Participant #8, at 11.

¹⁷¹ *Ibid*, Participant #1, Participant #2, Participant #7 and Participant #14 at 11.

¹⁷² *Ibid*, Participant #7, at 11.

¹⁷³ *Ibid*, Participant #1, at 11.

¹⁷⁴ *Ibid*, Participant #2, at 11.

¹⁷⁵ *Ibid*, Participant #5, Participant #11 and Participant #15, at 11.

¹⁷⁶ *Ibid*, Participant #8, at 11.

¹⁷⁷ *Ibid*, Participant #6, at 11.

(3) Seeking Guidance from those with Relevant Understanding/Expertise:

Sixteen participants rated this step as very important (5/5) and two rated it 4/5 for importance. One participant commented that this step is “one of the most important.”¹⁷⁸ Another said that this step “should happen for panel (i.e. what decision-makers are best suited for the situation”¹⁷⁹ while another said this “makes selection of the panel critical (having well-rounded decision-makers).¹⁸⁰ This reinforces the emphasis on a case-by-case selection of decision-makers discussed above.

(4) Confronting offenders and deliberating decisions publically:

Eleven participants rated this step as very important (5/5). Two rated it 3/5 and 2 rated it 1/5. Three participants didn’t circle any number. Participants who commented on this step were divided, as their ratings indicate. As noted above, one participant was concerned about how this principle has been implemented in the past, from a place of anger, which did “more harm than good.”¹⁸¹ On the other side of the debate, another participant said confronting offenders was important, “especially if you don’t know what you’re doing to others.”¹⁸² He saw it as helpful to offenders. Two participants advocated care in confronting offenders, one advising, “see if there is another way of dealing with it first”¹⁸³ and another saying that

¹⁷⁸ *Ibid*, Participant #12, at 13.

¹⁷⁹ *Ibid*, Participant #13, at 14.

¹⁸⁰ *Ibid*, Participant #12, at 13.

¹⁸¹ *Ibid*, Participant #6, at 13.

¹⁸² *Ibid*, Participant #10, at 13.

¹⁸³ *Ibid*, Participant #17, at 14.

“discretion would have to be used.”¹⁸⁴ While these concerns and debate are congruent with the general concerns over confidentiality, this also gave me valuable feedback for how I framed this step. By combining confronting the offender and public deliberation, the one overshadowed the other. In the full Cree legal summary, it was clear that discretion was used when confronting offenders, and there were examples of people being shown how they had affected others, privately or one on one, rather than being *publically* confronted about their harmful actions. This was also very clearly the preferred method for the *Aseniwuche Winewak*.¹⁸⁵ As will be discussed later, public deliberation is seen as important. For these reasons, I am cautious about these results. I think this procedural step would need to be divided into two, and each discussed more thoroughly, in order to gain a more accurate understanding of the underlying principle.

(5) Identifying appropriate decision-makers and implementing their decisions:

Sixteen participants rated this step very important (5/5). One rated it 4/5 and one rated it 3/5 for importance. One participant said it would be important to “make sure everyone understands,”¹⁸⁶ and another commented that this was an important step “because on case by case it would be different.”¹⁸⁷ This is congruent with the

¹⁸⁴ *Ibid*, Participant #14, at 14.

¹⁸⁵ In addition to this feedback, see discussion in the Chapter Three, at 101-103.

¹⁸⁶ Cree Justice Process Questionnaire Compiled Results, *supra* note 43, Participant #17, at 14.

¹⁸⁷ *Ibid*, Participant #7, at 13.

feedback regarding the care taken in choosing decision-makers, and the felt need for decision-makers to be selected on a case-by-case basis.

b. Discussion:

In general, while the majority of participants thought all these procedural steps were important, and four participants affirmed these procedures as “good” or “all the right steps”¹⁸⁸ in specific comments, with one adding, “the steps should all work as an intervention,”¹⁸⁹ there is obviously more work to be done. In all the AJR project final reports, identifying procedural steps was the most challenging for student researchers and the area in which I felt the most uncertain, either as author or as editor. There could be several reasons for this. It is possible that procedure is an area of law that has been particularly damaged by the ravages of colonialism.

Procedures fall within what HLA Hart would call “secondary rules” – rules about the processes by which primary rules are interpreted, adjudicated and changed.¹⁹⁰ I have often wondered if a society’s secondary rules may be the hardest hit by the colonial dismantling and delegitimizing of legal traditions. As Napoleon and I argue elsewhere, the analogous situation of what happened to most, if not all, Indigenous societies would be if legal actors in contemporary Canadian society (judges, court clerks, police, prison guards) suddenly were punished by powerful outsiders, despite, or *because* of, their role in maintaining familiar legal procedures

¹⁸⁸ *Ibid*, Participant #3, Participant #4, Participant #11 and Participant #18 at 13-14.

¹⁸⁹ *Ibid*, Participant #11, at 13.

¹⁹⁰ Hart, *supra* note 101 at 98.

to reach and implement a legitimate decision. And not just punished, but demeaned and discredited, held up as examples of irrationality and barbarism. We say:

Our current legal actors would be placed in an untenable position. So would we, as ordinary Canadian citizens. Those who trusted and turned to these legal actors when in need would suddenly no longer know what or who to rely on for protection from harm. We would know that our reliable, respected legal actors were punished according to the outsiders' rules for following the rules we knew. So whose rules should we trust? Neither would feel particularly solid or reliable.¹⁹¹

This crisis of legitimacy might contribute to or help explain the perception of the long period of virtual lawlessness described by the Secwepemc elders in the above section.

It is also possible that the issue is the opposite problem. It could be that this is an area so intact that people's implicit knowledge of process and procedures is taken for granted, so the challenge lies in drawing out what seems so obvious it is not articulated, in an explicit way.¹⁹² A third possibility (and none of these are mutually exclusive) is that procedures that worked well in the past may not work as well today, and new procedures need to be added or created, due to changing circumstances.¹⁹³ For the *Aseniwuche Winewak*, who are interested in applying Cree legal principles in a court or court-like process, this may be particularly relevant and necessary. Developing a hybrid process likely entails picking and choosing essential

¹⁹¹ Roots to Renaissance, *supra* note 28 at 232.

¹⁹² This difficulty was explored in Val Napoleon, Angela Cameron, Colette Arcand and Dahti Scott, "Where's the Law in Restorative Justice?" in Yale Belanger, ed., *Aboriginal Self Government in Canada: Current Trends and Issues*, 3rd edition (Saskatoon, Purich Publishing Press, 2008) [Napoleon et al].

¹⁹³ See the detailed and thoughtful analysis of this complex issue through investigatory, trial and sentencing phases of criminal justice in David Milward, *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights* (Vancouver: UBC Press, 2012). See also Jeremy Webber, "Individuality, Equality and Difference: Justifications for a Parallel System of Aboriginal Justice" in *RCAP: Roundtable on Justice, Aboriginal People and the Justice System: National Round Table on Aboriginal Justice Issues* (Ottawa: Royal Commission on Aboriginal Peoples, 1993).

legal processes to include, while mindfully setting others aside from the formal process.

ii. Legal Responses:

a. Analysis:

Participants were asked what Cree legal responses would be important to include in a court process using Cree legal principles today. The legal responses identified in the Cree legal summary were:

- (1) Healing (the offender and the victim)
- (2) Supervision
- (3) Temporary Avoidance or Separation
- (4) Permanent Separation
- (5) Acknowledgement of Responsibility
- (6) Re-integration
- (7) Natural and Spiritual Consequences

I added the following responses, which I intended to refer to the Criminal Code sentencing principles of denunciation and general and specific deterrence¹⁹⁴:

- (8) Sending a Message the offence was wrong (to the offender and to the community).

Participants were also asked what offences each particular response might be more or less appropriate for.

¹⁹⁴ *Canadian Criminal Code*, RSC 1985, c C-46, S. 718 (b). For a plain language discussion of the theory of specific and general deterrence see:
<http://www.lawconnection.ca/content/sentencing-theory-background>

(1) Healing:

Fifteen participants said including the response principle of both healing the offender and healing the victim in a court process was very important (5/5), one rated both 4/5 and two rated both 3/5 for importance. Fourteen participants commented that healing the offender would be important all of the time, for all offences.¹⁹⁵ One participant commented that healing was always important, but “especially important for adults.” He reasoned, “If you’re in court its because you’ve done something wrong.”¹⁹⁶ On a similar line, one elder reasoned, “If someone’s not right it’s important to put them in the right mindset.”¹⁹⁷ However, another elder did caution, “It depends on the case. Some people are easy to help, others less willing to accept it.”¹⁹⁸ Another participant said that, while important, healing “is hard work”.¹⁹⁹

Twelve participants commented that healing the victim was important all the time.²⁰⁰ Two participants reasoned “it is better for the community”²⁰¹ or people “need to let go of grudges”²⁰² Two participants referred to facilitating forgiveness and restoration.²⁰³ One elder cautioned “each individual will respond to help differently”²⁰⁴ and two participants commented, like healing for the offender,

¹⁹⁵ Cree Justice Process Questionnaire Compiled Results, *supra* note 43 at 15.

¹⁹⁶ *Ibid*, Participant #11, at 15.

¹⁹⁷ *Ibid*, Participant #7, at 15.

¹⁹⁸ *Ibid*, Participant #1, at 15.

¹⁹⁹ *Ibid*, Participant #6, at 15.

²⁰⁰ *Ibid*, at 16.

²⁰¹ *Ibid*, Participant #12 at 16.

²⁰² *Ibid*, Participant #17 at 16.

²⁰³ *Ibid*, Participant #7 and Participant #13, at 16.

²⁰⁴ *Ibid*, Participant #1, at 16.

healing for the victim was hard work.²⁰⁵ This feedback is consistent with stories that illustrate the Cree ideal of healing (note the reasoning: if someone has done wrong, they need healing to put them back in their ‘right’ mind again), the predominance of healing in the Cree legal summary, and the findings in the *AJR Final Report* that healing, while a preferred response to harm, is not viewed as a quick fix or panacea.²⁰⁶

(2) Supervision:

Fourteen participants said the response principle of supervision of the offender in a court process was very important (5/5), two participants rated it 4/5 and one participant rated it 3/5 for importance. One participant didn’t rate it at all.

Participants had a lot to say about when and *how* this response principle should be applied. Seven participants commented that this principle should apply all the time, to all offences.²⁰⁷ One participant added that, while it should apply to all offences, it would be even more important in cases of “violent and confrontational behavior.”²⁰⁸

One elder thought supervision needed to be “closer than a probation officer.” She stressed, “Some people actually need to be followed around to be properly supervised. What the probation officer does is not supervision.”²⁰⁹ Another

²⁰⁵ *Ibid*, Participant #6 and Participant #7, at 16.

²⁰⁶ AJR Project Final Report, *supra* note 82, at 9.

²⁰⁷ Cree Justice Process Questionnaire Compiled Results, *supra* note 43, Participant #2, Participant #6, Participant #11, Participant #13, Participant #15, Participant #16, and Participant #18 at 17.

²⁰⁸ *Ibid*, Participant #13, at 17.

²⁰⁹ *Ibid*, Participant #7, at 17.

suggested having “more than one person supervising. Maybe decision-makers.”²¹⁰

Some participants saw supervision as vital to “look out for you so you’re not getting into trouble”²¹¹ or so “we can ensure no-one re-offends.”²¹²

On the other hand, four participants thought that, while this principle was important, it would *not* be appropriate in all cases, and needed to be decided on a case-by-case basis.²¹³ One participant commented that, while in some cases, supervision would be “really appropriate”, in others it would be “too much”²¹⁴ and another pointed out, “they need room to breathe too.”²¹⁵ Participants also talked thoughtfully about *how* they believed supervision should be implemented. Two participants stressed the supervisor’s main role is actually “support”.²¹⁶ One participant even suggested supervision is best implemented in the “form of family support” because “they will know best”²¹⁷ Another said that if an offender was “had hurt someone, they should be supervised” but added it was important the supervisor “communicate with [the offender] throughout supervision.”²¹⁸

(3) Temporary Avoidance or Separation:

Only seven participants said including the response principle of temporary avoidance or separation of the offender in a court process was very important. Four

²¹⁰ *Ibid*, Participant # 11, at 17.

²¹¹ *Ibid*, Participant #16, at 17.

²¹² *Ibid*, Participant #18, at 17. Would that we could.

²¹³ *Ibid*, Participant #4, Participant #8, Participant #10 and Participant #12, at 17.

²¹⁴ *Ibid*, Participant #12, at 17.

²¹⁵ *Ibid*, Participant # 4, at 17.

²¹⁶ *Ibid*, Participant #5 and Participant 15 at 17.

²¹⁷ *Ibid*, Participant #17, at 17.

²¹⁸ *Ibid*, Participant # 10 at 17.

participants rated it 4/5, two participants rated it 3/5, one rated it 2/5 and one rated it 1/5 for importance. Four didn't rate it at all. This was the largest range in ratings for any principle.

Eleven participants commented that this principle would need to be applied on a case-by-case basis, and only in specific circumstances – particularly for serious and violent offences and until or in order for the offender to get the help they needed to heal.²¹⁹ Some participants thought temporary avoidance or separation would only be appropriate in cases of serious or very harmful offences,²²⁰ where the community was at risk,²²¹ or for “repeat offenders who don't take opportunities for healing.”²²² Three participants believed temporary avoidance or separation would be appropriate for cases involving physical or sexual violence, including domestic abuse and incest, saying the offender would need help or treatment before returning to the home.²²³ One participant also said it would be appropriate “if it is needed for the healing of the victim.”²²⁴

Six participants said that temporary avoidance or separation would be appropriate until or so the offender was able to get the help or healing needed.²²⁵ One participant said that while this principle was important, the offender “would

²¹⁹ *Ibid*, Participant #2, Participant #4, Participant #5, Participant #6, Participant #8, Participant #10, Participant #11, Participant #12, Participant #13, Participant #14 and Participant #15, at 18.

²²⁰ *Ibid*, Participant #10, Participant #11 and Participant #13, at 18.

²²¹ *Ibid*, Participant #12, at 18.

²²² *Ibid*, Participant #13, at 18.

²²³ *Ibid*, Participant #6, Participant 14 and Participant #15, at 18.

²²⁴ *Ibid*, Participant #8, at 18.

²²⁵ *Ibid*, Participant #1, Participant #3, Participant #6, Participant #8, Participant #11 and Participant #15, at 18.

have to be in a good mind to understand why.”²²⁶ Two participants stressed that, if this principle was implemented, the offender would still need support and to see their family (with supervision).²²⁷ Two participants said they were “not sure” about this principle. One elder, as referred to above, wondered if it was as important as it used to be, due the fact “we all live so far apart now.”²²⁸

(4) Permanent Separation:

Six participants said including the response principle of permanent separation of the offender in a court process was very important. Two participants rated it 4/4, four participants rated it 3/5 and one participant rated it 1/5 for importance. Three didn’t rate it at all.

One participant stated their belief that permanent separation was “never appropriate.”²²⁹ Two participants said they were “not sure” or “would be hesitant,”²³⁰ the latter reasoning that it was “almost too much” and “it would be judging – not my job.”²³¹

Eleven participants said this principle would need to be applied on a case-by-case basis, and only in very specific circumstances – particularly the most serious and violent of offences, such as murder, and where the offender is unwilling or incapable of changing, such as refusing to take responsibility or permanent

²²⁶ *Ibid*, Participant #4, at 18.

²²⁷ *Ibid*, Participant #17 and Participant #16, at 18.

²²⁸ *Ibid*, Participant #18 and Participant #7, at 18.

²²⁹ *Ibid*, Participant #8, at 19.

²³⁰ *Ibid*, Participant #18 and Participant #12, at 19.

²³¹ *Ibid*, Participant #12, at 19.

instability.²³² Of these, eight participants said the seriousness of the crime as a significant factor,²³³ four said the offender's inability or unwillingness to change or make amends was a significant factor,²³⁴ and two said the offender's family was a significant factor to consider in each case.²³⁵ Most participants listed two or more considerations, some of which could be seen to pose a possible conflict in certain cases. For example, one participant stated:

It depends what you do. Murder or really violent crimes. If there was "no hope, no help" for them. If they were forgiven they could be alright.²³⁶

Another said:

If there were no kids involved. Violent offences and offenders that aren't willing to deal with underlying issues.²³⁷

Participants all seemed acutely attuned to the gravity, risks and consequences of such a drastic measure. One participant cautioned: "The last two instances [temporary and permanent separation] could be at risk of quick fixes which could be more detrimental than helpful."²³⁸ One elder said, "If it is to be done it should be done in the right way."²³⁹

²³² *Ibid*, Participant #2, Participant #3, Participant #4, Participant #5, Participant #6, Participant #7, Participant #9, Participant #10, Participant #11, Participant #14 and Participant #15, at 19.

²³³ *Ibid*, Participant #3, Participant #4, Participant #6, Participant #7, Participant #9, Participant #10, Participant #11 and Participant #15, at 19.

²³⁴ *Ibid*, Participant #4, Participant #6, Participant #10 and Participant #15, at 19.

²³⁵ *Ibid*, Participant #3 and Participant #15, at 19.

²³⁶ *Ibid*, Participant #10, at 19.

²³⁷ *Ibid*, Participant #15, at 19.

²³⁸ *Ibid*, Participant #14, at 19.

²³⁹ *Ibid*, Participant #1, at 19.

(5) Acknowledgement of Responsibility:

Fifteen participants said including the response principle of the offender acknowledging responsibility in a court process was very important. One participant rated it 4/5, one participant rated it 3/5 and one participant rated it 2/5 for importance. Two participants said this would be good or really good to see.²⁴⁰ Six participants said this principle would be important all the time, for all offences.²⁴¹ One added emphatically, “it’s the most important for everybody.”²⁴²

On the other hand, one participant flagged a “concern about people taking advantage of this.”²⁴³ Some participants saw the validity of this as conditional, cautioning, “if it’s sincere,”²⁴⁴ “there would have to be a mutual understanding of responsibility for it to be meaningful,”²⁴⁵ “amends and restitution more than apology”,²⁴⁶ and “as long as they came to make the proper amends, it would be appropriate.”²⁴⁷

(6) Re-integration:

Thirteen participants said including the response principle of offender re-integration in a court process was very important. Three participants rated it 4/5 and two participants rated it 3/5 for importance. Two participants seemed to see

²⁴⁰ *Ibid*, Participant #1 and Participant #7, at 20.

²⁴¹ *Ibid*, Participant #3, Participant #4, Participant #9, Participant #11, Participant #14 and Participant #16, at 20.

²⁴² *Ibid*, Participant #16, at 20.

²⁴³ *Ibid*, Participant #8, at 20.

²⁴⁴ *Ibid*, Participant #15, at 20.

²⁴⁵ *Ibid*, Participant #5, at 20.

²⁴⁶ *Ibid*, Participant #6, at 20.

²⁴⁷ *Ibid*, Participant #18, at 20.

this principle as an imperative to others. One elder said, “Good because they want to come back and it’s good to welcome them.”²⁴⁸ Another participant stated, “Focus on what needs to be done to facilitate acceptance.”²⁴⁹ Two participants said this would be important all the time and should always be a focus.²⁵⁰

Ten participants commented that how or whether this principle applies should be decided on a case-by-case basis and would depend.²⁵¹ Factors to consider included the severity or type of the harm,²⁵² whether the offender has taken responsibility and addressed the underlying issues,²⁵³ and whether it is acceptable to the victim(s).²⁵⁴ For example, one participant commented, “Each case is going to be so hard and depend on the type of harm and the victim(s).”²⁵⁵ Another cautioned, “But only when people have made changes in their life, taken responsibility, gotten the help they need.”²⁵⁶ Finally, one participant, who saw this as “important for everyone involved” and “in all offences if it is possible” stressed, “It has to be acceptable to the victims. Also reintegrating victim.”²⁵⁷

²⁴⁸ *Ibid*, Participant #1, at 21.

²⁴⁹ *Ibid*, Participant #6, at 21.

²⁵⁰ *Ibid*, Participant #5 and Participant #12, at 21.

²⁵¹ *Ibid*, Participant #3, Participant #4, Participant #8, Participant #9, Participant #10, Participant #11, Participant #13, Participant #15, Participant #16 and Participant #18, at 21.

²⁵² *Ibid*, Participant #4, Participant #9, Participant #13 and Participant #16, at 21.

²⁵³ *Ibid*, Participant #3, Participant #11 and Participant #18, at 21.

²⁵⁴ *Ibid*, Participant #4, Participant #13 and Participant #15, at 21.

²⁵⁵ *Ibid*, Participant #4, at 21.

²⁵⁶ *Ibid*, Participant #11, at 21.

²⁵⁷ *Ibid*, Participant #15, at 21.

(7) Natural and Spiritual Consequences:

Twelve participants said including the response principle of natural and spiritual consequences in a court process was very important. One rated it 1/5 for importance. Five participants didn't rate it at all.

Four participants commented that considering natural and spiritual consequence was important all the time, for all cases.²⁵⁸ Some participants talked about this being good or very important, stating: "it needs acknowledgement",²⁵⁹ "they have to understand and consider it [including seeking to heal the person if they ascertain bad medicine was involved]",²⁶⁰ and "decision-makers should keep prayer involved before they make decisions."²⁶¹ Two participants gave reasons for its importance, stating: "it would be good because everyone should think that way. What you do today will affect you later on",²⁶² "if someone uses medicine in a bad way it's going to come back on them."²⁶³

Interestingly enough, two other participants cited their firm belief in the existence of natural and spiritual consequences, as reasons for the *opposite* proposition – that it was not necessary to include this principle in a formal court process, explaining this principle is "not applicable because it will happen anyway"²⁶⁴ and "it's going to come back on him anyways."²⁶⁵ A total of four participants stated this principle should not be used in a court process today. The

²⁵⁸ *Ibid*, Participant #3, Participant #8, Participant #11 and Participant #12, at 22.

²⁵⁹ *Ibid*, Participant #8, at 22.

²⁶⁰ *Ibid*, Participant #17, at 22.

²⁶¹ *Ibid*, Participant #11, at 22.

