

ACCESSING JUSTICE AND RECONCILIATION

IBA Accessing Justice and Reconciliation Project: Final Report

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I. Introduction:

The Accessing Justice and Reconciliation Project [AJR Project] is 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. This report will summarize the major findings from this project and make recommendations for further research.

Project Vision and Goals: 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.

Project Methodology: 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 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 our researchers to clarify, correct, add to and enrich their initial understandings. The results were synthesized and organized in an analytical framework for accessibility, overall coherence, and ease of reference.

II. Recommendations for Future Work:

In this section, we make recommendations for future work related to the two major overall themes that became evident through our analysis of this research project. These themes, and the recommendations, are discussed in more detail below in the section, “Project Findings: Two Overall Themes”.

Theme #1: Diversity:

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

Recommendation 1.1: Further research is needed to identify and articulate the full breadth of principled legal response and resolutions within Indigenous legal traditions.

Recommendation 1.2: Further research is needed (i) to more clearly identify or develop legal processes necessary for a decision to be accepted as legitimate by those impacted by it, and (ii) identify the guiding or underlying constitutive principles that form interpretative bounds within specific Indigenous legal orders.

Theme #2: Consistency, Continuity and Adaptability:

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

Recommendation 2.1: Support community-based research and engagement processes to enable communities to identify and discuss legal principles so they become more explicit and accessible within communities themselves.

Recommendation 2.2: Support community justice and wellness initiatives to identify and articulate guiding or supporting legal principles, as a basis for developing, grounding and evaluating current practices and programming addressing pressing social issues within their communities.

III. Summary of Findings: Gathering the Threads:

I take the thread from the fingers that are weary, and go on with the work.¹

The existence and ongoing meaningful presence of living Indigenous legal traditions in many Indigenous people's lives and communities is a fundamental premise that underlies this project.² Still, even within these communities, it would be misleading to suggest that all Indigenous laws are completely intact or in conscious and explicit use.. Given this, at this point in history, when we talk about Indigenous legal traditions, we are necessarily talking about a project that requires not just recognition, but also mindful, intentional acts of recovery and revitalization. No living tradition remains in some static, pristine state over centuries of inevitable internal and external changes. However, when legal traditions have been so comprehensively denied, disregarded and damaged through the concerted efforts and willful blindness of colonialism, there are real challenges to accessing, understanding and applying them today. Indigenous legal scholar, Gordon Christie, cautions us not to underestimate the immense damage and losses to Indigenous laws over years of colonization, and he describes our work as one way of "gathering up the threads".³ We agree that 'gathering up the threads' is the most honest, hardheaded way to describe the resource outcomes of this research project.

The themes and principles that emerged from this research project are the threads right now. They were pulled out of published stories, oral traditions, lived experiences, opinions and aspirations shared by the generous and thoughtful respondents interviewed in each partner community. What is perhaps most unique or innovative about this research project is that we have synthesized all of these different strands together into one analytical framework for each partner community. We can take the metaphor one step further and invite people to imagine the framework as a loom. Many more threads are needed, and some may not fit, and will need to be removed later, but in each case, we believe there is enough there to allow us to see the faint outline of the complete fabric the threads come from, and envision the rich, textured material that further careful and deliberate work could produce. Of course, the limit to our metaphor is that, with law, unlike fabric, there is never a completely finished product. In all living legal traditions, statements of law are always provisional, not unchanging truths.⁴ Indigenous legal principles are no exception to this. They can and should develop, adapt and transform through time.⁵

In this section, we will list the legal traditions this project engaged with, and the partner communities we worked with for each legal tradition. After briefly describing the

¹ Edward Carpenter, "By the Shore" in Theo Dorgan, ed., *A Book of Uncommon Prayer* (Toronto: Penguin Books, 2008) at 107.

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

³ Gordon Christie, Guest Lecture, IBA AJR Project Intensive Orientation, May, 2012.

⁴ See generally, Jeremy Webber, "Legal Pluralism and Human Agency" (2006) 44 Osgoode Hall LJ 167.

