



Précis Paper

Indigenous Laws and the Common Law

A discussion about the current landscape around Indigenous legal activism relating to land and law.

Discussion Includes

- Innovations in learning Indigenous law
- Stories
- Difference between legal orders and legal systems
- Indigenous Law Research Unit
- Canada's teaching curriculum
- Strategic Indigenous litigation

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Indigenous Laws and the Common Law

1. In this edition of BenchTV, Rebecca Johnson (Professor, University of Victoria, Canada) and Thalia Anthony (Associate Professor, UTS, Sydney) discuss the current landscape around Indigenous and Common Law legal thinking and activism relating to land and law.

Innovations in Indigenous Law

2. Over the past decades, legal scholars have focused attention on the complicated histories of settler colonialism, and the harsh impact of colonial law on Indigenous peoples. A key development in recent years is a renaissance of scholarship focusing on Indigenous laws and legal orders, and how they have continued to exist, respond to and interact with colonial legal systems.
3. A new innovation in Indigenous law at the University of Victoria in Canada is the Joint Degree Program in Canadian Common Law and Indigenous Legal Orders (JD/JID).¹ Students graduate in four years with two professional degrees: a Juris Doctor (JD) and a Juris Indigenarum Doctor (JID).
4. This program combines the intensive study of Canadian Common Law with an equally intensive engagement with Indigenous laws. In each subject area, there is a trans-systemic approach, where students study how both the Canadian common law and another specific Indigenous legal order engages with a different area of law. The JD/JID will help students develop the skills needed to practice within Canadian Common Law, with Indigenous legal orders, and at the interface between them.
5. Both Australia and Canada have typically spoken about Indigenous legal orders as if they were not as equally robust as common law legal systems. This is beginning to change.

Stories

¹ For more on the JD/JID program, <https://www.uvic.ca/law/about/Indigenous/jid/index.php>

6. Law is a way that humans solve problems, structure their relationships, and engage with the human and non-human world around them. In both common law legal orders and Indigenous legal orders, stories are tools for thinking. In common law, stories generally take the form of case law. These stories use specific people and their problems to derive legal principles that apply to present and future situations.
7. In many Indigenous legal orders, there are a range of stories/oral narratives that carry legal knowledge, principles, and teachings. These are often organized in forms less familiar within Common Law jurisprudence. In some of these narratives, for example, legal problems are considered by creating distance, with animals and other non-human actors playing important roles. There is something powerful in such stories, and what they can teach about principles and processes through a form of engaged distance.
8. Indigenous storied legal resources have been important to recent legal activism that aims at creating space for healthier relationships between Indigenous and Common Law legal orders. One pathway forward has been to draw on the strengths of the Common Law approach of looking to past cases/stories for their reasoning, and then extend that approach to engage with the reasoning processes carried in Indigenous cases/stories. This work requires people to understand and work with Indigenous stories in their complexity. It involves learning how to “listen” to these stories in different ways. This drawing together of Common Law and Indigenous story work is one way that common law trained people can begin to develop the tools of literacy needed to work with Indigenous laws in their fullness.
9. This approach also involves some unlearning. The way law has been taught in legal institutions in Australia and Canada has tended focus on rote learning of established principles. It is not uncommon for law students and lawyers who begin to engage with Indigenous law to feel some unease in opening up to new ways of seeing and listening for law. It can be challenging but also productive to work with stories in different ways, and accept that current ways of understanding law may not be complete.

Difference between legal orders and legal systems

10. Legal traditions can be organized in different ways, and these differences can interfere with people’s ability to see other forms of law in the world around them. The language of legal system and legal order (Napoleon, 2013) can be helpful to common law-trained lawyers as they begin to engage with Indigenous law.

11. In a legal system, the relationships that matter are vertical, and decision-making power is centralized. Many common law and civilian legal traditions can be described as legal systems. The law operates in a pyramid form. The law comes from the top and it is applied down in a hierarchical fashion. Legal knowledge is often specialized and held by experts. To know how to govern our relationships, we look up to know the rules, and then apply down.
12. In a legal order, the relationships that matter are lateral, and decision-making power is decentralized and overlapping. Many Indigenous legal traditions can be described as legal orders. There are more people implicated in decision-making, and the focus is on how people work to establish and maintain multiple relations with others who are proximate to them (both human and non-human). The strategies for thinking about law are also different as people need to be individual decision-makers and apply the law themselves in the context of these relations.
13. Every person has both vertical and lateral decision-making structures in their lives. With increasing challenges of access to justice within conventional legal systems, Indigenous legal resources (such as oral narratives) are particularly powerful tools: they are designed to focus attention on processes and strategies on the lateral horizon, strategies that are particularly suited to the resolution of conflicts where there is no agreed upon or available superior authority to turn to. They can help develop skills for collaborative problem-solving.