²⁶² *Ibid*, Participant #1, at 22.

²⁶³ *Ibid*, Participant #4, at 22.

²⁶⁴ *Ibid*, Participant #6, at 22.

²⁶⁵ *Ibid*, Participant #16, at 22.

other reasons for this included it being “kind of dicey. Kind of like taking God’s role”²⁶⁶ and “that will be each individual person’s – how they view on the inside.”²⁶⁷ One participant said this principle was important, “but not on it’s own”²⁶⁸ while another said, “it depends, consequences could be any other response.”²⁶⁹

(8) Sending a Message the Offence was Wrong (to the offender and to the community):

Fourteen participants said that sending a message to *the offender* that the offence was wrong was very important. Three participants rated this 4/5 for importance. Six participants commented that this was important for all offences.²⁷⁰ Two participants saw this as teaching “right from wrong”²⁷¹ or ensuring “a standard is set for all offences so that its not a free pass.”²⁷² Six participants talked explicitly about how this should be applied, viewing this as talking with the offender, explaining and helping him or her understand what he or she did wrong.²⁷³ For example, participants stressed, “Talk to their face, don’t send them a message”,²⁷⁴ it

²⁶⁶ *Ibid*, Participant #15, at 22.

²⁶⁷ *Ibid*, Participant #18, at 22.

²⁶⁸ *Ibid*, Participant #13, at 22.

²⁶⁹ *Ibid*, Participant #10, at 22.

²⁷⁰ *Ibid*, Participant #3, Participant #8, Participant #11, Participant #13, Participant #15 and Participant #16, at 23.

²⁷¹ *Ibid*, Participant #1, at 23.

²⁷² *Ibid*, Participant #15, at 23.

²⁷³ *Ibid*, Participant #4, Participant #5, Participant #8, Participant #10, Participant #16 and Participant #17 at 23.

²⁷⁴ *Ibid*, Participant #4, at 23.

would be “important with proper support and safety in mind”²⁷⁵ and “The offender has to understand, and the elder has to understand the person.”²⁷⁶

Eleven participants said that sending a message to *the community* that the offence was wrong was very important. Two participants rated this 4/5, one participant rated it 3/5 and three participants rated it 1/5 for importance. Five participants did not comment. Four commented that this was not important or appropriate,²⁷⁷ two reasoning, “you would hear about it anyways”²⁷⁸ or “everyone will understand”²⁷⁹ and one commenting, “I’m not supposed to tell everybody that something is wrong.”²⁸⁰ On the other hand, nine participants stated that this would be good and important to include in a court process.²⁸¹ Reasons for this included, ““It’s important to tell someone what they did was wrong”,²⁸² to set that standard”,²⁸³ “so that community norms that are wrong are corrected”,²⁸⁴ and “so people will watch what they do.”²⁸⁵ Six participants talked explicitly about *how* this should be applied, viewing this teaching, explaining and helping the community

²⁷⁵ *Ibid*, Participant #6, at 23.

²⁷⁶ *Ibid*, Participant #17, at 23.

²⁷⁷ *Ibid*, Participant #8, Participant #10, Participant #16 and Participant #17, at 24.

²⁷⁸ *Ibid*, Participant #10, at 24.

²⁷⁹ *Ibid*, Participant #17, at 24.

²⁸⁰ *Ibid*, Participant #16, at 24.

²⁸¹ *Ibid*, Participant #1, Participant #2, Participant #3, Participant #4, Participant #5, Participant #7, Participant #11, Participant #15 and Participant #18, at 24.

²⁸² *Ibid*, Participant #18 at 24.

²⁸³ *Ibid*, Participant #15, at 24.

²⁸⁴ *Ibid*, Participant #5, at 24.

²⁸⁵ *Ibid*, Participant #11, at 24.

understand.²⁸⁶ One participant commented that teaching the community is “important, but practically difficult. It’s hard enough to explain to one person.”²⁸⁷

b. Discussion:

All participants not only recognized the identified response principles, but also were very capable and willing to work with the principles in that form. As I worked through their feedback I was struck by how similar I felt, reading their responses, to being an articling student listening to senior lawyers discuss an area of law. Not only did the community participants recognize and understand the principles, simply ‘listening’ to their rich discussion of them taught me more and increased my own relatively meager understanding and competency.

For example, the emphasis on supporting and teaching people who have done wrong, especially when supervision is warranted, or when ‘sending a message’ about community standards to the offender and community, was striking. I was humbled by participants’ comments regarding a principle of ‘sending a message the offence was wrong’, because, as mentioned above, I intended this to be a plain language way of discussing the Criminal Code sentencing principles of denunciation and specific and general deterrence. It was very clear that participants did believe community standards needed to be set and upheld, but it was equally apparent that most participants viewed this as a something best accomplished through teaching

²⁸⁶ *Ibid*, Participant #1, Participant #2, Participant #4, Participant # 5, Participant #7 and Participant #18, at 24.

²⁸⁷ *Ibid*, Participant #4, at 24.

and fostering understanding, rather than assuming consequences alone can stand as an adequate deterrent, either for individuals or the community at large.

This strong emphasis on supporting, guiding and educating offenders cannot be reduced to a simple dichotomy between Cree and other Indigenous legal traditions and the common-law state responses, that often emphasize deterrence. First, the Cree emphasis on teaching and guidance takes place in conjunction with strong cautionary tales of natural and spiritual consequences of wrong actions.²⁸⁸ Someone or something else deters, so it may be more accurate to say, as one participant did, that most people do not see this as a human role. Denunciation may be part of teaching. Recall in the story, *Killing of a Wife*, where a man kills his wife but claims she drowned accidentally.²⁸⁹ After investigating, Meskino publically confronts the man, denounces his actions and explains to the whole group that he will die because of them. He does die within a year, but from no human cause.²⁹⁰ Some Indigenous legal traditions do have a principle of deterrence that, at least historically, humans were responsible for implementing. Tsilhqot'in people have quite vivid historical stories explicitly about deterrence, in addition to extensive examples of severe natural and spiritual consequences of wrong actions.²⁹¹ Coast Salish peoples also had graphic historical examples of punishment or deterrence in extreme cases.²⁹² Yet, in the Coast Salish Legal Summary, "teaching

²⁸⁸ See, for example, Chapter Three at 118-119.

²⁸⁹ Chapter Three, at 100.

²⁹⁰ Chapter Three, at 118.

²⁹¹ *The AJR Project Tsilhqot'in Legal Traditions Report* (May 2014, unpublished), on file at the University of Victoria ILRU, at 28 and 34-36.

²⁹² *The AJR Project Coast Salish Legal Traditions Report* (May 2014), unpublished), on file at the University of Victoria ILRU at 29-30.

responsibility/foster understanding” from a young age, through various teachings and ceremonies, was still seen as the best way of preventing harms in the first place.²⁹³ One response principle was “providing guidance to wrongdoers.” This was explained the following way:

This is an active response but one that continues to avoid aggravating a harmful situation. Modes of providing guidance include lecturing, blanketing, one-on-one guidance, and speaking with Elders. The primary focus is to impress upon a wrongdoer why his or her behaviour is wrong and to promote an understanding of why that behaviour is wrong/harmful. It is up to the wrongdoer to change his or her ways after he or she receives these teaching and guidance.²⁹⁴

On the opposite coast of Canada, Mi’kmaq elders talked extensively of the importance of teaching offenders to develop empathy and understand their own underlying issues in order to promote responsibility and rehabilitation.²⁹⁵

Anishinabek elders also articulated an underlying belief in the efficacy of teaching and guidance to best promote community safety and wellness. Elder Jean Borrows encapsulated the Anishinabek aspiration behind this approach when she stated eloquently, “Teach them the principles, and they can govern themselves.”²⁹⁶ Neepitapinaysiqua opined that laws only have to be “imposed externally” on people when:

Legal education in a community is weak and people have become alienated from the legal traditions and values...rather than the laws being part of people’s identity and way of life, as they may become when people are educated in laws through stories and other means from a very young age.²⁹⁷

²⁹³ *Ibid*, at 26.

²⁹⁴ *Ibid*, at 28.

²⁹⁵ *The AJR Project Mi’kmaq Legal Traditions Report* (May 2014), unpublished), on file at the University of Victoria ILRU, at 25-27.

²⁹⁶ *The AJR Project Anishinabek Legal Traditions Report* (May 2014), unpublished, on file at the University of Victoria ILRU, at 28.

²⁹⁷ *Ibid*.

While education was seen as preventative and generative, like in the other legal traditions mentioned, it was also seen as valuable to speak up and educate wrongdoers as to the harmful effects of their actions.²⁹⁸ In all of these Indigenous legal traditions, both aspiration and efficiency undergird the focus on guidance and education for offenders.

What stands out the most about the community feedback is the in-depth knowledge, nuance and complexity evident in each of the participant's reasoning. I was at first surprised at how many participants commented that, insofar as training needed for community members prior to a Cree Justice process being viable, very little would be needed, and would mostly entail training on regular court process, issues affecting offenders, such as abuse and FASD, and making the framework of Cree legal principles widely available.²⁹⁹ One participant commented:

They would not need much beyond making work on Cree legal principles available to them. If we were to start tomorrow I'm sure they could do it.³⁰⁰

The depth of the discussion about the Cree legal response principles indicates his confidence is not misplaced. The community participants were engaging in exactly the kind of critical, rigorous and practical exploration of Indigenous legal principles that Napoleon et al argue are essential for application. Lay-people often roll their eyes or express frustration at lawyers' apparent failure to ever give a straight yes or no answer, but legally trained people know only too well it is a rare legal question that doesn't truthfully begin with "it depends." This fluidity is why Jeremy Webber advocates for identifying, not some elusive past authentic moment in any legal

²⁹⁸ *Ibid.*

²⁹⁹ Cree Justice Process Questionnaire Compiled Results, *supra* note 43, at 30.

³⁰⁰ *Ibid*, Participant #12, at 30.

tradition, but rather the issues that “preoccupy public life” and the “distinctive structure of the fundamental debates” over time in a particular society.³⁰¹ All law is in constant motion, and yet moves in familiar and recognizable forms, slowly, sometimes glacially, in a conversation that takes place over generations.³⁰²

A good example of this was in the discussion around natural and spiritual consequences. There was no evident division among community participants about whether or not natural and spiritual consequences exist and affect human beings. Nobody indicated they did not believe this. However, participants were clearly divided about whether or how natural and spiritual consequences should play a role in a formalized justice process. The one did not follow automatically, as it is too often insinuated. Rather different people had different, but equally strong, articulate and reasoned positions on this issue, some of which would lead to the same result as the current Euro-Canadian justice system – exclusion of overt reliance on the spiritual in legal *decision-making*. Inasmuch as I want to resist and discourage simplistic dichotomies between Indigenous and state legal orders, I have to acknowledge the debate that is apparent within the community is non-existent, on these terms, within the formal Canadian justice system. It may be uniquely

³⁰¹ Jeremy Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (Montreal: McGill-Queens University Press, 1994) at 186.

³⁰² For this reason, it is more useful, and more realistic, to see a tradition as “a patchwork of multiple themes and commitments, often united only by agreement about what the terms of debate over these themes and commitments will be.” Katharine T. Bartlett, “Tradition, Change, and the Idea of Progress in Feminist Legal Thought” (1995) *Wisconsin Law Review* 303 at 330. Alasdair MacIntyre captures this reality by arguing “traditions, when vital, embody continuities of conflict.” He defines living tradition as a “historically extended, socially embodied argument, and an argument precisely in part about the goods which constitute the tradition.” Alisdair Macintyre, *After Virtue: A Study in Moral Virtue* 3rd ed. (Indiana: University of Notre Dame Press, 2007) at 222.

Indigenous (in this case, Cree) debate. Whatever the outcome at any one point in time, in any one community,³⁰³ it will likely remain a live debate within Cree societies.

The AJR Project Final Report findings highlighted the breadth and variety of Indigenous legal responses available, within and between Indigenous legal traditions.³⁰⁴ The nuanced discussion and differing views evident in the *Aseniwuche Winewak* community feedback about applying the Cree legal response principles demonstrates, not only their recognition, but their importance, given the rich debates imagining their more formal and explicit implementation creates or re-invigorates within the community.

iii. Legal Rights and Obligations:

a. Analysis:

In the Cree legal summary, I identified five legal obligations and five legal rights, two of which were substantive and three of which were procedural in nature. The legal obligations are:

- (1) Responsibility to help when asked
- (2) Responsibility to ask for help when needed
- (3) Responsibility to give back when helped
- (4) Responsibility to prevent future harms

³⁰³ Jeremy Webber, "Naturalism and Agency in the Living Law" in Marc Hertogh, ed., *Living Law: Reconsidering Eugene Ehrlich* (Oxford: Hart, 2008) 201, pointing out any one statement of law is always a provisional agreement reached in a backdrop of continuing disagreement.

³⁰⁴ AJR Project Final Report, *supra* note 82, at 7-10.

(5) Responsibility to warn others

Participants were asked how important they thought it was to uphold or maintain these legal obligations in a formal court process today.

Legal Obligations:

Between thirteen to fifteen participants did say all these obligations were very important to maintain in a contemporary court process, with one or two ratings of 3/5 or 4/5 for importance. Fifteen participants said the responsibility to warn was very important. Three participants did not rate any of the obligations. One participant explained that she felt she “can’t answer without a process in place.”³⁰⁵ Some participants discussed issues of implementation. One advised that, in regard to the responsibility to ask for help, “its up to the person (important but not required) voluntary better than mandatory.”³⁰⁶ Others advised taking care around a responsibility to give back, cautioning, “not everybody is able to give back”,³⁰⁷ this “could be in the form of personal success/transformation”,³⁰⁸ and “they give back in many ways, including appreciation.”³⁰⁹ One participant suggested, “programs and resources would help” to prevent future harms.³¹⁰ Two participants commented on

³⁰⁵ Cree Justice Process Questionnaire Compiled Results, *supra* note 43, Participant #6, at 25.

³⁰⁶ *Ibid*, Participant #12, at 25.

³⁰⁷ *Ibid*, Participant #2, at 25.

³⁰⁸ *Ibid*, Participant #11, at 25.

³⁰⁹ *Ibid*, Participant #16, at 26.

³¹⁰ *Ibid*, Participant #15, at 26.

warning others, one stating, “it depends on the person’s track record”³¹¹ and the other saying we “need to know who to watch out for.”³¹²

I also identified two substantive legal rights:

- (1) Right to protection and safety
- (2) Right to be helped when vulnerable

And three procedural rights:

- (3) Right to share your side of the story
- (4) Right to know how and why decisions are made
- (5) Right to transparent decisions made with consultation

Participants were asked how important they thought it was to uphold or maintain these legal rights in a formal court process today.

Legal Rights:

Between twelve to fifteen participants did say all these rights were very important to uphold in a contemporary court process, with one to four ratings of 3/5 or 4/5 for importance. Between one and three participants did not rate all the rights. One elder said he was “not sure about the last three rights”, which were the procedural ones, and did not rate any of these ones.³¹³ The majority of participants (twelve) did not comment at all. Those that did comment did so primarily regarding the right to share one’s story, and the right to know how and why decisions are made. Some

³¹¹ *Ibid*, Participant #11, at 25.

³¹² *Ibid*, Participant #15, at 26.

³¹³ *Ibid*, Participant #18, at 27.

participants reinforced it was important for “that person to be able to share”³¹⁴ and everyone should have “the chance to speak.”³¹⁵ One participant stressed this “makes knowledgeable decision-makers critical”³¹⁶ and another, who had experience sitting on the past Native court, reminded us “some people aren’t ready to tell their side though.”³¹⁷ This same elder said offenders knowing the how and why of decisions was important “because last native court offenders weren’t happy with the sentence they got.”³¹⁸ Two participants said this was important because the offender needs to understand the decision.³¹⁹ One agreed the offender and victim had a right to know the how and why of a decision, but said “not the community.”³²⁰

b. Discussion:

In general, participants were less responsive and had less to say about Cree legal rights and obligations than about Cree legal process or legal responses. It is possible the language of rights and obligations did not resonate in the same way. It is also possible the rights and obligations identified were not ones that resonated strongly, or that they would require more thought to actually uphold or maintain within a formalized justice process today. While I have observed some of these obligations are deeply felt by certain people within the community, for example, the responsibility to help when asked (one elder’s comment about this obligation was

³¹⁴ *Ibid*, Participant #7, at 27.

³¹⁵ *Ibid*, Participant #15, at 28.

³¹⁶ *Ibid*, Participant #11, at 27.

³¹⁷ *Ibid*, Participant #1, at 27.

³¹⁸ *Ibid*, Participant #1, at 27.

³¹⁹ *Ibid*, Participant #7 and Participant #11, at 27.

³²⁰ *Ibid*, Participant #15, at 28.

simply, “if I can’t help someone I find someone else who can”³²¹), it is another question altogether if these should or could be upheld in a formal justice process. On a practical level, it is worth pointing out that, by the time participants came to questions about rights and obligations, they had already discussed a lot, from several different angles.

The little that was added did tend to enrich or reinforce previous conversations under other categories. For example, an obligation to warn others, or prevent future harms, fit within the discussions regarding the procedural step of maintaining individual and community safety as well as the emphasis on accessing help and resources for treatment in the discussion of the response principles of healing and of temporary separation. Participants did comment on the importance of the right to share one’s story and to know how and why decisions are made. This fit with discussion around why and how a “native court” would be more effective at helping the community at a general level. It also reinforced the importance of the procedural step of public deliberation, suggesting the apparent hesitancy around that step may indeed relate to the aspect of publically confronting the offender. Like the other categories, participants clearly took the identified rights and obligations seriously, and approached them thoughtfully.

³²¹ *Ibid*, Participant 7, at 25.

Conclusion:

*Cree legal principles are just scratching the surface. Need more work.*³²²

In Chapter Two of this dissertation, I discussed challenges of accessing, understanding and applying Indigenous laws, and methods for approaching these challenges. I proposed a method for engaging with Indigenous legal traditions that I hoped would enable Indigenous laws to be more accessible, understandable and applicable today. In Chapter Three, I demonstrated the results of my method to make Indigenous legal principles more *accessible*, through the AJR Project and the Cree legal summary. In Chapter Four, I demonstrated, through exploring Cree relational legal theory, that this method, approached mindfully, can lead to a deeper *understanding* of not only the identified principles in the framework, but the essential background narratives within a legal tradition. In this chapter, I demonstrated how this legal research might support Indigenous communities to build a solid and useful foundation for *application*, through the case study of *Aseniwuche Winewak's* community feedback about the Cree legal principles for a proposal to develop a contemporary Cree Justice Process.

In the end, the comment that stays with me the most was from the community feedback was: "Cree legal principles are just scratching the surface. Need more work."³²³ I could not agree more. And I would add, I hope they always will. The "hard work of law" that is never done, and it always needs more work.³²⁴

³²² *Ibid*, Participant #12, at 13.

³²³ *Ibid*, Participant #12, at 13.

³²⁴ Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law* (Cambridge: Cambridge University Press, 2010) at 8: "The hard work of ... law is never done."

However, Indigenous peoples face even harder work due to the ravages of colonialism. Generations of invalidation and degradation have led to “radical absences”, not just in colonial society, but also within Indigenous social and legal orders.³²⁵ Brant Castellano states:

The language of self-government has obscured the reality that Aboriginal Peoples are engaged in a struggle to *restore ethical order in their communities and nations*. ...Efforts to regain control of education, health, justice, etc. are only in part about the power to govern. They are fundamentally about restoring order to daily living in conformity with ancient and enduring principles that support life.³²⁶

In Chapter Two, I said I hoped legal scholars, through respectful and robust engagement with Indigenous laws, could support Indigenous communities doing the ongoing work of accessing, understanding and applying their own laws, as part of a larger political project of rebuilding citizenry and restoring peace, order and good governance.³²⁷ The fact there are lively debates and thoughtful nuanced engagement with the Cree legal principles by members of the *Aseniwuche Winewak*, lead me to feel cautiously optimistic the framework of principles does provide solid support for Indigenous communities who are rebuilding and revitalizing ancient and enduring Indigenous legal principles that support life. I feel confident the *Aseniwuche Winewak* is up for this restorative work and this method will be useful for it. Like everything else, whether Indigenous communities choose to do this, will be and should be up to each community themselves.

Where and how can the Cree legal principles, as identified within the framework and discussed by *Aseniwuche Winewak* community members, be

³²⁵ de Sousa Santos, *supra* note 7.

³²⁶ Brant Castellano, *supra* note 1, at 112 (emphasis mine).

³²⁷ Chapter Two, at 69-70 (Sekaquaptewa and Napoleon).

reconciled and harmonized with Canadian laws, to create the necessary space for public, accountable and adequately resourced application in our profoundly intertwined societies and legal orders? In the final part of this dissertation, I examine the existing spaces and intellectual barriers for the reception, recognition and application of Indigenous legal principles within the current Canadian political and legal institutions and imaginations.

Chapter Six: Navigating Through Narratives of Despair: Making Space for the Cree Reasonable Person in the Canadian Justice System

We [settlers and descendants] came up as Chapter 15 of the story. A little too early perhaps.¹

1. Introduction:

In the Cree language, many words assume or require a response. For example, when greeting someone, you say “*Tansi*.” This does not translate into “hello”, but rather closer to “How are you?” The response is “*Manando*” (I am well). The flow and assumptions of conversation embedded in the Cree language reminds us speech always occurs in relation to others. When you speak, it matters who is listening, what they hear and how they choose to respond or not respond. Indifference and disengagement are the most effective forms of silencing. If no one is listening, you can speak all you want, and still be voiceless.

When I was speaking informally to professionals about the possibility of a Cree Justice process in the Grande Cache area, a couple justice system professionals told me, separately, they thought there was no need for one, because the *Aseniwuche Winewak* themselves were not actually over-represented in the justice system. I was taken aback, first, because, from my personal experience, there seemed to be a great deal of interaction with the justice system, and second, because they saw the amelioration of the issue of over-incarceration as the *sole* rationale of creating space for Aboriginal justice in Canada. By this logic, if Aboriginal justice initiatives *were*

¹ Michael Asch, “Canadian Sovereignty and Universal History” in *Storied Communities: Narratives of Contact and Arrival in Constituting Community* (Vancouver: UBC Press, 2011) at 29, paraphrasing a verbal report by Ted Chamberlin during RCAP about where European settlers came up in the story of Gitksan history [Asch].

successful in ameliorating over-incarceration of Aboriginal people in Canada, they would be eliminated as unnecessary.