⁵ For an eloquent argument regarding Indigenous peoples' right to this, see generally: John Borrows, "Chapter 15: Physical Philosophy: Mobility and the Future of Indigenous Rights" in Benjamin J Richardson, Shin Imai and Kent McNeil, eds. *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oregon: Hart Publishing, 2009) at 403.

overarching research question, and the elements and purpose of the common analytical framework, we then identify the two major overall themes that emerged from our analysis, along with examples and recommendations for further work that flow from these findings.

A. Legal Traditions and Partner Communities:

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 as follows:

Legal Tradition	Partner Communities	Justice/Wellness Program
Coast Salish	Snuneymuxw First Nation	Social Development and Family Preservation Program
	Tsleil-Waututh Nation	North Shore Restorative Justice Society
Tsilhqot'in	Tsilhqot'in National Government	Culture and Customs Program
Northern Secwepemc	T'exelc Williams Lake Indian Band	Holistic Wellness Program
Cree	Aseniwuche Winewak Nation	Mamowichihitowin Wellness Program
Anishinabek	Chippewas of Nawash Unceded First Nation #27	Maadookii Senior's Centre, Residential School Archives
Mi'kmaq	Mi'kmaq Legal Services Network, Eskasoni	Mi'kmaq Legal Support Network

There are several other related and parallel community research projects that the Indigenous Research Clinic was able to connect to this larger project, but which have not yet been shared with partner communities.

B. The Research Question:

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 can access, understand and use on the ground if they want to. We broke down the broad research objective of accessing justice and reconciliation into two focused research questions that could assist communities both to respond to the residential school legacy and impacts and to build toward a stronger, healthier future. These research questions were:

<p><u>Residential Schools facts, motives and history:</u></p> <p>(Harm caused by the State and Residential Schools to Indigenous students, their families and communities)</p>	<p><u>Residential School impacts:</u></p> <p>“Residential School Legacy” or “Intergenerational Trauma” (Indigenous people harming other people within communities today).</p>
<p>= Inter-group harms and conflict</p>	<p>= Intra-group harms and conflicts</p>
<p>= <u>Research Question:</u></p> <p>How did/does this Indigenous group respond to harms and conflicts <i>between</i> groups?</p>	<p>= <u>Research Question:</u></p> <p>How did/does this Indigenous group respond to harms and conflicts <i>within</i> the group?</p>

We note that, while these research questions flow from the fact and impact of the residential schools within Indigenous communities, they are also core questions that any functional social or legal order must minimally be able to address.⁶ Thus they form a vital part of a future vision of genuine reconciliation wherein Indigenous societies and communities are strong, self-governing, vibrant and healthy places into many future generations. As the research proceeded, it became apparent that there were far more ‘threads’ in both published materials and oral traditions pertaining to the research question about responses to harms and conflicts within groups. The vast majority of community respondents focused on this issue as well. Given these factors, and in response to the strong community interest, the research outcomes of this project focus almost entirely on this latter research question:

How did/does this Indigenous group respond to harms and conflicts within the group?

⁶ H.L.A. Hart, *The Concept of Law* 2nd ed. (New York: Oxford University Press, 1994) at 194.

C. The Analytical Framework:

The analytical framework used to approach, explore and organize the information gathered in this project consists of five parts. In answering the research question, 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 harms and conflicts between people?
3. **Legal Obligations:** What principles govern individual and collective responsibilities? Where are the “*shoulds*”?
4. **Legal Rights:** What should people be able to expect from others (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 two important functions we believe this analytical framework serves. First, it focuses our attention to the specifics and working details of Indigenous legal traditions, rather than remaining at the level of broad generalities which can not only flatten the complexity of these traditions into over-simplified or pan-Indigenous stereotypes, but are hard to imagine applying to concrete issues.⁷ Second, while focusing on specific details, we are reminded that, just as with other legal traditions, specific principles, practices and aspirations within Indigenous legal traditions do not stand alone, but are all interconnected aspects of a comprehensive whole.⁸ The examples provided below will refer to both the Indigenous group, and which part of the analytical framework they come from.

⁷ The Research Coordinator of this project, Hadley Friedland, has discussed the practical need for moving past generalities and generalizations elsewhere. See Hadley Friedland, “Practical Engagement with Indigenous Legal Traditions on Environmental Issues: Some Questions”, in: *Environmental Education for Judges and Court Practitioners* (University of Calgary, Canadian Institute of Resources Law, 2012), online: http://cir.ca/system/files/Hadley_Friedland-EN.pdf at 5-8.