Indigenous Law Research Unit (ILRU)

14. Val Napoleon and Hadley Friedland are pivotal figures in the development of the Indigenous Law Research Unit at the University of Victoria and the development of new ways of thinking and new pedagogies for working with Indigenous and Common Law.
15. The Indigenous Law Research Unit (ILRU) started as a single project in partnership with the Truth and Reconciliation Commission of Canada (TRC), the Indigenous Bar Association, and the Law Foundation of Ontario.² The TRC was one of the outcomes of the largest tort class action in Canada, brought by survivors of Indian Residential

² Reports from the Accessing Justice and Reconciliation Project are available here: <https://www.indigenousbar.ca/indigenoulaw/>

Schools.³ This project aimed at responding to the resulting calls for justice and reconciliation by revitalizing Indigenous Laws.

16. As part of the research work, a call was put out to First Nations communities across Canada to invite them to enter into partnerships to explore how people within their Indigenous legal order dealt with harms and injuries both between communities and within communities in the past. This work was grounded deeply in storied resources, and deep and intensive engagement with community partners.
17. Since that first project, the Indigenous Law Research Unit has worked with 50 communities, and spoke with over 500 community members on projects dealing with harms and injuries, crime and torts, environmental law, child welfare, water law, human rights law and citizenship law.⁴
18. The work with the Indigenous Law Research Unit is about revitalizing and reengaging the Indigenous Nation's own legal order, exploring the relationship between historical and contemporary legal responses. This work involves not only paying attention to stories, but also learning about law through contemporary practices, and through engagement with land and language. It has been helpful to work closely with Indigenous language speakers in this work, as language helps uncover more aspects of legal theory and different ways of categorizing and understanding legal relations.

Canada's teaching curriculum

19. Indigenous knowledge and laws are sometimes seen as in conflict rather than as in coexistence with contemporary legal system. This is particularly so with respect to subjects like property. There are deep structures of thinking in the Common Law that for many years have understood ownership of land as pivotal, in way that are different from, and often incompatible with understandings in many Indigenous legal orders. For example, there are important differences between world views that understand land as 'a commodity' and those that understand land as 'a relation'. These differences

³ Reports, materials, and more information on the TRC can be accessed at the National Centre for Truth and Reconciliation: <https://nctr.ca/map.php>

⁴ For more resources related to the work of the ILRU (including a series of educational videos and discussion guides providing introductions to important topics in the area of indigenous law), see the "Resources" tab at this link: <https://www.uvic.ca/law/about/indigenous/indigenouslawresearchunit/index.php>
Another exciting partnership model for the engagement of Common Law and Indigenous Legal Orders can be seen in the Wahkohtowin Law and Governance Lodge at the University of Alberta. See <https://www.ualberta.ca/law/faculty-and-research/wahkohtowin>

sometimes stop conversation from proceeding in helpful ways. But there are ways for grappling with these very different ways of conceptualizing and understanding law and legal categories.

20. The graphic *Indigenous Law 101* is one tool that can be helpful to encourage broader conversations about the different things people are thinking about when they refer to “the law” in Indigenous law.
21. Sometimes, a conversation about law might be about sources of law and legal authority. People will often talk about Indigenous law, for example, as if it is rooted exclusively in an idea of the sacred, or in custom, while failing to acknowledge that common law also has its sacred sources of law, and its reliance on custom. A focus on the roots of the tree can help visibilize the many sources that nourish law, whether Indigenous or Common Law. This can extend the discussion of the interplay of sources, including the natural world, customary law, and practices of deliberation.
22. Sources of law are also quite different from resources of law. In thinking about resources, we can ask broader questions of where and how law can be written. Law can be recorded in many forms, including stories, trial transcripts, case comments, judicial opinions, language, dreams, songs, ceremony, protocols, practices, historical and anthropological records.
23. The leaves in the graphic also can open room for thinking about the different ways law has been implemented in the world to solve specific problems. That leaves fill seasonal functions can also help us think about change and renewal in the application of law. The graphic of the tree can thus open spaces of metaphor and image to support conversations about larger structures of law and legal thinking in both Indigenous Law and the Common Law.
24. In the past, the approach of many judges, particularly in the colonial courts in Australia and NSW, was to treat the stories as mythology or superstition, rather than as complex resources which speak to possible authorities, procedures, practices and remedies (and in this sense, more analogous to an enabling statute, with authority in regulating communities and practices). In current times, this is shifting, and there is an increasing hunger by the judiciary for materials that will help them address the place of Indigenous law in the Courts.