Significantly, neither turned their minds to the issues of under-reporting and under-protection. However, it was even more striking that neither was able to imagine the *Aseniwuche Winewak* wanting to run their own justice process because they have their own longstanding traditions of thought and principled ways of responding to universal human and social issues and they wished to implement these in a more contemporary, structured way. As the community participants stated in their feedback, most believe their own ways, at bottom, make more sense and would be more *effective* in maintaining safety, peace and order in their communities.²

Indigenous laws exist. After centuries of their existence being a deep absence in Canadian legal and political thought and practice, there are increasing calls for and interest in recovering and revitalizing Indigenous laws, and using them in more formal and explicit ways. In the first part of this dissertation, I found that there are ongoing challenges but also cogent methods Indigenous legal scholars can use to ascertain and articulate Indigenous laws from an internal point of view. I demonstrated how legal scholars can engage with Indigenous legal traditions, using structured methods to do so respectfully and robustly. We can adapt and apply basic skills learned in law school to approach, analyze and organize Indigenous legal principles in accessible and transparent frameworks, deepen our understanding about background or meta-principles, and develop resources that concretely

² Chapter Five at 212-214.

support Indigenous communities to apply their own legal principles in more formal and explicit ways today. The results of my research also demonstrate that, while there is lingering damage from colonialism and decidedly uneven ground, Indigenous legal thought and practice clearly persists. The rich normative resources from Indigenous legal traditions are, with hard work, accessible, understandable and applicable today.

In this final part of my dissertation, I turn to a haunting question. Does any of this matter? Is there is space, in the day-to-day reality, *and* in the imaginary of contemporary Canada, for the type of rigorous Indigenous legal reasoning that David Macphee imagined being implemented in a contemporary formal Cree justice process? This will require space for, not isolated elements, disconnected practices,³ or vague superficial pan-Indigenous “values”⁴ but for public Cree legal *thinking* to take root in an explicit way.

In this chapter, I explore whether there is logical space within our current narratives to implement the rigorous and nuanced Cree legal thinking the *Aseniwuche Winewak* participants demonstrated and David MacPhee envisions occurring more formally within a Cree justice process. The context that Cree legal thought exists in today includes iterative “narratives of despair”, perpetuated through the mainstream media, the legal system and even the political narrative of trauma that aims to push back against these. These narratives of despair contribute to maintaining the intractable conflicts, violence and conditions of vulnerability for Indigenous people. In this chapter, I introduce a representative figure of Cree legal

³ Chapter Two at 30 (Napoleon).

⁴ Chapter Two at 32 (Fletcher).

reasoning – the reasonable Cree person, drawn from logical premises and the findings in the previous chapters. Through this figure, I review the current media, legal and political narratives, as well as the spaces within Canadian justice system with potential for Indigenous laws to be rigorously and transparently applied, as well as the false dichotomy between safety and healing. I conclude there is intellectual work needed to expand our narratives or move beyond these before this occurs. We need serious and sustained engagement with Indigenous legal traditions. We non-Indigenous people need to listen better.

2. The Reasonable Cree Person:

So many societal and academic stories about Indigenous peoples start in the wrong place.⁵ The justification for creating space for Indigenous laws to address violence and vulnerability within the criminal justice system also tends to start with the massive failure of the justice system in relation to Aboriginal peoples, both in terms of over-incarceration and under-protection.⁶ These heartbreaking, terrifying and demoralizing “two sides of the same coin” are very real.⁷ There is a long and

⁵ Asch, *supra* note 1. Asch argues, “We [settlers and descendents] are Chapter Fifteen of the story of this place and our stories are to be added to and interact with other stories, but our stories cannot substitute for them” (at 29). As with land, so with law.

⁶ “The justice system has failed... Aboriginal people on a massive scale” was the opening statement of the Manitoba Justice Inquiry. See A.C. Hamilton and C.M. Sinclair, Commissioners, *The Justice System and Aboriginal People: Report of the Aboriginal Justice Inquiry of Manitoba*, online at <http://www.ajic.mb.ca/volume1/chapter5.html#8>. See also James C. MacPherson, “Report from the Round Table Rapporteur” [Report from the Roundtable] in *Aboriginal People and the Justice System: National Round Table on Aboriginal Justice Issues* (1993) at 4 [RCAP Roundtable on Justice]. For some of the statistics on under-protection, see Canada, Canadian Centre for Justice Statistics, Profile Series: 18, *Aboriginal Peoples in Canada* (2001), online at <http://www.statcan.ca/english/research/85F0033MIE/85F0033MIE2001001.pdf>, at 6-7.

⁷ Jonathan Rudin, “Aboriginal Peoples and the Criminal Justice System”

continuing history of misunderstandings and reasonable distrust generated by colonialism, systemic and individual racism, cultural differences and entrenched poverty and social dislocation. I wholeheartedly agree that the “imposition visited upon Indigenous people as part of colonization” and “coercive nature of that encounter” that have “impeded Indigenous peoples’ ability to develop and express their distinctive understandings” give us, as Jeremy Webber says, “reason to make space.”⁸ Yet I wonder about the unintended effects of giving such pride of place to the need for amelioration of relatively recent social issues, often with a gloss of ‘cultural difference.’ Why don’t we focus on what must have been, as a matter of logic alone, a long history of successful, or at least adequate, Indigenous social ordering, including legal resources for responding to universal social and human issues all laws grapple with.

The spaces that tend to be created or permitted within the state justice system don’t seem to be making a significant impact on effectively ameliorating systemic and background issues or their impacts. There have been a simply immense amount of studies and inquiries.⁹ For a very long time, we have known that, statistically, Indigenous people are more likely than non-Indigenous people to

(2007), Research paper commissioned for the Ipperwash Inquiry, online: http://www.archives.gov.on.ca/en/e_records/ipperwash/policy_part/research/pdf/Rudin.pdf, at 64.

⁸ Jeremy Webber, “The Grammar of Customary Law” (2009) 54 McGill LJ 579 at 616 [Webber, Grammar].

⁹ Between 1967 and 1993, when the Royal Commission of Aboriginal Peoples [RCAP] report was written, there were over 30 government commissioned studies investigating the causes and possible solutions to this massive failure. See Carole Blackburn, “Aboriginal Justice Inquiries, Task Forces and Commissions: An Update” in RCAP Report from the Roundtable, *supra* note 6 at 15. Eight of these were reviewed for the Roundtable on Justice (at 16-38). Many other reports and inquiries have been commissioned since, including the Ipperwash and Stonechild Inquiries.

be victims of crime, be victims of violent crime and victims of spousal assault.¹⁰ According to a comprehensive study by the RCMP, there are 1017 police recorded incidents of Indigenous female homicide victims and 164 unresolved missing Indigenous females between 1980 and 2012 in Canada.¹¹ Violence against women is a world wide epidemic, yet Indigenous women are three times more likely to be violently victimized than their non-Indigenous counterparts.¹² While homicide rates for non-Indigenous women have decreased, they have increased for Indigenous women over the same time period in Canada.¹³

Indigenous people, including women and youth are over-represented in prison, are considered higher risk to reoffend and have higher needs.¹⁴ In 2001, Indigenous women accounted for almost one-quarter of female inmates. In 2014, the Office of the Correctional Investigator's report states the Aboriginal inmate population is "growing rapidly" (increasing 47.4% since 2005).¹⁵ In 2015, the CI Office states the Indigenous population has increased 37.3%. Indigenous women

¹⁰ Canada, Canadian Centre for Justice Statistics, Profile Series: 18, Aboriginal Peoples in Canada (Ottawa: Canadian Centre for Justice Statistics, 2001), online: <http://www.statcan.gc.ca/pub/85f0033m/85f0033m2001001-eng.pdf> [Justice Statistics, Aboriginal, 2001] at 6-7.

¹¹ Royal Canadian Mounted Police, "Missing and Murdered Aboriginal Women: A National Operational Overview" (2014), online: <http://www.rcmp-grc.gc.ca/pubs/mmaw-faapd-eng.pdf> at 6-7 [RCMP Missing and Murdered Aboriginal Women].

¹² *Ibid* at 7.

¹³ *Ibid* at 10. According to the RCMP report, the proportion of Aboriginal female homicide victims have increased from 8% in 1984 to 23% in 2012 and is "a direct reflection of the decrease in non-Aboriginal female homicides."

¹⁴ Justice Statistics, Aboriginal, 2001, *supra* note at 10-11.

¹⁵ Howard Sapers, "Office of the Correctional Investigator's Annual Report, 2013-2014", online: <http://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20132014-eng.aspx#sIV>

now make up 33% of the total inmate population under federal jurisdiction, representing an increase of 109% between 2001 and 2011.¹⁶

Napoleon has cautioned about the risk of ‘narratives of despair’ about the current plight of many Indigenous peoples foreclosing, or rendering invisible and unexamined, other narratives within both state and Indigenous societies and legal traditions.¹⁷ One reality today is that no legal or other tradition stands alone. We are all exposed and affected by the narratives of others and the Canadian state exists as a massive social fact that is not going anywhere. As discussed in the previous chapter, the Canadian state maintains a monopoly on the legitimate use of coercive force, so a Cree justice process addressing criminal law matters will require negotiation and harmonization with state laws as well as cooperation and resources from state legal actors.

I have addressed many audiences, academic and non-academic, Indigenous and non-Indigenous in the past six years, and argued we need to shift our assumptions in order to recognize, like Borrows does, that Indigenous people are reasoning people in reasonable legal orders.¹⁸ There are only so many times you can say this out loud, and watch the lights go on in people’s faces, before you feel a deep sorrow and something close to rage, even as a non-Indigenous person. The weight of

¹⁶ “Aboriginal Issues,” Government of Canada, Office of the Correctional Investigator, online: <http://www.oci-bec.gc.ca/cnt/priorities-priorites/aboriginals-autochtones-eng.aspx>

¹⁷ Val Napoleon, “Indigenous Citizenship and the Law,” February 19th, 2013, McGill University The Social Diversity and Education Office’s Indigenous Education Series Public Lecture [Napoleon, Indigenous Citizenship].

¹⁸ Chapter Two, at 61.

radical absence,¹⁹ the immensity of the erasure, denigration and dehumanization hits you. How can this still be a necessary shift in 2015? Yet it clearly is. There is still so much “unlearning” to do.²⁰

Borrows has used the Anishinabek trickster figure, Nanabush, to explore Canadian law²¹, and it is high time the visiting went respectfully in the other direction too. Surely the common- law’s best-loved mythical figure is the ‘Reasonable Person’. One of the best judicial descriptions of the reasonable person’, by Justice Laidlaw in *Arland and Arland v. Taylor*, is as follows:

A mythical creature of law whose conduct is the standard by which the Courts measure the conduct of all other persons and find it to be proper or improper in particular circumstances as they may exist from time to time. He is not an extraordinary or unusual creature; he is not superhuman; he is not required to display the highest skill of which anyone is capable; he is not a genius who can perform uncommon feats, nor is he possessed of unusual powers of foresight. He is a person of normal intelligence who makes prudence a guide to his conduct....His conduct is the standard “adopted in the community by persons of ordinary intelligence and prudence”.²²

I think we need a reasonable Cree person to help us navigate out of the narratives of despair, by moving us beyond just amelioration of current social ills, or accepting unexamined practices, to understanding a process of explicit reasoning through Cree law.

¹⁹ Boaventura de Sousa Santos, “Beyond Abysmal Thinking: From Global Lines to Ecologies of Knowledge” (2007) *Eurozine*, online: <http://www.eurozine.com/articles/2007-06-29-santos-en.html> [de Sousa Santos].

²⁰ Sara Anderson, KAIROS Canada Education Associate, talks about the experiential “Blanket Exercise” she facilitated in many of the TRC events, to educate people about the real history of Indigenous dispossession, resistance and resilience, stating, “It is my hope that more people will be able to begin the process of unlearning the story they’ve been told their whole lives. Only then will we be able to walk on the path of reconciliation and create a new story for Canada.” Sara Anderson, “Unlearning Canada’s History: The Blanket Exercise” (May 13, 2015) *Rabble.ca*, online: <http://rabble.ca/blogs/bloggers/kairos-canada/2015/05/unlearning-canadas-history-blanket-exercise>

²¹ John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 51 and generally.

²² *Arland and Arland v. Taylor*, [1995] 3 DLR 358 (CA), [1955] OR 131, at 142.

The reasonable Cree person, as an ordinary person of normal intelligence and prudence, is clearly a cut above the mythical images of Indigenous peoples such as lawless, vanishing, performing, essentialized,²³ or “arcadians or barbarians”²⁴ At the same time, the reasonable Cree person does not “require the wisdom of Solomon”²⁵, and thus falls well below the equally mythical creatures of the “wise old elder”, or “noble” selfless environmental stewards.²⁶ Rather, the reasonable Cree person muddles along like the rest of us, an ordinary human actor who is capable of understanding and engaging rationally with laws.

Some legal theorists focus, not on the more formal manifestations of law, but rather on the legal reasoning in the judgment of ordinary actors ordering their affairs *through* law. Lon Fuller argues law can be seen as a “language of interaction” that creates meaning and predictability in people’s social behavior over time.²⁷ Gerald Postema maintains systems of law actually depend, for their force, not on traditional notions of habituation and enforcement, but rather, whether they make sense “as practical guides for self-directing agents...only when they are set in context of concrete practices, attitudes and patterns of social interaction.”²⁸ Fuller

²³ See descriptions of non-Indigenous people’s images of Indigenous peoples under these and other categories in Daniel Francis, *The Imaginary Indian: The Image of the Indian in Canadian Culture* (Vancouver: Arsenal Pulp Press, 1992) [Francis].

²⁴ James B. Waldram, *Revenge of the Windigo: The Construction of the Mind and Mental Health of North American Aboriginal Peoples* (Toronto: University of Toronto Press, 2004) at 300, talking about the obvious pervasive influence of a “primitivist discourse” of Indigenous peoples as “arcadians or barbarians” on researchers leading to conflicting and contradictory portraits of Indigenous peoples in the mental health field [Waldram, *Revenge of the Windigo*].

²⁵ *Stewart v. Pettie*, [1995] 1 SCR 131 at p. 150 [Stewart v Pettie].

²⁶ Francis, *supra* note 23.

²⁷ Lon Fuller, “Human Interaction and the Law” (1969) 14 *American Journal of Jurisprudence* 2, at 2 [Fuller, *Human Interaction*].

²⁸ Gerald Postema, “Implicit Law” (1993) 13 *Law and Philosophy* 361 at 375- 376 [Postema].

and Postema suggest a vital site of legal reasoning, generally, is in the daily lives of citizens who use law as a practical guide to reason through and make decisions in their own specific social circumstances. The reasonable Cree person is just this – an ordinary legal actor who uses the Cree legal tradition as a practical guide to think through and make reasonable and principled decisions, when, like the rest of us, she is called to judgment.²⁹

3. A Logical Starting Point

The reasonable Cree person cannot time travel, but, as a matter of ordinary logic alone, begins at a logical starting point. The logic goes like this: Prior to European contact or ‘effective control’, Indigenous peoples lived here, in this place, in groups, for thousands of years. We know that when groups of human beings live together, they have ways to manage themselves and all their affairs.³⁰ This task of coordination is “the most common of common denominators in law.”³¹ As stated above, Indigenous societies must have faced the inevitable and universal issues of human violence and vulnerability for millennia. Therefore, as a matter of logic alone, the reasonable Cree person’s starting point for any inquiry is that, *at some point*, and for a very long time, Cree and other Indigenous peoples managed and responded to these universal human issues successfully enough to maintain civil societies.

²⁹ Jennifer Nedelsky, “Judgment, Diversity, and Relational Autonomy” in Ronald Beiner and Jennifer Nedelsky (eds). *Judgment, Imagination, and Politics: Themes from Kant and Arendt* (Maryland: Rowman and Littlefield, 2001) at 103 [Nedelsky, Judgment].

³⁰ Lon Fuller describes law as “a direction of purposive human effort” consisting in “the enterprise of subjecting human conduct to the governance of rules”: Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964) at 130.

³¹ Webber, Grammar, *supra* note 8 at 583.

It feels a bit embarrassing to even have to point this out as a logical starting point, but it is important to do so, because the myth of Indigenous people as lawless, and without any internal regulation or intellectual resources for managing their own affairs has too often been used as a trope for European theorists and jurists to make claims about property and other rights, with no basis whatsoever.³² There have been devastating political and *legal* consequences for Indigenous societies based on illogical assumptions about an absence of law.³³ Dispensing with illogical starting points doesn't lead the reasonable Cree person to subscribe to a utopian vision of Indigenous legal traditions generally, or responses to human violence and vulnerability specifically. However, she has no logical reason to think Indigenous laws didn't work well enough for thousands of years.³⁴ Thus she can approach Cree and other Indigenous legal traditions, not as non-existent or paragons of perfection, but as reasonable legal orders with reasoning people. That is the logical starting point.

4. The Cree Legal Tradition as a Reasoning Process:

The Cree reasonable person knows Indigenous and non-Indigenous human beings are reasoning, feeling, imagining and seeking beings. She knows we are also vulnerable beings. The reasonable Cree person is not a stand in for all Cree people,

³² *Ibid*, at 591.

³³ See, for example: James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995), at 65, and Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty" An Essay on R v. Sparrow" (1991) 29 Alta L Rev 498 at 507.

³⁴ In Val Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (University of Victoria, Faculty of Law, PhD dissertation, 2009, unpublished, on file with the author), this argument is made persuasively throughout [Napoleon, *Ayook*].

nor does she speak for the Cree people as a whole. What makes the reasonable Cree person *Cree* is not physical location, biological identity or blood quantum, but that she reasons with and through the Cree legal tradition. She is a mythological figure of Cree legal thinking.

There is a difference between the common understanding of law and a *legal tradition*, although they are interconnected concepts.³⁵ It appears the most commonly understood and widely used definition of law is rules pertaining to social conduct. At the very least, theorists seem to agree that rules pertaining to social conduct seem to be a necessary *component* of all law.³⁶ Joseph Raz adds that people “need not be aware of rules as legal rules in order to be guided by rules which are in fact legal” and argues “law can and does exist in cultures which do not think of their legal institutions as legal”³⁷ Yet lists of do’s and don’ts are not terribly useful indicators of any law. As discussed at length in Chapter Four, rules, or even principles can become incomprehensible and even meaningless without an understanding of larger narratives they embody or are a part of.³⁸

³⁵ Law itself is an endlessly debated concept in western societies, with many “diverse, strange and even paradoxical” definitions H.L.A. Hart, *The Concept of Law* 2nd ed. (New York: Oxford University Press, 1997) [Hart]. Hart begins his classic text by observing: “Few questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange and even paradoxical ways as the question ‘What is law?’” (at 1).

³⁶ See, for example, Joseph Raz, “Can There be a Theory of Law?” in Martin P. Golding and William A Edmundson, eds., *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Oxford: Blackwell Publishing Ltd., 2005) at 324- 342, at 325 [Raz], Lon L. Fuller, *The Morality of Law* rev. ed. (New Haven: Yale University Press, 1969) at 106 [Fuller, *Morality*, *supra* note?? and Hart, *Ibid*, at 3.

³⁷ Raz, *supra* note 36, at 337. Raz maintains, the “concept of law is among the culture-transcending concepts. It is a concept which picks out an institution which exists even in societies which do not have such a concept.” (at 340).

³⁸ See Chapter Four at 159-164.

James Boyd White explains that “knowledge of the law is like knowledge of a language.” It is impossible to reduce it to a set of rules. Rather, knowledge of it “consists of being able to use it more or less well, in one set of the situations or another.”³⁹ Any first year law student learns this quickly enough. Just knowing the rules is never sufficient. Martin Krygier argues this aspect of law both embodies particular traditions and is “a profoundly traditional social practice.”⁴⁰ Participating in such a tradition “involves sharing a way of speaking about the world which, like language...shapes forms and in part envelops the thought of those who speak it and think through it.” This will make it “difficult for insiders to step outside of it or for outsiders to enter and participate in it untutored.” Legal traditions provide not just social rules, but also “substance, models, exemplars and a *language* in which to speak within and about law.”⁴¹

When we speak about Cree, or other Indigenous legal traditions then, we are talking about more than social rules. We are speaking about the Cree narratives that give social rules meaning, that make them meaningful and that make sense of the world around Cree individuals and communities. We are speaking about the languages through which this meaning-making occurs. Legal traditions are not only prescriptive, as norms that have “endured in different iterations in different times”⁴² but also *descriptive*. Martin Krygier says participation in any tradition, actually

³⁹ James Boyd White, “Legal Knowledge” (2001-2002) 115 *Harvard Law Review* 1396 at 1397 [White, Legal Knowledge].

⁴⁰ Martin Krygier, “Law as Tradition” (1986) 5, 2 *Law and Philosophy* 237-262 at 239 [Krygier]

⁴¹ *Ibid*, at 244.

⁴² Katharine T. Bartlett, “Tradition, Change, and the Idea of Progress in Feminist Legal Thought” (1995) *Wisconsin Law Review* 303 at 312 [Bartlett].

“shapes forms and in part envelops the thought of those who speak it and think through it.”⁴³ We not only turn to our legal traditions for information to solve present problems, we actually use them to *think through* the problem in the first place, to decide if it is a solvable problem or a problem at all. This is why legal meaning is actually world-making, why it becomes “the world in which we live”.⁴⁴

We are reasoning, feeling, imagining, seeking beings and we crave meaning from our experiences.⁴⁵ White calls us “meaning-making creatures”⁴⁶ MacIntyre says we are “essentially...story-telling animal[s]”.⁴⁷ Recent cognitive research has demonstrated these descriptions aren’t mere rhetoric. Our need for meaning is not secondary, but rather integral to our “know-how” and our reasoning processes themselves. Current cognitive research shows that stories actually “are a basic principle of the mind. Almost all of our experience, our knowledge, and our thinking are organized as stories.”⁴⁸ As well, logical and narrative thinking complement each other. Narrative thinking structures experience itself and makes experience communicable to others.⁴⁹ The complex, multi-vocal, living, evolving *reasoning* process that is a legal tradition gives us the necessary narratives to create and share meaning with each other.