⁸ The Academic Lead of this project, 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.

D. Project Findings: Two Major Overall Themes:

It would be impossible to even list all the findings from the syntheses developed from engaging with six legal traditions and seven partner communities. Rather than focusing on the detailed findings within each legal tradition, we will instead focus on the 2 major overall themes that became evident from our analysis of the individual syntheses that made up the project as a whole. The first theme is diversity – there is wide range of principled legal responses and resolutions to harm and conflict in each Indigenous legal tradition. The second theme is consistency, continuity and adaptability. While there is a remarkable consistency and continuity in legal principles over time, how they are implemented demonstrates their adaptability and responsiveness to changing contexts. We include examples to help illustrate these themes, as well as recommendations for future work that flow from each theme:

1. Diversity: There is no ‘one size fits all’ approach within or among Indigenous legal traditions. There are a wide variety of principled legal responses and resolutions to harm and conflict available within each legal tradition.

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

For example, in our engagement with the Mi’kmaq legal tradition, one elder stated that the Mi’kmaq concept of *abeksikdawaebegik* (reconciliation) was one of the “biggest concepts” in Mi’kmaq society. However, he explained this carefully: “You can tell when reconciliation is done in our community...its not just forgiveness, it’s if that person has taken *abeksikdewapan*, that responsibility”.⁹ Indeed, this project’s engagement with the Mi’kmaq legal traditions suggested the predominant legal response to harm is the principle of promoting the taking of responsibility by offenders. The two main ways respondents described promoting responsibility for the offender were, (1) to provide restitution to his or her victims,¹⁰ and (2) to develop empathy for his or her victims.¹¹ In both published stories and interviews, rehabilitation or personal transformation of offenders emerged as an important principle,¹² as did the principle of healing, support, and rehabilitation of victims.¹³ Importantly, both historically and currently, there were also other principled legal responses to harm and conflict. These include either temporary

⁹ *Accessing Justice and Reconciliation Project: The Mi’kmaq Legal Traditions Report* (2013) [unpublished, on file with authors] (footnotes omitted) at 23 [Mi’kmaq Legal Traditions Report].

¹⁰ *Ibid* at 23-25.

¹¹ *Ibid* at 26-27.

¹² *Ibid* at 27-29.

¹³ *Ibid* at 29-31.

or permanent separation of an offender,¹⁴ specific deterrence, including, historically, physical punishment, and currently, temporary loss of freedom.¹⁵ In the published stories, there is also included incapacitation in extreme circumstances of cruel and malicious ongoing harm.¹⁶

In our engagement with the Cree legal tradition, respondents made it very clear they see healing of the offender as the predominant and preferred legal response to even extreme harms. For example, when one researcher asked about published stories in which people who became *wetikos* (windigos) – a Cree legal concept describing a very harmful or dangerous person)¹⁷ were killed, one elder, who practices traditional medicine, exclaimed: “probably someone who didn’t know nothing and had no compassion would just go kill someone”.¹⁸ She went on to state emphatically that instead, the proper response is to try to help and heal the person turning *wetiko*. She stressed that these people should not be seen as faceless dangers, but rather, “these are our family members”.¹⁹

However, while healing was a preferred response for Cree peoples, it was not implemented in isolation or blind to ongoing risks of harm. When someone was waiting for or not willing to accept healing, the principle of avoidance or separation was often employed in order to keep others safe.²⁰ Avoidance or temporary separations were also principled ways of de-escalating conflict and expressing disagreement.²¹ Other principles guiding responses to harm and conflict included acknowledging responsibility as a remedy,²² re-integration,²³ learning from natural or spiritual consequences,²⁴ and, historically, in published stories, incapacitation in cases of extreme and ongoing harm.²⁵ Re-integration followed healing or taking responsibility.²⁶ The same elder quoted above pointed out that re-integration might require ongoing observation and monitoring, even for life where warranted, as it was in the case of someone helped from turning *wetiko*, as no one can be completely healed from this.²⁷

¹⁴ *Ibid* at 31-33.

¹⁵ *Ibid* at 33-34.

¹⁶ *Ibid* at 34.