25. As an example of the work Indigenous legal resources can help us do, let's consider one example, a Secwépemc story, "The War with the Sky People."⁵ Stories (Indigenous legal resources) where shared, are meant to be engaged with over time, and to be returned to with one's questions. This story can be used to explore many questions, and invites discussion about leadership, institutional structures, shared resources, partnership obligations, vulnerability, gender and more. The stories are valuable not simply for judging the characters in the story, but also for developing skills for resolving other challenges in the present, challenges confronting both Indigenous and non-Indigenous people.
26. Common law lawyers can learn from and can learn to work with Indigenous storied resources. The point of turning to Indigenous legal resources is not to deny, supplant or erase the common law. It is rather to re-open spaces for seeing anew the relationships that need to be built in order for Indigenous and non-Indigenous peoples to advance the shared project of living in this world. This will require those of us trained in the Common Law system to be able to see and work with Indigenous legal orders. We need increased fluency in order to collaborate in constructing institutional ladders to that will serve everyone in the partnership, and will help us attend to vulnerabilities and obligations to the human and non-human world around us.

Strategic Indigenous Litigation

27. On the Canadian scene, there has been a lot of strategic litigation in the field of Aboriginal Law, drawing inspiration and energy from work done in Australia and in other common law countries. This work focuses attention on direct engagement with the State, and clinical programs have played a role, coming from a number of angles, including criminal law, constitutional law, environmental law, poverty law, and municipal law. This includes thinking about the relationship between strategic litigation within the normal framework and opening up space for Indigenous law.
28. It is not necessarily the case that the outcomes in particular cases will be different between an Indigenous legal order applied and the Canadian common law applied. However, there is a huge difference in asking which legal order has been engaged with and how we learn to respect the legality of the places we live.

⁵ This story as recounted to James Teit in 1909 is appended at the end of this paper. To see the place of this story in a larger project on Secwépemc Land and Resources see <https://www.uvic.ca/law/assets/docs/ilru/SNTC%20Law%20Book%20July%202018.pdf>

29. There is strategy in telling a different story of the law in which common law is just one piece of one legal order amongst many. It is not helpful to theorize law in ways that positions legal orders as primarily in contest with each other to establish primacy. It is possible to work with legal difference through languages of partnership or treaty. In this case, one might ask different questions about the multiple obligations that might be present within a shared legal universe. This is an approach which takes legal pluralism seriously, and allows us to see law as a tool for living, not just a tool of punishment.

BIOGRAPHY

Rebecca Johnson

Professor, University of Victoria, Canada

Dr Rebecca Johnson is a Professor of Law, and Associate Director of the Indigenous Law Research Unit at the University of Victoria Faculty of Law. Her research interests are marked by cross-disciplinarity and collaboration, and include such topics as the tax treatment of childcare, judicial dissent, Indigenous legal methodologies, family formation, mothers and babies in prison, and Inuit law-and-film. She is part of the [*Testify! Indigenous Laws + the Arts Collective*](#), and is a co-curator of two blogs focusing on innovations in legal education: [Project Pedagogy](#), and the TRC-inspired blog [#ReconciliationSyllabus](#). She currently teaches Law-and-Film, Legal Theory, Business Associations, and Indigenous Law: Research, Method & Practice.

Thalia Anthony

Associate Professor, UTS - Sydney

Dr Thalia Anthony's expertise is in the areas of criminal law and procedure and Indigenous people and the law, with a particular specialisation in Indigenous criminalisation and Indigenous community justice mechanisms. Her research is grounded in legal history and understandings of the colonial legacy in legal institutions. She has developed new approaches to researching and understanding the role of the criminal law in governing Indigenous communities and how the state regulates Indigenous-based justice strategies. Her research is informed by fieldwork in Indigenous communities and partnerships with Indigenous legal organisations in Australia and overseas. Dr Anthony's research informs her teaching in terms of advancing strategies for Indigenous cultural competencies in Law curricular, which has its genesis in 2008 when she organised an Australian and New Zealand conference on this theme.