⁴³ Krygier, *supra* note 40, at 244.

⁴⁴ Robert Covers, “Nomos and Narrative” (1983) 97 Harv L Rev 4 at 5 [Covers].

⁴⁵ James Boyd White, *Living Speech: Resisting the Empire of Force* (New Jersey: Princeton University Press, 2006) at 41 [White, *Living Speech*] arguing: “This capacity is the deepest nerve of our life, and our instinct to protect it and its freedom at almost any cost is a right one.”

⁴⁶ *Ibid.*, at 41.

⁴⁷ Alisdair MacIntyre, *After Virtue: A Study in Moral Virtue* 3rd ed. (Indiana: University of Notre Dame Press, 2007) at 216 [MacIntyre].

⁴⁸ Lori Graham and Stephen McJohn, “Cognition, Law, Stories” (2008) Legal Studies Research Paper Series, Research Paper 08-14 at 28 [Graham and McJohn].

⁴⁹ Krygier, *supra* note 40, at 4.

Cree and other Indigenous legal traditions were dismissed, displaced and denigrated for generations, by powerful state actors. All judgment of the particular substantive content of these legal traditions aside, for better or worse, they were part of the narrative processes through which Cree human experiences were made comprehensible and communicable to others, and through which Cree know-how, reasoning and judgment developed for generations. John Gray argues eloquently:

What makes us essential... is what is most accidental. Indeed, the very meaning of anyone's life is a matter of local knowledge, and the greatest disaster that can befall any community is that the shared understandings – the myths, rituals and narratives – that confer meaning on the lives of its participants be dissipated in too rapid or too sweeping of cultural change.⁵⁰

To deprive someone of their stories is, as MacIntyre puts it in the case of children, is to “leave them unscripted, anxious stutterers in their action as well as their words.”⁵¹ The lack of an intelligible narrative to place one's actions and experiences into is an extremely deep loss, community destroying and potentially life-threatening.⁵² It is not rational to dismiss or ridicule most or all of a peoples' collective reasoning processes, developed over generations, and then dismiss their practices as irrational.

This is why positing a historic utopia cannot adequately capture the importance of Cree legal traditions to human flourishing and social order within

⁵⁰ John Gray, *Enlightenment's Wake: Politics and culture at the close of the modern age* (London and New York: Routledge, 1996) at 105. Oakeshott takes this one step farther and argues “Change is a threat to identity and every change is an emblem of extinction” Michael Oakeshott, *Rationalism in Politics and Other Essays* (Indianapolis, IL: Liberty Press, 1991) at 410 [Oakeshott].

⁵¹ MacIntyre, *supra* note 47, at 216.

⁵² MacIntyre, *Ibid*, at 217. Arguing, “when someone complains – as do some of those who attempt or commit suicide – that his or her life is meaningless, he or she is often and perhaps characteristically complaining that the narrative of their life has become unintelligible to them, that it lacks any point.”

Cree communities, and the immensity of the terrible losses wrought by colonialism. In part, it is because of what it too erases – the ability to imagine the contemporary, reasonable Cree person, the value of Cree social rules, meaning making, and world-making narratives, socially embodied generational conversations and debates, and the capacity to confidently respond to universal human and social issues. The core narrative of *Wah-ko-to-win* explored in Chapter Four and the particulars of specific Cree legal principles outlined in Chapter Three, as discussed by community participants in Chapter Five are “just scratching the surface” of the vast Cree intellectual resources that make up the multi-generational project that is the Cree legal tradition. This “vast storehouse” of experience and solutions,⁵³ is why I think the concept of the reasonable Cree person can help us more productively and *accurately* begin a conversation of why it is so vital to access, understand and apply Cree legal principles to the relatively recent, but also ugly, urgent and devastating social circumstances of present day.

These dangerous social conditions leads to an important question. Is the reasonable Cree person alive? Napoleon asks how we can confront the appalling violence against and erasure of Indigenous women, while still viewing Indigenous women as active agents.⁵⁴ How do we fully acknowledge the horror and danger Indigenous women face, the relentless powerlessness, fear and grief ricocheting through their lives, loves and relationships, the mental and emotional toll of existing under the constant threat and actualization of violence, within often bleak

⁵³ Krygier, *supra* note 40 at 248, argues the past, in a tradition, is not so much a historical truth or golden moment in time we seek to recover, but rather “a vast storehouse to be searched for solutions to present problems.”

⁵⁴ I am paraphrasing Napoleon, Indigenous Citizenship, *supra* note 17.

conditions of vulnerability? How do we do this while still acknowledging Indigenous women are first and foremost citizens, of their First Nations and of Canada, indeed, legal agents, who are capable of and indeed constantly reasoning and acting to reach goals, to build lives, to create safety and often to protect and care for others?⁵⁵

There are no easy answers. I can identify nothing about our Cree reasonable person that would protect her from suffering the fate of far too many Indigenous women and girls across Canada. Nothing.⁵⁶ Starting the conversation from a different place and recognizing her reasoning process does not render her invincible. Because this is just a dissertation, as the author it is in my control to ensure she survives –something I unfortunately cannot do for my own daughter or nieces in real life.

5. The Cree Reasonable Person's Tools for Practical Reason

What would be some of the reasonable Cree person's tools for practical reason?

Based on my research in the preceding chapters, the Cree reasonable person would not differ significantly from Justice Laidlaw's description. It is just that her reasoning would have developed within the language of Cree legal traditions, rather than the common law. Her conduct could be the standard adopted in the Cree community by persons of ordinary intelligence and prudence. Relying on my research results, I would argue the Cree reasonable person's reasoning process

⁵⁵ *Ibid.*

⁵⁶ Contrary to popular belief that "high risk" lifestyles cause the murders of Indigenous women, the *vast* majority of Indigenous female homicide victims are not involved in the sex trade (88%) or otherwise supporting themselves through illegal means (82%). RCMP Missing and Murdered Aboriginal Women Report, *supra* note 11 at 17.

would be informed by four background narratives or meta-principles that guide Cree practical reason: *Wah-ko-to-win*, generosity and good-heartedness, education and guidance, and case by case reasoning through Cree legal principles.

a. *Wah-ko-to-win*

As described at much greater length in Chapter Four, the reasonable Cree person both understands and values the concept of *Wah-ko-to-win*, the fact we all live embedded and connected in multiple nested relationships. Indeed, relational reasoning would be central to the reasonable Cree person's. This includes recognition of our larger relationships with the spiritual and natural world and some consciousness that there are natural and spiritual consequences to our own and others' actions. This also includes recognition of ours and others familial and human relationships, our close proximity and interconnectedness to many others.

The reasonable Cree person sees interdependence and reciprocity as ideals, as opposed to an ideal of independence and frontier individuality. However, like all ordinary people, she will not always live up to or achieve her ideals. The fact we all live in relationship will infuse her reasoning. It will lead her to emphasize principles such as healing and re-integration when possible, but also to warn people appropriately, prevent future harms, and be alert to the need for supervision and stronger measures such as separation where needed to keep loved ones safe from other loved ones if their actions are harming or endangering them. It will also lead for her to carefully weigh the risks and benefits of intervening or confronting others, due to the relational costs. She may reasonably choose avoidance in order to prevent conflict from escalating where there is no immediate danger or risk to

others. Where there is danger or violence, she decides to take action fully aware of the potential impacts on her and others in relationship with both the offender and the victim.

The reasonable Cree person relies on relationships as resources where they are available. Where she can, she invites or includes people who have relationships with, or are particularly capable of connecting with and managing an individual who puts people at risk. She also seeks out these relationships for sources of support, teaching and persuading individuals in less urgent, more chronic issues or who are struggling with interpersonal conflict. She carefully considers who is best suited to provide help and guidance in each particular case, depending on their particular skills and knowledge. If matters did not improve with one person, she might seek out another prior to assuming the individual was rejecting help.

b. Good-Heartedness, Kindness, Generosity and Hospitality

The reasonable Cree person believes that relationship-building is foundational to peace between peoples. She believes that the strongest and best leaders create relationships with others through acts of vulnerability, kindness and generosity and hospitality, and that these powerful actions can stop wars, build peace, save lives and enrich a people with new ideas and resources. She understands it is vital to maintain and regularly renew respectful relationships between peoples who rely on each other or live in close proximity.

The reasonable Cree person understands it is her obligation to ask for help when she needs it. She also understands that, if someone asks her for help because she is capable of doing so, she should help them. It doesn't matter if the person is

within her close relationships, a stranger or from another community entirely. She believes that it is more normal to act from compassion than it is to act from obligation. The reasonable Cree person believes that it is important to give back to those who provide help whenever she can.

The reasonable Cree person believes the best legal decision-makers are those who are good-hearted. She sees kindness, caring and making an effort to truly listen and understand others as effective, even essential skills for a legal decision-maker to have. She knows that intensive acts of kindness, care and hospitality can sometimes heal and transform those who are harmful back into their normal selves, or from a dangerous stranger into a new and valued relation. The reasonable Cree person understands that kindness is power. She aspires toward being goodhearted.

c. Education, Guidance and Support

The reasonable Cree person sees teaching, guidance and support as the most effective way of teaching right from wrong and setting or re-establishing community standards. She sees helping someone to understand what he or she has done wrong and how he or she has affected others as the most effective way to help them change harmful behaviours. She believes education is the best way to create and maintain community safety and standards. She sees support as a crucial aspect of supervision, and a life long need for some offenders.

The reasonable Cree person is always learning. She learns from natural and spiritual consequences of her actions, and believes others can learn this way too. She learns from and teaches from the natural world around her, through observation and analogy. She pays attention to spiritual signs, experiences,

including her dreams and the dreams of others, and deliberates about their interpretation and application with others. She learns from and teaches through stories. She learns from and teaches through experience, reading, from listening to elders and mentors, from school, from workshops and conferences, from scientific and social science research.

d. Case by Case Reasoning through Cree Legal Principles:

Just as the “reasonable person” often “bears a suspicious resemblance to the judge”,⁵⁷ my reasonable Cree person resembles the *Aseniwuche Winewak* community participants who gave such thoughtful and carefully reasoned feedback about applying Cree legal principles. She is capable of thinking through the range and complexity of Cree legal principles. She can imagine how and when to apply specific Cree legal principles on a case-by-case basis. She prioritizes healing, taking responsibility and re-integration, without assuming they are always appropriate or possible for every person in every case. She can flexibly consider using or blending these responses with other principles, such as supervision and temporary or more permanent separation. She is aware of the risks that come with each response.

The reasonable Cree person may disagree with other reasonable people about the applicability of certain Cree legal principles in certain cases. As demonstrated clearly by the *Aseniwuche Winewak* community participants, no

⁵⁷ Mayo Moran, *Rethinking the Reasonable Person* (Oxford: Oxford University Press, 2003) as quoted in Allen M. Linden, Lewis N. Klar and Bruce Feldthusen, *Canadian Tort Law: Cases, Notes and Materials* 12th ed. (Toronto: LexisNexis Canada, 2004) at 181.

complex tradition is ever univocal⁵⁸ or internally consistent.⁵⁹ Complex traditions such as law never stand alone. Not only are they made up of multiple traditions themselves, but they are also embedded in other traditions, within a broader culture, and ultimately within the material reality that includes the natural world. This means traditions are always facing external changes, bringing change one way or the other.⁶⁰ Vitally, a legal tradition can also change by *not* changing in response to new circumstances. Bartlett points out that when a tradition “stops making sense under existing circumstances” it will not continue. This means “the strength of a legal tradition is not how closely it adheres to its original form but how well it is able to develop and remain relevant under changing circumstances.”⁶¹ This means legal traditions must change over time. In reference to her work regarding the Gitksan legal order, Napoleon points out:

the reality is that over time, implicit and explicit Gitksan law will reflect the world around it – including personal, political, economic, and legal relationships with other peoples. This does not mean, however, that Gitksan people will somehow cease to be Gitksan people, but rather that the Gitksan legal order now reflects the realities [of the present].⁶²

Tradition is “never fixed, stable, and unchanging”, but rather something that “evolves and builds on what preceded it much like the common law.”⁶³

⁵⁸ Frederick L. Will, “Reason and Tradition” (1983) 17, 4 *Journal of Aesthetic Education* 91-105 at 100. See also Bartlett, *supra* note 42 at 317: “Traditions are not unitary, coherent, or integrated wholes.”

⁵⁹ Bartlett, *Ibid.*

⁶⁰ Edward Shils, *Tradition* (Chicago: University of Chicago Press, 1981) at 142 and 151. Shill’s sources of external change include changes in the environment, demographic changes, military intrusion, emigration, trade and technological advances (at 327).

⁶¹ Bartlett, *supra* note 42, at 331.

⁶² Napoleon, Ayook, *supra* note 34 at 49. Napoleon’s date of writing was 2008.

⁶³ Bartlett, *supra* note 42, at 308. MacIntyre points out that traditions are also embedded in the “larger and longer history of the tradition as well” These practices also make tradition “intelligible” to us in the present (MacIntyre, *supra* note 47, at 222).

Just as the Cree legal tradition, like the Gitksan legal tradition, reflects the realities of the present, so too does the reasonable Cree person's legal reasoning. The reasonable Cree person's thinking reflects a long history of Cree legal thought and experience, but also the current political, social, economic and natural realities of today and legal relationships with other peoples. She knows Cree laws hold no simple answers or silver bullets and implementing Cree legal principles is a lot of hard work. She considers, as the community participants did, whether certain principles are applicable today, and what might need to be changed. She knows each case is different, and so is each community. She is keenly aware of the political context, realities and resources around her.

The reasonable Cree person is a person of ordinary intelligence and prudence. However, her reasoning emerges from the Cree legal tradition, rather than the common-law tradition. While this sketch of her resources for practical reason is not exhaustive, it is enough, for our purposes, to proceed with the reasonable Cree person as a figurative representative of Cree legal thought. And so we can take our reasonable Cree person visiting through the narratives within Canadian popular, legal and political thinking, and to the existing spaces for addressing the issues she and too many other Indigenous women and children face daily in contemporary Canada. We must explore whether she could be welcome, or even imaginable within them.

6. Narratives about Violence against Indigenous Women and Children

a. The Media Narrative

Bradley Gorham discusses the powerful role of the media in constructing common-sense reality in any society. He argues that much of the knowledge that forms the basis on which we behave is a socially constructed “agreement reality” rather than experiential or “objective reality.” As “much of our knowledge - those images and pictures in our heads - comes not from personal experiences but from other people”, the media can play a larger role than we might think in our beliefs and assumptions about the world.⁶⁴ Gorham calls this the “power of myth” which is “all those unstated, unquestioned, and unnoticed beliefs we assume about the world.”⁶⁵ A subset of these “social reality beliefs” is stereotypes, defined as “understandings about particular social groups that we have learned from our social world.”⁶⁶ Media provides us with social information, which includes dominant myths and stereotypes, both constructed as natural and inarguable.⁶⁷ This constructed social reality can remain at a pre-reflexive level, deeply informing the scope of our reactions and judgments of objective reality.

Mark Cronlund Anderson and Carmen L Robertson relentlessly demonstrate the pervasive and pejorative colonial, racialized, and essentialized images of

⁶⁴ Bradley Gorham, “Stereotypes in the Media: So What?” (1999) 10 *Howard Journal of Communications* 229 at 232 [Gorman].

⁶⁵ *Ibid* at 233.

⁶⁶ *Ibid* at 233. He stresses that “Such meanings and representations are not universally agreed upon”.

⁶⁷ *Ibid* at 233.

Indigenous people in the main stream Canadian media.⁶⁸ Their central claim in the book is that mainstream Canadian newspapers have, since the nineteenth century, portrayed Indigenous peoples in ways that promote colonial constructs as just plain common sense for the majority of Canadians:

Colonial representations as common sense, naturalized and totalized, comprise the gist of what reflects Canada's past and present colonial imaginary in the printed press.⁶⁹

These representations consist of endless variations and intersections of three essentialized characteristics: moral depravity, innate inferiority, and a lack of evolution, or "stubborn resistance to progress.", continuing, in various forms, to present day.⁷⁰

Anderson and Robertson discuss more recent news stories about violence and conflicts between Aboriginal people, and it is here where their central insight – that the demeaning images of Aboriginal peoples in the news have become an unquestioned "common-sense" in the Canadian collective imaginary – comes into play for the reasonable Cree person today. Political and legal decision-makers, non-Indigenous and Indigenous alike, read the same mainstream newspapers. Charles Taylor has pointed out that "misrecognition shows not just a lack of due respect. It can inflict a grievous wound, saddling its victims with crippling self-hatred."⁷¹ It is at least worth questioning to what extent this relentless misrecognition has fed back into lateral violence within many Aboriginal communities today, which, in turn,

⁶⁸ Mark Cronlund Anderson and Carmen L. Robertson, *Seeing Red: A History of Natives in Canadian Newspapers* (Winnipeg: University of Manitoba Press, 2011).

⁶⁹ *Ibid* at 9.

⁷⁰ *Ibid* at 6-7.

⁷¹ Charles Taylor, "The Politics of Recognition" in Amy Gutman, ed. *Multiculturalism*. (New Jersey: Princeton University Press, 1994).

continues to provide ample fodder for news stories to perpetuate this misrecognition. This constructed social reality may make it difficult for many people to *recognize* the complexity of today's painful iterations, let alone the possibility of talking about them honestly, compassionately, and respectfully, according to Cree legal principles.

b. State Law's Narratives

State legal systems tell stories of their own, and currently have unique power in our society for stifling discussion and debate about these stories.⁷² In the primary story about law in our society, the law is a stable ground of legal rules and principles, where suffering caused by law or mistakes in the legal process are an unfortunate but a lesser evil in the overall cost-benefit analysis.⁷³ Legal racism and inequality are relics of the past, which the legal system is slowly overcoming.⁷⁴ The judicial process “knowingly struggles against” and “aspires to an autonomy from distributional inequalities.”⁷⁵ In Canada, we add to this the Charter age of not just formal equality, but substantive equality, where we seek, not just equality of process, but equality of opportunities and outcomes.⁷⁶

These noble and aspirational narratives are rooted in an even more basic claim of rationality. Adjudication is seen as “a device which gives formal and

⁷² Pierre Bourdieu, “The Force of Law: Toward a Sociology of the Juridical Field” trans. Richard Terdiman, (1987) 38 *Hastings Law Journal* 805 at 838 [Bourdieu].

⁷³ Louis E. Wolcher, “Universal Suffering and the Ultimate Task of Law” (2006) 24 *Windsor Y.B. Access Just.* 361, at 381 [Wolcher].

⁷⁴ Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction* (New York: New York University Press, 2001) at 91 [Delgado and Stefancic].

⁷⁵ Oren Fiss, “Against Settlement” (1984) 93 *Yale L.J.* 1073 at 1078.

⁷⁶ Jonathan Rudin, “Aboriginal Justice and Restorative Justice” in Elizabeth Elliot and Robert Gordon, *New Directions in Restorative Justice: Issues, Practice, Evaluation* (Portland, Or.: Willan Publishing, 2005) at 103-109 [Rudin].

institutional expression the influence of reasoned argument in human affairs.” It thus “assumes a burden of rationality.”⁷⁷ In legal practice, courts are obligated to give reasons⁷⁸, and, as already discussed, one of the most familiar conceits in legal reasoning is the “common-law’s famous lyricism” of the “reasonable person” who, unsurprisingly, often “turns out to bear a rather suspicious similarity to the judge.”⁷⁹

Accessing the state legal system’s rationality comes with a significant catch, beyond even ‘access to justice’ issues. In order to access its power, one must tacitly agree to its “rules and conventions” and submit to what Pierre Bordieu calls the “juridical construction of the issue.”⁸⁰ This requires a process of “translation”⁸¹ or “conversion”⁸² through which ordinary experience is completely redefined into a recognized legal category.⁸³ This means that whatever the original experience or need is, it “tends to be converted into a claim of right or an accusation of fault or guilt.”⁸⁴ Lon Fuller spells this out plainly:

A naked demand is distinguished from a claim of right by the fact that the latter is a demand supported by a principle; likewise, a mere expression of displeasure or resentment is distinguished from an accusation by the fact the latter rests upon some principle.⁸⁵

On top of this conversion, lived experience and need (demand or displeasure) are further narrowed by first, the need to come to some relatively “black and white”

⁷⁷ Lon Fuller, “The Forms and Limits of Adjudication” (1978) 92 Harv L Rev 353 at 366 [Fuller, Adjudication].

⁷⁸ *R v. Sheppard* [2002] 1 SCR 869, 2002 SCC 26 at p.5 and 15.

⁷⁹ Mayo Moran, *Rethinking the Reasonable Person* (Oxford: Oxford University Press, 2003) as quoted in Allen M. Linden, Lewis N. Klar and Bruce Feldthusen, *Canadian Tort Law: Cases, Notes and Materials* 12th ed. (Toronto: LexisNexis Canada, 2004) at 181.

⁸⁰ Bourdieu, *supra* note 72, at 831.

⁸¹ *Ibid*, at 833-834.

⁸² Fuller, Adjudication, *supra* note 77, at 369.

⁸³ Bourdieu, *supra* note 72, at 831.

⁸⁴ Fuller, Adjudication, *supra* note 77, at 369.