¹⁷ 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 Saukteaux Societies – Past, Present and Future Uses, with a Focus on Contemporary Violence and Child Victimization Concerns*. University of Alberta LLM Thesis, 2009 [unpublished] at 21-53

¹⁸ *Accessing Justice and Reconciliation Project: The Cree Legal Traditions Report* (2013) [unpublished, on file with authors] (footnotes omitted) at 30 [Cree Legal Traditions Report].

¹⁹ *Ibid*.

²⁰ *Ibid* at 31.

²¹ *Ibid* at 31-32.

²² *Ibid* at 33-34.

²³ *Ibid* at 34-35.

²⁴ *Ibid* at 35-37.

²⁵ *Ibid* at 37-38. See also: Val Napoleon, Jim Henshaw, Ken Steacy, et al, *Cree Law: Mikomosis and the Wetiko* (Victoria, BC: UVIC, 2013).

²⁶ Cree Legal Traditions Report, *supra* note 18 at 34-35.

²⁷ *Ibid* at 34.

One of the paramount considerations underlying responses and resolutions to harm in the Tsilhqot'in legal tradition is maintaining individual and community safety. Elder Marie Dick stressed that ensuring safety is one of the key benefits of law, along with providing for discipline and taking care of people.²⁸ In older published stories, this principle was applied in diverse ways, according to different circumstances, from pre-emptive action to stop a war,²⁹ to providing food to a starving community, despite being abandoned by them earlier.³⁰ Proportionality was another important principle that stood out in many stories and accounts.³¹ Deterrence, both general and specific, was also considered an important principle. Elders gave a historical example of this, where a chronic thief was physically punished to deter him from stealing (specific deterrence). Later in life, he became a teacher, and was spoken of respectfully for using his own deformity to discourage young people from stealing (general deterrence).³² Obviously physical punishment for deterrence no longer occurs today, but the principle behind this case is still seen as a valid and practical response to behaviour causing a lot of harm to others.

In our engagement with the Tsilhqot'in legal tradition, temporary separation, and, in very rare, extreme cases, permanent separation, were also mentioned as available responses to harm and conflict.³³ Finally, like in many other Indigenous legal traditions, healing was seen as a preferable resolution. However, elders were careful to point out that it often requires, or occurs after, a period of separation and reflection. According to some of the elders interviewed, the ability to heal the self is a natural consequence of temporary separation.³⁴ For example, elder Catherine Haller talked about how community members who committed harms might be “locked in a pit house” in the mountains for a while to allow people who committed harms to let their anger subside.³⁵ Elder Agness Haller noted that people in “bad situations” would go off on their own to “make them think about what they did” and that was a form of healing.³⁶ Elder Thomas Billyboy talked about how people would come back to a community after a period of separation if they had “smartened up”.³⁷ The elders’ discussion of the value of a period of voluntary or even forced separation demonstrates that healing requires creating space for the wrongdoer to reflect and change the thinking and behaviour that led to the harm in the first place.

In our engagement with the Coast Salish legal tradition, a broad spectrum of principles for responding to or resolving harms and conflicts emerged, including teaching responsibilities,³⁸ conflict avoidance,³⁹ providing guidance to wrongdoers,⁴⁰ restitution,⁴¹

²⁸ *Accessing Justice and Reconciliation Project: The Tsilhqot'in Legal Traditions Report* (2013) [unpublished, on file with authors] (footnotes omitted) at 26 [Tsilhqot'in Legal Traditions Report].

²⁹ *Ibid* at 27.

³⁰ *Ibid* at 27.

³¹ *Ibid* at 28-29.

³² *Ibid* at 29.

³³ *Ibid* at 29-31.

³⁴ *Ibid* at 31.

³⁵ *Ibid*.

³⁶ *Ibid*.

³⁷ *Ibid*.