The War with the Sky People

This case is taken from a story entitled *The War with the Sky People* in James Teit, "The Shuswap" in Franz Boas, ed. *The Jesup North Pacific Expedition: Memoir of the American Museum of Natural History* Vol II, Part IV (Leiden: EJ Brill/ New York: GE Stechert, 1909) at 749.

Black Bear and Wolverine were both great chiefs. Black Bear was of the Fish people and Wolverine was of the Bird people. They assembled the warriors of all the fishes and birds in order to go to war against the people of the sky.

All the men shot their arrows up towards the sky, but they fell back without hitting it. Then, Wren⁶, who was the smallest of all the birds, shot an arrow, which stuck in the sky. The next smallest bird shot an arrow, which hit the end of the first one and stuck. Then they shot more arrows, each one stuck in the end of the other until there was a chain of arrows forming a ladder from earth to sky.

On this ladder of arrows, all the warriors ascended to the sky. They left the two chiefs, Wolverine and Black Bear to guard the bottom. Soon after all the warriors reached the sky world, Wolverine and Black Bear began to laugh at each other's tails. Black Bear got angry and chased Wolverine around the foot of the ladder. He hit the ladder and knocked it down.

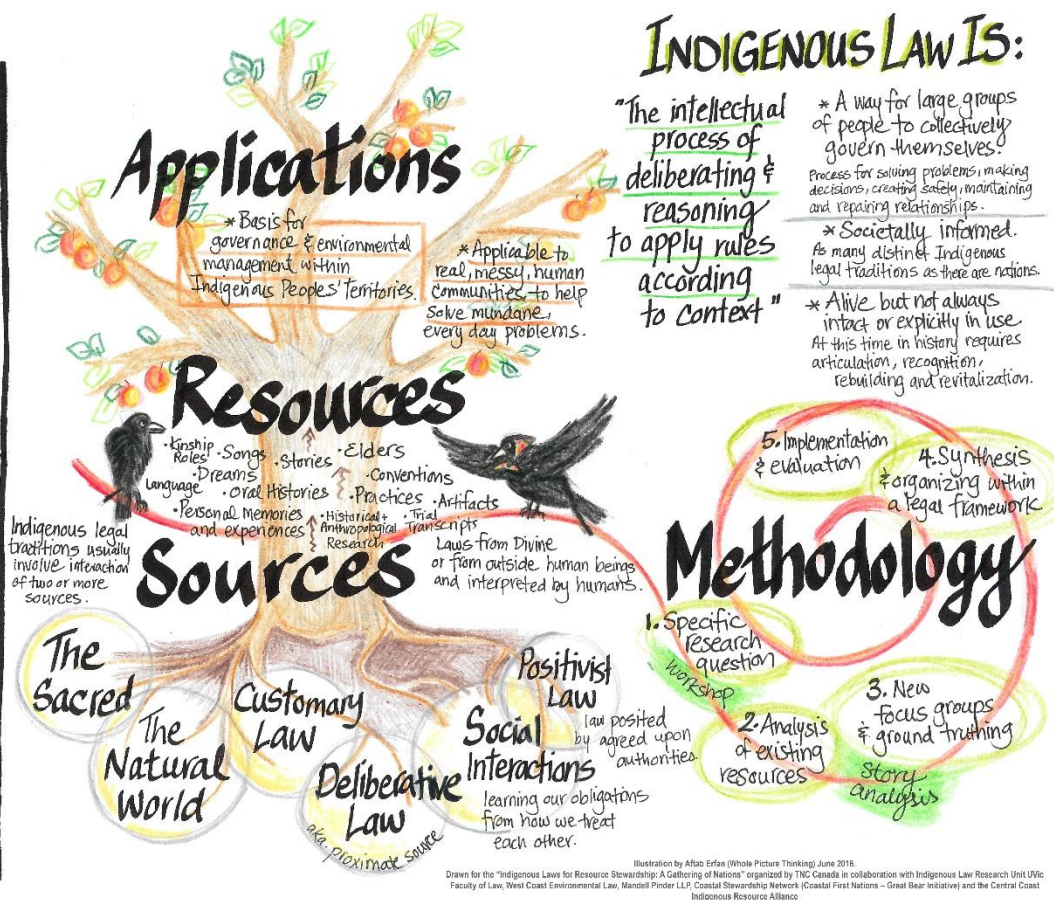
Meanwhile the earth warriors attacked the sky people, and at first they were victorious but then began to lose the battle. The sky people gathered in great force and fought, defeating the earth warriors who fled towards the ladder.