⁸⁵ Fuller, Adjudication, *Ibid*, at 369.

decision, second, the need to conform one's claims to recognized procedures, and finally, the reliance on precedent to reach a decision.⁸⁶

Bourdieu argues that the fact that the original parsing into categories, decision-making and interpretation of precedent are carried out by actors who are largely from the dominant class in any society, means the "ethos of legal practitioners" and the "immanent logic of legal texts" which justify and determine outcomes, "are strongly in harmony with the interests, values, and world-views of these dominant forces."⁸⁷ In this way, class, gender and racial inequities (which converge with the interests of the dominant class⁸⁸) are perpetuated through the very legal culture that makes such grand claims of liberty, equality and justice.⁸⁹ Individuals are, for the most part, constructed as ahistorical juridical equals. The combination of State law's claim to rationality and unquestioned power to judge authoritatively, along its power to define what is justiciable obliterates a great deal of context and experience from legal judgments, including the agency and judgment of Indigenous actors, the broader social realities affecting individuals, all relational networks, and any explicitly Indigenous legal principles.

The courts have a unique power to claim and name any issue in a way that has profound effects on the societal perception of that issue.⁹⁰ In cases of violence against Indigenous women and children, courts determine guilt or innocence of individuals, allocate individual responsibility and select individual punishment for

⁸⁶ Bourdieu, *supra* note 72, at 832.

⁸⁷ *Ibid* at 842.

⁸⁸ Delgado and Stefancic, *supra* note 74, at 7.

⁸⁹ Bourdieu, *supra* note 72, at 842.

⁹⁰ *Ibid*, at 848.

harms done.⁹¹ Where children are involved or impacted, courts determine more complex decisions of child apprehension or custody orders. The focus is on decontextualized individuals, “lifestyles” and “choice” and obfuscates the material circumstances in which these choices are made.⁹² This focus also ignores the impacts of and impacts on those individuals’ relational networks completely. Families and communities are reduced to a factor in the “best interests of the child” analysis, a small consideration in sentencing or a regrettable afterthought. This reinforces the media’s narratives, because Indigenous individuals are juridically constituted as individual offenders or victims. Without *wah-ko-to-win*, the problem can be reduced to one of “crime” or individual ‘high-risk lifestyles” or Indigenous women’s failures to protect, themselves or their children.

c. The Trauma Narrative

The primary counter-narrative to these dominant ones explains violence and victimization against women and children in Indigenous communities as an aspect of intergenerational trauma, resulting from massive social upheaval inflicted deliberately or recklessly by colonial mechanisms.⁹³ The idea that the current

⁹¹ Val Napoleon, “Who Gets to Say What Happened? Reconciliation Issue for the Gitksan” in David Kahane and Catherine Bell, eds., *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) at 177.

⁹² Marlee Kline, “Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women” (1993) 18 *Queen’s LJ* 309, at 321. See 319-330 for a broader discussion of how the law focuses on individual characteristics and obfuscate the material conditions within which choices are made [Kline, Complicating].

⁹³ John Borrows writes cogently about the massive social upheaval created by colonial policies and actions that goes far beyond residential schools in Borrows “Crown and Aboriginal Occupations of Land: A History and Comparison.” (2005) Research paper prepared for the Ipperwash Inquiry, Section 2: (57-76). Online:

appalling rates of violence and victimization in many Indigenous communities is linked to intergenerational trauma is widespread, and widely accepted and used by both non-Indigenous and Indigenous scholars, politicians and activists.⁹⁴ Several hazy terms have been used to describe this. There is the “legacy” in reference to intergenerational abuse stemming from the residential schools in Canada⁹⁵, “historical trauma, ‘historical legacy’, ‘American Indian holocaust’ ... ‘intergenerational post-traumatic stress disorder’ and ‘soul wound’”.⁹⁶

James Waldram explains the central contentions of all these terms are that Indigenous people have

experienced generations of unresolved trauma and grief, including ‘disenfranchised grief’ that cannot be acknowledged or mourned, and [have] internalized dysfunctional emotions and behavior to the point where they [have] become normative.⁹⁷

The result of colonialism has been that Indigenous people’s “soul, their very essence” has become wounded. This is exacerbated by other factors such as an “obligation to share ancestral pain” and “acculturative stress”.⁹⁸ A good example of this is found in a study purporting to explain the “intergenerational transmission” of

http://www.ipperwashinquiry.ca/policy_part/research/pdf/History_of_Occupations_Borrows.pdf

⁹⁴ Waldram, *Revenge of the Windigo*, *supra* note 24 at 234 and 316-319.

⁹⁵ The Aboriginal Healing Foundation describes its mission as supporting the healing needs from the “legacy of abuse” from the residential schools. Online: <http://www.ahf.ca/about-us/mission>. “The legacy” is used extensively throughout Schedule N of the Indian Residential Schools Settlement Agreement, online: <http://www.trc-cvr.ca/mandateen.html> at 1 [Schedule N].

⁹⁶ Waldram, *Revenge of the Windigo*, *supra* note 24, at 225.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

trauma”.⁹⁹ The authors call for a new “model of historic trauma transmission” that they believe will better explain current “maladaptive social and behavioral problems” and “endemic” complex post traumatic stress disorder [PTSD] in Indigenous communities. They assert “hidden collective memories” of trauma or “collective non-remembering” of epidemics throughout North America from the 1400s to the 1800s make Indigenous peoples “more susceptible to the deeper feeling of grief and trauma in their day to day lives.”¹⁰⁰ Regional and cultural diversity, contested historical ‘truths’ and very different colonial experiences across Canada all disappear into one “meta-narrative” of historical trauma¹⁰¹ set against an idyllic pre-contact era devoid of any trauma at all, where all Indigenous people were somehow all interconnected.¹⁰²

Waldram argues it is clear Indigenous peoples use trauma “not always as a pathological condition, but as a metaphor for their historical relationship with the European settler society.”¹⁰³ The disjunction between this metaphorical use of trauma and the clinical diagnosis of PTSD, as well as the difficulties inherent in unpacking the concrete mechanics of how such a concept as “historical trauma” is actually transmitted are important (and puzzling) questions that remain largely unexamined.¹⁰⁴

⁹⁹ Cynthia C. Wesley-Esquimaux and Magdalena Smolewski, *Historic Trauma and Aboriginal Healing* (Aboriginal Healing Foundation, 2004) online: <http://www.ahf.ca/downloads/historic-trauma.pdf>

¹⁰⁰ *Ibid* at iii-iv.

¹⁰¹ Waldram, *Revenge of the Windigo*, *supra* note 24, at 227.

¹⁰² *Ibid*, at 223.

¹⁰³ *Ibid*, at 236.

¹⁰⁴ *Ibid*.

More importantly, for our purposes here, while this meta-narrative of trauma certainly makes the case for the ongoing damage of historic oppression and the need for healing¹⁰⁵, it does not make the case for Indigenous agency or judgment in the face of current violence and victimization risks. While acknowledging the immense social suffering Indigenous peoples have endured (and continue to endure) due to colonialism, the trauma narrative does not challenge the notion of Indigenous peoples as “simply victims, passively accepting their fate as colonized beings, internalizing pathology to the point where it becomes the norm in families and communities”.¹⁰⁶

Recognizing Indigenous agency, judgment and responsibility is a crucial difference between a political narrative of trauma and a “trauma-informed” approach to current social ills, which recognizes the impacts of trauma and responds with empathy and hope.¹⁰⁷ Waldram argues that both post-colonial theory and sound therapeutic practice calls for “decentring historical analysis” and retelling the story of trauma in a way that describes “not only the trauma but the ways in which the individual dealt with and also opposed it.”¹⁰⁸ Otherwise the individual remains a ‘passive recipient and damaged product of oppression, thus entrapping

¹⁰⁵ *Ibid*, at 229.

¹⁰⁶ *Ibid*, at 227.

¹⁰⁷ See, for example, Susan J. Ko, Julian D. Ford, Nancy Kassam-Adams, Steven J. Berkowitz, Charles Wilson, Marleen Wong, Melissa J Brymer and Christopher M. Layne, “Creating Trauma-informed Systems: Child Welfare, Education, First Responders, Health-care, Juvenile Justice” (2008) 39 (4) *Professional Psychology Research and Practice* 396. A trauma-informed perspective also underlies the philosophy of healing or problem-solving courts, discussed later in this chapter.

¹⁰⁸ Waldram, *Revenge of the Windigo*, *supra* note 24 at 228.

her in a narrative of decline”.¹⁰⁹ Judith Herman also maintains it is essential that therapists avoid infantilizing trauma survivors and instead insist that, while she is “not responsible for the injury that was done to her, she is responsible for her recovery.”¹¹⁰

When “trauma transmission” subsumes continuing violence and victimization, there is another overlooked aspect of stopping that trauma. Herman stresses that taking responsibility has an added dimension for survivors who have harmed others, or committed atrocities themselves, whether in desperation, under duress, or in conditions of “slow degradation”. Understanding the extreme circumstances these decisions were made under is *not* enough.¹¹¹ Rather, “the survivor needs to mourn for the loss of her moral integrity and to find a way to atone for what cannot be undone.” Acknowledging responsibility and finding appropriate forms of restitution for one’s own actions does not exonerate the perpetrator, but actually “reaffirms the survivor’s claim to moral choice” and opens the way “to the assumption of power and control” in the present.¹¹² In other words, the abdication of accountability is not conducive to healing. Rebuilding one’s moral integrity requires accepting one’s own agency and judgment in both past and present circumstances. This need is all the more pressing in the context of colonization, where Indigenous people’s moral agency, intellectual capacity and

¹⁰⁹ *Ibid.*

¹¹⁰ Judith Herman, *Trauma and Recovery: The Aftermath of Violence – from domestic violence to political terror* (New York: Basic Books, 1997) at 192 [Herman].

¹¹¹ *Ibid.*

¹¹² *Ibid.*, at 193.

legal reasoning have been systemically devalued or dismissed by the dominant settler society for so long.

The “intergenerational trauma” narrative that has been widely adopted by Indigenous groups and allies reintroduces some crucial context and de-emphasizes individual culpability, but does nothing to seriously challenge the dominant media narratives of depravity and incapacity. The notion that Indigenous individuals and communities are suffering from intergenerational trauma, which is manifested in dysfunction and despair, and flows from generation to generation, actually fits seamlessly. It simply explains more sympathetically the reasons for the depth and breadth of dysfunction and failure. This story is compelling, and with every front-page horror or tragedy, it becomes more so. Like every lie that proves itself, it contains a grain of truth in the honest compassion for painfully vulnerable and obviously suffering women and children in and from Indigenous communities. A cry of “racism” or cultural imperialism will do nothing to allay it. It simply polarizes the discussion further, so the conversations of colonial disruption and loss speak past the conversations of present horrors and loss as if these contend, or cancel the other out. Unfortunately, the trauma narrative is fast becoming as much of a narrative of despair as the dominant media and legal narratives. These are not narratives that can accommodate the reasonable Cree person. Let us turn now to the possible spaces within the current justice system that might welcome her.

7. Spaces for Indigenous Laws in the Canadian Justice System:

a. The Supreme Court's *Gladue* Principles and Directives:

In *R v Gladue*,¹¹³ the Supreme Court recognized that:

for many if not most aboriginal offenders, the current concepts of sentencing are inappropriate because they have frequently not responded to the needs, experiences, and perspectives of aboriginal people or aboriginal communities.¹¹⁴

In particular, the Court explained:

A significant problem experienced by aboriginal people who come into contact with the criminal justice system is that the traditional sentencing ideals of deterrence, separation, and denunciation are often far removed from the understanding of sentencing held by these offenders and their community...¹¹⁵

The Court found that the unique circumstances of Aboriginal offenders include their systemic and background factors as well as “the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.”¹¹⁶ In particular, the Court said Aboriginal understandings, ideals and conceptions of sentencing procedures and sanctions were important for Canadian courts to consider.

While acknowledging there was huge diversity between Aboriginal individuals and communities, the Court found there was enough evidence to acknowledge that, in most Aboriginal societies, there was (1) a “primary emphasis upon the ideals of restorative justice”¹¹⁷ and (2) a “common underlying principle” of the “importance of community-based sanctions.”¹¹⁸ Thus, considering restorative

¹¹³ *R v Gladue*, [1999] 1 SCR 688, 171 DLR (4th) 385, [Gladue].

¹¹⁴ *Ibid* at para 73.

¹¹⁵ *Ibid* at para 70.

¹¹⁶ *Ibid* at para 66.

¹¹⁷ *Ibid* at para 70.

¹¹⁸ *Ibid* at para 74.

ideals “is extremely important to the analysis under s. 718.2(e)”¹¹⁹ as is applying community based sentences whenever appropriate. The Court insightfully explained:

It is often the case that neither aboriginal offenders nor their communities are well served by incarcerating offenders, particularly for less serious or non-violent offences. Where [community-based] sanctions are reasonable in the circumstances, they should be implemented.¹²⁰

The Court stated strongly that, “In all instances, it is appropriate to attempt to craft the sentencing process and the sanctions imposed in accordance with the aboriginal perspective.”¹²¹

A year later, in *R v Wells* [Wells] the Supreme Court addressed the challenge of applying what had come to be known as *Gladue* principles in cases of serious and violent offences. The Court held that the more serious the crime, the less the background circumstances of the offender and the principles of restorative justice will apply to determining a fit sentence, and stressed that:

Notwithstanding what may well be different approaches to sentencing as between aboriginal and non-aboriginal conceptions of sentencing, it is reasonable to assume that for some aboriginal offenders, and depending upon the nature of the offence, the goals of denunciation and deterrence are fundamentally relevant to the offender’s community... [T]o the extent that generalizations may be made, the more violent and serious the offence, the more likely as a practical matter that the appropriate sentence will not differ as between aboriginal and non-aboriginal offenders, given that in these circumstances, the goals of denunciation and deterrence are accorded increasing significance.¹²²

The Ontario Court of Appeal actually distinguished Aboriginal offenders from other racialized offenders who face similar systemic racism and background factors such as poverty and social dislocation. In *R v Borde*, Rosenberg, JA stressed that, while

¹¹⁹ *Ibid* at para 70.

¹²⁰ *Ibid* at para 74.

¹²¹ *Ibid* at para 74.

¹²² *Ibid* at paras 40-42.

Gladue imposes an affirmative duty on judges to inquire into these factors in the case of Aboriginal offenders, it does not preclude them from doing so for non-Aboriginal offenders, as sentencing principles generally are “broad and flexible” enough to consider these in appropriate cases. However, he pointed out:

An important part of the *Gladue* analysis hinged on the fact that the traditional sentencing ideals of deterrence, separation, and denunciation are often far removed from the understanding of sentencing held by Aboriginal offenders and their community...The importance that the Supreme Court attached to sentencing conceptions of Aboriginal communities results from the specific reference to Aboriginal offenders in s. 718.2(e). In this regard, Aboriginal communities are unique.¹²³

Twelve years after *Wells*, in 2012, the Supreme Court revisited the *Gladue* principles, in the context of their application for Aboriginal offenders that breach long-term supervision orders in *R v Ipeelee*.¹²⁴ Justice Lebel affirmed much of what was set out in *Gladue* and reiterated, even more strongly, the importance of considering Aboriginal communities’ differing perspectives and conceptions of sentencing:

The *Gladue* principles direct sentencing judges to abandon the presumption that all offenders and all communities share the same values when it comes to sentencing and to recognize that, given these fundamentally different world views, different or alternative sanctions may more effectively achieve the objectives of sentencing in a particular community.¹²⁵

It is interesting that Justice Lebel linked considering Aboriginal values and world views, just as the *Aseniwuche Winewak* community participants linked using Cree legal principles, to the more effective achievement of sentencing objectives in particular communities.

¹²³ *R v Borde*, 172 CCC (3d) 225 (Ont CA) at para. 32.

¹²⁴ *R v Ipeelee*, 2012 SCC 13, 428 NR 1, 91 CR (6th) 1.

¹²⁵ *Ibid* at para 74.

There is strong, unambiguous language in *Gladue*, *Wells* and *Ipeelee*, about the need to consider Aboriginal community's needs, experiences and perspectives, including their understandings, values, worldviews and differing conceptions of appropriate sanctions and *procedures*. The Ontario Court of Appeal cited the existence of these differing conceptions to distinguish Aboriginal offenders from other offenders suffering similar background circumstances. Despite this guidance, the *Gladue* analysis has, in practice, changed very little in the way of actual sentencing practices. The imperative of a *Gladue* analysis has largely been reduced, unquestioningly to "*Gladue* Reports", which still focus primarily on social context evidence, such as common historical experiences and social disadvantages,¹²⁶ or even simply adding "*Gladue* factors", upon request, to standard pre-sentencing reports, and is rife with practical problems of the costs, skills and time to complete them.¹²⁷ In addition, even if the law requires *Gladue* reports, they rarely (if ever) have a practical effect on reducing or altering the sentence imposed for serious and violent crimes,¹²⁸ leading to a palpable lack of utility by offenders and defence counsel in such cases.¹²⁹

¹²⁶ For a guide to the content recommended to include in Gladue reports, see "Gladue Primer" (Legal Services of BC, 2011), available online:

<http://resources.lss.bc.ca/pdfs/pubs/Gladue-Primer-eng.pdf>

¹²⁷ See, for example, the discussion of the issues of implementation in Manitoba, and the differences between this and the Gladue Court in Toronto, in David Milward and Debra Parkes, "Gladue: Beyond Myth and Towards Implementation in Manitoba" (2011) 35:1 *Man LJ* 84 at paras. 9-17. See also Jonathan Rudin, "Aboriginal Over-representation and *R. v. Gladue*: Where we Were, Where We Are and Where We Might be Going," (2008) 40 *SCLR* (2d) 687-713.

¹²⁸ See, for example, *Gladue*, *supra* note 113, *R v Jacko*, 2010 ONCA 452, *Ipeelee*, *supra* note 123.

¹²⁹ See Milward and Parkes and Rudin, *supra* note 126. Anecdotally, after *Ipeelee*, one Alberta judge told me of Aboriginal offenders begging him to waive the *Gladue* report requirement, because they were experienced enough to know it would not reduce their

b. Current Access to Justice and Community Justice Initiatives for Aboriginal People

In addition to the *Gladue* principles being implemented through Gladue reports, there are initiatives across Canada that potentially ameliorate the current issues the mainstream justice system poses for Aboriginal individuals and, to some extent, Aboriginal communities. There appear to be four main alternative or supplementary models: Court worker Services, Problem-solving/Therapeutic courts, Aboriginal courts and Community based Restorative Justice or Healing Programs.

First, there are Court worker Programs to assist and support Aboriginal individuals to navigate the mainstream justice system in criminal and some youth and family court matters. The purpose of the Aboriginal Courtwork Program is “to help Aboriginal people in conflict with the criminal justice system obtain fair, equitable, culturally-sensitive treatment.”¹³⁰ Court workers provide information, act as a liaison and even represent Aboriginal individuals in court matters, and may refer clients to legal resources, legal counsel and other health, educational, employment or community support services.¹³¹ According to Justice Canada’s website, the federal government has provided funding to provinces to run these

sentence, and waiting for a writer was simply prolonging their time stuck in remand. They wanted to get sentencing over with so they could be transferred to a provincial or federal institution with better living conditions and access to programming.

¹³⁰ Government of Canada, Department of Justice. “Aboriginal Courtwork Program”. <http://www.justice.gc.ca/eng/fund-fina/gov-gouv/acp-apc/index.html> [Aboriginal Courtwork Program].

¹³¹ *Ibid.*

programs since 1978, through “Access to Justice Services Agreements.”¹³² Most Aboriginal court worker programs are contracted by provinces to Aboriginal run agencies or bands to deliver services,¹³³ such as Native Counseling Services of Alberta,¹³⁴ the Ontario Federation of Indian Friendship Centres¹³⁵ and Aboriginal Legal Services of Toronto in Ontario¹³⁶ and The Mi’kmaq Legal Support Network in Nova Scotia.¹³⁷

Second, there are Problem-solving or Therapeutic courts across Canada, that Aboriginal individuals can and do access, even though many are not designed specifically or exclusively for Aboriginal people. Therapeutic courts are part of the regular court system, but aim to manage or resolve underlying socio-economic or health issues that lead to repetitive criminal behaviour.¹³⁸ They include drug treatment courts, mental health courts, domestic violence courts, community courts, youth courts and Aboriginal courts.¹³⁹ Problem-solving courts vary, but are

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ Native Counseling Services of Alberta, “Programs”, online: <http://www.ncsa.ca/online/>

¹³⁵ Aboriginal Courtwork Program, *supra* note 130.

¹³⁶ Aboriginal Legal Services of Toronto. “About”.

<http://www.aboriginallegal.ca/#!/about/mainPage>

¹³⁷ Mi’kmaq Legal Support Network. “Our Eskasoni”.

<http://www.eskasoni.ca/departments/12/>

¹³⁸ Glen Luther, Mansfield Mela, Victoria J Bae. “Literature Review on Therapeutic Justice and Problem Solving Courts”. University of Saskatchewan, 2013.

<http://www.usask.ca/cfbsjs/documents/Lit%20Review%20MHC%20Saskatoon%20Academic%20Dec%202013.pdf> at page 12.

¹³⁹ Susan Goldberg, *Problem-solving in Canada’s Courtrooms: A Guide to Therapeutic Justice* (Ottawa: National Judicial Institute, 2011), available online at: <https://www.nji-inm.ca/index.cfm/publications/?langSwitch=en> [Goldberg, Problem-solving Courtrooms] at 7-16. See also: Provincial Court of British Columbia, “Problem-solving Courts”, online: <http://www.provincialcourt.bc.ca/about-the-court/court-innovation/problem-solving-courts>. In the United States, there are also unified family courts and re-entry courts for sex offenders and other offenders re-entering society after imprisonment. See: Bruce J Winick and David B Wexler, eds., *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the*

distinctive in their active judicial interaction with and supervision of offenders, their non-adversarial, interdisciplinary team approach to address “recycling problems” underlying criminal behavior,¹⁴⁰ and their holistic and collaborative decision-making and sentencing practices to “promote pro-social behaviours and positive change” in individual offenders.¹⁴¹ In Canada, there are currently addiction or drug treatment courts, community or integrated courts that deal with offenders with poverty related, issues, including homelessness, addiction and mental illness, mental illness courts and domestic violence courts.¹⁴²

Third, there are Aboriginal courts. These are sometimes seen as a subcategory of problem-solving or therapeutic courts and share most of the above common features and approach.¹⁴³ In addition to these, Aboriginal courts may “facilitate the trial court’s ability to consider the unique systemic and individual factors that contribute to an Aboriginal person’s criminal behavior” and have knowledge and links to services for Aboriginal people within a particular community.¹⁴⁴ They may incorporate Aboriginal language, culture and resources and allow more time than a regular trial court to “seek alternatives to prison that are informed by Aboriginal understandings of justice.”¹⁴⁵ In this, they can be seen as

Courts (North Carolina: Carolina Academic Press, 2011) at 5 [Winick and Wexler]. Domestic violence raises a unique set of issues and there is growing literature on best practices and innovative approaches in specialized court processes across Canada. See Jane Ursel, Leslie M. Tutty and Janice LeMaistre, eds., *What’s Law Got to Do With It? The Law, Specialized Courts and Domestic Violence in Canada* (Toronto: Cormorant Books Ltd., 2008) generally and in “Part 2: Criminal Justice: Different Models of Specialization” at 69-196.