³⁸ *Accessing Justice and Reconciliation Project: The Coast Salish Legal Traditions Report – Community Partner: Snuneymux'w* (2013) [unpublished, on file with authors] (footnotes omitted) at 25 [Coast Salish Legal Traditions Report].

restoration,⁴² providing ongoing support and monitoring,⁴³ retribution,⁴⁴ and punishment for deterrence as a last resort when nothing else works to rectify the harmful behaviour.⁴⁵ Elders explained that punishment was only used when the harm was severe and nothing else had worked to help the wrongdoer recognize his or her harmful ways. The wrongdoer would first be provided with guidance and taught responsibilities, and with opportunities to rectify the harms. If the harm continued, after multiple opportunities, or was extremely severe to begin with, then punishment could be an appropriate response.⁴⁶ What becomes apparent of course, is the corresponding responsibilities of leadership and other decision-makers, and the group as a whole to fulfill arising obligations for dealing with the offender, to ensure that the appropriate legal processes are adhered to and to protect people's respective substantive and procedural rights.

These examples demonstrate that there are nuanced and robust understanding of principles such as healing or reconciliation that may have much to offer other Indigenous communities and the broader Canadian community as well. They also give a sense of the broad variety of legal principles within each Indigenous legal tradition that are available to respond to the unique actual circumstances of specific situations of harm or conflict.⁴⁷ The diversity of existing principles reflects the rich complexity of these legal traditions.

³⁹ *Ibid* at 27-28.

⁴⁰ *Ibid* at 28-29.

⁴¹ *Ibid* at 33-34.

⁴² *Ibid* at 35-37.

⁴³ *Ibid* at 37.

⁴⁴ *Ibid* at 30-32.

⁴⁵ *Ibid* at 31-32.

⁴⁶ *Ibid* at 29, 30 and 32.

⁴⁷ It is absolutely critical not to conflate harm with conflict here, as with Canadian law. For an excellent discussion on this point, see Alan Edwards and Jennifer Haslett, "Violence is not Conflict: Why it Matters in Restorative Justice Practice" (2011) 48:4 *Alberta Law Review* 893.

At least two recommendations flow from these findings:

Recommendation 1.1: Further research is needed to identify and articulate the full breadth of principled legal response and resolutions within Indigenous legal traditions.

The Canadian justice system and Aboriginal justice are often discussed in starkly dichotomous terms. This oversimplified dichotomy cuts both ways. Flattening the complexity of Indigenous legal traditions can make it appear as if their applicability and utility is limited in cases of repeated or serious harms. Within communities, this dichotomy may undercut people's perception of the legitimacy of certain decisions that could, in fact, be seen as principled responses rooted in one's own legal tradition, albeit implemented through new means, with new partners, such as justice system actors. While there is no question that important differences do exist, at practical, conceptual and aspirational levels, our research results suggests that when Indigenous legal traditions are considered in their full complexity, there are also points of connection and confluence with western legal traditions. We recommend further research to more fully explore the full complexity within Indigenous legal traditions and to identify points of divergence *and* convergence with principles that guide the Canadian justice system.

Recommendation 1.2: Further research is needed (i) to more clearly identify or develop legal processes necessary for a decision to be accepted as legitimate by those impacted by it, and (ii) identify the guiding or underlying constitutive principles that form interpretative bounds within specific Indigenous legal orders.

In each synthesis, substantially more threads emerged in the "Legal Responses and Legal Resolutions" section than in any other, including "Legal Processes" and "General Underlying Principles". Whether this is due to damage from colonialism, the focus or expectations of researchers or respondents, or just the deeply internalized, implicit nature of these principles, further explorations are needed in these areas in order to effectively and legitimately apply the identified response principles in an explicit and transparent way today. The breadth of principled responses available within each Indigenous legal tradition highlights the need to identify the legal processes and procedures that are important to signal the legitimacy of any particular decision to those impacted by it even if they might not agree with the decision itself. In some cases, where the damage from colonialism has been severe, or contexts have changed radically, this may involve partial or full development of new processes. The breadth of principles also guides our attention to the importance of understanding and making more explicit the background and constitutive themes, aspirations and beliefs that frame the interpretative boundaries of these principles, as well as influence the balancing and blending required in any particular case.

2. Consistency, Continuity and Adaptability: Indigenous legal traditions reveal both consistency and continuity over time, and responsiveness and adaptability to changing contexts.