With no escape ladder, many of the earth warriors made a stand against the sky people, while others threw themselves down. The birds were able to reach the earth safely for they could fly down; but many of the fishes, who tried to throw themselves into a large lake, were wounded. In their fall, some missed the lake and dropped on rocks. Thus the skull of the sematsa'i came to be flattened, the kwa'ak broke its jaw, the tcoktci'tcin got a bloody mouth, and the sucker had all its bones scattered and broken, so that it died. The grandson of a man called Tcel gathered the bones, put them back into the body, and revived it. This is the reason why the sucker has now so many bones scattered through its flesh, why the sematsa'i has a flat head, the tcoktci'tcin⁷ a red mouth, and why the mouth of the kwa'ak appears to be broken. The earth people who remained above were all slain, and transformed by the sky people into stars.

⁶ Some say Humming Bird, others Chickadee.

⁷ The Shuswap in many parts of the country do not eat this fish

INDIGENOUS LAW 101



Some readings for those who want more...

Indigenous Law is...

Val Napoleon & Hadley Friedland, "Indigenous Legal Traditions: Roots to Renaissance" in Markus D. Dubber & Tajana Hörnle, eds, *The Oxford Handbook of Criminal Law*, 1st ed (Oxford: Oxford University Press, 2014) 225.

Val Napoleon. "Thinking About Indigenous Legal Orders" in René Provost & Colleen Sheppard, eds, *Dialogues on Human Rights and Legal Pluralism* (Dordrecht: Springer, 2013) 229.

Sources...

John Borrows. *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 6-22, and 23-58.

John Borrows. *Drawing Out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 2010) at 75-90, 216-227.

Methodology...

John Borrows, “Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education” (2016) 61:4 McGill LJ 795.

Hadley Friedland, “Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws” (2012) 11:1 Indigenous Law Journal 1.

Hadley Friedland & Val Napoleon, “Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions” (2015-2016) 1:1 Lakehead Law Journal 17.

Rebecca Johnson & Lori Groft, “Learning Indigenous Law: Reflections on Working with Western Inuit Stories” (2017) 2:2 Lakehead Law Journal 118.

Val Napoleon & Hadley Friedland, “An Inside Job: Engaging with Indigenous Legal Traditions Through Stories” (2016) 61:4 McGill LJ 725.

Resources and Applications...

Jessica Asch, Kirsty Broadhead, Georgia Lloyd-Smith, & Simon Owen, *Secwépemc lands and resources Law Research Project*. Report prepared for the Indigenous Law Research Unit, Shuswap Nation Tribal Council, 2016, online: ILRU < <https://www.uvic.ca/law/assets/docs/ilru/SNTC%20Law%20Book%20July%202018.pdf>>

Hadley Friedland, Bonnie Leonard, Jessica Asch, & Kelly Mortimer, “Porcupine and Other Stories: Legal Relations in Secwépemcúlecw” (2018) 48 *Revue générale de droit* 153.

Hadley Friedland, *Accessing Justice and Reconciliation: Cree Legal Summary*. Report prepared for the Indigenous Law Research Unit, Indigenous Bar Association, Law Foundation of Ontario, & Truth and Reconciliation Commission of Canada, 2014, online: Indigenous Bar Association < http://indigenoubar.ca/indigenoulaw/wp-content/uploads/2013/04/iba_ajr_final_report.pdf>

Hadley Friedland. *The Wetiko Legal Principles: Cree and Anishinabek Responses to Violence and Victimization* (Toronto: University of Toronto Press, 2018).

Emily Snyder, Val Napoleon, & John Borrows, “Gender and Violence: Drawing on Indigenous Legal Resources” (2015) 48:2 *UBC Law Review* 593.

Lara Ulrich & David Gill, “The Tricksters Speak: Klooscap and Wesakechak, Indigenous Law, and the New Brunswick Land Use Negotiation” (2016) 61:4 McGill LJ 979.