¹⁴⁰ Winick and Wexler, *Ibid.*

¹⁴¹ Goldberg, Problem-solving Courtrooms, *supra* note 139 at 8-9.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*, at 10-11.

¹⁴⁴ *Ibid.*, at 11.

¹⁴⁵ *Ibid.*

a further actualization of the *Gladue* principles by actors in the mainstream justice system. Unfortunately, one way Aboriginal courts often differ from other problem-solving courts is additional funding. For example, there is no additional funding provided to the First Nations Courts in New Westminster, Duncan or Kamloops.¹⁴⁶ There is also no assessment process for suitability, like there is for drug courts and domestic violence courts.¹⁴⁷

Finally, there are many community based restorative or healing programs for Aboriginal people operating across Canada. These range from community justice panels or justice committees, to sentencing circles, peacemaking circles, family group conferencing and mediation to intensive healing programs or processes offenders participate in for an extended period of time. Many of these programs describe themselves as using or integrating traditional or culturally appropriate methods, relying on elders, involving extended family and community, and focusing on underlying causes of behaviours, healing, repairing and restoring relationships, peace, harmony and order in the community. They are often connected to the mainstream justice system, pre or post charge. They may provide sentencing guidance to the court, and the offender's participation may be an alternative measure or a condition of a peace bond, probation order or conditional sentence.

¹⁴⁶ A Provincial Court Judge described this difference in response to an audience question about the differences between his experiences sitting on the Vancouver drug treatment court and the Duncan First Nations court at the "Healing Courts, Healing Plans, Healing People International Conference on Therapeutic Jurisprudence", hosted by the School of Social Work, University of British Columbia, October 9-10th, 2014.

¹⁴⁷ *Ibid*, In response to an audience questions contrasting the Vancouver drug treatment court and the new First Nations Court in Duncan, in addition to lack of funding, the Judge also named the lack of individualized assessment and a lack of resources to help offenders actually implement their "healing plans."

However, many are not restricted to these circumstances, and will accept voluntary participants who are not currently involved in a formal criminal or family justice matter. According to the Department of Justice's "Aboriginal Justice Strategy" website, the federal government currently funds approximately 275 community based justice programs that serve over 800 communities across Canada.¹⁴⁸

Most of these initiatives have certain things in common. They are fully or partially funded within the existing mainstream justice system and operate as part of or in conjunction with it. With very few exceptions,¹⁴⁹ they do not deal with serious or violent crimes. To the best of my knowledge, all problem-solving and Aboriginal courts in Canada deal only with summary offences. Most take an interdisciplinary approach to social and health issues underlying specific criminal behaviours and non-legal professionals are heavily involved. Most are informed by and integrate psychological and social science research into their approach. They strive to treat individual offenders with empathy and respect. They usually allow or even encourage individual offenders to tell their story and take an active role in finding their own solutions. Most, if not all, provide support for or connect individual offenders to helping resources to heal, recover from or manage their underlying issues.

¹⁴⁸ Department of Justice, Canada, Aboriginal Justice Strategy "Community Based Justice Fund", online at: <http://www.justice.gc.ca/eng/fund-fina/acf-fca/ajs-sja/cf-pc/index.html>

¹⁴⁹ Dr. John Hylton names a handful of community based healing programs across Canada that deal with domestic violence and sexual violence. These include "Hollow Water in Manitoba, Waseskun House in Quebec, the Canim Lake Family Violence Program in Canim Lake, British Columbia, and a community-based healing process on the Mnjikaning First Nation in Ontario." Dr. John Hylton, *Aboriginal Sexual Offending in Canada* (Ottawa: Aboriginal Healing Foundation, Aboriginal Healing Foundation Research Series, 2006) at 42 [Hylton].

These programs have varying degrees of public records. Obviously, the in-court work of court workers, problem-solving courts and Aboriginal courts are public and recorded so transcripts could technically be accessed. On the other hand, there are no public records for the majority of community based justice programs. This can be for practical, ethical or principled reasons. For example, mediation or therapeutic processes come with ethical confidentiality obligations and the T'suu T'ina Peacemaking Circles makes a point of burning all records once a peacemaking process is complete.¹⁵⁰ Among other things, this means it is difficult to impossible for anyone outside the direct participants in the process to access or understand *how* decisions are made and the reasoning behind the decisions.

This is a crucial point, because, arguably, some Indigenous legal principles are compatible with or even being *practiced* within many of these spaces.¹⁵¹ It is just happening in implicit or unspoken ways¹⁵² or through what is couched in the language “traditions” or “values,” without examining what these things actually do for or mean to participants in interactional settings.¹⁵³ Many community justice programs refer broadly to Indigenous understandings and conceptions of justice,

¹⁵⁰ Judge L.S. Tony Mandamin, in consultation with Ellery Starlight and Monica One-Spot, “Peacemaking and the Tsuu T’ina Court” in Wanda D. McCaslin, ed., *Justice as Healing, Indigenous Ways: Writings on Community Peacemaking and Restorative Justice from the Native Law Centre* (Minnesota: Living Justice Press, 2005) at 354 [Mandamin].

¹⁵¹ Napoleon and I argue implicit Indigenous legal reasoning is exactly what is happening in Val Napoleon and Hadley Friedland, “Indigenous Legal Traditions: Roots to Renaissance” in Markus D. Dubber and Tatjana Hornle eds., *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014) at 235-237 [Roots to Renaissance].

¹⁵² Val Napoleon, Angela Cameron, Colette Arcand and Dahti Scott, “Where’s the Law in Restorative Justice?” in Yale Belanger, ed., *Aboriginal Self Government in Canada: Current Trends and Issues*, 3rd edition (Saskatoon, Purich Publishing Press, 2008) [Napoleon et al].

¹⁵³ Justice B. Richland, *Arguing with Tradition: The Language of Law in Hopi Tribal Court* (Chicago: Chicago University Press, 2008) at 61.

and even their own laws.¹⁵⁴ However, the Indigenous legal principles and *reasoning* behind these practices and conversations are not being made explicit or examined. There is nowhere to find, as David Macphee envisioned for the *Aseniwuche Winewak*, a public record of decisions based on Indigenous legal principles to learn from, analyze and build on in future cases. Further, nothing seems to be being built further beyond or even upon the cautious successes of the models that already exist. There are more programs but neither the jurisdiction nor the scope of these courts or programs are expanding. Some would argue this is with good reason.

c. Challenges and Critiques of Community Justice and Healing Programs

There have been ongoing calls, and implementation of, culturally sensitive, community controlled services and healing initiatives. The concept of healing has become pervasive in both public and professional discourse.¹⁵⁵ Waldram describes the Aboriginal “healing movement” as “the most profound example of social reformation since Confederation.”¹⁵⁶ There have been numerous government agreements with Indigenous communities that create greater Indigenous control over community justice programs¹⁵⁷ and children services delivery.¹⁵⁸ There are

¹⁵⁴ See, for example, Mandamin, *supra* note 150, at 350-353, Ted Palys and Wenona Victor, “Getting to a Better Place Qwi:qwelstóm, the Stó:lō and Self-Determination” in *The Law Commission of Canada’s Legal Dimensions Initiative regarding Indigenous Legal Traditions* (Vancouver: UBC Press, 2005) at 20, Joe Pintarics and Karen Sveinunggaard, “Meenoostahtan Minisiwin First Nations Family Justice: Pathways to Peace” (2005) 2:1 *The First People’s Child and Family Review* 67 at 71.

¹⁵⁵ James B. Waldram, ed. *Aboriginal Healing in Canada: Studies in Therapeutic Meaning and Practice* (Ottawa: Aboriginal Healing Foundation, 2008), online: at 6 [Waldram, AHF Study].

¹⁵⁶ *Ibid.*

¹⁵⁷ For examples of community justice projects currently supported by the Department of Justice across Canada, see Programs and Initiatives, Department of Justice, online: <http://www.justice.gc.ca/en/ps/ajs/programs.html>. In 2005, there were 88 agreements

also numerous healing programs operating across Canada, many of which were initially funded in whole or in part by Aboriginal Healing Foundation grants.¹⁵⁹

If breaking the silence about internal violence is any indication, at least some of these programs seem to be making a difference. Braithwaite points out that in the Healing Circles in Hollow Water forty-eight adults out of a community of six hundred admitted responsibility for sexually abusing children, forty-six as a result of their participation in healing circles and only two as a result of being referred to a court of law for failing to participate. He argues:

What is more important than the crime prevention outcome in Hollow Water is its crime detection outcome. When and where has the traditional criminal process succeeded in uncovering anything approaching forty-eight admissions of criminal responsibility in a community of just six hundred?¹⁶⁰

However, uncritically assuming this example of increased comfort with help-seeking is universal or typical is foolhardy. At best, current community initiatives actually operate within legislated perimeters and must adhere to the applicable government

with the Department of Justice, serving over 280 Aboriginal communities, which allowed communities to develop their own restorative justice practices. See also the summary of initiatives across Canada in Hylton, *supra* note WHAT at 40-41.

¹⁵⁸ The Royal Commission on Aboriginal People lists several changes in government policies in the 1980s and 1990s that focused on “supporting increased Aboriginal control of the development, design and delivery of child and family services.” These included allocated funding from the Department of Indian and Northern Affairs to 36 agencies, which covered 212 bands. *Report of the Royal Commission on Aboriginal Peoples, Gathering Strength*, Vol.3 (Ottawa: Ministry of Supply and Services, 1996) at 23 [RCAP: Gathering Strength]. Agencies and services were also established under a tripartite agreement in Manitoba with the Four Nations Confederacy, sponsored jointly by bands and government in Ontario, developed regionally in BC and Nova Scotia, and agreed on with individual bands under a provincial mandate in Alberta and Saskatchewan (at 30). According to the Alberta Child and Youth Advocate’s website, Online: http://advocate.gov.ab.ca/main_links_list.html, there are currently eighteen delegated First Nations agencies operating in Alberta.

¹⁵⁹ To date, there has been 1345 grants across Canada, to a total of 406 million. Aboriginal Healing Foundation Funded Projects, online: <http://www.ahf.ca/funded-projects>.

¹⁶⁰ John Braithwaite, “Restorative Justice and Social Justice” (2000), 63 *Saskatchewan Law Review* 185 at 201.

regulations, which are becoming increasingly standardized.¹⁶¹ There are three major concerns that create considerable risk of failure in both community controlled justice programs and child protection agencies. While there is not the same voluminous discussion about healing programs, it is fair to extrapolate there may be similar factors at play. These three concerns are incommensurate resources and responsibility, lack of accountable and transparent decision-making processes, and romanticization and essentialization of culture and tradition. These concerns all contribute to a profound concern about safety.

i. Incommensurate resources and responsibility

Increased community control over justice, healing and child protection takes place in the present context of a trend of “responsibilization” by neo-liberal governments where the “responsible individual” and “responsible communities” are supposed to manage and control themselves for the government.¹⁶² Responsibility for risk management is also increasingly localized.¹⁶³ There is, no doubt, a policy shift geared toward increasing devolution and privatization of child protection services.¹⁶⁴ Community control is occurring in this context, often without resources for supporting the work of care. The funding formula for on-reserve Aboriginal children is still 22% less than for other children, now subject of a current human

¹⁶¹ For an excellent discussion on the trend of increasing standardization for Community Justice programs, see Rudin, *supra* note 76 at 103-109. For child protection, see Gerald Cradock, “Risk, Morality, and Child Protection: Risk Calculation as Guides to Practice” (2004) 29, 3 *Science, Technology and Human Values* 314 [Cradock].

¹⁶² Chris Anderson, “Governing aboriginal justice in Canada: Constructing responsible individuals and communities through ‘tradition’” (1999) 31 *Crime, Law and Social Change* 303, at 312-314 [Anderson].

¹⁶³ Cradock, *supra* note 165 at 322-323.

¹⁶⁴ Hester Lessard, “The Empire of the Lone Mother: Parental Rights, Child Welfare Law, and State Restructuring” (2001) 39 *Osgoode Hall L.J.* 717, at 758 [Lessard].

rights complaint launched by the First Nations Child and Family Caring Society.¹⁶⁵ It is worth keeping in mind the long battle of jurisdiction between the federal and provincial governments over child welfare provision on reserves were about neither level of government wanting to fund them.¹⁶⁶

In a similar vein, community justice projects struggle with a complete lack of funding for community consultation and development before implementing justice projects¹⁶⁷, and inadequate, uncertain funding for existing ones.¹⁶⁸ This results in “unrealistic expectations”¹⁶⁹ and a lack of “proper infrastructure of personnel and program policies and procedures”. Even programs that operate successfully for a long time lack the “recognition and security” that funding, policy and legislative commitments bring.¹⁷⁰ Chris Anderson points out these initiatives download responsibilities on Aboriginal communities and essentially expect them to “do more with less resources”, despite the fact that “in virtually all Aboriginal communities these original expenditures were grossly insufficient to begin with.”¹⁷¹ Finally,

¹⁶⁵ This case was launched by the First Nations Child and Family Caring Society launched the case in 2007. The Canadian Human Rights Tribunal started hearing evidence in 2013 and heard final submissions in October 2014. At the time of writing, the hearing is complete and a decision is expected at some point in 2015. For closing submissions, see online:

<http://www.fncaringsociety.com/sites/default/files/Caring%20Society%20-%20Closing%20Submissions.pdf>

¹⁶⁶ Though this lack of services is often mentioned, the impact of it, except during “life and death situations” (see Tae Mee Park, “In the Best Interests of the Aboriginal Child” (2003) 16 WRLSI 43 at 44) is rarely discussed directly. But see brief mention of this in Lessard, *supra* note 164, at 741, where she points out “Aboriginal communities were subjected to the harshest impacts of the residual model without any of the moderating effects of the preventive, support, and advocacy services available more generally to non-Aboriginal Canadians.”

¹⁶⁷ Rudin, *supra* note 76 at 101.

¹⁶⁸ Hylton, *supra* note 149 at 42.

¹⁶⁹ Rudin, *supra* note 76 at 100.

¹⁷⁰ Hylton, *supra* note 149 at 42.

¹⁷¹ Anderson, *supra* note 162 at 315.

community control of justice and child protection does nothing to address the material conditions of poverty that form the context of many child protection matters¹⁷² and criminal offences.¹⁷³

ii. Lack of Accountable and Transparent Decision-Making Processes

Deeply connected to the consistent lack of funding for either community consultation or development of policies and procedures, is the lack of accountability and transparency in the decision-making processes of community controlled initiatives.¹⁷⁴ It goes without saying that the development of transparent policies and procedures takes time and some expertise or consultation. Despite many reports recommending the importance of this aspect for community justice programs, this vital governance issue continues to be ignored in funding agreements.¹⁷⁵

This basic lack of accountability or procedures for contestation or transparency is exacerbated by the increasing governmental push for standardization and ‘equality’ between community initiatives. In child protection services, Gerald Cradock describes how the increasing reliance of standardized risk assessment forms in child protection matters by government, in tandem with increasing localization of responsibility, in effect “separates responsibility (local)

¹⁷² Marlee Kline, Child Welfare Law “Best Interests of the Child” Ideology, and First Nations” (1992) 30 Osgoode Hall LJ 375 at 425 [Kline].

¹⁷³ Jane Dickson-Gilmore and Carol LaPrairie, *Will the Circle Be Unbroken: Aboriginal Communities: Restorative Justice and the Challenges of Conflict and Change* (Toronto, University of Toronto Press, 2005) at 55-56 [Dickson-Gilmore and LaPrairie].

¹⁷⁴ Angela Cameron, “Stopping the Violence: Canadian Feminist Debates on Restorative Justice and Intimate Violence” (2006) 10(1) *Theoretical Criminology* 49 at 58 [Cameron].

¹⁷⁵ Rudin, *supra* note 76, at 101. Hylton’s report repeats this is one of the major problems with community controlled programs: Hylton, *supra* note 149 at 125.

from accountability (central)". Essentially this results in an artificial split where 'facts' are centrally determined while "value-laden remedies remain the responsibility of local communities."¹⁷⁶ Rudin points out community justice funding is offered on a "take it or leave it" basis in discreet areas that do not necessarily match with the needs of community members in front of service providers. This means that, in order to remedy actual need, staff may adjust to acting in a "clandestine manner".¹⁷⁷ The logical result of this complicated mess of separating responsibility and accountability is local staff who must rely on their own judgment, without having any supportive, comprehensible framework for self or community evaluation of that judgment.¹⁷⁸ Even if they are not corrupt, there is no way to counter that perception if it arises within the community.

This all contributes to serious accountability and transparency concerns with many community controlled restorative justice initiatives, including a lack of objective evaluations or enforceable obligations¹⁷⁹ as well as serious lack of "procedural safeguards" for victims¹⁸⁰ or offenders.¹⁸¹ There is "no formal processes to challenge decisions made in this context."¹⁸² This opens the door for political

¹⁷⁶ Cradock, *supra* note 161 at 323.

¹⁷⁷ Rudin, *supra* note 76 at 108.

¹⁷⁸ Jane Dickson-Gilmore and Carol LaPrairie have found that a lack of evaluation is an issue generally: "It is now well established that evaluation of Aboriginal community restorative justice projects is unusual, even where it is held out as a condition of funding. Where evaluation does occur, it too often avoids addressing some of the more troubling or sticky issues that arise.": Dickson-Gilmore and LaPrairie, *supra* note 173 at 183-185. They also note that, from available data, "projects appear to be consistently unable to provide general knowledge and understanding about their form and function to the communities they intend to service." (at 185).

¹⁷⁹ *Ibid*, at 102-103.

¹⁸⁰ Cameron, *supra* note 174, at 58.

¹⁸¹ Anderson, *supra* note 162 at 313.

¹⁸² *Ibid*, at 320.

interference, and the perpetuation of abuse and/ or marginalization of vulnerable individuals through dysfunctional power relationships. In community justice initiatives, this has led to several documented cases of adult victims of intimate violence being re-victimized, including “victim blaming, threats of physical violence, physical violence and coercion.”¹⁸³ In the context of Aboriginal controlled child protection agencies, this has “led to poor placements and politically controlled decision-making that left children in dangerous situations.”¹⁸⁴ In the most extreme cases, this has resulted in the deaths of children in care of these agencies,¹⁸⁵ but there has also been horrific abuses suffered as well.¹⁸⁶

iii. Romanticization and Essentialization of Tradition and Culture

If there is no time or resources to develop policies and procedures for accountability and transparency in community initiatives, then it cannot be shocking there is certainly no time or resources for the opportunity to “rigorously or critically

¹⁸³ Cameron, *supra* note 174 at 57.

¹⁸⁴ Anne McGillivray and Brenda Comaskey, *Black Eyes All of the Time: Intimate Violence, Aboriginal Women, and the Justice System* (Toronto: University of Toronto Press, 1999) at 136 [McGillivray and Comaskey].

¹⁸⁵ See for example, the death of Lester Deslarjais, while under the care of Dakota Ojibway Child and Family Services, “The Giesbrecht Report”, as cited in John Borrows and Leonard I. Rotman, *Aboriginal Legal Issues: Cases, Materials and Commentary*, 2nd Ed. (Ontario: LexisNexis Canada, 2003) at 871[Borrows & Rotman]; See also the *Report of the Gove Inquiry into Child Protection in British Columbia* by Thomas J. Gove, commissioner. (Vancouver: B.C, 1995) online:< <http://www.qp.gov.bc.ca/gove/>>; Office for Children and Youth, *Report to the Attorney General of British Columbia under Section 6 of the Office for Children and Youth Act on the Director’s Case Review Relating to the Nuuchah-nulth Child Who Died in Port Alberni on September 4, 2002* (Victoria: BC, 2006), online: <http://www.rcybc.ca//Groups/Investigation%20Reports/reporttoAG_nuu-chah-nulth.pdf>.

¹⁸⁶ See, for example, the case of 13 year old Jane Doe, *Jane Doe (Public Trustee of) v. Awasis Agency of Northern Manitoba* [1990] 4 CNLR 10, 72 DLR (4th) 738 (Man.CA) [Jane Doe].

examine” local cultural norms and practices.¹⁸⁷ This obscures the fact that people are constantly making choices about how to interpret ‘traditional’ values¹⁸⁸, and choices as to what parts and forms of Indigenous ‘culture’ will be put into practice in the contemporary situation.¹⁸⁹

In a study of five Aboriginal Healing Foundation funded healing projects, Waldram suggests that, while the study of what constitutes a ‘traditional’ practice is complex, it is also largely irrelevant to its use in healing programs. More importantly, “the very idea of traditionality, in the contemporary context, provides an emotionally safe place for troubled individuals where they can link their troubles to a historic past.”¹⁹⁰ However, in the context of community based violence and victimization, it is questionable whether the uncritical acceptance of traditionality always creates the same sense of safety. There is such a strong political push and legitimate longing for healing and for Indigenous children to remain within their own families, communities and culture, that people may focus on romanticized versions of ‘traditional culture’ without critically evaluating how the family and community are actually functioning.

An extreme example of this is found in Marlee Kline’s well known article about Aboriginal child welfare. Although she argues there are responsibilities for and communal practices of child –raising in Aboriginal communities that non-Aboriginal people cannot understand, she quotes, as a source of this insight, an

¹⁸⁷ As suggested as a method for considering implicit Aboriginal law in Aboriginal justice projects practices, in Napoleon et al, *supra* note 152.