One advantage of analyzing and synthesizing information from multiple resources to answer a specific research question within Indigenous legal traditions is that this method enables us to recognize patterns and themes we might not otherwise spot. The consistency and continuity of certain principles in each legal tradition through history, despite different expressions and disparate resources, was noteworthy and significant. Time and time again, we saw that Indigenous legal principles can and do maintain their core integrity while adapting to new and changing contexts. There was often remarkable continuity and consistency in legal principles within Indigenous legal traditions from ancient stories to contemporary times. These deep-rooted principles are illustrated and implemented in new ways over time and in changing circumstances.

For example, in our engagement with the Anishinabek legal traditions, with regard to legal processes, an important legal principle that emerged was that a collective community process was typically required to determine major decisions over how to address serious harms.⁴⁸ Collective community processes for determining responses to serious harms were identifiable in a number of stories (*Animosh w'guah izhitchigaet*/What the Dog Did; The Boy Who Defeated a Windigo; The Story of Redfeather; Another Windigo Story) and recorded in historical reports from outsiders to that tradition (the Mayamaking Case).⁴⁹ Anishinabek legal responses were also recorded in band council decisions on how to consult and address community concerns regarding contemporary community issues (e.g., Pow-wow),⁵⁰ and in respondents' lived experiences of responding to contemporary issues of harm.⁵¹ The described harms differed, ranging from a man who had become extremely dangerous to himself and all those around him in 1838,⁵² to a 2000 decision about whether a pow-wow should be held in a location that would disturb a delicate alvar bedrock.⁵³ Those involved in the collective processes differed, ranging from birds in one story to a smaller hunting group in one historical account, a group of jingle dancers in a contemporary lived experience, to the band council with the entire reserve, and several outside experts as consultants.⁵⁴ What did not differ was that the decisions addressing the harms were made through a deliberate collective community process.

Similarly, an important legal right identified in the Anishinabek legal tradition was the right to be treated with dignity and compassion, even after one caused harm. This was evident in several older stories, which included people, animals, and ghosts (i.e., Mashos

⁴⁸ *Accessing Justice and Reconciliation Project: The Anishinabek Legal Traditions Report* (2013) [unpublished, on file with authors] (footnotes omitted) at 15 [Anishinabek Legal Traditions Report].

⁴⁹ *Ibid* at 15-16 and 25-26. Some of these recorded stories were described as myths or folktales and they are housed in different collections.

⁵⁰ *Ibid* at 16.

⁵¹ *Ibid* at 15.

⁵² *Ibid* at 15.

⁵³ *Ibid* at 16.

⁵⁴ *Ibid* at 15-16.

and the Orphans; Paguak; The Story of Redfeather; Marriage II; The Foolish Maidens and the Diver).⁵⁵ It was also evident through the thoughtful opinions and reasoning, and actions of elders in the interviews. One elder, who worked as nurse for many years, sometimes would treat sick and dying prisoners from the local jail. She stated that it was her belief that the prisoners were each entitled to care and compassion in their illness, regardless of the crimes they had been convicted for. When one prisoner had his shackles on too tight, she acted on her Anishinabek responsibilities by repeatedly asked the warden to loosen them so he could be more comfortable.⁵⁶

Another elder, the renowned author, Basil Johnston, gave an articulate opinion about the underlying rationale of this principle. He explained that to treat someone who has committed harm with continued empathy and respect, even when denouncing the harm they have committed, reaffirms that person's basic goodness and capacity for good acts and thereby encourages them to act in a good way in the future. On the other hand, treating someone as if they were fundamentally bad and no longer entitled to respect and compassion may take away their motivation to strive to be a good person capable of making a positive contribution to the community. Thus this principle benefits the individual and the community as a whole.⁵⁷ This example is also a good illustration of how many people do consciously act on and think through these deeply rooted principles today – and in the everyday.

In our engagement with the Coast Salish legal tradition, one example of a legal obligation was to take care of and help those in need.⁵⁸ This legal obligation was evident in several ancient stories (The Boys who became a Killer Whale; Flea Lady; Wolf and Wren).⁵⁹ In the interviews, elders discussed historic examples, such as the whole village gathering up as much food as they could to help a family get through a long winter and the brothers of a man who died looking after his family for life.⁶⁰ They talked about learning this obligation and about contemporary ways they and others acted on this Coast Salish responsibility to others.⁶¹ For example, one elder took a couple aside, so it wasn't in front of a group of people, and offered them help and guidance. He explained he had no relationship with them except for being part of the same longhouse and being a close friend of their grandmother; however he believed "it is the responsibility of the people supposedly in the know to guide the rest that are following".⁶²

These responsibilities lead to concrete actions, such as helping people who are injured or hurt, or even opening one's home to a woman whose husband is at home drunk.⁶³ When discussing the hypothetical example of whether a young couple that didn't know how to take care of their child had an obligation to ask for help, one elder stated that they didn't

⁵⁵ *Ibid* at 41-43.

⁵⁶ *Ibid* at 43.

⁵⁷ *Ibid*.

⁵⁸ Coast Salish Legal Traditions Report, *supra* note 38 at 40.

⁵⁹ *Ibid*.

⁶⁰ *Ibid* at 40.

⁶¹ *Ibid* at 40-41.

⁶² *Ibid* at 29.

⁶³ *Ibid* at 41.

have that obligation. Rather it was up to the rest of the community “to pull them in”.⁶⁴ Again, these threads demonstrate that the legal obligation being illustrated in ancient stories, historically acted on, taught, and learned, continue to form part of Coast Salish peoples’ principled legal actions and thought processes today.

In our engagement with the Secwepemc legal tradition, a vital procedural step that emerged was public confrontation and witnessing. This procedural step, which ensured facts were confirmed prior to any legal response to wrongdoing, is evident in older published stories (Coyote and his Son, The Young Hunter and his Faithless Wife).⁶⁵ Publically confronting wrongdoers was also seen as a crucial part of the process for resolving harms in the community in the 1940s. Elder Charlie Gilbert said the Chief and a tribunal used to publically confront wrongdoers in front of a crowd.⁶⁶ One elder said that, in the old days, when someone did something wrong, they would be asked to come to a circle, with the Chief and council. She said that she “understood it to be more like a public confession...the way I heard it from the old people”.⁶⁷ Another community member, Rick Gilbert, explained his understanding that wrongdoers “would have to come before the Chief and everybody would be there to witness it for the village”.⁶⁸

In contemporary times, this procedural step of public confrontation and witnessing is still considered valuable and used sensitively and creatively, depending on the context. One elder gave an example of a medicine person speaking out in a multi-community gathering about youth using drugs and alcohol, to let them know they were noticed, without directly confronting anyone or specifying who was to blame.⁶⁹ On the other hand, in another contemporary situation involving a man over-hunting, the community was consulted, and the wrongdoer was “severely reprimanded” at the public meeting.⁷⁰ The community nature of the public confrontation can also serve to reinforce the ties of the wrongdoer to the community. For example, in one contemporary sentencing circle, one of the young men being sentenced was from the community but had grown up in Saskatchewan. Elder Lynn Gilbert understood that the young man was affected by the words of one of the elders who “let him know, you know, that he was a member of the hereditary line and he should be behaving with pride and dignity, not bringing shame upon the name”. The young man “really felt that he didn’t...realize at the time that this was his line, so, I’m hoping, haven’t heard anything bad about him since...”.⁷¹ The diversity of these examples illustrate the enduring nature of this procedural principle, as well as Secwepemc people’s ability to adapt it to multiple contexts and apply it flexibly, depending on each unique factual situation.

⁶⁴ *Ibid* at 41.

⁶⁵ *Accessing Justice and Reconciliation Project: The Secwepemc Legal Traditions Report* (2013) [unpublished, on file with authors] (footnotes omitted) at 21 [Secwepemc Legal Traditions Report].

⁶⁶ *Ibid* at 22.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

In our engagement with the Mi'kmaq legal tradition, when we looked at legal responses and resolutions, one principle that stood out was personal transformation or rehabilitation of offenders.⁷² This was colourfully illustrated in ancient stories, where people who caused harm to others were sometimes transformed into somebody or something useful to the community. For example, a man using dark magic who wants to live forever is transformed into a cedar tree (The Man Who Wanted to Live Forever) and a *Jenu*, a dangerous cannibal giant, becomes a beloved, and very helpful, member of a family when they treat him with kindness and hospitality (Jenu). In one story, a girl is cured from causing harm when the underlying cause, a curse from an old man, is discovered and dealt with (The Snow Vampire).⁷³ This principle is evident and implemented in contemporary times through professional initiatives that employ modern therapeutically transforming practices. Today, the Mi'kmaq Legal Services Network (MLSN) delivers programs to help offenders deal with underlying issues that prompted the offending behaviours, including addiction treatment, therapy, and anger management programs.⁷⁴