¹⁸⁸ *Ibid*, at 19.

¹⁸⁹ Anderson, *supra* note 162 at 318.

¹⁹⁰ Waldram, AHF Study, *supra* note 155 at 6.

unnamed Alberta elder, who actually says, *in the quote*, that there *used* to be such community practices, and people used to act on such responsibilities, but it is unfortunately *no longer the case*.”¹⁹¹ This glaring contradiction is not unusual.

Waldram found:

The sum total of the Aboriginal mental health literature is a series of conflicting and contradictory portraits of seriously disturbed individuals living disordered lives in dysfunctional communities, suffering from cultural anomie, marginality and maladaptation, yet continuing to bask in the warm, inherently therapeutic glow of historical cultural traditions, psychically brought forward even by individuals without any experience whatsoever of these traditions. These two portraits do not mesh, and I would suggest neither is accurate, yet their co-existence is easily predictable from the perspective of primitivist discourse.¹⁹²

These contradictions and accompanying willful, or wishful blindness has real consequences for the safety of women and children today. For example, I saw this played out repeatedly in my previous work in both children’s services *and* as a community liaison for an Aboriginal community. A painful, but important example is the number of times I have listened to a well meaning person say that children need to connect with elders, while sitting beside someone who, had already or immediately afterwards disclosed to me about their sexual victimization *by* an elder or elders. ¹⁹³

¹⁹¹ The quote describing past responsibilities and practices toward children concludes with the elder stating: “It’s unfortunate that there is so many things that have entered into the native way of life that we have lost these values of the family home.” Kline, *Best Interests Ideology*, *supra* note 172 at 411. Pointing this out does not mean I am dismissing all the points Kline raises in this article. The challenge is precisely that there is this level of contradiction or willful blindness in the middle of such meticulous and thorough research and carefully thought out writing.

¹⁹² Waldram, *Revenge of the Windigo*, *supra* note 24 at 305.

¹⁹³ Rupert Ross mentions his own shock, when, after giving what he assumed would be a shocking hypothetical example of abuse by an elder, he immediately was told three virtually identical stories by three women from different reserves across Canada. Rupert Ross,

McGillivray and Comaskey point out that “[c]hildren’s bodies need protecting as much as their culture, and culture means little when it ignores or condones their injury.”¹⁹⁴ I have met far too many Indigenous youths, now in non-Indigenous care, who were moved from relative to relative and were victimized by so many of them that they refuse to have anything to do with Indigenous people or cultural activities. In fact, I am sad to say that I encountered this particular issue so often in my work with adolescents that I developed a standard strategy to respond to it. One young girl had panicked tantrums at the *sight* of a visibly Indigenous person. Another was shocked to hear non-Indigenous people could also be abusive or abused.

Obviously, this complicated hate of a person’s own ethnicity or culture not only contributes to issues of troubled identity and self-image, but is reinforced or enflamed by individual and systemically racist messages received within broader Canadian society. In regard to the goal of preserving the cultural identity of Aboriginal children, Bunting argues that “seeing cultural identity as something that is acquired through genetics and maintained through symbolic rituals oversimplifies cultural identity”¹⁹⁵ She argues for an approach to culture that recognizes culture as “a contested and dynamic process rather than a static or abstract concept that is

Returning to the Teachings: Exploring Aboriginal Justice (Toronto: Penguin Books, 1996), at 47-48 at 230 [Ross, *Returning to the Teachings*].

¹⁹⁴ McGillivray and Comaskey, *supra* note 184 at 137.

¹⁹⁵ Annie Bunting, “Complicating Culture in Child Placement Decisions” (2004) 16 Can J Women & L. 137 at 142.

assessed rather than lived.”¹⁹⁶ This includes a need to recognize the continuum of experiences of Indigenous children themselves.¹⁹⁷

8. Safety First?

This all brings us to safety. While the healing discourse is widely accepted and there are some community controlled justice, healing and child protection programs across Canada, there remain considerable barriers to success and safety. I was quite young when I had my first experience, as a non-Indigenous person, of asking a professional for help, only to have them refuse to act to protect Indigenous children. That incident involved a client of mine calling me at two in the morning, telling me her very violent and intoxicated husband had beaten her up and physically thrown her out of the house but still had their two children with him, whom he was threatening to harm, in order to teach her a lesson. I advised her to call the police, and she told me she had, twice, but they refused to help.¹⁹⁸ When I phoned, despite initially refusing, the police finally agreed to come down after some intense negotiations and the children were okay that night. This experience has deeply shaped my understanding that, for many, if not most Indigenous people, calling for help is a crapshoot. They simply do not have *reliable* access to the state actors who hold the monopoly on the legitimate use of coercive force. This experience also

¹⁹⁶ *Ibid*, at 146.

¹⁹⁷ Chan Durrant Limited, “A Review of the Office of the Children’s Advocate” (Calgary, Alberta: Minister of Children’s Services, 2000) at 2-3, as cited in Bunting, *Ibid*, at 144.

¹⁹⁸ I have written about this elsewhere. Hadley Friedland, “Different Stories: Aboriginal People, Order and the Failure of the Criminal Justice System” (2009) 72 (1) Saskatchewan Law Review 105 at 4.

illustrates how intertwined women's and children's safety actually are in many cases.

There is much written about Indigenous women and the pervasive and dangerous intimate violence they face, but most of the focus on Indigenous children is their need to remain within family, community and culture.¹⁹⁹ There are good reasons for this,²⁰⁰ yet if many Indigenous women residing on reserves report encountering "significant conditions of endangerment" and have "reported profound fear of victimization and death"²⁰¹, what about Indigenous children? It is beyond question that children are the most vulnerable group in society.²⁰² They are also the most victimized group, even based on reported crimes alone.²⁰³ Their profound voicelessness is perpetuated and reinforced by societal norms and law itself, which completely leaves them at adults' mercy.²⁰⁴ In Anne McGillvray and Brenda Comaskey's study of violence against Indigenous women, childhood emerged as a central issue. Over four decades and several regime changes in child protection, from Indian agents and residential schools to Indigenous controlled

¹⁹⁹ See, for example, Kline, Best Interests Ideology, *supra* note 172.

²⁰⁰ See the very thoughtful and nuanced discussion of the complicated reality Indigenous children in care face in Ardith Walkem, *Wrapping Our Ways Around Them: Aboriginal Communities and the CFCSA Guidebook* (ShchEma-mee.tkt Project (Lytton, BC: Nlaka'pamux Nation Tribal Council, 2015), online: <http://www.nntc.ca/docs/aboriginalcommunitiesandthecfcsaguidebook.pdf>

²⁰¹ Gillian Balfour, "Falling Between the Cracks of Retributive and Restorative Justice: The Victimization and Punishment of Aboriginal Women." (2008) 3, 2, *Feminist Criminology* 101 at 104 [Balfour].

²⁰² Michael Freeman, "Whither Children: Protection, Participation, Autonomy?" (1994) 22 *Man. L.J.* 307 at 307 [Freeman].

²⁰³ David Finkelhor, *Childhood Victimization: Violence, Crime and Abuse in the Lives of Young People* (New York: Oxford University Press, 2008) at 3 [Finkelhor, Child Victimization].

²⁰⁴ Freeman, *supra* note 202, at 307.

child protection agencies, the major consistency was that “children tried and failed to get protection.”

Almost twenty years after the incident described above, I too became an adult who Indigenous children tried and failed to get help from. Two small children I know well came to me one night to tell me they were scared to go home because their dad was drinking. Their dad was also someone I loved, who had been recently convicted of severe intimate partner violence, and was attending a local healing program as a community-based alternative to incarceration. After ensuring the children were physically safe for the night, I phoned, not the police, not child welfare, but the lead therapist of the healing program. I explained the situation and what the children had told me. This approach seemed ideal to me – I believed their cry for help would be responded to from a holistic, healing place. I felt at peace thinking their safety was in the hands of trained professionals already working with the family and well aware of the level of violence that had occurred in the past. Months later, a thankfully non-fatal crisis occurred and child welfare became involved. In the aftermath, as I joined in the planning and support around the family, I was stunned to learn the therapists in the healing program had done nothing at all with the information I had given them *months* earlier. They had not talked to the children, they had not passed on the information to child welfare, and they had not told me they were not going to respond to the children’s pleas for help so I could decide on what further action to take myself. They had done nothing at all to assess or address the children’s physical safety in their own home. It was with a sinking heart I realized that it was my trust in a *healing* program that had led me to join the

legion of adults who had failed these two little ones particularly, and Indigenous children generally.

Many feminist theorists have called for closer study of healing and restorative justice projects. Angela Cameron has echoed a women's shelter network's call for a moratorium on new restorative or Aboriginal justice projects that address intimate violence until further research is done to analyze their safety for women and children.²⁰⁵ There is a striking lack of empirical or other research that addresses safety and efficiency of healing programs for situations involving intimate violence or sexual victimization.²⁰⁶ My experience with a healing program's non-response to the issue of children's fears and safety from a parent in the program illustrates the dangers inherent in assuming some end goal of healing negates any need for assessing and effectively addressing present safety issues in the present. While calls for "breaking the silence" are strong, Dr. Hylton argues cogently that

if victims are encouraged to disclose the abuse they have suffered, adequate and appropriate services must be available for victims and offenders. If not, many will be left even more severely damaged.²⁰⁷

How does this happen? Are community based healing and victims' immediate safety diametrically opposed? Must we resign ourselves to choosing one or the other?

We know, from the information in the Cree legal summary in Chapter 3 and the *Aseniwuche Winewak* participant responses in Chapter 5, that this is not the case

²⁰⁵ Cameron, *supra* note 174 at 59.

²⁰⁶ *Ibid.* See also Hylton, *supra* note 149 at 70-71 and Dickson-Gilmore and LaPrairie, *supra* note 173 at 183.

²⁰⁷ Hylton, *supra* note 172 at 140.

within the Cree legal tradition. In *Creating New Stories*, a critical insight into Cree legal principles related to reconciliation is that creating safety was crucial:

Our children, our young women and our young men, need to and deserve to be protected and live in communities they feel safe in and proud to be a part of today. If we or our families are not in a safe place, then none of the other principles we discuss can have positive effect. Safety is foundational.²⁰⁸

This makes intuitive sense – for example, the first stage of trauma recovery is establishing safety. It is hard to impossible to heal if you are not safe from continued violence and victimization or the threat thereof.²⁰⁹ The centrality of safety was reinforced by the community feedback about using Cree legal principles in a Cree Justice process. Recall that sixteen out of eighteen participants rated the procedural step of “Taking Appropriate Safety Measures for Individuals and Community” as very important (5/5) and two rated it 4/5 for importance.²¹⁰ The rich discussions regarding how to maintain safety,²¹¹ and the importance placed on the duty to warn others and duty to prevent future harms,²¹² also illustrated how important maintaining individual and community safety is to people within the community itself. Safety clearly matters deeply to people within Cree communities. Establishing safety is both foundational for trauma recovery and a foundational Cree legal

²⁰⁸ Hadley Friedland and Lindsay Borrows, “Creating New Stories: Indigenous Legal Principles of Reconciliation” (2014) Online: <https://keegitah.wordpress.com> at 26.

²⁰⁹ Herman, *supra* note 110, says the first fundamental stage of trauma recovery is “establishing safety.” Only then can trauma survivors go on to the next phases, “reconstructing the trauma story and restoring the connection between survivors and their community.” (at 2). In her talk, “Child Development Essentials” at the CLE BC Access to Justice for Children Conference, Vancouver, BC, May 13-14th, 2015, child psychologist Dr. Mary Korpach stressed that, while there are several effective interventions to alleviate the trauma symptom of hyper-arousal in children, these will not work unless the child is actually in a safe place. It is sadly remarkable how often this step seems completely overlooked or ignored in Indigenous healing contexts.

²¹⁰ Cree Justice Process Questionnaire Compiled Results, *supra* note 43, at 14.

²¹¹ *Ibid* at 11.

²¹² *Ibid* at 25.

principle. Yet conditions of endangerment and vulnerability, for both women and children, continue at an alarming rate.

In a significant way, the current false dichotomy between safety and healing within Indigenous communities proceeds from characterizing Indigenous and state justice as diametrically opposed rather than acknowledging the limits imposed by the state's presumptive monopoly on the use of coercive force, as discussed in the previous chapter. This is exacerbated by the barriers described above - systemic devolution of responsibility without corresponding resources, support for rigorously understanding the principles underlying cultural practices or assessing and building capacity within communities. The dominant media and state law narratives also play a role. At best, state law's narratives are inadequate and unreliable. At worst, state law is seen as such "a tool for government oppression"²¹³ so turning to it in order to access its resources are fraught with risks of real or perceived victimization. If community-based initiatives fail in their immense task of protection and healing, the media quickly picks up these failures and the pervasive moral devaluation of Indigenous people in the dominant media narrative continues. This, in turn, heightens the stakes and tensions at the community level.

One can see how even well-intentioned community leaders and competent professionals could grow so defensive and feel so embattled they might ignore or avoid information that signals safety concerns. They may truly fear these concerns

²¹³ TRC final report at Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg, 2015), online: [http://www.trc.ca/websites/trcinstitution/File/2015/Honouring the Truth Reconciling for the Future July 23 2015.pdf](http://www.trc.ca/websites/trcinstitution/File/2015/Honouring%20the%20Truth%20Reconciling%20for%20the%20Future%20July%2023%202015.pdf) at 202 [TRC Final Report].

coming to light might subject a vulnerable family to an unreliable, often vicious system, or reflect negatively on their own ability to handle such cases, so risk losing further capacity. Otherwise caring, intelligent and responsible adults in communities may operate from similar fears. When accountability becomes viewed as a threat and transparency as a risk, community based programs can end up modeling and reinforcing an added level of silencing rather than providing adequate and appropriate responses to breaking the silence within communities.²¹⁴ There are currently no public procedural and normative frameworks for healing, justice and protection initiatives that support them to work through these complex issues in a principled transparent way, or demonstrate *how* they have done so to community members, justice system professionals and the general public.

9. The Reasonable Cree Person's Place in the Current Justice System:

What would the reasonable Cree person, as a representative figure of Cree legal thought, using Cree law's tools for practical reason, think of the mainstream justice system, and the available narratives and the spaces for applying Cree practical reason? Could she see herself actively taking part of it?

Lon Fuller argued the capacity of law to be a practical guide to reason with is actually a crucial aspect of fidelity to law.²¹⁵ We reason through a legal tradition's precepts when they are broadly congruent with a *meaning* that we, as reasoning,

²¹⁴ For example, in the horrific case of Jane Doe, *supra* note 186, the legal issue was the child welfare agency responsible for her wellbeing actually applying to seal case records for their own self-protection.

²¹⁵ Fuller, *Morality of Law*, *supra* note 30, at 39-41 (Fuller argued "fidelity" to a system of law is engendered when the law is legitimate (met his criteria for internal morality) and when those subject to it can reason through its rules).

feeling, imagining, seeking beings who are vulnerable, *can think through our lives with*, or, at least, *think we can live with*. Not exactly an exacting standard. We don't have to necessarily agree with every law – we can indeed harbour deep disagreements, and still live with precepts and practices for the simple reason we see, at some level, the value of being part of an ordered community.²¹⁶

Pragmatically, we may live with precepts we may not understand or agree with simply because they don't really affect our lives enough to bother us, or because we don't believe we have the power to change them. Crucially though, we will never have *fidelity* toward a legal tradition that is incompatible with our life itself, or gives an intolerable meaning to our way of life, experiences or histories. This is not to say we won't obey the law, out of overlapping moral claims, pragmatism, fear of coercion, exhaustion or even habit and a dearth of alternatives, but we will never *reason* through our world with its intolerable rules. That would be masochistic. The gap in legitimacy and enforcement is formidable.

What mere amelioration or the cultural difference argument misses, and what the trauma narrative does not respond to, is the fact that the reasonable Cree person would likely find most of Canadian law, not so much incomprehensible as deeply *unreasonable*. Canadian law is set against a background mythology, perpetuated by the mainstream media, of narratives of Indigenous people as backward, deficient and depraved, which the reasonable Cree person knows herself, her ancestors and her relatives not to be, and which gives an intolerable meaning to her way of life, experience and history. The juridical construct of individuals as

²¹⁶ Jeremy Webber, "Legal Pluralism and Human Agency" (2006) 14 Osgoode Hall Law Journal 167 at 177.

ahistorical individuals completely responsible for themselves and only responsible for themselves (and their children, but only if it is a child protection matter rather than their own incarceration) is a further absurdity.

Relationships aren't considered, and the court decision about an individual rarely, if ever, explores all the individual's relationships in the decision, as resources or as deeply affected parties, regardless of the seriousness of the offence. The principles of denunciation and deterrence aren't implemented in a reasonable way, where the offender and community could actually learn and understand what was done wrong and what community standards are. If you add in Gladue reports or problem-solving courts, you get a little more reasonable, if you have a good-hearted judge listening and seeking to understand the offender's story. Problem-solving and Aboriginal courts may provide more guidance and supportive supervision for some offenders but only in a smattering of cases. Community based restorative justice or healing programs may include more consideration of family and community members, but if they solely focus on one legal principle – healing – without blending it or balancing it with others when necessary, they remain insufficient for safety and won't make sense as a stand alone for many, if not most cases. Very few, if any, of the most reasonable options can be used to deal with the serious or violent offences that cause the worst trauma, that break a community apart and leave ripples of grief, loss, fear and anger in their wake. It just doesn't make sense.

Who could actually think through their lives with this, particularly with the impacts of “wounds of mass systemic harms, both past and present”²¹⁷ and extreme levels of violence to contend with? Who could imagine these resources for practical ‘reason’ leading to a more peaceful and ordered community? When you start from the perspective of the Cree reasonable person, steeped as she is in Cree legal *thought*, rather than cultural difference, it is clear why the *Aseniwuche Winewak* community participants see a Cree justice process using the Cree legal principles as being more reasonable and *effective* in maintaining safety, peace and order in their communities. For this to happen however, we need to establish more symmetrical and respectful relationships between Indigenous laws and legal actors and state laws and legal actors. This requires us to go beyond both the ugly narratives of the primitivist discourse and even the seemingly more hopeful narratives of amelioration and healing, to a different starting place altogether.

10. Restarting the Conversation: Recovering Indigenous Legal Traditions

On its face, despite the serious limitations and barriers that do exist, there seems to be some spaces provided, even directed, by the Canadian mainstream justice system for considering Indigenous experiences, perspectives, understandings and conceptions of justice. How do we reconcile the clear directive from the Supreme Court and these multiple sites of informed and longstanding attempts at

²¹⁷ “Reflections on Justice as Healing” in Wanda D. McCaslin, ed., *Justice as Healing, Indigenous Ways: Writings on Community Peacemaking and Restorative Justice from the Native Law Centre* (Minnesota: Living Justice Press, 2005).

amelioration with the alarming and demoralizing statistics that tell us rates of serious and violent crime by and against Indigenous people keep growing?

This question has been on many minds and hearts. There are generally two main streams of thought, despite the internal or even opposing variations within each. The first stream is the *immensity* of the problems Indigenous peoples are struggling with, that often manifest themselves as crime. These underlying issues are simply too large or intractable for any ameliorative attempts to have much impact for a very long time. They took generations to create, and they will take generations to repair. The second is the *focus* of ameliorative efforts. Ameliorative efforts tend to be on sentencing and treatment after the fact, but this is misguided or insufficient to address the real sources of the underlying issues, whether this is framed as systemic racism, socio-economic circumstances, population growth, ratio of youth, intergenerational trauma, continuing economic and environmental injustices, inadequate or substandard educational, early intervention and children protection services, colonialism writ large, or any combination of the above.

I think there is truth in both these streams of thought. I deeply respect and appreciate the efforts of the many people that continue to work toward and fight for justice in these areas. The related question that concerns me though, is a little different –How do we acknowledge the depth and the breadth of the current social suffering and terrible danger too many Indigenous people live with or die from, and also navigate out of the current narratives of despair? Can we step away from the emphasis on amelioration to ground the conversation in a more respectful, symmetrical and, I would argue, more *accurate* way?

Why aren't Indigenous legal traditions taking root and growing in Canada? What is missing? Certainly, as we see with Aboriginal courts and community justice projects, more long term and secure resources. However, I also think there is an intellectual deficit at play. If we want better answers, maybe we need to be asking better questions. In order to establish a firm foundation for accessing, understanding and applying Indigenous laws today, opening up jurisdictional space and directing adequate resources is necessary, but not sufficient. We also need the kind of intellectual work within Indigenous legal traditions that I have demonstrated is possible in the last three chapters. We need to be able to imagine the reasonable Cree person, and we need narratives and resources for practical reason that would be tolerable for her to reason through life's problems with, instead of being useless or even harmful.

How, as a society, to respond to the reality of human violence and human vulnerability in Indigenous communities, raises urgent questions at the very core of law's concerns.²¹⁸ Identifying legitimate answers to this question is important to Indigenous communities for several practical reasons. To the extent self-governance is a long term goal, Indigenous communities will need legitimate processes for addressing these issues, because human violence and human vulnerability will never be completely eradicated in any society. They are both part of our human

²¹⁸ H.L.A. Hart asserts that our human vulnerability means that one of "the most characteristic provision[s]" of any system of law or morals must include the prohibition or restriction of "violence in killing or inflicting bodily harm": Hart, *supra* note 35 at 194. Although he rejects force as a necessary identifying mark of law, on this point, Fuller agrees with Hart, stating, "given the facts of human nature, it is perfectly obvious that a system of legal rules may lose its efficacy if it permits itself to be challenged by lawless violence." See: Fuller, *Morality of Law*, *supra* note 30 at 108. I interpret this as logically extending to intimate violence and child victimization, at least theoretically, if not in practice.

condition.²¹⁹ As Hylton argues, the “immediate threats to the well-being of Aboriginal women and children...undermine the prospects for [long-term] positive social development in Aboriginal communities.”²²⁰ In the immediate situation, the violence and vulnerability that are both especially acute at this point due to a confluence of many historical, social and systemic reasons, must be addressed somehow because otherwise there is no end in sight.