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

You focus on the perpetrator first. If the offence he committed stemmed from dysfunctional family, dysfunctional character, loss of language, residential school, alcohol, addictions, or maybe the person was sexually molested in their lives. All those things have to be dealt with first. So there is going to be very little focus on the offence itself, because when all these things are done and the committee is convinced the person is ready to live up to their responsibility, then you can talk about the healing things we have in our language.⁷⁵

The underlying principle is consistent, although the means through which it occurs has changed drastically. Similarly, it should come as no surprise, given the Cree legal tradition's emphasis on healing as a response to harm, that our AJR Project partner community, AWN, responds to the issue of intimate violence by partnering with the Mamowichitowin Wellness Program to deliver therapeutic services to offenders and families of offenders.⁷⁶ These are just two of many examples of Indigenous communities accessing and applying contemporary professional knowledge and resources to implement enduring legal principles in ways that are responsive to the issues they face today.

⁷² Mi'kmaq Legal Traditions Report, *supra* note 9 at 27-29.

⁷³ *Ibid* at 28-29.

⁷⁴ For more information, see: <http://www.eskasoni.ca/Departments/12/>.

⁷⁵ Mi'kmaq Legal Traditions Report, *supra* note 9 at 27.

⁷⁶ For more information, see online: http://www.aseniwuche.com/our_people/programs_services.html.

At least two recommendations flow from these findings:

Recommendation 2.1: Support community-based research and engagement processes to enable communities to identify and discuss legal principles so they become more explicit and accessible within communities themselves.

While this project's findings are clear that Indigenous legal principles have great consistency over time, while being implemented in adaptive and responsive ways, much of their current use is occurring on an informal or implicit level within communities. Yet it is clear that at least in some communities, there are people who can discuss these at a practical and philosophical level, and have implemented them within professional justice and wellness programs. Community-based research and engagement processes that work toward making these legal principles more explicit and accessible may strengthen and reinforce their conscious and active use, especially among youth and those who have been dislocated from their community for various reasons.

Recommendation 2.2: Support community justice and wellness initiatives to identify and articulate guiding or supporting legal principles, as a basis for developing, grounding and evaluating current practices and programming addressing pressing social issues within their communities.

Given both the continuity and adaptability of Indigenous legal principles, a promising direction for further research is to explore the potential for using these principles as a basis for developing, implementing and evaluating community initiatives and partnerships. In particular, this may provide an alternate or additional method for principled evaluation of these initiatives, rather than simply relying on anecdotal reports or recidivism rates. This work, if carried out in a serious and sustained way, may provide a robust and transparent foundation for strengthening community justice and wellness initiatives, more symmetrical inter-societal partnerships between communities and outside professionals, and practical justice reform rooted in mutual recognition and respect.

IV. Conclusion:

The only conclusion we can possibly reach at the close of this project is that it is just the beginning. The hard work of gathering the threads has started. We believe there is much hope that even the process of intentionally and seriously continuing it will contribute to a truly robust reconciliation in Canada. The process and the results of this work contain their own threads for more symmetrical inter-societal relationships based on reciprocity and mutual respect.

This work is vital for the future health and strength of Indigenous societies and has much to offer Canadian society as a whole. Robert Cover once famously described law as “not merely a system of rules to be observed, but a world in which we live”.⁷⁷ Law is a “resource in signification”.⁷⁸ Legal traditions are not only prescriptive, they are descriptive. They ascribe meaning to human events, challenges and aspirations. They are intellectual resources that we use to frame and interpret information, to reason through and act upon current problems and projects, to work toward our greatest societal aspirations. Finding ways to support Indigenous communities to access, understand and apply their own legal principles today is not just about repairing the immense damages from colonialism. As Chief Doug S. White III (Kwulasultun) puts it, this is the essential work of our time:

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

Snuneymuxw First Nation,
16 November 2012

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

⁷⁷ Robert Cover, “Nomos and Narrative” (1983) 97 Harv L Rev 4 at 5.

⁷⁸ *Ibid.*



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