The latest research on childhood victimization strongly suggests that strengthening norms and enforcement against intimate violence correlates positively with reduced rates of such violence.²²¹ This leads me to ask: what if the opposite is also true? What if part of the continuing fear, trauma and violence today is linked to the erosion of Indigenous legal traditions, which, while not perfect, would appear to have worked well enough for thousands of years prior to European contact?²²² Rupert Ross has argued compellingly that at least some of the trauma and dislocation correlated to the “collision with Western culture” and Indigenous cultures is the pervasive devaluation of Indigenous culture by the dominant society,

²¹⁹ Hart, *Ibid.*

²²⁰ Hylton, *supra* note 149, at 99.

²²¹ Finkelhor, *supra* note 203, at 10. Finkelhor argues there is “considerable evidence that strengthened norms and sanctions play an important role in discouraging crime and offensive behaviour. As norms changed regarding spousal assault, evidence suggests its incidence has declined. As norms have changed with regard to corporal punishment, that has declined too. ...This is all evidence that when norms are clear and strict, offenses are discouraged.” He argues that shifting norms related to all kinds of child abuse is a likely cause of the real decline in child victimization in North America in recent years (at 138-139).

²²² See generally, Napoleon, Ayook, *supra* note 34.

and acknowledging the rich complexity and gifts within these cultures could make a powerful difference today.²²³ The same can be said about Indigenous laws.

Because violence and vulnerability are issues all societies face, logic alone dictates Indigenous societies had ways to deal with these issues prior to the arrival of Europeans. Logically, these legal traditions must have provided principled ways to address social problems and order human affairs.²²⁴ These legal traditions, like all legal traditions, also provide a specific way of not just solving, *but articulating and reasoning through social problems* in the first place.²²⁵ The prevalent political and legal narratives that focus on cultural practices rather than legal reasoning within Indigenous traditions may inadvertently continue the mischief of reducing “thought to practice.”²²⁶ Recovering and reclaiming Indigenous legal reasoning may enable Indigenous communities to use these collective intellectual resources in a more explicit and targeted way today,²²⁷ thereby strengthening vital norms about safety and well-being within communities, and developing legitimate and effective responses to pressing social issues, such as violence and victimization. This is why

²²³ See Ross, *Returning to the Teachings*, *supra* note 193 at 47-48 and Rupert Ross, “Telling Truths and Seeking Reconciliation” in *From Truth to Reconciliation: Transforming the Legacy of Residential Schools* (Ottawa: Aboriginal Healing Foundation, 2010) at 156-158. Online: <http://www.ahf.ca/downloads/from-truth-to-reconciliation-transforming-the-legacy-of-residential-schools.pdf>.

²²⁴ Fuller describes law as “a direction of purposive human effort” consisting in “the enterprise of subjecting human conduct to the governance of rules”: See Fuller, *Morality of Law*, *supra* note 30 at 130.

²²⁵ See generally, Cover, *supra* note 44 and White, *Legal Knowledge*, *supra* note 39.

²²⁶ H. Patrick Glenn, “The Capture, Reconstruction and Marginalization of “Custom”” (1997) 45 *American Journal of Comparative Law* 613-620 at 620, quoting Clifford Geertz *Local Knowledge* (1983) at 208.

²²⁷ Ross argues that, despite contemporary realities and challenges, including abuse of these teachings and a desire for punishment by many Aboriginal people, bringing back traditional teachings to prominence is the “one best way for communities to deal with the problems that show up as charges in criminal courts”: Ross, *Returning to the Teachings*, *supra* note 193, at 15.

my question is deeply related to amelioration. It just doesn't start or end there, but rather, in the deeply rooted and enduring existence and intrinsic value of Indigenous legal traditions for Indigenous peoples, and for rebuilding relationships of mutual respect between peoples.

11. Conclusion:

*Establishing respectful relations...requires the revitalization of Indigenous law and legal traditions.*²²⁸

In this chapter, I introduced the concept of the reasonable Cree person, as a representative figure of Cree legal thought, based on logic and my research in earlier chapters of this dissertation. The lack of acknowledgement and recognition of Indigenous legal thought is a deep absence in current conversations about the horrifying rates of violence, victimization and death Indigenous women and children suffer, as well as over-incarceration of Indigenous offenders. These conversations instead tend to focus solely on amelioration, with a side of unexamined cultural difference. I outlined the current grim statistics about the growing rates of under protection and over-incarceration, and violence by and against Indigenous people in Canada.

I also reviewed the dominant media, legal and political narratives about these issues and outlined some of the main ways the courts and mainstream justice system have attempted to ameliorate these issues. While there are significant directives and spaces within the mainstream justice system for Indigenous perspectives and conceptions of justice, these spaces are not growing, and public

²²⁸ TRC Final Report, *supra* note 213 at 16.

and explicit application of specific Indigenous legal principles and Indigenous legal *thinking* is largely absent. Even in community justice initiatives, there is a lack of transparency, explicit reasoning, and there are significant barriers to success. This all contributes to the continuing lack of safety for Indigenous women and children within their own communities.

In the first part of this dissertation, I argued there is increased interest in engaging with Indigenous legal traditions, and we need transferable methodologies for serious and sustained engagement with Indigenous laws in order for them to be more accessible, understandable and applicable. I shared examples of outcomes of one methodology for doing so, arguing these demonstrate this methodology does work to increase access, understanding and applicability. In this part, I considered how these outcomes might be recognized or received within the dominant narratives and available spaces to deal with violence and vulnerability within the current Canadian justice system. I concluded, sadly, that the reasonable Cree person would not likely recognize herself in the current narratives and spaces available to her, any more than the justice system recognizes her at present. In short, I am not sure if Canada is as ready as the *Aseniwuche Winewak* are to start applying Cree legal principles in a recognized and formalized Cree justice process.

For David MacPhee's vision of a Cree justice process that reasons through and applies Cree legal principles to become a reality, the good-hearted justice system professionals involved would need to be able to recognize both the existence of Cree legal principles, and be able to imagine people actively engaging with Cree legal reasoning through these principles, in a way that could conceivably begin to

bridge the gap between legitimacy and enforcement that currently exists. How well we answer practical questions about relationships and harmonization between state law and Indigenous laws will depend on how well we do the needed intellectual work first. Making space for Indigenous peoples to reclaim the language of law and recognizing Indigenous legal reasoning is an active process. It is absolutely necessary if we are going to have reasoned conversations about a reasonable legal order for Canada's future.

I believe this is possible. Judith Herman has described how veterans transformed the public and professional recognition of traumatic stress by collectively "insisting upon the rightness, the dignity of their distress."²²⁹ The heart of my work has been to acknowledge distress but also insist upon the rightness and dignity of colonialism survivors' decision-making. Indigenous legal decision-making has gone unrecognized or misrecognized for far too long in Canada. If nothing else, this dissertation stands as a demonstration that, if we work hard enough at it, non-Indigenous people can learn to learn. We can listen better. I hope the reasonable Cree person would recognize herself, and her legal reasoning in these pages, would feel heard, valued and welcome in this space. I hope I have learned to learn enough to contribute, in at least some small way, to *Wah-ko-to-win*.

²²⁹ Herman, *supra* note 109 at 27.

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Appendix A: AJR Project Community Participant Information Package

Community Based Research Project: Oral Histories and Indigenous Legal Traditions on Justice and Reconciliation

COMMUNITY HANDOUT

The Indigenous Bar Association in Canada (IBA) has launched an indigenous legal research project in collaboration with the UVIC Faculty of Law, the Truth and Reconciliation Commission of Canada, and the Law Foundation of Ontario. This is a forward-looking project aimed at sharing internal knowledge and strengths in a clear and open way. Professor Val Napoleon at the Faculty of Law, University of Victoria is the project lead, and she is working with a number of law students and communities over the summer months of 2012.

The law students are working directly with the project coordinators, Renée McBeth (Victoria) and Hadley Friedland (Edmonton), and with, Community-Based Researchers, who will be hired directly from within selected communities where interviews are taking place.

Community Sessions and Interviews

This research project is focused on identifying the law in historic oral traditions that are already publically available, and which concern successful historical responses to conflict, compensation and injury, and peace-making and dispute resolution. Working with communities, the research will identify internal strengths and resiliencies within indigenous legal resources and processes, and ways of teaching.

We acknowledge that, given the broad subject of justice and reconciliation, some people may choose to share their own personal experiences within open-ended community processes. However, this is not the intent of this project, nor will it be deliberately evoked by any of the interview questions. We plan to manage this possibility by explaining the purpose of the project and explicitly telling all community participants that we do not encourage personal disclosures because (1) that is not the goal of this project, and (2) we are not set up to appropriately respond to or address such disclosures. In recognition that this may occur regardless, as an added safety measure we will ensure that the Community-Based Researchers will provide a written sheet of information about available community-resources to all the participants.

Community-Based Coordinators:

In the selected communities, a community-based researcher will be hired to assist with this project and support the law students. Among other tasks, the community-based researcher will identify and compile a written document listing available community resources to support individuals participating in the focus groups and interviews in the event they experience any emotional or mental distress in the course of the workshops or interviews.

In your community, the Community-Based Coordinator is _____.

Research Plan:

The research plan includes:

- (1) an intensive introduction to indigenous legal traditions course,
- (2) researching publicly available ethnographic materials for selected indigenous legal traditions,
- (3) analysis and synthesis of materials,
- (4) preparing presentations for selected indigenous communities,
- (5) working with and conducting interviews in selected indigenous communities,
- (6) preparing project papers and reports,
- (7) presenting findings at a public seminars in Victoria, and at a national conference to be held in Winnipeg in October 2012 (dates to be confirmed).

Contacts:

Dr. Val Napoleon may be reached at the University of Victoria, Faculty of Law: 250-721-8172 or napoleon@uvic.ca.

Hadley Friedland may be reached at hadfried@gmail.com.

Renée McBeth may be reached at demcon@uvic.ca.

Please feel free to ask us any questions that you have before proceeding with the consent form. You can also contact us at any time in the future if you have further questions.

ACCESSIBLE RESOURCE HANDOUT

Crisis Lines (these are available 24 hours a day and are free to call):

Parent Help Line: 1-888-603-9100

National Residential School Crisis Hotline: 1-866-925-4419

Local resources:

The Community-Based Coordinators will ensure that information about local community-resources is provided to all the participants.

Appendix B: AWN Cree Justice Project Participant Information Package

Cree Legal Traditions: Short Summary

Community Partner: Aseniwuche Winewak Nation

Indigenous Law- What are we Talking About?

What is law? In its simplest understanding law is found in the ways we solve problems, make decisions, create safety and maintain or repair relationships. When discussing what law is we often recognize it in our daily lives as something written in codes or regulations and enforced by judges and police. This understanding of law is a correct one but we believe that it is only one form that law can take. Different approaches to solving problems, making decisions, creating safety and maintaining or repairing relationships exist.

For this work we started with the belief that forms of law also existed, and continue to exist, in Indigenous communities including the communities of this area. However, with the absence of courts and written texts, the expression of Cree law is not the same as Canadian law. Instead Cree law can be found in stories and in the interactions between people and their environment as they respond to harm, injuries and disputes. Within these responses Cree law is expressed in principles, procedures, obligations and rights that communities have used, upheld and passed on for thousands of years. This was not just about obeying certain individuals or following certain rules. It was about people thinking through principles and acting on their obligations together. This still goes on today in different ways.

We also started this work with the belief that Indigenous laws and their approaches to problem solving, making decisions, creating safety and maintaining or repairing relationships are still capable of thriving and serving the needs of communities. This belief is held despite historical efforts to minimize the role of Indigenous laws in communities and its treatment as something other than law.

The results of our work were guided by these two main beliefs and continue to guide the conversation of how these laws can best thrive and serve the needs of the community today.

Cree Short Legal Synthesis Introduction:

In 2012-2013, Aseniwuche Winewak Nation [AWN] was selected as a community partner to participate in a national research project launched by the *University of Victoria Faculty of Law's Indigenous Law Research Clinic*, the *Indigenous Bar Association* and the *Truth and Reconciliation Commission*, and funded by the *Ontario Law Foundation*, called the Accessing Justice and Reconciliation Project [AJR Project].

The overall vision for this project was to honour the internal strengths and resiliencies present in Indigenous societies, including the resources within these societies' own legal traditions. The goal of the AJR Project was to better recognize how Indigenous societies used their own legal traditions to successfully deal with harms and conflicts between and within groups and to identify and articulate legal principles that could be accessed and applied today to work toward healthy and strong futures for communities.

The AJR Project's approach was to engage with Indigenous laws seriously as *laws*. Researchers analyzed publically available materials and oral traditions within partner communities, using adapted methods and the same rigor required to seriously engage with state laws in Canadian law schools. Researchers used an adapted „case brief method“ to analyze a number of published and oral stories, and to identify possible legal principles. They presented this work to elders and other knowledgeable people within our partner communities, who graciously shared their knowledge, opinions and stories with them. This helped researchers to clarify, correct, add to and enrich their initial understandings. The results were synthesized and organized in an analytical framework for accessibility and ease of reference.

The following short synthesis is a brief summary of the main principles identified and discussed at greater length in the report prepared based on Kris Statnyk's and Aaron Mills' research and analysis of the resources within Cree legal traditions to address harms and conflicts between people. The students relied on publically available resources and interviews within AWN in the summer of 2012 for their analysis. A more in-depth analysis and discussion of these principles can be found in the „AJR Project: Cree Legal Traditions Report.“

[Note: Cree short synthesis omitted from appendix]

An Indigenous Justice Process: Exploring the Possibilities Today

The AJR Project identified Cree legal principles used to successfully deal with harms and conflicts within groups. The next question for the UVic Indigenous Legal Research Clinic is looking at how these laws can best thrive and serve the needs of the community today.

Dealing effectively with harms or conflicts in Aboriginal communities can have unique aspects compared to non-Aboriginal communities. When an offence occurs, often both the person who offended and who was offended against are people who are deeply rooted and cared about within the community. As one AWN elder put it, “these are our family members”. This can be both a challenge and strength. AWN is interested in exploring the possibilities for developing and implementing a credible justice process that is acceptable and sensitive to the needs, norms and aspirations of the Aboriginal communities in the area. The goals for this justice process would be to promote the personal responsibility of offenders to their communities and support community healing, with an overarching goal of contributing to the maintenance of safe, healthy and peaceful Aboriginal communities.

The UVic Indigenous Legal Research Clinic is working with AWN and the Hinton Friendship Centre to explore what this justice process could look like, how Cree legal principles might be used, and what people want and need today in the community. We are interested in hearing from community members, elders, youth, justice system professionals and other helping professionals involved in the community. Our major 3 areas of focus for community engagement and discussion are:

1. Cree Legal Principles: The Aboriginal people in this area maintained peace and order within their societies for thousands of years. How can we build on these internal strengths today in more formal settings? What do you think the identified Cree legal principles for responding to harm and conflict have to offer today, within or connected to the court system? What do you see as important? What concerns or questions do you have about using these principles in this new way today? What might be missing that is also important to you?
2. The Current Court System: Many studies repeatedly show that the Canadian justice system has failed Aboriginal people on a massive scale. There are also many good people working hard to make things better in every region. What isn't working for Aboriginal people locally? What is working for Aboriginal people locally? What issues do local Aboriginal people face that are unique, or that have different aspects to them in Aboriginal communities?
3. Other Aboriginal Justice Programs: There used to be a Native Court operating in this area. There are also different Aboriginal Justice programs operating across Canada. Based on what you know and have heard, what is good about these kind of court processes? What are your concerns or worries? What would be important to you? What questions do you have about the possibility of starting one in this area? What advice would you give?

The Indigenous Legal Research Clinic team for this project can be reached by email: Hadley Friedland: Hadfried@gmail.com and Kris Statnyk: kstatnyk@gmail.com, or by phone: 780-827-5324. The AWN community coordinator is Carol Wanyandie.

AWN NATIVE COURT RESEARCH PROJECT QUESTIONNAIRE

PARTICIPANT INFO

Age Group

☐ 18-30 ☐ 31-60 ☐ 60 and older

Gender

☐ Male ☐ Female

Community

☐ Muskeg ☐ Susa Creek ☐ Grande Cache Lake ☐ Victor Lake ☐ Wanyandie Flats
☐ Joachim ☐ Town of Grande Cache ☐ Hinton ☐ Edson ☐

Other: _____

Do you identify as Aboriginal?

☐ Yes ☐ No ☐ I prefer not to answer

Are you a member of the professional community?

☐ Yes ☐ No If yes, what is your role? _____

Have you been personally involved in the Canadian Justice system?

☐ Yes ☐ No ☐ I prefer not to answer

Have any of your family members been personally involved in the Canadian Justice system?

☐ Yes ☐ No ☐ I prefer not to answer

Have you participated in the Mamowichihitowin or West Yellowhead Domestic Violence Program?

☐ Yes ☐ No ☐ I prefer not to answer

If yes, in what capacity did or do you participate?

☐ Family member ☐ Caregiver ☐ as a person who has offended

☐ as a person who was offended against ☐ Other: _____

GENERAL

Would you like to see Cree legal principles and concepts within a Court process today?

If you, a family member or a loved one were charged with an offence would you want to participate in a Court process that used these Cree legal principles? Why or why not?

What types of offences should such a Court process deal with? What types of offences should not be included?

What are the benefits and risks involved in a Court process that uses Cree legal principles?

DECISION-MAKERS

The outcome of our research identified those who have abilities and responsibilities to respond to harms and to resolve conflicts. Those identified included: Medicine people, Elders, family members and the community as a group. Do you think that these decision-makers should be involved in a court process that uses Cree legal principles? Which ones? Why?

What are the most important characteristics of a decision-maker?

How do you think decision-makers should be selected?

LEGAL PROCESS

How do you think the process could ensure that decisions are made in a good way?

How do you think the process could ensure victim, family and community safety is maintained?

Do you have any concerns (e.g. confidentiality) if you, a family member or a loved one were to participate in this process?

On a scale of 1 to 5 how important are these procedural steps in a Court process that uses Cree legal principles (1 = not important / 5 = very important)?

Recognizing warning signs that harm may be developing or has occurred:

1 2 3 4 5

Taking appropriate measures to keep individuals and community members safe:

1 2 3 4 5

Seeking guidance from those with relevant understanding and expertise:

1 2 3 4 5

Confronting offenders and deliberating decisions publically:

1 2 3 4 5

Identifying the appropriate decision-makers and implementing their decisions:

1 2 3 4 5

Additional Comments on Procedure (i.e. other steps, concerns, insights, advice):

LEGAL RESPONSE PRINCIPLES

On a scale of 1 to 5 how important it is to be able to use these response principles to reach decisions in a Court process that uses Cree legal principles (1 = not important / 5 = very important)?

Healing of Offender:

1 2 3 4 5

What are some examples of offences this response would be most appropriate for? Least appropriate?

Healing of Victim:

1 2 3 4 5

What are some examples of offences this response would be most appropriate for? Least appropriate?

Supervision of Offender:

1 2 3 4 5

What are some examples of offences this response would be most appropriate for? Least appropriate?

Temporary Avoidance and/or Separation of Offender from individuals or community:

1 2 3 4 5

What are some examples of offences this response would be most appropriate for? Least appropriate?

Longer/ More Permanent Separation of Offender from individuals or community:

1 2 3 4 5

What are some examples of offences this response would be most appropriate for? Least appropriate?

Acknowledgement of Responsibility from the Offender (e.g. Apology, amends or restitution):

1 2 3 4 5

What are some examples of offences this response would be most appropriate for? Least appropriate?

Re-Integration of Offender back into the Community:

1 2 3 4 5

What are some examples of offences this response would be most appropriate for? Least appropriate?

Consideration of Natural or Spiritual consequences of actions:

1 2 3 4 5

What are some examples of offences this response would be most appropriate for? Least appropriate?

Sending a Message to the Offender that his or her offence was wrong:

1 2 3 4 5

What are some examples of offences this response would be most appropriate for? Least appropriate?

Sending a Message to the Community that the offence was wrong:

1 2 3 4 5

What are some examples of offences this response would be most appropriate for? Least appropriate?

Additional Comments on Legal Principles (i.e. other response principles, concerns, insights, advice):

LEGAL OBLIGATIONS

On a scale of 1 to 5 how important is it to maintain the following Cree legal obligations in a Court process that uses Cree legal principles (1 = not important / 5 = very important)?

Responsibility to Help when asked:

1 2 3 4 5

Responsibility to ask for Help when needed:

1 2 3 4 5

Responsibility to Give Back for Help received:

1 2 3 4 5

Responsibility to Prevent Future Harms or Disputes:

1 2 3 4 5

Responsibility to Warn Others of Potential Dangers or Risk of Harm:

1 2 3 4 5

Additional Comments on Legal Obligations (i.e. other obligations, concerns, insights, advice):

LEGAL RIGHTS

On a scale of 1 to 5 how important is it to uphold the following Cree legal rights for participants in a Court process that uses Cree legal principles (1 = not important / 5 = very important)?

The Right to Protection and Safety:

1 2 3 4 5

The Right to be Helped when Vulnerable:

1 2 3 4 5

The Right to Share Your Side of The Story:

1 2 3 4 5

The Right to know how and why a decision is reached:

1 2 3 4 5

The Right to have a decision reached through consultation:

1 2 3 4 5

Additional Comments on Legal Rights (i.e. other rights, concerns, insights, advice):

RESOURCES

What support, resources and training do justice system professionals, such as judges and lawyers, need in order to do a good job working with Cree legal principles?

What support, resources and training do elders and other community members need who might be helping or participating in a court process that uses Cree legal principles?

What support, resources and training would you or family members need to meet any ***expectations or obligations*** within a Court process that uses Cree legal principles?

OTHER COMMENTS

Your experiences, thoughts, feelings, questions and concerns are important to us. This section is to give you the space to say anything else you might want us to know or think about regarding:

- (1) the Cree Legal Principles,
- (2) the current Court System, or
- (3) other Aboriginal Justice programs, including the past Native Court in this area.

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